



MPCE
Ministério Público
do Estado do Ceará



ESMP
ESCOLA SUPERIOR DO MINISTÉRIO
PÚBLICO DO ESTADO DO CEARÁ

Revista Acadêmica Escola Superior do Ministério Público do Ceará

Ano 11 nº 2
(Jul./Dez. 2019)

Prosecutorial Independence, Discretion and Strategy in the Commonwealth of The Bahamas¹

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ABSTRACT

The concepts of prosecutorial independence, discretion and strategy are considered the cornerstones of an effective and efficient criminal justice system under common law. To this end the state of the Commonwealth of the Bahamas amended its national constitution and established an independent office of the Director of Public Prosecutions (ODPP). The ODPP must have appropriate policy-legal and organizational frameworks to enable it enhance its independence from the office of the Attorney General (AG). This paper explores how the constitutional framework promotes the independence of the ODPP Bahamas and any claw backs. A comparison is made with other independent ODPPs such as Uganda. The last part of the paper examines strategies adopted by ODPP Bahamas that are meant to enhance prosecutorial independence and discretion.

Keywords: *Prosecutorial independence. Discretion. Strategy. The Commonwealth of the Bahamas. Attorney General. Office of the Director of Public Prosecutions. Uganda. Claw backs.*

¹ Data de Recebimento: 16/08/2019. Data de Aceite: 20/09/2019.

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1 INTRODUCTION

Many common law countries are still grappling with prosecutorial independence, discretion and strategy for the Director of Public Prosecutions (DPP). A number of states have embarked on granting the DPP more autonomy in conducting criminal prosecutions independent of the Attorney General (AG) and the police. The transition involving reform of laws and organizational restructuring in many countries including The Bahamas has not been smooth sailing, to say the least.

The Office of the Director of Public Prosecutions (ODPP) is one of the critical agencies of government in ensuring the proper functioning and administration of the criminal justice system in The Bahamas. In spite of its critical role, very little jurisprudence in The Bahamas has been developed so as interest the public, legal profession, policy makers and academia in the pivotal role of this office. This publication is intended to give the reader an insider's perspective of both the theoretical and practical aspects of this constitutional office.

A reference to the history of the Commonwealth of the Bahamas is essential in understanding how the ODPP was introduced. The Bahamas was a British colony and attained its independence on July 10th, 1973. English law was retained through the Constitution, The Bahamas Independence Order 1973.³ This included the substance of the common law, the doctrines of equity and the statutes of general application in force in England, together with the procedure and practice observed in the courts of justice in England at the time.⁴ The introduction of English law also brought with it the institutional framework including the office of the prosecutor who happened to be the AG. In order to appreciate the role of the office of the prosecutor, it is pertinent to examine its origins as in the next section.

3 O'Brien, Derek. "Small States, Colonial Rule and Democracy." In *Small States in a Legal World*, pp. 139-163. Springer, Cham, 2017. See Antoine, Rose-Marie Belle. *Commonwealth Caribbean law and legal systems*. Routledge-Cavendish, 2008. See also Palmer, Catherine A. "Tourism and colonialism: The experience of the Bahamas." *Annals of tourism Research* 21, no. 4 (1994): 792-811.

4 Reid, Giselle. "The Legacy of Colonialism: A Hindrance to Self-Determination." *Touro Int'l L. Rev.* 10 (2000): 277.

2 HISTORICAL BACKGROUND TO THE OFFICE OF THE PUBLIC PROSECUTOR

The term prosecute derives from the Latin phrase *prosecutus*, the past participle of *prosequi* which means “follow after, chase, pursue”. The meaning of prosecute, that is, “bring to a court of law” was first recorded in the 1570s in England.⁵ In the United Kingdom (UK) prosecutions used to be conducted by private individuals. The development of a police system meant that there was a policy shift whereby the police took over investigations and prosecutions of those suspected of breaking the law or committing crime.⁶ Public policy from then demanded that those suspected criminals would be punished for the common good of the public by the police and the courts. The victim or complainant⁷ was relegated to becoming a witness on behalf of the public or the state. In the 1700s the classic criminal trial in England had been an almost inquisitorial affair comprising of an informal discourse between the private prosecutor, the accused, the judge and the witnesses.⁸ Lawyers, whether prosecuting or defending as known nowadays, were largely conspicuous by their absence. In the late 1700s and early 1800s, the presence and involvement of lawyers in the criminal trial increased and the criminal process shifted sharply in form and procedure to an adversarial process. Furthermore the typical accused in the early 1800s, faced a lot of challenges. Fair trial rights that would today be regarded as fundamental aspects of the right of an accused were profoundly absent.⁹ It is often posited that to alleviate the unequal status of the accused in the criminal process the notion gained acceptance that the prosecuting lawyer was to

5 Cooley, Rita W. “Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies.” *The American journal of legal history* 2, no. 4 (1958): 304-312.

