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Strengthening the Right to Private Prosecution as an Anti-Corruption Tool in Uganda: Lessons from other Commonwealth Jurisdictions

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Abstract

This article explores the law on private prosecutions and how this mechanism can be used as an anti-corruption tool in fragile states like Uganda. This is because corruption is a scourge that significantly cripples the provision of social services in a country once public resources are embezzled by powerful persons. There are numerous limitations to public prosecution of corruption in transitional democracies. State structures are prone to political influence-peddling, which has a bearing on police investigations and the public prosecution of corruption. Consequently, alternative strategies for combating this serious crime are essential. To enable the strengthening of the private prosecution regime in Uganda, a comparative analysis of the best practices from other selected Commonwealth jurisdictions is conducted. The limitations of the private prosecution regime are discussed to enable the strengthening of this anti-corruption tool. Uganda can benefit from the best practices of other Commonwealth jurisdictions in strengthening its private prosecutions regime as a powerful anti-corruption tool.

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Keywords: private prosecutions; Uganda; corruption; anti-corruption; public prosecutor; Commonwealth; fragile states; transitional democracies

1 INTRODUCTION

The National Objectives and Directive Principles of State Policy of the Constitution of Uganda, 1995, provide that "all public offices shall be held in trust for the people,"[1] and that "all persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people."[2] Further, the National Objectives and Directives Principles also emphasise that "all lawful means shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices."[3] It is also the duty of every Ugandan citizen "to combat corruption and misuse or wastage of public property," among other obligations.[4] Perhaps one of the ways every Ugandan citizen can engage in combating corruption and the misuse of public resources is the private prosecution of its perpetrators. This is where the mechanisms in place for its public prosecution are weak or have failed. This is especially so in a transitional democracy like Uganda. Corruption has been used as a tool to sustain power by the ruling class in Uganda.[5]

One of the fundamental principles of the rule of law is that everyone is equal before and under the law, in all spheres of life, and shall enjoy equal protection of the law.[6] This democratic tenet, however, does not seem to apply when public investigators and public prosecutors are confronted with investigating and prosecuting politicians and wealthy individuals for corruption.[7] The Marxist dictum that the state and the law are structures intended to protect the ruling class when exploiting the working class could offer a philosophical context to this state of affairs.[8] This is because conviction rates for these categories of persons are still very low, not only in Uganda but in many transitional democracies.[9] Where the suspected culprit is part of a government organ, the likelihood of his/her public prosecution is slim. This is because the state actors may be reluctant to act.

The difficulty of prosecuting high-profile individuals for corruption is also partly rooted in the nature of the anti-corruption legislation. This legislation is drafted to curb petty corruption,

1 Principle XXVI (i); See Art 8A of the Constitution of the Republic of Uganda, 1995, which makes the national objectives and directive principles of state policy justiciable before the courts of law. See *Male Mabirizi v Attorney General, Consolidated Constitutional Appeals No. 2,3 and 4/2019,* where Elizabeth Musoke JCC stated that "pursuant to Article 8A, the objective principles are now justiciable."

2 Principle XXVI (ii).

3 Principle XXVI (iii).

4 Article 17(i).

5 Muhumuza "The politics of Anti-corruption Reforms and Reversals in Uganda's Changing Political Terrain" 2016 *Economic and Political Studies* 62 84.

6 See Art 21(2) of the 1995 Constitution. In the case *Okupa v Attorney General* (Misc. Cause No. 14 of (2005) [2018] UGHCCD 10 (31 January 2018) the High Court referred to Art 21 of the 1995 Constitution in defining what amounts to discriminatory treatment by the government. The applicants stated that the government of Uganda pursued illegal practices, which led to the arming of the Karimojong tribe who in turn violated the Applicant's human rights by rustling their cattle and causing general insecurity in their villages. The court also sought the aid of Art 28 of the African Charter on Human Rights. Art 26 of the International Covenant on Civil and Political Rights and Art 7 of the Universal Declaration on Human Rights, to interpret the principle of equality before the law in the aforementioned case.

7 See Art 21 of the 1995 Constitution.

8 Isaac (ed) *The Communist Manifesto* (2012) www.jstor.org/stable/j.cctt5vmx2 (accessed 13-06-2023).

9 Henning "It's Getting Harder to Prosecute Politicians For Corruption" *The Conversation*, (16-02-2018) https://www.google.com/amp/s/theconversation.com/amp/its-getting-harder-to-prosecute-corruption-91609 (accessed 27-07-2023).

but not grand corruption.[10] This is because influential individuals usually engage in grand corruption that may require international cooperation. This is if the investigations into these serious crimes are to yield cogent evidence that could result in convictions in courts of law.[11] Some of the proceeds of these crimes are stashed away in safe tax havens that can only be accessed with the help of international financial intelligence networks.[12] There is a need for specialised skills among investigators and prosecutors to effectively carry out their mandate and produce persuasive evidence against high-profile individuals, thereby enabling their convictions in court.[13] The specialised skills include forensic accounting and technical skills in investigating and prosecuting corruption, among others. There is a considerable political interference in the course of investigating high-profile individuals for corruption.[14]

Police investigators and public prosecutors consequently face a lot of challenges when pursuing these individuals. Private prosecutions could offer some hope in curbing these complicated corruption crimes. The successful private prosecution and conviction of high-profile individuals would send a message to influential criminals that impunity will not be tolerated by citizens. Private prosecutions can, therefore, be effectively used by individual citizens and civil society organisations as an anti-corruption mechanism to successfully prosecute these culprits.[15]

Therefore, this article critically explores the private prosecution regime in Uganda. The article also assesses the effectiveness of private prosecutions as an anti-corruption tool in Uganda. In doing so, a comparative analysis of private prosecutions in numerous Commonwealth jurisdictions is carried out to tease out the best practices for private prosecutions. These best practices can be employed to strengthen private prosecutions as an anti-corruption tool in Uganda.

Part 1 of the article introduces the discussion on corruption in Uganda and why alternative strategies for combating this grave crime are vital, given the limitations of public prosecutions of corruption. Part 2 examines the legal framework governing private prosecutions in Uganda. The limitations of the private prosecution regime in Uganda are also discussed in Part 2. The best practices on private prosecutions from other Commonwealth jurisdictions are reviewed in Part 3. The possibility of enabling a normative framework for the right to institute private prosecutions within international human rights instruments as an accountability tool is also explored in Part 3. Given the best practices from other Commonwealth jurisdictions, Part 4 also considers the possibility of using private prosecutions as an anti-corruption mechanism in transitional democracies like Uganda. The opportunities to strengthen private prosecutions as an anti-corruption tool in Uganda are also discussed under Part 4. The paper concludes by suggesting that anti-corruption activists may need to employ private prosecution as one of the

10 Matembe *The Struggle for Freedom and Democracy Betrayed* (2019) 203 204.

11 Montalban *Paradise Papers: Offshore Investment of the Rich and Powerful* (2017).

12 ICIJ "Panama Papers: Exposing the Rogue Offshore Finance Industry" https://www.icij.org/investigations/panama-papers/ (accessed 27-07-2023).

13 *Ibid.*

14 Transparency International Uganda "As Strong as its Weakest Link. Stakeholders Perceptions of the Ugandan Legal and Institutional Anti-Corruption Framework" (2015). http://tiuganda.org/wp-content/uploads/Stakeholders-Perceptions-of-theUganda-Legal-Anti-Corruption-framework.pdf (accessed 27-07-2023).

