

The uniqueness of the Namibian Prosecutor-General

Lovisa Indongo

Introduction

The office of the Prosecutor-General in Namibia is a constitutional establishment in terms of Article 88 of the Namibian Constitution, which declares that –

[t]here shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Service Commission.

The Judicial Service Commission, in turn, is a body constituted of the Chief Justice, a judge, the Attorney-General, and two members of the legal profession elected by their peers. The Constitution dictates that no person is eligible for appointment as Prosecutor-General unless such person is legally qualified and entitled to practice in all courts in Namibia and is a fit and proper person, by virtue of their experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office. The Prosecutor-General is not a political appointee. The Constitution is silent on the Prosecutor-General's term of office. However, other officers that are appointed in the same manner as the Prosecutor-General, i.e. judges (Article 82) and the Ombudsman (Article 90), hold office until the age of 65 with the option for the President to extend that age to 70. In Articles 84 and 94, the Constitution makes provision for the removal of judges and the Ombudsman from office. There are no similar provisions for the Prosecutor-General.

The powers of the Prosecutor-General

The Constitution

Under Article 88(2), the Prosecutor-General has the powers –

- (a) *to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;*
- (b) *to prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;*
- (c) *to perform all functions relating to the exercise of such powers;*
- (d) *to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;*
- (e) *to perform all such other functions as may be assigned to him or her in terms of any other law.*

The uniqueness of the Namibian Prosecutor-General

In the matter of *Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order and Others*,¹ it was held that the discretion to decide whether to proceed with a prosecution or to withdraw it is one of the fundamental functions in exercising a duty to prosecute. The Constitution makes the exercise of prosecutorial powers subject to its provisions in Article 88(2)(a). The Prosecutor-General, therefore, does not have the power to act contrary to constitutional provisions, and any such contrary action is invalid. Article 5 in Chapter 3 of the Constitution, which sets out fundamental human rights and freedoms, reads as follows:

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Fundamental rights and freedoms include the protection of life and liberty, respect for human dignity, protection from slavery and forced labour, equality and freedom from discrimination, protection from arbitrary arrest and detention, fair trial, the protection of privacy as well as the family, children’s rights, property, political activity, and culture. Article 18 imposes a duty on all administrative bodies and officials to act fairly, reasonably and within the requirements imposed upon them by common law and/or statute. The Article further provides that persons aggrieved by the exercise of administrative acts and decisions have the right to seek redress from the courts and or a tribunal. Similarly, Article 25 provides for the enforcement of fundamental rights and freedoms by a competent court. It also provides for legal assistance to any aggrieved person by the Ombudsman.

The Criminal Procedure Act, 1977 (No. 51 of 1977)

The Prosecutor-General derives his/her powers and legitimacy from the above constitutional provisions, which are complemented by the Criminal Procedure Act. Section 2(1) of the Act gives the Prosecutor-General the prerogative to institute criminal prosecutions over all offences that fall within the jurisdiction of Namibian courts. All such prosecutions are to be instituted on behalf of the Namibian people and in the name of the state, save for private prosecutions as provided for in section 13(1) of the Act. The Prosecutor-General has the power to take over private prosecutions and continue with the prosecution. Section 6 of the Act sets out the Prosecutor-General’s powers to withdraw charges before the accused has pleaded, and to stop proceedings thereafter. A prosecution can only be stopped with the written consent of the Prosecutor-General or any other

1 1994 (1) SA 387 (C).

person authorised to do so. Section 61 of the Act sets out the Prosecutor-General's powers to summon an accused person and stipulate an admission-of-guilt fine. The Prosecutor-General also has the power to authorise an accused's release on bail as provided for by section 68 of the Act.