6 Kurland, Philip B., and D. W. M. Waters. “Public prosecutions in England, 1854-79: An essay in English legislative history.” *Duke LJ* (1959): 493.

7 In The Bahamas a victim of crime is referred to as a virtual complainant.

8 Baker, John H. “Criminal courts and procedure at common law 1550-1800.” *Crime in England* 37 (1977).

9 Barnes, Thomas G. “Prosecuting Crime in the Renaissance. England, Germany, France.” (1976): 784-791.

act, albeit within an ascent adversarial framework, as a “minister of justice” and not as a “normal” advocate.¹⁰ In 1894 the office of the DPP was established in the UK and has since undergone several reforms.¹¹ The DPP in the UK is still under the superintendence of the Attorney General. The public prosecutor in Anglo-American criminal procedure performs two primary functions. One is investigatory, that is, directing the police in gathering evidence and compiling a docket. The other is the forensic prosecutorial role presenting the evidence to the courts.¹² Along the way the public prosecutor has been mandated to decide whether to prosecute or not.

3 THE DEPARTMENT OF PUBLIC PROSECUTIONS UNDER OFFICE OF THE ATTORNEY GENERAL, THE BAHAMAS

Prior to 2017, all criminal proceedings were under the control and direction of the Attorney General. Article 78 of the Bahamas Constitution provided as follows:

78.-

1. The Attorney-General shall have power in any case in which he considers it desirable so to do-

a. to institute and undertake criminal proceedings against any person before any court in respect of any offence against the law of The Bahamas;

b. to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

c. to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.

2. The powers conferred upon the Attorney-General under paragraph (1) of this Article may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

¹⁰ *Ibid*

¹¹ Ashworth, Andrew. “Developments in the public prosecutor’s office in England and Wales.” *European Journal of Crime Criminal Law and Criminal Justice* 8, no. 3 (2000): 257-282.

¹² Langbein, John H., and AW Brian Simpson. *The origins of adversary criminal trial*. Oxford University Press on Demand, 2003.

3. The powers conferred upon the Attorney-General by sub-paragraphs (1) (b) and (c) of this Article shall be vested in him to the exclusion of any other person or authority: Provided that, where any other person or authority has instituted criminal proceedings, nothing in this Article shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.

4. In the exercise of powers conferred upon him by this Article the Attorney-General shall not be subject to the direction or control of any other person or authority.

5. For the purposes of this Article, any appeal from any determination in any criminal proceedings before any court or any case stated or question of law reserved for the purpose of any such proceedings to any other court shall be deemed to be part of those proceedings.

Article 78 of the Constitution of The Bahamas was repealed and replaced by a new Article 78 which provides as follows:

Functions of the Attorney General

The Attorney General shall be the principal legal adviser to the Government of The Bahamas.

The Attorney General shall be responsible for the administration of legal affairs of The Bahamas and legal proceedings for and against the State shall be taken-

In the case of civil proceedings, in the name of the Attorney General;

In the case of criminal proceedings, in the name of the Director of Public Prosecutions.

The Attorney General may, in any case involving considerations of public policy, national security or the international obligations of The Bahamas give general or specific directions to the Director of Public Prosecutions as to the exercise of the powers conferred upon the Director of Public Prosecutions by Article 78A(3) and the Director of Public Prosecutions shall act in accordance with those general or specific directions.

Any specific directions given under paragraph (3) must be in writing and signed by the Attorney General.

The comparison of the repealed Article 78 and the new one, it is clear that the DPP was operating under the direct control of the

Attorney-General. This meant that DPP would perform under delegated authority in the conduct of criminal prosecutions. In fact, Article 78 of the Bahamas Constitution of 1973 as amended never made mention of the office of the DPP. It operated as a department under office of the Attorney General. Departments are not independent and follow the policies and directions of their parent institution; the DPP in this case was no exception.

