

**JUDICIAL CONFERENCE. HELD AT PALAPYE 25-26 TH JULY
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**THE INDEPENDENCE OF THE DPP: (A CASE OF BOTSWANA)
PRESENTATION BY THE DIRECTOR OF PUBLIC
PROSECUTIONS
MR LEONARD B SECHELE**

INTRODUCTION

In considering whether or not Botswana Directorate of Public Prosecutions is independent, account has to be taken of various factors that influence the environment within which the DPP operates.

The factors include, but are not limited to-

- a. the Constitutional provisions establishing the Directorate of Public Prosecution. The Constitutional provisions include-
 - i. the qualifications for appointment of the Director of Public Prosecution;
 - ii. the functional independence; and
 - iii. the entrenchment of tenure of office;
- b. comparison of the Directorate of Public Prosecution with other Offices established by law.

ESTABLISHMENT OF THE DIRECTORATE OF PUBLIC PROSECUTION

The Directorate of Public Prosecution was established by the Constitution Amendment of 2005. The establishment of the Directorate is provided for in section 51A of the Constitution. In establishing the Directorate of Public Prosecutions it has always

been of critical importance that the Directorate of Public Prosecutions be insulated from improper external influence. The insulation would have the effect of reposing public confidence in the DPP. It is important that public confidence be garnered from the Directorate of Public Prosecutions process of decision making.

Section 51A provides as follows-

“(1) There shall be a Director of Public Prosecutions appointed by the President whose office shall be a public office and who shall be subject to the administrative supervision of the Attorney-General.

(2) A person shall not be qualified to be appointed to the Office of Director of Public Prosecutions unless he or she is qualified to be appointed to the Office of a Judge of the High Court.

(3) The Director of Public Prosecutions shall have power in any case in which he or she considers it desirable to do so-

(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken 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 herself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him or her in person or by

officers subordinate to him or her acting in accordance with his or her general or special authority.

(5) For the purposes of this section any appeal from any judgment 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:

Provided that the power conferred on the Director of Public Prosecutions by subsection (3)(c) of this section shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such person.

(6) In the exercise of the functions vested in him or her by subsection (3) of this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority:

Provided that-

(a) where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority, and with the leave of the court; and

(b) before exercising his or her powers in relation to cases considered by the Attorney-General to be of national importance, the Director of Public Prosecutions shall consult the Attorney-General.”

WHAT IS THE EXTENT OF THE INDEPENDENCE GRANTED BY THE VARIOUS SUBSECTIONS TO SECTION 51A

1. Subsection (1) provides that the office shall be public office and shall be subject to administrative supervision of the Attorney General. The effect of this subsection is that –
 - a. the Director of Public Prosecutions is a public servant and is subject to the rules governing the public service, in particular the Public Service Act.
 - b. the Director of Public Prosecutions is subject to the administrative supervision of another office, the office of Attorney General. This affects independence in so far as the Directorate of Public Prosecutions does not have its own resources and its independence may be affected by its dependence on the resources of the Attorney General. Authority to spend the budget requires approval of the Attorney General.
2. Subsection (2) sets the qualification of the Director of Public Prosecutions to be same as those of Judges of the High Court. The import of this provision is to ensure that the President appoints a person with the caliber to efficiently discharge the prosecutorial function.
3. Subsection (3) set out prosecutorial powers. It is however important to note the following-

- a. The power of the Director of Public Prosecutions to institute and undertake criminal proceedings before any court does not include proceedings in a court martial. Court Martials are regulated by Botswana Defence Force Act.

Please note that there is another exclusion not provided for under this subsection but found in section 32 of the Customary Courts Act which provides that *'no advocate or attorney shall have a right of audience in any customary court or in any magistrates' court in any criminal proceedings which fall to be determined by customary law'*.

My humble submission is that these exclusions do not impede on the independence of the Director of Public Prosecutions.

- b. the power of the Director of Public Prosecutions to take over and continue a criminal proceedings instituted by or undertaken by another person or authority is not subject to any limitations. This position is reinforced by proviso (a) to subsection (6)
- c. the power of the Director of Public Prosecutions to discontinue criminal proceedings granted under subsection(3)(c), does not , according to the proviso to subsection (5), extend to where proceedings are an appeal by a person convicted in any criminal proceedings or to any

case stated or question of law reserved at the instance of such person.