Article 88(2)(b) of the Constitution stipulates that the Prosecutor-General has the right to prosecute appeals. The right of appeal by the Prosecutor-General has always been a recognised right. Prior to the amendment of sections 310 and 311 of the Criminal Procedure Act by the Criminal Procedure Amendment Act, 1993 (No. 26 of 1993), the Prosecutor-General had a right of appeal, but this right was confined to appeal decisions of the High Court in favour of a convicted person, and then only on a question of law. The 1993 Amendment Act, being an express statutory provision, established the Prosecutor-General's general right of appeal, and gave wide powers of appeal to the office. In the matter of *S v Delie* (2),² it was held that the legislature had intended to grant wide powers of appeal to the Prosecutor-General. The Amendment Act gave the Prosecutor-General the power to appeal against any decision given in favour of an accused by a magistrate's court or the High Court (sections 347 and 354 of the Criminal Procedure Act). These powers are almost equal to the rights accorded exclusively to accused persons prior to 1993. These provisions empower the Prosecutor-General to appeal against the granting of bail, a decision on admissibility of evidence in favour of the accused, etc. Such appeals can be taken as far as the Supreme Court in terms of section 348 of the Criminal Procedure Act. In the matter of *S v Van Den Berg*,³ it was held that the amended section 310 of the Criminal Procedure Act was only aimed at lower court decisions and resulting orders given after the amendment of the section. The fact that proceedings were instituted before the amendment of the section has no effect on the applicability of the section, provided the decision appealed against was given after the amendment. In terms of section 4 of the Criminal Procedure Act, the Prosecutor-General can delegate his/her powers to any person assigned to the office in terms of the Public Service Act, 1995 (No. 13 of 1995) or any other law.

The Prosecutor-General's independence and accountability

In Article 87(a), the Constitution states that the Attorney-General exercises final responsibility for the office of the Prosecutor-General. It is because of this provision that, in August 1993, the Attorney-General instructed the Prosecutor-General to withdraw the prosecution in a certain matter. The Prosecutor-General

2 2001 NR 286 (SC).

3 1995 NR 23 (HC).

refused to follow this instruction and the Attorney-General successfully applied for a postponement of the trial in order to seek an interpretation of the relationship between the two offices from the Supreme Court.

In the matter of *Ex Parte: Attorney-General, Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,⁴ the court was asked to determine the constitutional relationship between the Attorney-General and the Prosecutor-General in respect of whether the Attorney-General had the authority to do the following:⁵

- i. *To instruct the Prosecutor-General to institute a prosecution, decline to prosecute or terminate a pending prosecution in any matter;*
- ii. *To instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution;*
- iii. *To require the Prosecutor-General to keep the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.*

In its deliberations, the court considered different models in the Commonwealth of how the functions of the Attorney-General and the Prosecutor-General were arranged, as follows:

- **Model 1:** The attorney-general is a public servant whose office is combined with the public functions of a director of public prosecutions and is not subject to the directions or control of any other person or authority. (The Bahamas, Botswana, Cyprus, Kenya, Malta, Pakistan, the Seychelles, Sierra Leone, Singapore, South Africa, Sri Lanka, Trinidad and Tobago, and Western Samoa)
- **Model 2:** The attorney-general is a political appointee and member of the government holding ministerial office, but does not sit regularly as a member of the cabinet. (England and Wales)
- **Model 3:** The attorney-general is a member of the government and normally included in the ranks of cabinet ministers. In some jurisdictions (e.g. most Canadian provinces as well as the federal government of Canada; Australia; Ghana; and Nigeria), the office of the attorney-general is combined with the minister responsible for justice. Where a separate office is responsible for public prosecutions, in the ultimate analysis, this office is subject to the direction and control of the attorney-general.

4 1998 NR 282 (SC).

5 (ibid.:285).

The uniqueness of the Namibian Prosecutor-General

- **Model 4:** The director of public prosecutions is a public servant who is not subject to the direction or control of any other person or authority. (Guyana and Jamaica)
- **Model 5:** The director of public prosecutions is a public servant subject to the directions of only the president in the exercise of his/her powers. (Tanzania)
- **Model 6:** The director of public prosecutions is a public servant, generally not subject to the control of any other person. However, if s/he is of the view that a case involves general considerations of public policy, s/he is obliged to bring the case to the attention of the attorney-general, who is empowered to direct him/her. (Zambia)

The court then held that the Namibian Attorney-General's appointment was a political one and that his/her functions were executive in nature. It also held that the Prosecutor-General, on the other hand, was not a political appointee and exercised a quasi-judicial function. The court further held that fundamental human rights and freedoms would not be protected if a political appointee were allowed to dictate which prosecutions were initiated or terminated, or how they should be conducted. In addition, the court held that such a position would not be in accordance with the ideals and aspirations of the Namibian people, taking into account the nation's historical background. Acting Judge of Appeal Leon finally decided that –⁶

[t]here is nothing in the Namibian Constitution that makes the office of the Prosecutor-General subject to the superintendence or direction of the Attorney-General"

"[T]he office [of the Prosecutor-General], appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter can exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefor.