4 THE FIRST INDEPENDENT OFFICE OF THE DPP POST 2017

In 2017 the Constitution of the Bahamas was amended by inserting Articles 78A and 78B whereby the Office of the DPP was elevated as a constitutional public office independent of the office of the Attorney General. For the first time the DPP enjoys prosecutorial independence and security of tenure. The other development is that under Article 78 (2) (b) provides that criminal proceedings shall be in the name of the Director of Public Prosecutions. Previously criminal proceedings had been brought in the name of the Crown.

5 CONSTITUTIONAL MANDATE OF THE DPP OF THE BAHAMAS

Article.78A (1) the Constitution of Bahamas provides that ‘there shall be a Director of Public Prosecutions appointed by the Governor General on the recommendation of the Judicial and Legal Service Commission and with the approval of Prime Minister.’ The appointee for the office of the DPP undergoes a three tier checks and balance system of the Governor General with recommendation of the Judicial and Legal Service Commission and then the People’s representative the Prime Minister. This ensures that the candidate is competent to hold such an important office. The candidate should also be able to

take into account the public interest and be of high moral standing. In order to ensure that the DPP enjoys security of tenure, his or her terms and conditions of service are similar to those of a Supreme Court Judge.¹³ The constitution further entrenched the office of DPP that the same shall not be abolished while there is a substantive holder thereof.¹⁴

In prosecuting matters, the Director acts on behalf of the community. Prosecutors have strikingly been called “ministers of justice”, a phrase which sums up the unique position of the prosecutor in the criminal justice system.¹⁵ It has been said that prosecutors must always act with fairness and detachment with the objectives of establishing the whole truth and ensuring a fair trial.

Although the ODPP does not have clients as such, in performing its functions the Office works closely with the Courts, the legal profession, police and other investigators, victim’s representatives and other government agencies. The DPP must also ensure that appropriate consideration is given to the concerns of victims of crime.¹⁶ Furthermore, in the exercise of their work prosecutors engage in decision making that is in the context of the law and profoundly subjective. This is so because the law requires discretionary authority to make it work. In exercising this discretion, the Prosecutor must take public policy into consideration.¹⁷ Overall prosecutors are expected to execute their mandate judiciously and in the interest of justice.

6 POWERS OF THE DPP BAHAMAS

The DPP is constitutionally empowered to have effective control

¹³ Article 78A (2) and 94 (2) and (3) of the Constitution.

¹⁴ Article 78B (6) of the Constitution.

¹⁵ Gershman, Bennett L. “The Zealous Prosecutor as Minister of Justice.” San Diego L. Rev. 48 (2011): 151.

¹⁶ Gillis, John W., and Douglas E. Beloof. “Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts.” McGeorge L. Rev. 33 (2001): 689.

¹⁷ Langer, Vera. “Public interest in civil law, socialist law, and common law systems: The role of the public prosecutor.” Am. J. Comp. L. 36 (1988): 279.

over criminal prosecutions. The functions of the DPP are provided under Article 78A (3) and include;

To institute criminal proceedings against any person before any court in respect of any offence against the law of the Bahamas.¹⁸

To take over and continue any criminal proceedings instituted by any person or authority.¹⁹

To discontinue at any stage before judgment any criminal proceedings.²⁰

The powers of the DPP under Article 78A (3) may be exercised by him or her in person or through any person acting under and in accordance with his general or specific instructions.²¹ The import of this Article is that officers under The DPP Bahamas enjoy delegated constitutional powers subject to his or her direction. This would enable the proper functioning of the ODPP without bogging down the DPP with all the tasks of the office.

7 POWER TO ENTER A NOLLE PROSEQUI

Nolle Prosequi is a Latin derivative meaning 'be unwilling to pursue or do not prosecute'. This is a formal written entry made on the court record when the Director of Public Prosecutions in a criminal prosecution undertakes not to continue the action or prosecution. This power is derived from Article 78A (3) of the Constitution is in parameteria with section 52 of the Criminal Procedure Code with necessary modifications.

The DPP may, in any criminal case, whether in the Supreme Court and at any stage of the case before verdict or judgment (whether judgment has been written or not but before it is pronounced) enter a nolle prosequi. He may do so orally (by stating in Court that he is

¹⁸ Article 78A (3) (a) of the Constitution.