15 Edmonds and Jugnarain *Private Prosecutions: A Potential Anti-corruption Tool in English Law* (2016) 5. Also see Mujuzi "The Right to Institute a Private Prosecution: A Comparative Analysis" 2015 *International Human Rights LR* 222.

anti-corruption tools under Part 5.

2 PRIVATE PROSECUTIONS IN UGANDA

Uganda's legal system is based on the British colonial legal system.[16] The Judicature Act stipulates the applicable laws in Uganda.[17] These laws include statutory law, common law, doctrines of equity, and customary law.[18] Thus, the English common law mechanism of private prosecution has been retained in Uganda, as opposed to other countries where the right to institute private prosecutions is provided for in their Constitutions.[19] Uganda has provided for this right in several Acts of Parliament.[20]

2 1 Who may institute a Private Prosecution in Uganda

Section 42 of the Magistrates Courts Act (MCA)[21] provides for the procedure under which a private prosecution may be instituted in Uganda.[22] A private prosecutor includes both natural and juristic persons.[23] The private prosecutor can be a victim of the crime. The private prosecutor can also be another person on behalf of the victim of the crime.[24] A statutory body can also institute a private prosecution.[25] In Uganda, jurisprudence is yet to develop on whether a prosecution by a statutory body is a private prosecution or a public prosecution. This is because statutory bodies execute their duties on behalf of the public.[26] In other Commonwealth countries, juristic persons can institute private prosecutions.[27] Section 42 of the MCA provides that, apart from a private prosecutor, a public prosecutor and a police officer can also institute criminal proceedings.

Article 120 of the 1995 Constitution provides that the Director of Public Prosecutions (DPP) has control over all criminal prosecutions in Uganda.[28] In exercising his/her mandate over all criminal prosecutions in Uganda, the DPP is not under the control and direction of any person or

16 Mahoro "Uganda's Legal System and Legal Sector" https://www.mecgeorge.edu/Documents/sampleCasesHistoryUganda.pdf (accessed 10-06-2023).

17 Cap. 16.

18 See s 14.

19 Sections 85 and 86 of The Constitution of The Gambia permit its citizens to institute private prosecutions., Art 57(6)(b) of the Constitution of Kenya, 2010 authorises Kenyan citizens to institute a private prosecution.

20 Sections 42 and 43 of the Magistrates Courts Act Cap 16; ss 12 and 13 of the Prevention and Prohibition of Torture Act 3, 2012, and S 11(4) (b) of the Human Rights Enforcement Act Cap. 12 of 2023.

21 Cap. 19 of 2023.

22 See s 42(1)(a).

23 The MCA does not define the word "person." Section 2 of the Interpretation Act Cap 2, 2023, however, defines a person to include a natural and juristic person., also see *Mugume v Attorney General* (Constitutional Application No. 5 of 2015) [2016] UGCC 8 (26 April 2016) where a public prosecution was conducted by a law firm of private prosecutors; For a detailed treatment of this see Mujuzi "Strengthening the Right to Institute a Private Prosecution in Uganda by Amending Art 120(3) of the Constitution: A Comment on *Uganda v Inspector General of Police, General Kale Kayihura*" 2017 *African J of Intl and Comp L* 590.

24 See Art 50(2) of the 1995 Constitution; also see S 12 of the Prevention and Prohibition of Torture Act, Act 3 of 2012.

25 See s 280 of the Companies Act, Act No. 1/2012 (as amended); also see S 46 of the NSSF Act Cap 222 (as amended), 1985; also see s 19 of the Fisheries and Aquaculture Act 5, 2023.

26 Some of the statutory bodies that can institute "private prosecutions" include National Environment Management Authority (NEMA), Uganda Revenue Authority (URA), Uganda Registration Services Bureau (URSB) and National Identification and Registration Authority (NIRA), among others.

27 For example, in South Africa juristic persons can institute a private prosecution., see *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 1 SACR 284 (CC); 2017 4 BCLR 517 (CC) where court indicated that it is possible under s 8 of the Criminal Procedure Act, to do so; also see Mujuzi "Private Prosecution of Environmental Offences Under the South African National Environmental Management Act: Prospects and Challenges" 2016 *SACJ* 1.

28 See Art 120(6) of the 1995 Constitution.

authority.[29] Apart from the Uganda Revenue Authority (URA) with respect to tax fraud cases[30] and the Inspectorate of Government (IGG) for corruption cases, the DPP has ultimate power in controlling all criminal prosecutions in Uganda.[31]

Unlike other countries,[32] the DPP does not first have to decline to prosecute an accused person before a private prosecutor can proceed to institute criminal proceedings.[33] There are, however, procedural safeguards to prevent the abuse of private prosecutions, enshrined under section 42 of the MCA, which must be met before a magistrate allows a private prosecution to be instituted against an accused person(s).[34] In *Charles Mbire v Uganda*,[35] the High Court held that before a magistrate authorises a person to institute a private prosecution, he/she must satisfy themselves that "a prima facie commission of the offense has been established" and that the complaint on oath is not "frivolous or vexatious."[36] Black's Law Dictionary[37] defines a "vexatious suit" as "a lawsuit instituted maliciously and without good grounds meant to create trouble and expense for the party being sued." In *GM Combined (U) Ltd v AK Detergents (U) Ltd*, the Supreme Court of Uganda held that a "vexatious suit" is one where "… a major matter of consideration is the likelihood of the plaintiff succeeding."[38]

In the case of *Hassan Basajjabalaba v Kakande Bernard*,[39] the High Court emphasised that before a magistrate draws and signs a charge sheet for a matter instituted by way of private prosecution, he/she must make and record a finding that "a prima facie commission of an offense has been disclosed and that "the complaint is not frivolous or vexatious."[40] Lameck Mukasa J stated that "A charge sheet dated 11th January 2013 was accordingly drawn. However, the learned Chief Magistrate did not make any findings as to whether the complaint was frivolous or vexatious. This was a material omission on the part of the magistrate".[41] The judge added that had the chief magistrate made this finding, she would have found that the complaint was vexatious. In Uganda *(Private Prosecution by Male Mabirizi) v Anita Annet Among*,[42] a private

29 Article 120(6) of the 1995 Constitution, also see *Obey Christopher v Uganda* High Court Miscellaneous Application No. 3/2016 and *Uganda versus Uwera Nsenga* Criminal Session No. 312/2013.

30 Under the High Court (Anti-Corruption Division) (Amendment) (Practice) Directions, 2019, Legal Notice No. 3 of 2019, the CJ under powers entrusted to him, under Art 133(1) (b) of the 1995 Constitution, amended The High Court (Anti-Corruption Division) Practice Directions, 2009, Legal Notice No. 9 of 2009, to include any other offences related to tax fraud. The CJ also designated the Commissioner-General, URA, or his or her representative as public prosecutors. Art 133 (1) (b) provides that the CJ "may issue orders and directions to the courts necessary for the proper and efficient administration of justice."

31 Article 120(6) of the 1995 Constitution.

32 See s 7 of the Criminal Procedure Act 51/1977 of South Africa; also see Art 44 of the Criminal Procedure Code, 1961 of Ethiopia; also see S 13 of the Criminal Procedure and Evidence Act, Chapter 9:07/2016 of Zimbabwe.

