

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 4

2024

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Empowering Justice: The Role of Private Prosecution in Cameroon

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ABSTRACT

Over the years, the right of access to justice has evolved and today, it is not just improving an individual's access to a court or guaranteeing legal representation, it is also the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards. Accessing justice in general and criminal justice in particular is primordial to ensuring stability, economic development, and human rights. There is therefore no gainsaying that the Cameroonian legislator is right in providing for the right of private individuals to institute criminal proceedings directly before the court in sections 60 and 157 of the Criminal Procedure Code though there is the lingering question of to what extent has the right to institute a private prosecution enhanced access to criminal justice in Cameroon? This is the question this paper seeks to answer.

Keywords: Private Prosecution, Access to Justice, Criminal Justice System.

I. INTRODUCTION

The importance of access to justice for both citizens and the state cannot be underestimated. Access to justice is an essential element of the rule of law and democracy. The rule of law signifies that laws that are enacted by the competent authority are fully executed by officials; that individuals wishing to enforce their rights should have unfettered access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. Access to justice is fundamental to securing the realization of rights. Where an individual suffers the violation of his right, he needs a mechanism which can grant him relief to the wrong suffered. It is therefore incumbent on the state to put in place mechanisms which are capable of dispensing justice in a rapid and less costly manner. Private prosecution therefore offers the state an opportunity to widen the sphere of criminal prosecutions as it serves as an alternative to public prosecutions in seeking justice.

The right to institute a private prosecution is guaranteed in Cameroon by the Criminal Procedure Code (CPC) in its sections 60 and 157. Private prosecution serves as panacea to the effects of

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inequality over the fundamental rights of the poor to access the justice system. The socioeconomic obstacles faced by the poor prevent them from hiring lawyers to protect their interests and from simply understanding or using the legal order.⁴ Poverty and inequality also negatively affect the autonomy of the poor; they do not allow the poor to interact directly with the state in order to solve their conflicts.⁵ Instead, the poor can interact with the state only through lawyers. Thus, the persistence and growth of inequality and poverty should cause concern about the poor's access to justice; a right which is a central component of the democratic, liberal states.⁶ Private prosecution, a legal mechanism of enforcing rights before the courts in a rapid and less costly manner is an option for mitigating the negative effects of inequality and poverty over access to justice. Delegating prosecution function to private actors therefore enlarges the field of access to justice as more persons can participate in the exercise of the sovereign powers of the state.

Unfortunately, despite the importance of justice and granting of access to it, the state continues to be incapable of removing all the obstacles preventing individuals from having access to the justice system. This inability to provide protection to citizens is giving legitimate rise to claims of denial. Having unresolved family, racial, employment, discrimination, housing or other legal problems will tend to lead, as we know, to further legal and other social and health-related problems.⁷ In attempting to provide solutions to these problems, the Cameroonian Legislator provided for private prosecution to permit its citizens have access to its Criminal Justice System but the question remains whether the expectations of private prosecution to enhancing access to justice are feasible? To answer this question, it is necessary to examine the advantages private prosecution offers justice seekers, that is, the utility of private prosecutions in accessing the justice system, examine the challenges facing individuals in accessing the criminal justice system through private prosecution before making suggestions aimed at strengthening private prosecution as a mechanism for enhancing access to justice.

II. THE UTILITY OF PRIVATE PROSECUTION IN ACCESSING THE JUSTICE SYSTEM

Private prosecution means different things in different countries but the bottom line is that a private individual is involved in the prosecution of the offence. While in some countries a private prosecutor conducts a prosecution in his own name, in other countries a private

⁴ Colin Crawford *et al.*, (2020), "Access to Justice: Theory and Practice from a Comparative Perspective", *Indiana Journal of Global Legal Studies*, vol.27, NO.1, p.2.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Farrow, Trevor C.W., (2014), "what is access to justice?", *Osgoode Hall Law Journal*, Vol.51, Issue 3, p.981.