¹⁹ Article 78A (3) (b) of the Constitution.

²⁰ Article 78A (3) (c) of the Constitution.

²¹ Article 78A (4) of the Constitution.

entering a *nolle prosequi* under this section) or in writing.²² There upon the accused shall be at once be discharged in respect of the charge for which the *nolle prosequi* is entered. This discharge shall not, however, operate as a bar to subsequent proceedings against him on account of the same facts.²³

It is, therefore, correct to say that the DPP has the unfettered discretion to bring charges against a person if he or she considers that any law has been infringed by that person.²⁴ He also has the prerogative to terminate the charges even without assigning reasons. The drafters of the constitution are alive to the fact that criminal cases are affected by many extraneous circumstances. This discretion therefore enables the DPP terminate and then reinstate charges as and when circumstances of a given case have changed.

8 PROSECUTORIAL INDEPENDENCE

There is a tradition of independence in the prosecution function. It is not difficult to see why. The public interest is best served by a prosecutorial decision making process divorced, to the greatest extent possible, from extraneous influences be they political or social.²⁵

Whereas prosecutorial independence is crucial in the administration of justice, there is need for accountability for the decisions taken or not. This would put some checks and balances on the conduct of the prosecutor and the government. Complete unfettered powers would be prone to abuse especially in cases where there is political dissent or acrimony.²⁶

Prosecutorial decisions, although quasi-judicial, are still admi-

22 Section 52 of the Criminal Procedure Code.

23 *Ibid.*

24 Flynn, Asher. "Plea-negotiations, prosecutors and discretion: An argument for legal reform." *Australian & New Zealand Journal of Criminology* 49, no. 4 (2016): 564-582.

25 Michel, Verônica. "The role of prosecutorial independence and prosecutorial accountability in domestic human rights trials." *Journal of Human Rights* 16, no. 2 (2017): 193-219 at 197.

26 Roach, Kent. "Prosecutorial Independence and Accountability in Terrorism Prosecutions." *Crim. LQ* 55 (2009): 486.

nistrative in nature. It has been argued that there may be some kind of accountability through the courts. It seems fairly well established however that the prosecutorial process is independent from the judicial process except in exceptional circumstances.²⁷

In the High Court of New South Wales decision of *Maxwell v The Queen* (1ST March 1996) the power of the courts to control the exercise of discretion by prosecuting bodies was considered by

Dawson J and McHugh J:

The decision whether to charge a lesser offence, or to accept a plea of guilty to a lesser offence than that charged, is for the prosecution and does not require the approval of the Court. Indeed the Court would seldom have the knowledge of the strength and weaknesses of the case on each side which is necessary for the proper exercise of such a function. The role of the prosecution in this respect, as in many others, is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system.²⁸

The court in *R v Brown* further clarified on prosecutorial independence as follows “The Court rightly observed that the most important sanctions governing the proper performance of a prosecuting authority’s functions are likely to be political rather than legal.”²⁹

The court finally observed in *R v Brown (Winston)* that;

‘It ought to now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, unsusceptible of judicial review. They include decisions whether or not to prosecute, to enter a *nolle prosequi*, to proceed *ex officio*, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts

27 Voigt, Stefan, and Alexander J. Wulf. “What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence.” *Journal of Institutional Economics* (2017): 1-22
28 *Maxwell v The Queen* (1996) 184 CLR

29 *R v Brown* (1989) 17 NSWLR 472

were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.³⁰

The concept of accountability is central to the idea of democratic governance based on the rule of law.³¹ Accountability is said to be achieved through Parliamentary democracy. It is said to occur through the Attorney General and Minister Legal Affairs to the Parliament and then to the community.³² The Attorney General and Minister of Legal Affairs are responsible in Parliament for the performance of the Director of Public Prosecutions.

This division of function is appropriate in principle and effective in action. It puts the Director and Prosecutors in the position of being able to make prosecution decisions without the distraction of concerns about the resource implications of those decisions and the many matters of administration that come up in a large and busy office.³³ In doing so, they are ultimately accountable to the Parliament. At the same time, the Office of Public Prosecutions has a dual accountability: it is responsible to the Director as his or her attorneys and it is responsible to the Parliament and the Attorney General and Minister of Legal Affairs for the manner in which it carries out the business of the Director and handles the budget allocated to it.