The court held that the Constitution created an independent Prosecutor-General on the one hand, while enabling the Attorney-General to exercise responsibility for the office of the Prosecutor-General on the other. The above conclusion was viewed as the only one which reflected the spirit of the Constitution. By this decision, the Supreme Court clearly defined the relationship between the Prosecutor-General and the Attorney-General. This decision also cemented the fact that the Prosecutor-General was independent and not subject to any superintendence or direction by any body or organ. This puts the Namibian

6 (ibid.:293B, 302A–B).

Prosecutor-General on par with his/her counterparts in Guyana and Jamaica (Model 4). However, the decision did not shed any clarity on the role of the Prosecutor-General as regards what exactly the role entailed, and how it was to be performed. For example, are there any other considerations in the exercise of prosecutorial powers, or is the Prosecutor-General duty-bound to prosecute every criminal case that meets the *prima facie* case test? Furthermore, the court did not elaborate on what was meant by the Prosecutor-General exercising a “quasi-judicial”⁷ function.

A quasi-judicial function

Baxter (1984) argues against the labelling of acts as *judicial*, *quasi-judicial*, *legislative*, etc., stating that such labelling is confusing.⁸ Wiechers (1985) defines a *quasi-judicial* act as one performed by a non-judicial body that resembles the court’s model of conduct. For an act to be classified as *quasi-judicial* it must be performed while exercising discretion. The general rule is that the principles of natural justice have to be complied with in the exercise of quasi-judicial functions.⁹ However, there is no requirement that the principles of natural justice be complied with in all cases involving the exercise of quasi-judicial functions. These principles also do not have to be complied with when they are expressly or by necessary implication excluded either by statute and/or common law. The nature of the act determines whether or not the principles of natural justice have to be complied with. There are further requirements that the act should not only involve the exercise of discretion, but should also affect a person or a person’s existing rights, powers, or privileges.¹⁰ Furthermore, the body is obliged to exercise its powers for the purpose such powers were conferred upon it. As Wiechers (1985) points out, the application of the principles of natural justice simply means that the decision-maker has to obtain as much information as possible about the circumstances in each case, and serve a wider, public interest in a wholly unbiased and honest manner.

The principles of natural justice have generally been summed up in the maxim *audi alteram partem* (“hear the other side”).¹¹ According to Wiechers (*ibid.*), the maxim includes a range of duties, including the following:

7 (ibid.:289).

8 Baxter, L. 1984. *Administrative law*. Cape Town: Juta.

9 Wiechers, M. 1985. *Administrative law*. Durban: Butterworths.

10 Judge Steyn in *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A).

11 (ibid.).

The uniqueness of the Namibian Prosecutor-General

- The duty to give all involved parties the opportunity to state their cases
- The duty to communicate all potentially prejudicial facts and considerations to the person so affected so they can answer thereto
- The duty to provide reasons for decision taken, and
- The duty that the organ exercising the discretion acts impartially.

The courts have acknowledged that failure to comply with the requirement to provide reasons for decision taken does not in itself amount to a breach of the rules of natural justice, but could indicate the presence of bad intentions or ulterior motives on the side of the actor.¹² This is because some organs of state have what is termed *free discretion* and, as such, need not give reasons for their decisions; indeed, this appears to be the Prosecutor-General's position.¹³ Wiechers (ibid.) concludes that the rules of natural justice serve to ensure that administrative organs that perform judicial and quasi-judicial functions duly apply their minds to matters before them. Baxter (1984) also points out that quasi-judicial decisions are less easily reversible than other administrative actions.