prosecutor co-prosecutes with a public prosecutor.⁸ The above two ways of conducting private prosecution do not feature in the CPC because its sections 60 and 157 have simply provided for the right of private persons to institute criminal proceedings in court while leaving the prosecution of the matter to the public prosecutor as principal party to all criminal matters.⁹

There is no characterization, definition or orientation given to the practical exercise of the concept of private prosecution under the CPC. The only indication given as concerns the right is that any injured person may institute criminal proceedings in court.¹⁰ By private prosecution, the victim of the offence may himself initiate a criminal action before the court by seising the court directly. Private prosecution is therefore the initiation of criminal proceedings by the civil party who actually suffered injury from the commission of a criminal offence. The exercise of this right before the court can be by the individual who has suffered loss or injury seising the court directly with a direct summons under section 60 of the CPC or him laying a complaint with a civil claim attached with the competent Examining Magistrate under section 157 of the CPC.¹¹ The right of private persons to commence criminal prosecutions as provided under the CPC is intended to bring justice closer to the people by making criminal proceedings more expedient and less costly. Where proceedings are less costly and expedient, the tendency is that more persons will resort to it in seeking justice for any wrong suffered.

The inclusion of private prosecution in the CPC enhances the functionality of the Cameroonian Criminal Justice System because it enlarges the sphere of protection of public peace, social interest; and saves up some valuable resources for the state. The public prosecutor for lack of resources may decline to prosecute some offences prompting the victims of these offences to initiate private prosecutions against the offenders thereby increasing the functionality of the Criminal Justice System. Though there are no official figures to attest to this fact, practice and other indices show that there is such an increase because more persons today use private prosecution to seek criminal justice. For example, in the Court of First Instance Dschang, if we add the 589 suits initiated by private prosecutors to the 2410 suits initiated by the public prosecutor between the year 2015 and 2021,¹² we will see that there is a considerable increase

⁸ Mujuzi, J.D., (2016), "Victim Participation in the Criminal Justice System in the European Union through Private Prosecutions: Issues Emerging from the Jurisprudence of the European Court of Human Rights", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol.24, p.115.

⁹ Section 128 of the CPC.

¹⁰ Section 60 of the CPC states that, criminal proceedings shall be instituted and prosecuted by the Legal Department. They may also be instituted by any government department or by the injured person under the conditions laid down by law.

¹¹ Section 157(2) of the Criminal Procedure Code states that the complaint lodged to the Examining Magistrate in which a victim claims damages shall set the criminal action in motion.

¹² Information gathered from the registry of the Court of First Instance Dschang. Though we cannot determine the margin of error with exactitude, we put it within +5/-5%. It should also be noted that this information was sought

in criminal prosecutions indicating that more and more persons are participating in the process. This participation is as a result of the simplicity and celerity that characterises private prosecution coupled with other advantages inherent in the procedure. Private prosecution is said to be simple because it requires little financial resources and the procedure is relatively faster as compared to public prosecution where many authorities meddle before it reaches the court. Thus, to measure the utility of private prosecution as a mechanism for enhancing access to justice, we must consider the cost of the procedure and its expediency to justice seekers comparatively to public prosecutions.

(A) Cost of Private Prosecutions

The prosecution of any criminal offence necessitate the use of time and other resources. However, for purposes of convenience, we shall only examine the cost of private prosecutions in terms of financial and time considerations. Considerations for financial loss and time are usually the primary factors that justice seekers consider when making decisions to pursue a criminal action. Where proceedings are costly, litigants, especially indigent litigants, tend to ignore the action because they can't afford the funds necessary to pursue the action, and, where proceedings are long and time consuming, justice seekers usually abandon the action because it consumes their economy in the form of transportation and other related expenses.

1. The Financial Factor in Private Prosecutions

Incurring financial cost in a criminal proceeding doesn't begin with the payment of deposit to the registry of the court to defray costs of the proceedings when instituting a private prosecution. In private prosecutions, invariably, a litigant starts incurring financial costs for his action as soon as he contacts Counsel or meets a Bailiff for the initiation of his private prosecution and he must bear in mind that court fees in criminal matters must be defrayed in one way or the other by one of the parties to the proceedings.¹³ A court is said to be properly seised in private criminal proceedings only when a deposit is paid at the registry of the court and the direct summons registered at the General Taxation Department.¹⁴ Fortunately, the circumvention of the role of the Judicial Police and the Legal Department in conducting investigations means that

for the purpose of illustration of this particular idea.