9 IMPLICATIONS OF ARTICLE 78 (3) AND (4) OF THE CONSTITUTION ON THE INDEPENDENCE OF THE DPP

Article 78 (3) of the Bahamas Constitution provides that; 'The Attorney General may, in any case involving considerations of public

30 [1997] 3 ALLER 769

31 Universal Declaration on Democracy, adopted by the Inter-Parliamentary Council at its 161st session, Cairo, 16 September 1997, para 14, www.ipu.org/cnl-e/161-dem.htm (accessed 8/8/2019)

32 Hamilton, James. "Prosecutorial independence and accountability." In European Commission For Democracy Through Law, Seminar on The Independence of Judges and Prosecutors: Perspectives and Challenges (Trieste Italy 28 February-3 March 2011), Venice Commission: <http://www.venice.coe.int/webforms/documents/default.aspx>. 2011.

33 Schonteich, Martin. "Strengthening prosecutorial accountability in South Africa." Institute for Security Studies Papers 2014, no. 255 (2014): 24.

policy, national security or international obligations of The Bahamas give general or specific directions to the DPP as to the exercise of the powers conferred upon the DPP by Article 78A(3) and the DPP shall act in accordance with those general or specific directions.’ Furthermore Article 78 (4) provides that; ‘Any specific directions given under paragraph (3) must be in writing and signed by the Attorney General.’ The framers of the constitutional amendment did not desire to have an institution with absolute authority. They provided for checks and balances on the DPP. It is evident that the DPP in The Bahamas is not totally independent as the AG still wields a measure of control over the functioning of the office of the DPP. It can be argued that the DPP is politically controlled by the AG to a certain extent. On the other hand, the safeguard against abuse by the AG is that the instructions must be in writing and signed by the AG in person. This ensures that the AG is personally accountable for his or her decision. On the 23rd of August, 2019, the AG Bahamas issued the first Directive to the DPP as regards prosecution of offences under the Proceeds of Crime Act.³⁴ In other common law jurisdictions such as Uganda, the DPP is totally independent of the AG.

Pertaining to criminal investigations, the DPP of Uganda is expressly mandated by the constitution to direct police to investigate any information of a criminal nature and report back to him or her.³⁵ This ensures that the DPP is in effective control of criminal prosecutions. However the DPP Bahamas does not have a similar mandate over police to investigate crime. This is a fundamental departure between the two sister institutions.

The other impediment to DPP’s independence in the Bahamas is that the bulk of prosecutions before Magistrates Courts are conducted by the police.³⁶ This raises concerns especially for one institution to detect, prevent, investigate and prosecute crime. This anomaly needs

34 Attorney General’s Directive 2019 tr-002

35 Article 120 (3) (a) of The Constitution of the Republic of Uganda, 1995

36 Section 39 of the Police Act, Chapter 205, Laws of The Commonwealth of The Bahamas.

to be addressed in light of Article 78A of the Constitution. Taking the example of Uganda, the DPP in 1998 recruited State Prosecutors who replaced police prosecutors. It follows that the DPP of Uganda exercises full and effective control of criminal investigations and prosecutions. It has taken nearly two decades to attain this. The DPP Bahamas will have to initiate and lobby for reforms in the law and policies plus invest in personnel and training prosecutors to be able to attain its independence.

Prosecutorial independence is closely interwoven with prosecutorial discretion. It would be difficult if not impossible for the DPP to exercise discretion in the absence of prosecutorial independence. It is therefore crucial to examine how the two concepts mutually operate in practice in the next section.

10 PROSECUTORIAL DISCRETION IN THE BAHAMAS

Prosecutors through charging decisions, plea bargains, and sentence recommendations exercise their mandate.³⁷ This must be done judiciously and fairly based on the facts and guided by the law to decide whether to prosecute or not. In arriving at a given decision, so many factors may come into play as prosecutors are human beings with a mind that is capable of imaginative thinking. One is therefore required to distinguish between morality, ethics and legal considerations. It is proper and prudent practice to always be guided by the law. This is because the law sets minimum standards of behaviour and violation thereof may subject the offender to prescribed sanctions. Smith and Levinson expound on the difference between legal, ethical and moral rules which lies in the particular consequence.³⁸ The law will provide for its own sanction ethical requirements can be and usually are enforced by a regulating body, with the power