33 Interestingly, in *Katuntu v MTN Uganda Ltd (*HCCS No. 248/2012) 2015 UGCOMMC 83, 52, the High Court of Uganda notes that a private prosecution has to be instituted with the consent of the DPP. There is no provision of the law that states that a private prosecutor should do so, as long as he or she fulfils the requirements under s 42 of the MCA.

34 Sections 42(3), (4), (5), (6) and (7) of the MCA.

35 HCT-00-CR-CV-0015/2012.

36 *Ibid* 7; also see Walyemera "Right to Institute a Private Prosecution Cannot be Wished Away" *Daily Monitor* (29-01-2020) https://www.monitor.co.ug/OpEd/Commentary/Right-institute-private-prosecution-can-t-wished-away/689364-543238-view-asAMP-g0i7i0/INDEX.html (accessed 07-03-2021) for a detailed treatment of this issue.

37 *Black's Law Dictionary* 9 ed 2022.

38 (1992) 2 EA 94.

39 High Court Criminal Revision No. 2/2013 (arising from Bug. Rd. Misc. Application No. 22/2013).

40 Section 42 (5) of the MCA.

41 High Court Criminal Revision No. 2/2013, 13.

42 (Civil Appeal 3/2024) [2024] UGHCACD 8 (15 October 2024).

prosecutor instituted charges of money laundering against the Speaker of Parliament, Anita Annet Among, in the magistrates' court at the Anti-Corruption Division. When the matter came for a ruling on whether the private prosecution was not vexatious and frivolous, the magistrate's court found that the complaint on oath was frivolous and vexatious. The magistrate's court noted that there was no prima facie case established against the accused person to enable the magistrate to sign the charge sheet to commence the private prosecution. On appeal to the High Court, Lawrence Gidudu J, agreed with the magistrate court's finding that since the magistrate's court had no jurisdiction to try offences under the Anti-Money Laundering Act, a magistrate had to first establish, prima facie, that the private prosecution was not vexatious or frivolous, to commit an accused person to the High Court for trial.[43]

Consequently, in Uganda, a magistrate is required to make a finding on the complaint before drawing and signing a formal charge instituted by a private prosecutor. In *Hassan Basajjabalaba versus Kakande Bernard*,[44] the High Court also agreed with the private prosecutor that "in private proceedings, there is no requirement to involve the Director of Public Prosecution or his staff in inquiring or conduct of the proceedings."[45]

Under section 42 (4) of the MCA, a magistrate is required to "consult the local chief of the area in which the complaint arose and put on the record the gist of that consultation."[46] alternatively, where the magistrate is unable to consult with the local chief, and "the complaint is supported by a letter from the local chief, the magistrate may dispense with the consultation and thereafter put that letter on the record."[47] In *Hassan Basajjabalaba v Kakande Bernard*,[48] instead of obtaining a letter from the local chief of the area where the offence was allegedly committed, the private prosecutor got the letter from the local council I chairman of his residence.

The High Court wondered whether the local council I chairman can be regarded "as a local chief for purposes of the subsection."[49] The judge noted that according to section 69 of the Local Government Act[50], "local council chairpersons were political heads, whereas the local chiefs were administrative heads and accounting officers of their respective sub-counties."[51] The High Court noted that the letter indicated that the complaint originated in the complainant's area of residence and not where the complaint was alleged to have occurred.

Lameck Mukasa J ruled that the chief magistrate erred in law when she dispensed with the consultations from the local chief when the letter she had on the court record did not indicate where the complaint arose.[52] The High Court concluded that neither the magistrate consulted the local chief where the complaint arose, nor was the complaint supported by a letter from the local chief.[53] The court further noted that the requirement was mandatory.[54] In a recent case, the

43 *Ibid* 8.

44 High Court Criminal Revision No. 2/2013 (arising from Bug. Rd. Misc. Application No. 22/2013).

45 *Ibid* 16.

46 Section 42(4) of the MCA.

47 Section 42 (4) of the MCA.

48 High Court Criminal Revision No. 2/2013 (arising from Bug. Rd. Misc. Application No. 22/2013).

49 *Ibid*.

50 Section 69(2) of the Local Government Act Cap 243, provides that "The chief shall be the administrative head and accounting officer of the respective sub-county or parish."

51 *Hassan Bassajabala v Kakande Bernard,* High Court Criminal Revision No. 2/2013 (arising from Bug. Rd. Misc. Application No. 22/2013) 11.

52 *Ibid*; also see Constitutional Petition No. 21/2006, *Rubaramira Ruranga v Electoral Commission*, where the Constitutional Court held that since there had been no elections for Local Councils for a long time, the Local Council Chairpersons had no legal mandate to conduct any business.

53 High Court Criminal Revision No. 2/2013 (arising from Bug. Rd. Misc. Application No. 22/2013).

54 *Ibid*.

High Court of Uganda has stated that the requirement for consultation with the local chief, as provided for under section 42(4) of the MCA, does not oust the Chief Magistrate's jurisdiction to hear a private prosecution.[55] The court further stated that it would amount to the Chief Magistrate's Court surrendering its adjudicative power to a local chief, which was never the intention of section 42(4) of the MCA. The High Court further stated that in interpreting section 42(4) of the MCA, the mischief rule of interpretation would best serve the interests of justice.[56] The High Court further stated that the court should shy away from the interpretation of a legal provision that is adverse to public interest, given the purpose of private prosecutions.[57] Rosette Kania J noted that the ambiguity under section 42(4) of the MCA has the potential to render the right to institute private prosecutions ineffective.[58] In *Uganda (Private Prosecution by Male Mabirizi) v Hon. Norbert Mao*,[59] Paul Gadenya J also noted that "… the correct position of the law is that even if a complainant files a complaint on oath without a letter from the local area chief to support the complaint, that fact does not render the complaint on oath incompetent."[60]

Considering that the decisions in the aforementioned cases are all from the High Court of Uganda, the position of the law on whether a private prosecutor should obtain a letter from the local chief before instituting a private prosecution is still unsettled, due to the concept of *stare decisis*.[61]

Under section 43 of the MCA and Article 120(3) (c), the DPP is, however, empowered to take over and continue the private prosecutions. The DPP may only discontinue with the consent of the court. In a recent case, *Uganda (Private Prosecution) v Mbaziira Bryan*,[62] Margaret Mutonyi J, in consideration of Article 120(4) of the 1995 Constitution, held that "… withdrawal of any criminal matter at any level is the exclusive function of the Director of Public Prosecutions in person, which mandate is in mandatory terms." She further noted that: "This noble function cannot be delegated to her or his subordinate staff, however senior they may be, as the withdrawal of criminal proceedings must be in the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process."[63] The DPP, however, may take over and continue the private prosecution.[64]

Case law jurisprudence on the power and the procedure the DPP may employ to take over and continue a private prosecution has been underscored in the case of *Uganda v Inspector General of Police General Kale Kayihura*.[65] The High Court held that the magistrate's court erred in holding that the DPP had to first make an application before taking over a private prosecution.[66] The High Court further held that the DPP does not require the consent of the private prosecutor

55 Criminal Revision Application No. 024/2022, 11. Also, see *Pepper v Hart* (1993) 1 All ER, 50.

56 Criminal Revision Application No. 024/2022, 11.

57 *Ibid*.

58 *Ibid*.

59 High Court Criminal Revision Appeal No. 8/2022.

60 High Court Criminal Revision Appeal No. 8/2022, 7 and 8.

61 See *Hassan Basajjabalaba v Kakande Bernard* High Court Criminal Revision No. 2/2013 (arising from Bug. Rd. Misc. Application No. 22/2013)*; Uganda (Private Prosecution by Male Mabirizi) v Hon. Norbert Mao* High Court Criminal Revision Appeal No. 8/2022*;* Criminal Revision Application No. 024/2022.