¹³ Sections 400 of the CPC states that an accused who is acquitted shall not be required to pay cost. Such costs shall be defrayed by the Public Treasury where the prosecution was initiated by the Legal Department. They shall be borne by the civil party where prosecution was initiated by him. However, the court may, by a reasoned judgment exempt the civil party who acted in good faith from the payment of all or part of the costs. Section 745 of again states that costs incurred by the Legal Department for commencing and carrying out criminal prosecutions and preliminary inquiries as well as the execution of judgments shall be advanced by the Public Treasury. The costs shall be borne by the party who fails except in cases where the court in its reasoned decision rules otherwise.

¹⁴ Fonkwe J. Fongang & Eware Ashu., (2019), *Cameroon Criminal Procedure and Practice in Action*, Veritas, Douala, p.290.

the resources that would have been consumed by these institutions are not used up thereby rendering the process cheaper. Furthermore, though in private prosecutions, the private prosecutor is required to make a deposit to defray the cost of the proceedings; to guarantee the eventual payment of any civil award, and to discourage frivolous and vexatious suits, these amounts are relatively small thereby making private prosecutions affordable for justice seekers. Practical observations from the courts show that these amounts are usually slightly below and above 30.000 frs deposit per direct summons of the private prosecutor. In the Court of First Instance Dschang, in *The People of Cameroon & Zoyin Rosaline v. Kenfack Therese & 02 Ors.*,¹⁵ the deposit was put at 36.200 frs, and, in the Court of First Instance Tombel in *The People of Cameroon & 01 Or., v. Kwiffo Kenna Syronne*,¹⁶ it was put at 30.000frs.

However, the fact that the amount to be paid as deposit is not determined in advance by any law, and thus, leaving its imposition at the discretion of the judge, can be controversial as some judges might be tempted to impose higher amounts that might seem exorbitant.

2. The Time Factor in Private Prosecution

It has been found that there are number of instances where people whose fundamental rights are infringed may not practically be in a position to seek relief from the courts because of judicial delays in criminal proceedings. Cumbersome procedures, often prevent litigants from obtaining justice from courts because most of the procedures are swallowed up in technicalities that affect the speedy trial and disposal of matters.¹⁷ Though litigation is generally time-consuming because it can at times be plagued with procedures, arguments and submissions that delay the course of justice unnecessarily, the circumvention of investigations in private prosecutions offers gains in time to the process. Comparatively, victims supported by public prosecutions will endure a case progression timeline dictated by an overstretched and under-funded police force or Legal Department; especially if the case is regarded by these organizations as low priority. Private prosecutions can provide a far faster route to conclusion, with shorter proceedings often meaning little overall costs in comparison to protracted, publicly-run criminal cases. This is one of the most significant advantages of private prosecutions; timeliness and immediacy of legal proceedings. Government supported services may have long waiting lists and you could end up waiting months for proceedings to be dealt with. This is especially true if your case is not classed as high priority, which is a common occurrence in criminal proceedings.

¹⁵ Judgment NO. 276/COR of 6th April 2021, (unreported).

¹⁶ Suit NO. CFIT/DS/69c/2022, (unreported).

¹⁷ UN Women, (2016), Guidance Note, Framework for Measuring Access to Justice Including Specific Challenges Facing Women, New York, pp.77-79.

Saving time in many cases often means saving money. The procedure is fast and expedient thereby limiting wastage of time that characterise public prosecutions and ultimately providing the private prosecutor with gains in time. This is a solution to the so much decried delays in the administration of criminal justice.