4. Subsection (4) allows the Director of Public Prosecutions to delegate the prosecutorial powers granted to the Director under subsection (3). The import of this subsection is to vest the function solely on the person of the Director of Public Prosecutions and where the function is delegated, the delegation it is to officers subordinate to the Director of Public Prosecutions and acting in accordance with the Director's general or special authority.
5. I however wish to point out to this gathering an inconsistency with this provision. The inconsistency is with regard to section 8 of the Criminal Procedure and Evidence Act which provides that the Director of Public Prosecutions may appear personally or by any person delegated by him to conduct a prosecution before any court. Section 8 of the Criminal Procedure and Evidence Act is clearly inconsistent with the delegation under the Constitution as the one under the Constitution is a delegation to officers subordinate to the Director of Public Prosecutions and acting in accordance with the Director's general or special authority.
6. Subsection (6) grants the director functional independence without any limitations.

However, paragraph (b) of the proviso requires the Director of Public Prosecutions to consult the Attorney General, where the Attorney General is of the view that a case is of national importance. The import of this proviso on the independence of the AG requires an indepth analysis of the following-

- a. The word 'shall' makes it mandatory for the DPP to consult the Attorney General;
- b. The consultation presupposes a discussion which is not binding on the DPP and my reasoning is based on the couching of the provision in so far as it states that the consultation is 'before the exercise of powers' by the DPP. My interpretation is therefore that a consultation under this proviso does not affect the functional independence accorded the DPP in subsection (6).

I would like to think that the proviso is intended to facilitate the constitutional mandate of the Attorney General as principal legal advisor to the Government;

- c. The phrase 'considered by the Attorney General to be of national importance' means it is the Attorney General who determines what constitutes cases of national importance. However, this poses two practical difficulties-
 - i. How is the Attorney General to know a matter is of national importance before the DPP has instituted criminal proceedings? The process of determining

whether or not the case is of national importance is initiated by the Director of Public Prosecution by preparing a summary of the case and submitting the summary to the Attorney General for consultation. This process requires a cordial and mature relationship between the Attorney General and the Director of Public Prosecutions as the latter can frustrate determinations of whether a case is of national importance to be done before an institution of criminal proceedings;

ii. The phrase ‘national importance’ has not been defined

leaving it to the discretion of the AG. That notwithstanding, the Director of Public Prosecutions has in the past consulted the Attorney General in cases that involve chieftainship, the prosecution of high profile public figures and cases where there is substantial public interest.

OTHER PROVISIONS OF THE CONSTITUTION WHICH ENHANCE THE INDEPENDENCE OF THE DIRECTOR OF PUBLIC PROSECTIONS

1. Section 122 makes provision for the remuneration of holders of certain offices including the Director of Public Prosecutions to be prescribed by an Act of Parliament. This is effected by the Specified Officers (Salaries and Allowances) Act. This insulates the Director from administrative decisions with regards to his remuneration as is the case with the other public officers. Further, Parliament is composed of MPs from

different political parties therefore this enhances independence in so far the remuneration of the Director is not approved by the ruling party

2. Section 112 vests on the President, the power appoint, to remove from office and to exercise disciplinary control over certain offices including the person holding office of Director of Public Prosecution. This section is does not in any way infringe on the independence of the Director of Public Prosecutions. To the contrary, section 112 is consistent with section 18(1) of the Interpretation Act which provides that “Where an enactment confers a power to appoint a person to an office, the power includes..... the power to remove or suspend, to exercise disciplinary control; to re-appoint or reinstate and to appoint a deputy or other officers.....”

3. Section 113 provides for the tenure of the Director of Public Prosecutions and states that-

“(1) Subject to the provisions of this section, a person appointed as Director of Public Prosecutions shall hold office for a 5 year renewable term or until he or she attains the age of 60 years, whichever is the earlier

(2)A person holding the office of Director of Public Prosecutions may be removed from office only for inability to perform the functions of his or her office (whether arising from

infirmity of body or mind or any other cause) or for misbehaviour or for incompetence and shall not be so removed except in accordance with the provisions of this section.