62 (Criminal Application 90/2023) [2024] UGHCCRD 40 (17 May 2024) 6-7.

63 *Ibid*.

64 Article 120(3) (c) of the 1995 Constitution.

65 (Revision Cause No. 34 of 2016) 2016 UGHCCRD 75 (17 August 2016). Earlier decisions on the DPP's power to take over private prosecutions include *Uganda v Opoka Pyenlyce David Nicholas* (Cr. Case No. 83/2003) 2009 UGHC 118 (5 March 2009); also see *Thomas Kweyelo alias Latoni v Uganda* (Const. Pet. No. 036 of 2011 (reference)) 2011 UGCC 10 (22 September 2011).

66 (Revision Cause No. 34 of 2016) 2016 UGHCCRD 75 (17 August 2016).

to take over his or her private prosecution.[67] It is the author's humble and considered view that the aforementioned Kayihura case was erroneously decided by Joseph Murangira J. In Uganda, an application for revision to the High Court from a magistrates' court can only be made after a final decision is rendered by a magistrates' court.[68] In this case, the magistrates' court had not made a final decision. Consequently, there were procedural errors in the Kayihura case. Unfortunately, the private prosecutors did not pursue an appeal against this erroneous decision of Murangira J.

The DPP, however, can take over the private prosecution to continue and can only discontinue it with the consent of the court where it was filed.[69] There seems to be a contradiction between section 43(1)(b) of the MCA, section 13(1) b of the Prevention and Prohibition of Torture Act of 2012 (PPTA), and Article 120(3)(d) of the 1995 Constitution. Whereas section 43(1)(b) and section 13(1) b of the PPTA authorise the DPP to discontinue the private prosecution without the consent of the court, Article 120(3)(d) explicitly states that the DPP must seek the consent of the court before it discontinues proceedings that were instituted by private prosecution. There is a need to amend section 43(1)(b) of the MCA, and section 13(1) b of the PPTA so that the said provisions are consistent with the supreme law of Uganda, the 1995 Constitution.

The DPP has on several occasions utilised this *lacuna* in section 43(1)(b) of the MCA, not to seek the Court's consent before withdrawing criminal proceedings originally instituted by private prosecution.[70] In the constitutional petition of *Naphtal Were v Attorney General*,[71] in a dissenting judgment, Kenneth Kakuru J held that the 1995 Constitution is the supreme law of Uganda. Kakuru, thereafter, stated that section 13(1) (b) of the PPTA is null and void to the extent of its inconsistency with the 1995 Constitution.

It is interesting that whereas there are several requirements for a private prosecutor to institute a private prosecution, section 42(2) of the MCA states that the validity of any criminal proceedings instituted under the aforementioned provision cannot be vitiated by "any defect in charge or complaint or by the fact that a summons or warrant was issued without any complaint or charge or, in the case of a warrant, without a complaint on oath."[72] Presumably, the framers of this particular provision of law were more interested in the administration of substantive justice as opposed to procedural technicalities.[73]

67 *Ibid*.

68 See the case of *Charles Harry Twagira v Uganda* (Criminal Application No. 3 of 2003) [2003] UGSC 31 (19 September 2003).

69 Articles 120(3) (d) and (4) of the 1995 Constitution. *Uganda (Private Prosecution) v Mbaziira Bryan* (Criminal Application 90/2023) [2024] UGHCCRD 40 (17 May 2024); also see *Robert Rutaro v Attorney General* Constitutional Petition No. 27 of 2016.

70 *Charles Mbire v Uganda* HCT-00-CR-CV-0015/2012, a private prosecution was instituted against a private multinational company for tax evasion. The DPP took over the case and withdrew it.

71 *Naphatal Were v Attorney General* (Consolidated Constitutional Application No. 42 of 2012; Consolidated Constitutional Application No. 52 of 2012) [2021] UGCC 9 (9 March 2021)

72 Section 42(2) of the MCA.

73 Under Art 126(2) (e) of the 1995 Constitution, substantive justice must be administered without undue regard to technicalities.

3 LESSONS FROM OTHER COMMONWEALTH JURISDICTIONS ON PRIVATE PROSECUTIONS

The general rule worldwide is that the office of the public prosecutor handles all criminal prosecutions. In numerous Commonwealth countries, however, private individuals and entities can institute private prosecutions.[74] Therefore, private prosecutions are the exception to the general rule in criminal proceedings.[75] This exception shows that the police and public prosecutor have structural limitations that may impede the effective execution of their public mandate. This is especially so when these government bodies investigate and prosecute individuals from within the law enforcement agencies and powerful individuals in society.

The value of private prosecutions has been reiterated in several Commonwealth jurisdictions. In *Kimani and Anor v Kahara*,[76] a court in Kenya stated that "The right of private prosecution is essential to counteract attempts by wealthy and influential people to stifle prosecutions when offenses by them are alleged in reports to the police." In *Kelly v District Court Judge Ryan*,[77] a court in Ireland held that "the existence of a private prosecutor acts as an external check against the risk of a rare lapse or oversight on the part of the Director [of Public Prosecutions]."[78]

Earlier, the United Kingdom's House of Lords in the case of *Gouriet v Union of Post Office Workers*[79] held that the right to institute a private prosecution "… is as a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of police officers and the office of Public Prosecutions to prosecute offenders against the criminal law." The House of Lords further noted that:

> The individual, in such situations [corruption, bias, neglect, failure, political interference, refusal to prosecute, etc.] who wishes to see the law enforced has a remedy of his own; he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority.[80]

The case law jurisprudence from the afore-mentioned selected Commonwealth states shows that private prosecutions are an important constitutional safeguard against inaction by police and the public prosecutor.

There are two ways in which states provide for the right to institute a private prosecution. The first includes the provision of this right in the Constitution of the country.[81] The second involves the provision in the country's criminal procedural law.[82] Whereas there is no express provision by juristic persons to institute private prosecutions in Uganda, in other Commonwealth countries,

74 These Commonwealth countries include South Africa, Kenya, The Gambia, Singapore, Tonga, Samoa, and Canada, among others. For a detailed treatment, see Mujuzi "The right to institute a private prosecution: a comparative analysis." 2015 *International Human Rights Law Review* 223; Also see *The Municipal Council of Dar-es-Salaam v AB De P Almeida* (1957) 1 EA 244, where a private prosecutor is defined as "any prosecutor other than a public prosecutor."

75 See *Branson v Marrero* 2010 EW Misc. 19 (CC) (07 December 2010) 27.

76 [1983] eKLR.

77 [2013] IEHC 321.

78 *Ibid*.

79 [1978] AC 435, 498. Also see, *Gujra, R (on the application of) v Crown Prosecution Service* [2013] 1 ALL ER 612, 68.

80 [1978] AC 435 477.