Access to justice signifies the ability to participate in the judicial process¹⁸ and this focuses on an individual's ability to access courts with little or no reliance on his financial power.¹⁹ Thus, the state adopting mechanisms to circumvent these obstacles to access to justice found private prosecution suitable because delegating prosecutorial function to private actors enhances access to justice especially as private prosecution permits litigants to take their matters directly to the court, surpassing the lengthy police investigations, eliminating the costs involved in police investigations, and consequently making court proceedings expedient and less costly. Therefore, there is no gainsaying that private prosecution is characterized by simplicity and celerity but like most other legal proceedings, it exhibits some inherent challenges to litigants who embark on it. This is exacerbated by the poor characterization of the concept of private prosecution in the CPC. Many aspects that characterize criminal prosecutions and that render them effective have not been defined in the CPC in the context of private prosecutions thereby making its effectiveness as a mechanism of seeking criminal justice questionable.

III. CHALLENGES TO THE PRACTICABILITY OF PRIVATE PROSECUTION

The initiative to modernize the Criminal Procedure System belongs to the Legislator who is the sole bearer of that prerogative.²⁰ This signifies that it is the duty of the Legislator to adopt measures to palliate the shortcomings in legislative enactments, or create new norms that meet the exigencies of the evolving times.²¹ Against this backdrop and coupled with the states' responsibility to guarantee the exercise of human rights under international human rights law, the Cameroonian Legislator did adopt private prosecution as a path for rights holders to exercise and enjoy their rights in its criminal procedure. Criminal procedure is principally regulated by the CPC in Cameroon. Thus, the right to institute a private prosecution is governed by the stipulations of the CPC. Unfortunately, the exercise of the right to institute a private prosecution as it is in the CPC is a mere 'announcement' because the details of the procedure as compared

¹⁸T.A. Nzouedja, (2021), *Principles and Practice of Criminal Litigation in Cameroon*, Optimist Press Nig.Coy, Nigeria, p.201.

¹⁹ Andrii Lapkin, "The Problems of Access to Justice in Rural Areas: On the example of Ukraine", International Conference on Society, Health and Welfare, Yaroslav Mudryi National Law University, Kharkiv, Ukraine, 2018.

²⁰ Adrienne Daurelle, (2022), "La Consecration par le Legislatateur de Creations Jurisprudentielles en Droit Penale", Memoire de Master de Droit Penale et Sciences Criminelles Parcours Criminologie, Pantheo-assas Universite, Paris, p.17.

²¹ Ibid, at p.6.

to that in a public prosecution are conspicuously absent. Some of the aspects that form the basis for an effective criminal prosecution have not been associated with the right to institute a private prosecution in the CPC. This is compounded by some legal impediments that usually underly criminal prosecutions such as the respect for laws or rules on immunity, amnesty, statutes of limitation, and double jeopardy. These theoretical incongruities have in turn, led to practical challenges in the exercise of the right to institute a private prosecution.

(A) Theoretical Challenges to the Right to Institute a Private Prosecution

The manner of circumscription of the concept of private prosecution in the CPC has exposed the concept to a series of obstacles that practitioners must grapple with when exercising the right to institute a private criminal prosecution. The exercise of the right to institute a private prosecution as it is in the Criminal Procedure Code is a sham because the details of the procedure as compared to that in a public prosecution are conspicuously absent. The poor or the non-definition of basic principles and rules of criminal prosecutions and the concept itself has led to the haphazard application of the concept before the courts. Some of these aspects not clearly defined by the CPC that pose problems to the exercise of the right to institute a private prosecution amongst others include the failure to provide for preliminary investigations, what role each stakeholder plays, and the failure to defined the type and the manner of payment of costs of the proceedings.

1. The absence of definition for Private Prosecution

Private prosecution means different things in different countries but the bottom line is that a private individual is involved in the prosecution of the offence. While in some countries a private prosecutor conducts a prosecution in his own name, in other countries a private prosecutor co-prosecutes with a public prosecutor.²² Whatever thing a private prosecution means is not stated in the CPC. The CPC has not defined the concept and what orientation it should take but practitioners, without any legal basis have given it the character of a public prosecution whereby the prosecution of the offence is solely the responsibility of the Legal Department. There is no legal provision in the CPC or in any law stating expressly that private prosecutions should be managed in like manner as public prosecutions. They rely on the fact that the Legal Department being designated principal party in all criminal matters consequently gives private prosecution a public connotation in its management while forgetting that there is a difference in simply designating an entity as principal party in a process and defining that process in its self. The failure to define or make a characterization of private prosecution has

²² Muzuji J.D., (2016), *op.cit*, p.115.

led to the erroneous construction of the powers of the Legal Department and this has simply put private prosecution at the mercy of the Legal Department.