The Prosecutor-General's position can be summarised in the following terms. S/he has absolute independence or free discretion in the exercise of prosecutorial powers, provided the following constitutional requirements are met:

- The Prosecutor-General acts within the powers conferred on the office to prosecute on behalf of the Namibian people and in the name of the state
- The Prosecutor-General exercises such powers subject to constitutional provisions and keeps the Attorney-General properly informed on relevant matters, and
- The Prosecutor-General duly applies his/her mind to the case before him/her, acts honestly and impartially, and discloses to the accused all facts on which the charges are based.

These are the only requirements in the exercise of the Prosecutor-General's discretion. As was remarked in the *Ex Parte: Attorney-General* matter,¹⁴ the Prosecutor-General's discretion – even though exercised by an independent organ – is not exercised in a lawless sphere: in a state founded on the principles of law, like Namibia, the state and administrators are bound by law.

The above provisions clearly indicate that the Prosecutor-General is independent in every sense of the word and is not subject to any outside influence and/or review. However, the provisions fall short of setting out what the role of the Prosecutor-General entails, and how s/he is to perform it.

12 (ibid.).

13 *Ex Parte: Attorney-General*, 1998 NR 282 (SC).

14 (ibid.).

The above provisions also mean that the Prosecutor-General is not accountable to any body or person for prosecutorial decisions. The only challenges that can be brought against him/her are those directed at the office-holder personally. For example, that s/he acted with malice or ulterior motives or is incompetent. The Judicial Service Commission is the only body that exercises authority over the Prosecutor-General, and can recommend his/her removal from office to the President. Even though the Commission has no powers to interfere with the Prosecutor-General's decisions, it has the power to look at the latter's personal conduct. The Commission will examine the Prosecutor-General's bona fides and consider his/her intentions; if found to be malicious, s/he will be found guilty of gross misconduct and can be removed from office. In terms of Article 84(1) of the Constitution, a Prosecutor-General can only be removed from office by the President acting on the recommendation of the Judicial Service Commission. It can be argued, however, that a wide and general accountability to Parliament, through the Attorney-General – who has no effective powers over prosecutions, does not ensure that individual decisions by Prosecutors-General are made fairly and equitably.¹⁵

It may be argued that the Prosecutor-General exercises power without responsibility since there is no review procedure. Indeed, the Prosecutor-General's decisions cannot be judicially challenged unless they are unconstitutional – and even then, only a party who has been affected and aggrieved directly by a Prosecutor-General's decision can lodge a challenge against it. In Article 18, the Constitution makes provision for people aggrieved by the acts of administrative bodies and administrative officials to seek redress before a court. Does this right extend to prosecution decisions? Are there other grounds upon which prosecution decisions can be challenged? Does the current position offer enough protection to the public against the extensive powers of the Prosecutor-General?

All the powers, none of the responsibilities?

There are no policies regulating the exercise of the Prosecutor-General's powers. The very few guidelines that exist include instructions from the Prosecutor-General to prosecutors to whom the power to prosecute has been delegated, as contained in circulars issued by the Prosecutor-General. Such circulars, which are directives issued by the Prosecutor-General to all prosecutors, deal either with specific crimes or a specific class of suspects. For example, one such circular directs that prosecutors forward all cases involving police officers of

¹⁵ Mansfield, G & J Peay. 1987. *The Director of Public Prosecutions: Principles and practices for the Crown Prosecutor*. London: Tavistock Publications.

the rank of Deputy Commissioner and above as suspects to either the Deputy Prosecutor-General in the region or the regional court prosecutor for a decision. Similarly, all dockets involving political office-bearers are to be forwarded to the Prosecutor-General for a decision. These circulars are not legal rules guiding the decision-making process: they are not legally binding. They are issued on a needs basis only, as a response to specific incidents, and not as a regular exercise. For example, three circulars were issued during 2000, one during 2001, and none in 2002.

Another form of guidance on the exercise of prosecutorial powers can be found in moratoria that the Prosecutor-General issues from time to time. Moratoria have been used twice since the office's inception in 1990. The first, being on prosecutions under the Casinos and Gambling Act, 1994 (No. 32 of 1994), was imposed pending a High Court decision; the second was on prosecutions under the Combating of Immoral Practices Act, 1980 (No. 21 of 1980), which was also imposed awaiting a High Court decision.