81 See, for example, Brazil, The Gambia, and Kenya.

82 See, for example, the United Kingdom, South Africa, Singapore, Taiwan, Jamaica, Ireland, and Lesotho.

juristic persons can institute private prosecutions.[83] For example, in South Africa, juristic persons can institute a private prosecution under section 8 of the Criminal Procedure Act. In the case of the *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*,[84] the court indicated that it is possible to do so under section 8 of the Criminal Procedure Act.[85] Juristic persons do not include companies. Consequently, companies cannot institute private prosecutions in South Africa.[86]

In many countries, the public prosecutor has to decline to institute a public prosecution for a private prosecution to be instituted.[87] In deciding whether to consent to a private prosecution, many prosecuting agencies in common law countries apply two tests, to wit, the *full code test* and whether the private prosecution is in the *public interest*.[88] The full code test considers whether the evidence presented to the prosecuting agencies "reveals a reasonable prospect of conviction, sometimes known as the 51% chance test …"[89] This is premised on the fact that once the evidence presented by a private prosecutor passes this test, then there is a fifty-one per cent chance that the private prosecutor will secure a conviction in court. The second test applied by the prosecuting agencies is that the private prosecution must be in the public interest.[90] What amounts to public interest, in such a situation may be challenging. *Black's Law Dictionary*[91] defines public interest as "the general welfare of the public that warrants recognition and protection." In the English case of *R v Bedfordshire,*[92] the court defined public interest as something in which the public has a stake.

Closely related to the issue of consent to a private prosecution by a public prosecutor is whether the public prosecutor can take over a private prosecution once it is instituted in court. For example, in Singapore, a public prosecutor can take over a private prosecution and continue or discontinue it.[93] Legislation in a majority of states shows that a public prosecutor can take over a private prosecution and continue with it.[94] A public prosecutor can also discontinue a private prosecution with or without the consent of the court.[95] This is because the state has the primary duty to institute criminal proceedings against suspected criminals.

In several states, the victim or a lawyer, instructed on behalf of the victim, can conduct the private prosecution.[96] In other states, the legislation specifically provides that the victim must

83 Other Commonwealth countries where a juristic person can institute a private prosecution include Australia, Canada, and the United Kingdom, among others.

84 2017 1 SACR 284 (CC); 2017 4 BCLR 517 (CC).

85 Mujuzi 2016 *SACJ* 1.

86 See *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 4 SA 720 (A) 726.

87 See s 7 of the Criminal Procedure Act 51/1977 of South Africa; also see s 13 of the Criminal Procedure and Evidence Act, Chapter 9:07/2016 of Zimbabwe.

88 *Ibid.*

89 For a full treatment on this see the case of *R (on application of Gujra) (FC) (Appellant) v Crown Prosecution Service (Respondent)* 2012 UKSC 52, see Judgment of Lord Wilson.

90 Edmonds and Jugnarain 5.

91 *Black's Law Dictionary* 8 ed.

92 24 L.J.G.B 84.

93 See s 13 of the Criminal Procedure Code of Singapore.

94 See Art 41(2) of the Constitution of Samoa. Also See *Teo v Attorney General* [2001] WSCA 7 (23 November 2001). Also, see S 72 of the Constitution of Mauritius and S 13 of the Criminal Procedure Act of South Africa.

95 *Gujra, R (on the application of) v Crown Prosecution Service*, 2013] 1 ALL ER 612 para 15.

96 For example, in the Canadian case of *Strachan (Private Prosecutor) v Szewcyk* 2013 ONCJ 402 (CanLII) para 72, where the court held that there was no need for the victim to hire a lawyer to institute a private prosecution.

instruct a lawyer to conduct the private prosecution.[97] The High Court in New Zealand has held that the victim must appoint a lawyer to facilitate an effective private prosecution.[98] This treatise shows that several Commonwealth states have adopted different strategies about who may conduct a private prosecution. The discourse also shows that the right to institute a private prosecution is conditional, depending on the legislative framework of a particular state.

In some nations, a private prosecution can only be instituted if the criminal proceedings are likely to succeed and if the private prosecutor has a substantial interest.[99] The criminal proceedings should also not be vexatious and frivolous.[100] In other countries, the courts will allow private prosecutions to proceed even if the criminal proceedings have no prospects for a conviction.[101] The better approach to avoiding the abuse of private prosecutions is to provide stringent procedural safeguards before private prosecutions can take place.[102]

The costs of a private prosecution are incurred by the private prosecutor in numerous Commonwealth countries.[103] To enable access to justice, some states have established mechanisms for legal aid for the indigent to institute private prosecutions.[104] In countries such as Australia[105] and Canada,[106] the authorities have indicated that the government has no duty to provide legal aid for a private prosecutor. The discussion above shows that in a majority of Commonwealth states, the prohibitive costs of a private prosecution are to be incurred by the private prosecutor. Given the purpose of private prosecutions, the indigent may be prevented from instituting private prosecutions against powerful individuals and influential legal entities due to the unavailability of legal aid. This state of affairs could, as a result, raise challenges with access to justice for the indigent.

3 2 Private Prosecutions and International Human Rights Law

The Supreme Court of Appeal of the United Kingdom has indicated that the public prosecutor has the primary duty to prosecute criminals and that the right to institute a private prosecution is not internationally recognised.[107] This right is yet to be provided for in any international human rights law instruments.[108] The developing scholarship about this mechanism indicates that this may change soon.[109] In addition to the scholarship, the African Commission has adopted a General Comment, where it appeals to state parties to tackle ill-treatment and torture by making use of private prosecutions. It states as follows:

97 See, for example, Taiwan where a court shall dismiss a private prosecution if a lawyer has not been instructed by the victim to conduct the private prosecution. See Art 329 of the Code of Criminal Procedure of Taiwan.

98 See *Davidson v Rogerson and Rogerson Hc Wang* Cri-2008-083-500354 [2009] NZHC 375 (1 April 2005) para 20.

99 See s 7 of the Criminal Procedure Act of South Africa.

100 See South Africa, United Kingdom, The Gambia, and Kenya.

101 See Ireland.

102 These stringent measures could include a security deposit before the private prosecution commences as is done in South Africa.

103 See for example Kenya, Azerbaijan and South Africa.

104 See Art 103(6) of the Code of Criminal Procedure of the Azerbaijan Republic.

105 *Potier v Legal Aid Commission of New South Wales* [2011] NSWSC 1066 (1 September 2011) para 40.

106 See, for example, the Legal Aid Policy of Newfoundland and Labrador, a province of Canada.

107 *Gujra, R (on the application of) v Crown Prosecution Service*, 2013] 1 ALL ER 612 66.

108 Mujuzi *International Human Rights Law Review* (2015) 223.

109 Mujuzi "Private Prosecution as a Local Remedy Before the African Commission on Human and People's Rights" 2019 *AHRLJ*. See also *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) *AHRLR*.