Comparatively, in Uganda, all the necessary details for a private prosecution have been provided by the Ugandan Criminal Procedure Code (UCPC) and the Magistrate's Court Act Cap 16. Section 42 of the Magistrate's Court Act Cap 16 provides for the right of crime victims to institute a private prosecution while section 84 of the UCPC provides details as to the conduct of a private prosecution. Per section 42 (1)(c), any person who has reasonable and probable cause to believe that a person has committed an offence may make a complaint of the alleged offence to a Magistrate who has jurisdiction to try or inquire into the alleged offence or within the local limits of whose jurisdiction the accused person is alleged to reside or be. The complaint may be made orally or reduced into writing by the Magistrate and signed by the complainant.²³ Upon receipt of the complaint, the Magistrate consults the local chief of the area in which the complaint arose and put on record the gist of the consultation but where the complaint is supported by a letter from the local chief, the Magistrate may dispense with the consultation and thereafter put that letter on record.²⁴ After satisfying himself that a *prima facie* case has been disclosed and that the complaint is not frivolous or vexatious, the Magistrate shall draw up and shall sign a formal charge containing a statement of the offence or offences to have been committed by the accused person.²⁵ Under section 42(6)(b), upon drawing a formal charge, the Magistrate shall issue either a summons or a warrant, as he deems fit, to compel the attendance of the accused person before the court.²⁶

From the above, we find that private prosecution as provided in the CPC is grossly scanty because the details provided for the concept under UCPC do not exist at all under the CPC. Under the UCPC, the procedure is well circumscribed with specific details regarding the mode of institution of a private prosecution, the role of the Magistrate in the process, circumstances under which a summons or warrant can issue, the relationship between the police chief and the Magistrate amongst others. We strongly suggest that the CPC be amended in these regards or a new law enacted that will incorporate the Ugandan model of private prosecution.

2. The failure to provide for Private Preliminary Investigations

The CPC has not provided for the conduct of preliminary investigations in matters brought by private prosecution. The Legal Department just proceeds to prosecute the matter just as it is

²³ Emmanuel Candia, (2017), "The Law and Practice of Private Prosecution in Uganda: An Alternative Path to Justice", p.5. <https://www.papers.ssrn.com> (accessed on 23/8/2023)

²⁴ Ibid, at p.6.

²⁵ Ibid, at p.7.

²⁶ Ibid.

brought before the Court by the private prosecutor with no diligence as to whether his evidence is withy enough to sustain a conviction. The representative of the Legal Department has little or no knowledge of the evidence to be brought by the private prosecutor because the matter was never investigated. Conversely in Uganda, section 42(4) of the Magistrate's Court Act Cap 16 provides that upon receipt of the complaint, the Magistrate consults the local chief of the area in which the complaint arose. This consultation is to get information that will permit the Magistrate make a determination whether there exists evidence to warrant a prosecution or not. In other words, the consultation may provide the Magistrate with some insights pertaining to information that is available to the police. This is nothing but some kind of investigation which power to solicit information from the police in certain instances is not provided in the CPC.

The provision for and the circumscription of the manner by which preliminary investigations can be conducted in private criminal proceedings is important in that it will permit the gathering of credible evidence for a proper prosecution before the Court. It is only when private individuals can conduct their own investigations, institute and prosecute criminal offences before the Court directly can we talk of private prosecution in Cameroon. The idea of persons instituting criminal proceedings before the Court and leaving the Legal Department to grapple to win a conviction without a fair and balanced preliminary investigations only breeds cronyism, corruption, tribalism, influence peddling, and favouritism. What will be the purpose of a criminal action if the private prosecutor can't even identify the accused person? In the Court of First Instance Dschang, in *The People of Cameroon & Tchinda Joseph v. Kemngne Christian & 3 Ors*,²⁷ the Court discharged some of the accused persons for lack of proper identification, whereas, if investigations were carried out the Court probably would not have arrived at that decision because the investigations would have revealed the identities of these accused persons as investigations also have as purpose the identification of offenders.