³⁷ Misner, Robert L. "Recasting prosecutorial discretion." *J. Crim. L. & Criminology* 86 (1995): 717 at 721
³⁸ Smith, Robert J., and Justin D. Levinson. "The impact of implicit racial bias on the exercise of prosecutorial discretion." *Seattle UL Rev.* 35 (2011): 795 at 806

to censure or remove as the case may be for instance the Bahamas Bar Council. Moral breaches are a matter for conscience alone. In exercising one's discretion whether to prosecute or not, the Prosecutor must put the integrity of the Public Service ahead of personal or political interest.³⁹ The DPP Bahamas allocates police file to senior prosecutors for perusal and legal advice to police. They advise on appropriate charges, adequacy of evidence, areas for further inquiries among others. However given that the constitution does not expressly mandate the DPP to direct police to bring suspects to book, it causes an icy relationship in some situations. Nonetheless thus far there is a cordial working relationship.

The decision to prosecute is the most problematic role of a prosecutor. Unlike other areas of the law where it is possible to resort to reported or unreported authorities, there are no such authorities to guide a prosecutor in reaching a decision whether to mount a prosecution or not.⁴⁰ The problem is compounded by the fact that the DPP, as the chief public prosecutor, rarely makes public his reasons for mounting or discontinuing prosecution. Unlike a court which has the opportunity of determining the credibility of witnesses, the DPP and his officers have to rely on the statements of the witnesses in the investigation files.⁴¹ In some cases a prosecutor, after perusing the file, may get the impression that there is "prima facie" evidence against the accused, but in the course of prosecution the witness turns out to be incredible and or hostile. The net effect is that no such case is made out to require an accused being put on his defense; for example, cases involving next of kin.

39 Green, Bruce A., and Ellen Yaroshfsky. "Prosecutorial Discretion and Post-Conviction Evidence of Innocence." *Ohio St. J. Crim. L.* 6 (2008): 467 at 469.

40 Paulsen, Erik. "Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements." *NYUL Rev.* 82 (2007): 1434.

41 Maylam, Simon. "Prosecution for money laundering in the UK." *Journal of Financial Crime* 10, no. 2 (2003): 157-158.

11 FACTORS INFLUENCING THE DECISION TO PROSECUTE INCLUDE

1. The existence of “prima facie” evidence. This is the evidence upon which a court, properly directing itself upon law and evidence, is likely to convict in the absence of an explanation from the accused. (This is a judicial definition.)⁴²
2. The attitude of the complainant. All offences are committed against the State and thus the attitude of complainant should not influence a withdrawal of a case. However, in some cases the complainant’s attitude is taken into account in deciding whether a prosecution is warranted. For example, when the accused is a relative of the victim, the item stolen has been recovered, and the parents of the accused pressure the complainant to withdraw the case.
3. Health of accused. Where the defendant’s health is poor, prosecution may be discontinued, especially in terminal illnesses.
4. Humanitarian factor. It is a cardinal rule that a prosecutor has to be fair and not oppressive. This is a factor that should be borne in mind in considering whether a consideration of a prosecution is merited. For example, if a husband and wife are charged and the husband dies in the process, the case against the wife could be withdrawn.
5. Public interest. The DPP has to assess whether the public interest will be served best by the prosecution. Therefore, the DPP makes consultation with his prosecutorial staff, especially in political cases.
6. Gravity of the offence, the circumstances surrounding the commission of the offence and its nature determine the gravity; e.g. Trespass to land and assaults arising out of vendetta or are intended to settle old scores.
7. Impact on international relations.

Where two sovereign states are involved, it is a good practice to

⁴² Bhatt –v- R (1957) E.A 332, East African Law Reports.

consider the impact of such intended prosecution on the relations between the affected States. In many situations most of the cases are handled through diplomatic channels. In the Bahamas, the DPP is guided by the written instructions of the AG as noted above. It could be argued that this arrangement would guard against prosecutions that would cause diplomatic stand offs between nations.

The above list is by no means exhaustive as each case is determined based on its peculiar circumstances and or merits and demerits.

Having considered how prosecutorial discretion is exercised, it is important to consider the strategies employed in fulfillment of DPP's mandate.