> In line with state parties' obligations under Article 7 of the African Charter, the option of private prosecution for acts of torture and other ill-treatment by non-state actors should be availed and sufficiently facilitated by the state when utilized by a victim, including by addressing practical challenges to private prosecution such as prohibitive costs or the impossibility in practice to access all relevant evidence.[110]

Activists have also attempted to institute private prosecutions for international crimes. In Davidson v British Columbia,[111] a private prosecutor instituted criminal proceedings for torture committed in Iraq against a former president of the United States of America (USA) in a Canadian court. The court held that the private prosecution would not be in the public interest. This was because there was no reasonable prospect that the suspect would be brought before the Canadian criminal justice system for trial.[112] Therefore, jurisprudence is developing around the value of private prosecutions. This is where the state neglects its duty to prosecute crimes and human rights violations against powerful individuals. Possibly soon, this legal mechanism will be recognised as a right and adopted into the international human rights treaties.[113]

4 The Prosecution of Corruption in Uganda

Under section 49 of the Anti-Corruption Act, the DPP, Inspectorate of Government (IGG), and Uganda Revenue Authority (URA) are charged with the duty of public prosecution of corruption in Uganda.[114] Section 49 above shows that a public prosecution can only be instituted with the authorisation of either the DPP or the IGG. If any other prosecutor instituted a trial without the consent of either of the two prosecutorial agencies, the criminal proceedings would be a nullity and would be dismissed from court. In the case of Uganda v Ndondo Bernard,[115] the High Court of Uganda held that "w]here proceedings require the DPP's consent, the accused is not to be charged and tried before such consent is obtained otherwise the proceedings are a nullity."[116]

In Uganda, the law does not provide for what grounds the DPP would consider to consent to a charge instituted by any other prosecutor, including a private prosecutor. In other common law countries, the prosecuting entity requires that the private prosecutor present to it evidence, indicating that the case has a high likelihood of securing a conviction once the consent is granted by the prosecuting agency.[117]

In deciding whether to commence criminal proceedings against a person, the DPP must consider "whether or not it is in the interest of the public to prosecute. Prosecutors must consider the seriousness of the offence, the nature of the crime, and the economic impact of the offence on the community."[118] Perhaps these could constitute the parameters upon which the DPP or IGG can authorise any other prosecution, including a private prosecution of a corruption matter under the category of "public interest," as provided for by Article 120(5). Ugandan case law shows that courts have entertained cases based on public interest, where the issues raised have

110 General Comment No. 4 on Art 5 of the African Charter on Human and Peoples' Rights, para 75.

111 2006 BCCA 447 (CanLII).

112 Also see, *Zhang v Canada (Attorney General),* 2007 FCA 201 (CanLII).

113 Walyemera *The Investigation and Prosecution of Corruption in Uganda* (LLD-thesis, University of the Western Cape, 2021).

114 See the High Court (Anti-Corruption Division) (Amendment) (Practice) Directions, 2019, Legal Notice No. 3, 2019.

115 (1985) EA 3, Also see *Abubaker Kakyama Mayanja v Republic* 1960 EA 23, which case makes the same point.

116 (1985) EA 4.

117 Edmonds and Jugnarain 5.

118 Law Development Centre*, The Uganda Criminal Justice Bench Book* (2017) Kampala: LDC 99.

included habeas corpus applications,[119] political rights,[120] execution of the death penalty,[121] environmental concerns,[122] freedom of worship,[123] torture,[124] and corruption,[125] among others.

The afore-mentioned discussion offers a glimpse into what the DPP or a Ugandan court confronted with defining "public interest" would consider as public interest before granting consent for any other prosecution to be instituted for a corruption case. What is not ascertained now is whether the DPP or a court of law in Uganda would also adopt the two tests, to wit, the full code test, and public interest, as an international best practice for granting consent for the institution of any other prosecutions. This is in cases where it is required by Ugandan law in many serious crimes including corruption offences. In Uganda, the closest legal provision of "tests" similar to the aforementioned tests that can be applied by the DPP to consent to private prosecution is found in Article 120(5) of the 1995 Constitution. Article 120(5) also provides "public interest" as a key factor in exercising the DPP's criminal prosecution mandate. Other grounds that the DPP may consider in deciding to exercise his or her mandate are "the interest of the administration of justice and the need to prevent abuse of legal process." Perhaps in granting a private prosecutor consent to institute criminal proceedings against suspects in corruption cases, the DPP would consider these grounds.

Apart from the public interest, the second ground the DPP could consider before authorising a private prosecution of a corruption matter is still grounded in Article 120(5) of the Constitution. It provides that the DPP shall have regard to "… the interest of the administration of justice"[126] The third and last limb of Article 120(5) provides that "… and the need to prevent abuse of legal process."[127] In *Tibeigana v Vijay Reddy*,[128] the High Court obtained the aid of Black's Law Dictionary[129] to define "abuse of court process" as follows; "a malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words, a perversion of it."[130] Similarly, the Supreme Court of Uganda has stated that "abuse of court process" "involves use of process for improper purpose (sic)."[131] Presumably, the DPP would seek the aid of the aforementioned cases and other authorities, to assist it on whether a corruption case merits the DPP's authorisation for a private prosecution.

Curiously, the anti-corruption legislation in Uganda does not also provide for what an aggrieved private prosecutor would do if the DPP refuses to consent to a private prosecution. Can an

119 *Uganda v Commissioner of Prisons, ex parte Matovu* 1966 EA 514.

120 *Rwanyarare v Attorney General*, Constitutional Petition No. 11/1997 and *Ssemogerere v Attorney General* Constitutional Petition No. 5/1999, among others.

121 *Uganda Law Society v The Attorney General*, (Constitutional Petitions No. 2 and 8 of 2002) [2009] UGCC 1 (4 February 2009).

122 *Greenwatch v Golf Course Holdings Limited,* HCMA NO. 390/2001 *The Environmental Action Network (TEAN) v AG and NEMA*, Miscellaneous Cause No. 39/2001, *NAPE v AES Nile Power* High Court Miscellaneous Cause No. 268/1999, among others.

123 *Dimanche Sharon v Makerere University* (Constitutional Cause No.1 of 2003) [2003] UGCC 6 (24 September 2003).

124 *Behangana v Attorney General* (Constitutional Petition No. 53 of 2010) [2015] UGCA 6 (12 October 2015).

125 *Fox Odoi-Oywelowo v Attorney General* Constitutional Petition No. 8/2003.

126 1995 Constitution.

127 *Ibid*.

128 (Miscellaneous Application No. 665 of 2019) 2019 UGHCCRD 200 (4 November 2019).

129 *Black's Law Dictionary* 6 ed.

130 (Miscellaneous Application No. 665 of 2019) 2019 UGHCCRD 200 (4 November 2019) 5.

131 *Uganda Land Commission v James Mark Kamoga*, Supreme Court Civil Appeal No. 08/2004 7; Also see *Dr. Tiberius Muhebwa v Uganda* (Constitutional Reference No. 09 of 2012 (Arising from CSC No. 209 of 2011)) (14 February 2014), where the Constitutional Court offers some examples of abuse of court process.

aggrieved private prosecutor sue the Attorney General[132] in an application for judicial review? Can a court of law authorise a private prosecution without the DPP's consent?[133] Can the court issue mandamus orders to the DPP to prosecute the corruption case itself?[134] It is argued that an aggrieved private prosecutor can explore all the aforementioned avenues to enable a public or private prosecution of a corruption matter to proceed.[135]

The DPP is not under the direction and control of any person or authority in the execution of its mandate under Article 120(6) of the 1995 Constitution. The DPP's decisions can, however, be challenged if they do not serve the public interest. In the case of *ACP Bakaleeke Siraji v Attorney General*,[136] the High Court agreed with the applicant, who argued that whereas the DPP was independent in the execution of its mandate, the DPP was accountable to the people and should perform its actions in the public interest, in the interests of the administration of justice and to prevent abuse of legal process as provided for by Article 120(5) of the 1995 Constitution. The High Court also agreed with the applicant that in case the DPP had acted beyond its mandate and proceeded unreasonably, then the applicant can apply to the court for an order for judicial review of the DPP's decision(s). Consequently, under section 36(1) of the Judicature Act,[137] the High Court may issue mandamus, prohibition, and/or certiorari orders against the decisions of the DPP.[138]

If the decision of the DPP does not serve the public interest, the interests of the administration of justice, or is an abuse of the legal process, it is submitted that an aggrieved prosecutor can employ the afore-mentioned procedures to enable the DPP to authorise the private prosecution of a corruption case.