The only legally binding guideline for the exercise of prosecutorial powers can be found in the objective common law principle, which requires a *prima facie* case to be present for the institution of a prosecution. That is, there should be sufficient admissible evidence providing a reasonable prospect of a successful prosecution.¹⁶ An important factor of this principle is that the decision should be based on admissible evidence, not just any evidence. Where there is no *prima facie* case, the prosecutor should not prosecute; should s/he nonetheless do so, the prosecution will be unfounded; it may also be malicious, and may lead to a delictual action of malicious prosecution.

Malicious prosecution is a common law intentional tort whose elements include intentionally (and maliciously) instituting or pursuing, or causing such institution or pursuit, of a legal action (either civil or criminal) brought without probable cause and dismissed in favour of the victim of the malicious prosecution. In some jurisdictions, the term *malicious prosecution* denotes the wrongful initiation of criminal proceedings, while the term *malicious use of process* denotes the wrongful initiation of civil proceedings.¹⁷ These delictual actions can only be brought after the criminal proceedings are completed and the accused acquitted. The person suing for malicious prosecution has to prove that there was no case set out in the docket from the outset.

16 As defined in National Prosecuting Authority of South Africa. 1999. *Manual for the National Prosecuting Authority of the Republic of South Africa*. Pretoria: NPA.

17 White, G Edward. 2003. *Tort law in America: An intellectual history*. Available at http://en.wikipedia.org/wiki/Malicious_prosecution; last accessed 20 August 2008.

The Prosecutor-General – and prosecutors – have complete discretion on how they handle cases that come before them, subject only to the prima facie principle and the fact that only the Prosecutor-General has the power to decline to prosecute in cases where a prima facie case is set out. The provisions of Article 88(2)(a) of the Constitution appear to oblige the Prosecutor-General to take prosecutorial action in all cases where a prima facie case is set out. Such action can be court proceedings, fixing an admission-of-guilt fine, or deciding to take no further step. An admission-of-guilt fine gives the accused the option of accepting his/her guilt and resolving the matter without going through the court process. In fixing an admission-of-guilt fine, the prosecutor is bound by the determination made by the district's magistrate, which sets a limit on the amount of the fine that may be stipulated. In deciding what action to take, prosecutors are guided by the legal principle of de minimus (i.e. the law does not concern itself with trivialities). This principle has considerable influence in a decision to take no further prosecutorial steps in trivial cases.

Prosecutorial discretion is essential for democratic prosecutorial services and the proper exercise of prosecutorial functions. However, there is consensus amongst writers on criminal justice that prosecutorial practice should be based on legal criteria and set policies to allow for supervision and accountability. The United Nations Guidelines on the Role of Prosecutors¹⁸ require countries where prosecutors are vested with discretionary functions to provide guidelines for the exercise of such powers in order to enhance fairness and consistency in prosecutorial decision-making. It is suggested that these guidelines be in the form of legislation or published rules or regulations. Another argument for having a legally binding prosecution policy is the protection it affords the public. When a prosecution policy is transparent and applied fairly, equally and consistently, it dispels the notion of bias. It is also important that such policy be enforceable by the courts in order to offer adequate protection.

We now look at some aspects of the exercise of prosecutorial powers by the Prosecutor-General.

18 United Nations. 1990. *Guidelines on the role of prosecutors: Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*. Available at <http://www2.ohchr.org/english/law/pdf/prosecutors.pdf>; last accessed 19 October 2008.

Consistency

Prosecutor-General circulars are used as a means of ensuring consistency and uniformity in prosecutorial decision-making. High and Supreme Court judgments are also regularly circulated to all prosecutors for the same reason. Prosecutors are meant to study these materials and, in so doing, become acquainted with the law and practice. However, there is no specific measure to ensure consistency and uniformity, and all prosecutors have full discretion in making prosecutorial decisions. But can there in fact be consistency and uniformity in such a system?

Transparency

There is no obligation or legal duty on the Prosecutor-General to give reasons for his/her decisions to any person, including crime victims. Furthermore, the manner in which prosecutorial decisions are made remains a mystery. There is also no established policy giving the public a right to know the reasons for prosecutorial decisions or a right to disclosure of the factors that impact upon prosecutorial decision-making. But again, can such a process actually be transparent?