12 PROSECUTORIAL STRATEGIES IN THE BAHAMAS

These are approaches adopted by prosecution agencies in executing their mandate. There is no "one size fit all" strategy. Prosecution agencies respond with strategies in accordance with the nature of criminal conduct confronting them. As society transforms so do new trends of crime. The ODDP Bahamas employs a number of these strategies in order to fulfill its mandate as highlighted below:

No dropping of charges strategy: This strategy was instituted to encourage victim cooperation and to increase the number of successful prosecutions. This is common in sexual and gender based violence (SGBV) cases. It should be noted that more often than not that victims of SGBV crime are dependent on the perpetrators. This strategy denies the victim of SGBV cases the option of freely withdrawing a complaint once formal charges have been filed. Further, the strategy limits the prosecutor's discretion to drop a case solely because the victim is unwilling to cooperate. This strategy has also been relied upon by prosecutors in the US when dealing with domestic violence cases.⁴³

⁴³ Corsilles, Angela. "No-drop policies in the prosecution of domestic violence cases: Guarantee to action or dangerous solution." *Fordham L. Rev.* 63 (1994): 853. At 855-6.

Victimless prosecution strategy or Evidence Based prosecution: This strategy entails prosecution even in the absence of the victim.⁴⁴ In many situations victims of crime give up pursuing their cases for various reasons. This can be very frustrating to any prosecutor. Nonetheless it is important to be innovative in ensuring that those who commit crime are brought to book. This strategy involves relying on out of court statements of victims and witnesses. Prosecution would rely on evidence of law enforcement, medical, confessions, recorded 919 calls to seek convictions against the accused. This calls for reliance on evidence that falls in the exceptions of the hearsay rule.

Aggressive prosecution strategy or the Felony case processor strategy: This strategy emerged from the US and was a move to professionalize criminal justice practices and remove them from what was perceived as corrupt political influence.⁴⁵ In the Bahamas, most felonies are indictable and tried before the Supreme Court. Felonies are aggressively pursued, investigated and prosecuted. The process of committing defendants for trial to the Supreme Court is done under section 258 of the Criminal Procedure Code⁴⁶ through the issuance of voluntary bills of indictment. The charges must be clear indictable felonies supported by credible evidence. The DPP or his/her delegated representative must attest to the authenticity and viability of charges. This was done to prevent abuse of the legal process.

Deterrence strategy: The deterrence theory posits that crimes can be prevented when the costs of committing the crime are perceived by the offender to outweigh the benefits.⁴⁷ General deterrence is the idea that the general population is dissuaded from committing crime when it sees that punishment necessarily follows the commission of a

44 Busching, Laurence. "Rethinking Strategies for Prosecution of Domestic Violence in the Wake of Crawford." *Brook. L. Rev.* 71 (2005): 391.

45 Worrall, John, and M. Elaine Nugent-Borakove, eds. *Changing Role of the American Prosecutor*, ALBANY. Suny Press, 2014 p 95-97.

46 Chapter 91 of the Laws of The Commonwealth of The Bahamas.

47 Gibbs, Jack P. "Deterrence Theory and Research Jack P. Gibbs." *The law as a behavioral instrument* 33 (1986): 87.

crime. Special deterrence involves punishment administered to criminals with the intent to discourage them from committing crimes in the future. The prosecutors are under instructions to seek the maximum sentences so that the would-be offenders would be dissuaded and discouraged. The would-be offenders either gang members or drug pushers are put on notice that there is no tolerance or lenience. The deterrence strategy proffers that the legal machinery would be unleashed to combat their criminal conduct in a swift and firm manner.⁴⁸

Charge Reduction strategy: This strategy is utilized in a limited manner. This may take a form of plea agreements between the prosecution and the defendant especially where evidence for the main offence is inadequate, then the prosecution may enter an agreement on a reduced charge. It ensures that there is a win-win situation for justice.⁴⁹

The Community prosecution strategy: This strategy is where the DPP extends prosecutorial services to the people and other justice agencies.⁵⁰ In Free port the Grand Bahamas, there is a fully fledged office headed by a Deputy Director of Public Prosecutions. Further there is a Case Management Coordination office comprised of police and counsel from the ODPF to coordinate between the public (witnesses), DPP and the court. Of course more needs to be done to reach out more to the greater parts of the Family Islands of the Bahamas.