4 1 Private Prosecution as an Anti-Corruption Tool

When the DPP, IGG, or the URA choose not to institute a public prosecution of a corruption case, private prosecutions offer opportunities to activist citizens to combat corruption in society. In other circumstances, powerful commercial corporations may engage in criminality without the ability of government institutions to act. Without this tool in such a situation, an environment of impunity would prevail.

In some countries, the mere threat of the institution of private prosecution may force the prosecuting agencies that are charged with the public mandate to institute criminal proceedings to do so.[139] The deterrence theory also lends credence to the fact that private prosecutions can

132 In Uganda, the Attorney General represents all government entities in legal proceedings.

133 See the case of *Uganda (Private Prosecution by Male Mabirizi) v Anita Annet Among* (Civil Appeal 3/2024) [2024] UGHCACD 8 (15 October 2024), 7, where Lawrence Gidudu J seems to indicate that a court can authorise a private prosecution of a money laundering case if the magistrate finds that the complaint and charge sheet, *prima facie*, disclose an offence for committal to the High Court. Also, see the case of *Simba Properties and Others. Vantage Mezzanine Fund II Partnership* (Miscellaneous Application No. 414/2022) [2022] UGCommC 28 (24 May 2022), 11, where Stephen Mubiru J states that a private prosecution is treated the same way as a public prosecution.

134 See the Kenyan Case of *Republic v Director of Public Prosecutions Ex-Parte Communications Commission of Kenya* 2014 eKLR 1, where the court stated that "Where the Court … finds that the DPP has exercised his discretion not to prosecute wrongly, the court can only remit the matter back to the DPP for reconsideration in view of the findings of the Court. The powers of the DPP are found in the Constitution and statute, and they should be exercised within the constitutional and statutory provisions. Given the source of the powers of the DPP, this Court has the authority to ensure those powers are exercised constitutionally and lawfully."

135 See s 223 of the MCA, which mandates the DPP to appoint any Advocate or any Public Servant as a Public Prosecutor.

136 (Miscellaneous Cause No. 212 of 2018) 2019 UGHCCD 4 (27 February 2019).

137 Cap 13.

138 See ss 37 and 38 of the Judicature Act Cap 13, for other related remedies.

139 Edmonds and Jugnarain 4.

deter criminal conduct in society.[140] In Uganda, corruption crimes have increased, but the anti-corruption mechanisms in place have not kept pace with these criminal activities. Many anti-corruption agencies have either refused, failed, or neglected to perform their mandate.

The anti-corruption legislation in Uganda allows for restitution against victims of corruption. In a private prosecution, once a court of law convicts a suspect, Ugandan courts have the power to order compensation against a convict in favour of victims of corruption.[141] This can enable a speedy resolution of a corruption matter before the court, as compared to civil proceedings, which are expensive to pursue and may result in delays.[142] A private prosecutor may also pursue confiscation proceedings against a convict. This may enable a court to undertake an examination of how the convict has benefited from corruption.[143] This can enable a court to order the confiscation of the proceeds of corruption.[144]

In terms of strategic interest litigation, a private prosecution of high-level persons for corruption may draw attention to the cancer of corruption, which the public authorities have ignored. This could enable publicity of the matter, which would cause a public debate. Consequently, these activities may enable the deterrence of corruption in society when the culprits are named and shamed.[145] The naming and shaming could deter many other potential perpetrators from engaging in corruption.

Compared to public prosecutions, private prosecutions of corruption, especially if pursued by civil society activists, can enable the mobilisation of adequate resources, which can lead to a thorough investigation of corruption crimes. This better-resourced investigation can facilitate the finding of cogent evidence that can enable convictions of high-profile individuals involved in corruption.

On successfully instituting criminal proceedings and securing a conviction against a suspect, a private prosecutor may seek costs incurred in the criminal proceedings from the government or the convict.[146] In some countries, the costs will be recovered from the government regardless of the outcome of the court process.[147] Unlike in Uganda, when a public prosecutor takes over the private prosecution in the United Kingdom, the private prosecutor can apply to the court to recover the costs of the private prosecution up to the stage at which the public prosecutor took over.[148] The discussion above shows that private prosecutions can effectively be deployed to curb corruption if the mechanism is strengthened by infusing best practices from other

140 See, for example, where private individuals or companies have brought private prosecutions for the protection of their intellectual property rights – See *Regina (Virgin Media Ltd) v Zinga* 2014 EWCA Crim 52 http://www.bailii.org/ew/cases/EWCA/Crim/2014/52.html? (accessed 17-07-2020) where insurance companies have sued individuals for having filed false insurance claims., See *R(Axa) v Gatley (2014) & R (Axa) v Paul Havert* (2015). This is to deter the criminal conduct of these individual fraudsters.

141 See s 35 of the Anti-Corruption Act 6, 2009; also see Part XVII of the Magistrates Courts Act of Uganda.

142 Edmonds and Jugnarain 11.

143 See ss 63, 64, 65 and 66 of Anti-Corruption Act 6, 2009.

144 *Ibid*.

145 Edmonds and Jugnarain 10; also see, for example, in Uganda in the *Kayihura case,* which enabled a significant decrease in police brutality, when the Inspector General of Police was privately prosecuted for the torture of citizens, together with seven other senior police officers.

146 See S 195 (1) of the Magistrates Court Act, which provides that "A court may order the payment of costs in any of the following circumstances—(a) to the prosecutor, whether public or private, by a person convicted of any offence by the court."

147 In the United Kingdom, whether the defendant is convicted or acquitted, the court can award the private prosecutor costs of the criminal proceedings. See S 17 of the Prosecution of offences Act of 1985.

148 Edmonds and Jugnarain 12.

Commonwealth jurisdictions into Uganda's private prosecutions regime.

4 2 Opportunities to Strengthen Private Prosecutions

There are numerous opportunities to strengthen the right to institute private prosecutions. Private prosecutions are an essential tool for enabling accountability for impunity in Uganda. Considering the importance of this mechanism, it ought to be strengthened.

The costs of instituting a private prosecution are prohibitive. Private prosecutors must incur all the expenses of a private prosecution.[149] There is no provision in Ugandan law to compensate a private prosecutor for expenses incurred if a private prosecution is unsuccessful. Considering that the private prosecutor is executing a public duty that ought to be executed by the public prosecutor at the taxpayer's expense, the private prosecutor ought to be reimbursed with reasonable costs by the government, not only when the private prosecutor secures a conviction but also when the accused person is acquitted. This is especially so if the private prosecution was concerned with corruption. This approach has been followed, albeit with some alterations, in Namibia,[150] Seychelles,[151] and South Africa.[152]