(3) If the President considers that the question of removing a person holding the office of Director of Public Prosecutions from office ought to be investigated then-

(a) he or she shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office; and

(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and advise the President whether the person holding the office of Director of Public Prosecutions ought to be removed from office under this section for inability as aforesaid or for misbehaviour or for incompetence.

(4) Where a tribunal appointed under subsection (3) of this section advises the President that a person holding the office of Director of Public Prosecutions ought to be removed from office for inability as aforesaid or for misbehaviour or for incompetence, the President shall remove such person from office.

(5) If the question of removing a person holding the office of Director of Public Prosecutions from office has been referred to a tribunal under this section, the President may suspend that person from performing the functions of his or her office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the person ought not to be removed from office”.

A number of issues arise from a reading of section 113-

- a. The term of a contract is 5 years and is renewable. This cannot impend on the independence of the Director of Public Prosecutions the reason being 10 years is a long enough;
- b. Even though qualification of appointment is the same as that of a Judge of the High Court, the retirement of the Director of Public Prosecutions is the same as that of the rest of the public service and shorter in comparison to that of Judges;
- c. The reasons for removal are varied but none have been defined, giving quite a wide latitude to use as a basis of the removal. Reasons are –
 - i. for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause);
 - ii. for misbehavior; or
 - iii. for incompetence
- d. The tenure of office of the Director of Public Prosecutions enhances his independence. A person is removed from office in the same manner they are appointed. However, the removal from office of the Director of Public is through a recommendation being made to the President, by a tribunal setup to investigate. This is the case notwithstanding that the appointment of the Director of Public Prosecutions is not subjected to a recommendation of any body or authority.

In comparison to Judges, their appointment is by the President, acting in accordance with the advice of the Judicial Service Commission. Similarly, the removal of a judge is subject to the recommendation a tribunal

COMPARISON WITH OTHER DEPARTMENTS SET UP BY LEGISLATION

<i>Office</i>	<i>Law under which established</i>	<i>Appointing Authority</i>	<i>Functional Independence</i>	<i>Security of tenure</i>
Directorate of Public Prosecutions	Constitution	President	YES	YES
Attorney General	Constitution	President	NO	NO
Auditor General	Constitution	President	YES	YES
Independent Electoral Commission	Constitution	President	YES	YES
Ombudsman	Ombudsman Act	President after consultation with the Leader of the Opposition	NO	YES

CONCLUSION

There has been argument by the former Attorney General as well as the current one that the Directorate of Public Prosecutions is a division of the Attorney General's Chambers.

I have tried to think along and share the views and with due respect I found no attraction in the views and accordingly parted with the position. It remains my view that the Directorate of Public Prosecutions is not a division of the Attorney General's Chambers and perform no function of the Attorney General as indeed prosecution is not a function of the AG.

The different views relating to the status of the Directorate of Public Prosecutions could be a product of the history of the prosecution service in the country. Until the establishment of the Directorate of Public Prosecutions, the Attorney General performed prosecutorial functions through a division of the Attorney General's Chambers referred to as Prosecutions Division. The staff of the Directorate of Public Prosecutions remain employees of the Attorney General's Chambers and are appointed by the Attorney General for the office of the Attorney General. Staff promotions are done by the Attorney General for the office of the Attorney General.

The Directorate of the Public Prosecutions budget is administered by the Attorney General. Authority to spend the budget requires approval of the Attorney General.

Whilst the Director of Public Prosecutions is functionally independent, the same Director of Public Prosecutions is dependent on the Attorney General for resources.

Having discussed the salient features relating to the independence or otherwise of the Director of Public Prosecutions, I share the view, contrary to previous interpretation that the Directorate of Public Prosecutions is not a division of the Attorney General's Chambers. In any event, Divisions within Departments are not created by legislation let alone being created by the Constitution.

Even if one were to agree with the view that the Directorate of Public Prosecutions is a division of the Attorney General's Chambers then that begs the question, how does a head of division have a functional independence and security of tenure?

On the basis of the discussion preceding I conclude by remarking that notwithstanding the Director of Public Prosecutions dependence on the Attorney General, the Directorate of Public Prosecutions enjoys functional independence which can be enhanced by a further amendment of the Constitution to provide for total separation of the Directorate the Attorney General's Chambers.

THANK YOU