Challenging the decision

The powers vested in the Prosecutor-General by the Constitution are absolute, and there is no review or oversight over prosecutorial decisions. As was confirmed in the Supreme Court matter of *Ex Parte: Attorney-General*,¹⁹ there is no review over the Prosecutor-General's decisions. The only requirement is that the Prosecutor-General keep the Attorney-General properly informed of all prosecutions or intended prosecutions that might arouse public interest, or of any high-profile cases, so that the Attorney-General can answer to Parliament and the Cabinet. The total independence of the Prosecutor-General can be viewed as a safeguard, as the Prosecutor-General needs to exercise his/her powers in terms of the law, having due regard to the facts of each case, and not falling prey to the whim or will of outsiders.

Private prosecution

The only mechanism that might be viewed as a remedy against a prosecutorial decision not to prosecute is the power provided for by section 5 of the Criminal Procedure Act. According to this section, where the Prosecutor-General has declined to prosecute a criminal matter, a private person with substantial interest

¹⁹ *Ex Parte: Attorney-General*, 1998 NR 282 (SC).

in the trial arising out of some injury suffered by that person as a result of such offence or the spouse of that person, or in cases where the death of a person is alleged to have been caused by the offence, the spouse or child of the deceased or the legal guardian or curator of a minor or lunatic may personally or with a legal practitioner institute and conduct a prosecution in respect of that offence in any competent court. This section also gives an interested party the right to request a certificate of *nolle prosequi* from the Prosecutor-General where s/he has declined to prosecute. This certificate enables the interested party to bring a private prosecution, thus ensuring that a case goes to court even when the Prosecutor-General has declined to prosecute. If proceedings are still not instituted within six months of its issue, the certificate of *nolle prosequi* lapses. Section 5 of the said Act also empowers an interested person to obtain a court order compelling the Prosecutor-General to make a decision to prosecute or not, in cases where such decision has been outstanding for more than six months.

The right to a private prosecution, however, is not a review of the Prosecutor-General's decision not to prosecute. In no way is the Prosecutor-General's decision not to prosecute questioned, examined or assessed. But as indicated earlier, the Prosecutor-General still has the power to take over a private prosecution instituted upon the issuing of a certificate of *nolle prosequi*.

Judicial review

The only prosecution decision that can be said to be open to review occurs in instances where the Prosecutor-General decides to appeal against a court decision given in favour of the accused person. Here, the respondent (the *accused* in the initial proceedings) can raise a challenge against the decision to appeal, in which case the court dealing with the appeal can consider the issue of whether the Prosecutor-General acted correctly in appealing. Here, the court has the power to examine the decision to appeal and the legal ground upon which the appeal is based. As a result, the court can find that the Prosecutor-General acted wrongly in appealing, and can dismiss the appeal – awarding costs to the respondent if deemed fit.

There is no mechanism in Namibian law to compel a prosecutor to reach a decision to prosecute or not, save for purposes of getting a certificate of *nolle prosequi* in terms of section 5 of the Criminal Procedure Act. This position leaves the public at the mercy of the Prosecutor-General. The law offers them no protection in this regard because decisions by prosecutors stand – whether they are right or wrong – and there is no recourse for the public to challenge them. Even prosecution decisions that leave much to be desired cannot be challenged.

Conclusion

The current lack of transparency and consistency in the Office of the Prosecutor-General leads to unequal application of the law and a poor understanding of the prosecution process. There should be some degree of review of prosecution decisions: ideally, a judicial review. However, the existence of a legally binding policy is a necessity for judicial review, as the courts can only review decisions to ensure that the body concerned acted within its powers and according to the prescribed manner.

Some comfort can be derived from the fact that, for as long as the courts are independent and the Judicial Service Commission functions properly, and in view of the practice of compulsory docket disclosure, where the accused is protected from unfounded or malicious prosecution, the peculiar complete independence and vast powers of the Prosecutor-General should cause no problems. The current position is to be preferred to one where executive influence can impact on prosecutorial decision-making and functioning. Such influence can be far more dangerous than an individual prosecutor pursuing some ideology or personal belief.