In situations where the DPP takes over a private prosecution and then exploits the provisions of section 43(1) (b) of the MCA and section 13(1) b of the PPTA to discontinue the criminal proceedings, there is a need for an amendment of this provision. Section 43(1) (b) of the Magistrates Court Act and section 13(1) b of the PPTA are contrary to Article 120(3) (d) of the 1995 Constitution and should be amended. Mujuzi has accurately argued that Article 120(3) of the 1995 Constitution should be amended to require the DPP to seek the consent of a private prosecutor before they take over and discontinue the criminal proceedings.[153] Additionally, the DPP must first demonstrate that the intention of the takeover is not to terminate criminal proceedings but to guide the process within the law, as provided by Article 120(5) of the 1995 Constitution. After the DPP takes over, the private prosecutor should be on watching brief throughout the criminal proceedings, and if there arises undue delay or suspicious termination of proceedings, the DPP must give clear justification to the court and the private prosecutor. Where the DPP decides to terminate the trial, the private prosecutor should have a right to apply for judicial review or even appeal the decision if they are not satisfied. Where the evidence shows that the DPP is engaged in dubious machinations to defeat the private prosecution, a court should allow the private prosecutor to continue the criminal proceedings to a conclusion where they have been discontinued by the DPP. Other Commonwealth jurisdictions have limited the public prosecutor's powers in this area.[154]

Several laws can also present significant challenges for a private prosecutor who intends to collect evidence to institute criminal proceedings against perpetrators of corruption in Uganda.[155] Under Article 41 of the 1995 Constitution and the Access to Information Act (AIA), every citizen has a right to access information in the possession of the state or any organ or agency of the state. A government agency may hold important information that may lead to the successful prosecution of influential suspects engaged in corruption, but may cite privacy concerns in refusing to release

149 Under s 196 of the MCA, the private prosecutor can be penalised in compensation and costs, if the court finds that the private prosecution is frivolous and vexatious.

150 See s 15(2) of the Criminal Procedure Act.

151 See s 290 of the Criminal Procedure Code.

152 See s 15(2) of Criminal Procedure Act.

153 Mujuzi 2017 *African Journal of International and Comparative Law* 592.

154 For example, Kenya. Also, see Mujuzi "The Power of Prosecutorial Heads to Intervene in Private Prosecutions in Commonwealth Countries", 2022 *Loyola Journal of Social Sciences* 97.

155 See Access to Information Act of 2005 and Data Protection and Privacy Act of 2019.

that information to a private prosecutor.[156] Private organisations may cite the right to privacy and data protection by refusing to reveal incriminating evidence.[157] These laws, however, exempt access to data that is obtained for purposes of criminal proceedings.[158] Consequently, a private prosecutor may utilise these provisions to access incriminating information on suspected persons that may lead to convictions in court. In situations where a private organisation refuses to provide personal information, a private prosecutor may institute proceedings to have the information released by order of the court to enable the private prosecution to proceed with cogent evidence.[159] Some Commonwealth countries, like Kenya[160] and the United Kingdom, provide a mechanism where police can hand over evidence to a private prosecutor if the public prosecutor does not intend to prosecute.[161]

Related to the difficulty of gathering and presenting evidence before a court of law in Uganda is the issue of witness protection. Other Commonwealth jurisdictions have witness protection laws, which fortify their private prosecution regimes in this area.[162] Uganda does not have a witness protection law.[163] It has, however, enacted the whistle-blowers law that is inadequate.[164] As we await the passing of a witness protection law in Uganda, the practical recommendations for this challenge include establishing *ad hoc* private witness protection measures for each private prosecution. This is to enable the physical and psychological protection of parties involved in private prosecutions. This may, for example, involve personal security training for victims, witnesses, and lawyers. This could be periodically or before the institution of any private prosecution(s). The other practical measure is for the lawyers to file applications against the accused persons and any other persons involved in the intimidation and harassment of the victims, witnesses, and lawyers.[165] Moreover, if the victims and witnesses are interfered with, the integrity of the evidence before the court is compromised. In a nutshell, pending the adoption of the framework on witness protection, the afore-mentioned practical measures would be useful in enabling the safety of witnesses and lawyers involved in the private prosecution of corruption.

The Magistrates Court Act also does not expressly provide that a juristic person can institute private prosecutions.[166] This is a limitation to the institution of private prosecutions in the sense that opposing counsel could argue that the law only allows natural persons to institute private

156 See Art 41(1) of the 1995 Constitution. Also see s 5 of the Access to Information Act of 2005.

157 See, ss 7 (1) and (2) (b) (iii), which provided that "(1) Subject to subsection (2), a person shall not collect or process personal data without the prior consent of the data subject."

158 See s 7 (2) of the Data Protection and Privacy Act of 2019, which provides that "personal data may be collected or processed a) where the collection or processing is authorized or required by law; or (b) where it is necessary- (iii) for the prevention, detection, investigation, prosecution or punishment of an offence or breach of law." Also see ss11(2) (e) (iv) that provides for the collection of data from a data subject, and section 17 on further processing of data only for a specific purpose.

159 This may be by way of an application under s 37 of the Access to Information Act to a chief magistrate. An application to financial institutions can also be made to enable the production of incriminating evidence to the private prosecutor under ss 7(2), 11(2) (e) (iv) and 17 of the Data Protection and Privacy Act of 2019.

160 See *Macharia v Attorney General* [2013] eKLR para 41.

161 See *ScopeLight Ltd v Chief of Police for Northumbria*, [2009] EWHC 958 (QB) (07 May 2009).

162 See for example, Britain (Witnesses (Public Inquiries) Protection Act 1982), Australia (Witness Protection Act of 1995), and South Africa (Witness Protection Act 112 of 1998).

163 Berkeley Law "Project: Legislation for a Witness Protection Law in Uganda: Uganda Law Reform Commission" https://lawcat.berkeley.edu/record/196811?ln=en (accessed 24-12-23).

164 Whistleblowers Protection Act, Cap. 34.

165 See s 94(1) (f) of the Penal Code Act Cap 128, which penal provision makes it a criminal offence to interfere with witnesses before, during, or after criminal proceedings. Also see s 94 (d), (g) and (i) of the Penal Code Act with interfering with judicial proceedings. Also see the case of *Uganda (Private Prosecution by Brass for Africa) v Phillip Monk* (Criminal Case No. 30 of 2022) of the Chief Magistrates Court of Mbale, Uganda, where the private prosecutor relied on s 94 (1) (f) of the Penal Code Act.

166 *Ibid;* also see s 42 of the MCA.

prosecutions in Uganda. By the time the court decides that a person includes both natural and juristic persons, a private prosecutor would have incurred significant litigation costs.[167] Therefore, section 42 of the Magistrates Courts Act should be amended to clearly state that a "person" includes both natural and juristic persons, as is illustrated under the Interpretation Act.[168] The discussion above shows that once this legal mechanism is strengthened, it will bolster the fight against corruption.

5 CONCLUSION

The right to institute a private prosecution by an individual or any other legal person is an important tool in ensuring access to justice. It also enables accountability for those who commit crimes. Private prosecutions can offer quicker and often more effective remedies.[169] Compared to public prosecutions, private prosecutions offer swifter and more effective remedies to victims of crime or individuals or legal entities that intend to pursue criminals.

The mechanism of private prosecution is a powerful legal tool that can be deployed in the fight against corruption within both the public and private sectors to great effect. This is especially so in an environment where public institutions that monitor, investigate, and prosecute corruption have neglected to execute their legal mandate due to political and other influences. The best practices from other Commonwealth jurisdictions can strengthen the anti-corruption regime to curb corruption in Uganda. These best practices include the acquisition of cogent evidence and dealing with the prohibitive costs of instituting a private prosecution to enable access to justice for the indigent.

167 Section 2 of the Interpretation Act of 1976 (as amended) provides that a "person" includes "any company or association or body of persons corporate or unincorporated".

168 See s 2 of the Interpretation Act Cap 3 of 1976, however, defines a person to include a natural and juristic person.

169 Edmonds and Jugnarain 5.