Prosecution led Investigations: This strategy considers the major role prosecutors play in guiding police during investigations.⁵¹ The prosecutors actively contribute to the analytical processes during criminal inquiries. It is through such interactions with investigators

48 Braga, Anthony A., and David L. Weisburd. "The effects of focused deterrence strategies on crime: A systematic review and meta-analysis of the empirical evidence." *Journal of Research in Crime and Delinquency* 49, no. 3 (2012): 323-358.

49 Shermer, Lauren O'Neill, and Brian D. Johnson. "Criminal prosecutions: Examining prosecutorial discretion and charge reductions in US federal district courts." *Justice Quarterly* 27, no. 3 (2010): 394-430.

50 Gray, Kelley Bowden. "Community Prosecution: After Two Decades, Still New Frontiers." *J. Legal Prof.* 32 (2008): 199.

51 Dandurand, Yvon. "Strategies and practical measures to strengthen the capacity of prosecution services in dealing with transnational organized crime, terrorism and corruption." *Crime, Law and Social Change* 47, no. 4-5 (2007): 225-246.

that they offer feedback and guide investigators for thorough and solid cases. It is acknowledged that successful prosecutions often depend on the quality and aptness of advice and assistance prosecutors offer the police during investigations.⁵² It posited that since the prosecutors are aware of what court requires in terms of evidence to prove the elements of crime, then their participation would help police focus their resources on the right areas. This is best attained through this strategy. The DPP Bahamas relies on this strategy for high profile cases and for serious crimes.

Exceptional Vagueness Strategy: The strategy is employed to the use of presumptions or strict liability statutes where the act is presumed to be “prima facie” evidence of intent.⁵³ In the Bahamas, the voluntary bill of indictment (VBI) of armed robbery will include a count of receiving dishonestly obtained property in situations where the defendant is arrested with recently stolen property. The key with this strategy is that by avoiding the issue of intent, prosecutors side step any discussion of the defendant’s motive, thereby reducing the possibility that a juror might identify with the defendant’s cause. In a situation where the defendant’s identity was in doubt due to difficult circumstances for identification by the victim, if the defendant was arrested with the victim’s property then the presumption under the doctrine of recent possession kicks in.⁵⁴ Where the defendant has no reasonable explanation as to how the property came into his or her possession, then he is presumed to be the thief.⁵⁵ This may arise where the prosecution evidence is weak on the major charge but there are other kindred offences. This enables the prosecutor to widen his or her net. It may conversely be argued that this embarrasses the

52 Dandurand, Yvon. “Addressing inefficiencies in the criminal justice process.” International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia (2009).

53 Dampousse, Kelly R., and Chris Shields. “The morning after: Assessing the effect of major terrorism events on prosecution strategies and outcomes.” *Journal of Contemporary Criminal Justice* 23, no. 2 (2007): 174-194.

54 See section 91 of the Evidence Act, Chapter The Laws of Bahamas.

55 See *R v Seymour* [1954] 1 All ER 1006.

defendant during his defence. It is a permissive practice before the criminal justice system in the Bahamas.

13 CONCLUSION

In conclusion, the ODPP Bahamas as an independent office is in its formative years but nonetheless it has attained some milestones in the right direction. A lot still needs to be done to harness its independence. There must be law reforms and organizational changes to the ODPP to enable it properly function independent of the AG. The government of the Bahamas must prioritize the needs of the ODPP to enable it execute its critical role of combating crime and ensuring that the country is crime free, however only time will tell.

INDEPENDÊNCIA FUNCIONAL, CRITÉRIO E ESTRATÉGIA NA COMMONWEALTH DA BAHAMAS

RESUMO

Os conceitos de independência funcional, critério e estratégia são consideradas as pedras angulares de uma justiça efetiva e eficiente sob a common law. Para este fim, o estado da Commonwealth das Bahamas alterou sua constituição nacional e estabeleceu um escritório independente do Diretor de Ministério Público (ODPP). O ODPP deve ter estruturas políticas-legais e organizacionais apropriadas para permitir aumentar sua independência do escritório do Procurador-Geral (AG). Este artigo explora como o arcabouço constitucional promove a independência do ODPP das Bahamas. É feita uma comparação com outros ODPPs independentes, como Uganda. A última parte do artigo examina as estratégias adotadas pelo ODPP Bahamas com o objetivo de aumentar a independência e critérios do Ministério Público.

Palavras-chave: *Independência Funcional. Ministério Público. Commonwealth das Bahamas.*

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