The CPC would have provided private individuals with the possibility to conduct private investigations and reliably use them or even admit their reports as mere information just as it admits reports of Judicial Police officers under its section 91 and this would have given private prosecutions some leverage in criminal proceedings. In developed countries, private detective work is central in fighting crime where the public prosecutions are facing resource limitations in undertaking some prosecutions. Persons can turn to these private detectives and hire them to investigate, institute and prosecute criminal offences. Though this kind of evidence must be taken with care, it can still be a valuable asset in the prosecution of the accused person if the

²⁷ Judgment N0.283/COR of 9th April 2021, (unreported).

State or some entity provided a defined code of conduct for gathering evidence under such circumstances. The code should be tailored to give guidance to private prosecutors, and to those who advise, assist or act on their behalf, on the general principles to be applied when making decisions about private prosecutions. In the UK, there is a Code for Private Prosecutors that provides guidance for anyone bringing a criminal proceeding and addresses some topical issues and challenges for those bringing private prosecutions.²⁸ What the State needs to do is to provide some sanity in the sector by imposing some obligations and liabilities such as registration with some government agency and facing some criminal charges or financial loss in case of any malpractice. Private investigators like most law enforcement agents should be registered with an agency and issued licenses with a detail description of the type of working equipment they are authorized to use in performing their duties to make them credible. For example, in the USA, and according to the United States Department of Labor,²⁹

Many jurisdictions require private investigators to be licensed. Depending on local laws, they may or may not carry a firearm. Equipment can vary greatly, but generally involves a wide variety of surveillance equipment and recording devices. While private investigators may investigate criminal matters, they typically do not hold law enforcement authority by virtue of the position, regardless of licensure. Private investigators' authority is usually identical to other citizens' (off-duty or retired law enforcement officers serving as a private investigator may retain their police powers at all times, depending on the jurisdiction). They are expected to keep detail notes and to be prepared to testify in court regarding any of their observations on behalf of their clients. Great care is required to remain within the scope of the law; otherwise, the investigator may face criminal charges. Irregular hours may also be required when performing surveillance work.

We submit that the Legislator should provide for detective work to assist private prosecutors in seeking criminal justice by simply providing for mandatory licensing of all private investigators and causing them to take an oath of office to better control and limit anarchy in the sector. Where the private detectives are sworn officers of the law, they will be held to the same standards of professionalism as the Judicial Police Officers and their work in assisting private prosecutors must ensure that any evidence obtained is admissible, that the investigations are fair and balanced, and that the proceedings are not an abuse of Court's process.³⁰ This can be

²⁸ Private Prosecutors' Association Code for Private Prosecutors, Edition 1.1 revised 30.07.2019, UK.

²⁹ Bureau of Labor Statistics, U.S Department of Labor, Occupational Outlook Handbook, Private Detectives and Investigators, 2010-2011 Edition, p.477- 478.

³⁰ Section 3.1.1.1 of the UK Code for Private Prosecutors.

buttressed by the State enacting a ‘Code of Conduct’ for all private prosecutors.

3. The undefined roles of certain stakeholders

The roles various stakeholders play during private prosecution are mere presumptions. They are not clearly defined or legally attributed to them in the CPC or any other piece of legislation. For example, it is the direct summons issued by the Bailiff at the instance of the crime victim that seises the court yet there is no provision in the law sanctioning that particular practice. Again, there is no legal provision expressly authorizing Bailiffs or lawyers to draft criminal charges and put the burden of a criminal charge on an individual. It is true that a summons can be issued at the request of the aggrieved party but with no other indication as to who prefers the charge, whether the aggrieved party, the bailiff, or the lawyer, practice has just presumptively accorded these authorities with the powers to draft charges and impose the burden of a criminal charge on accused persons in matters of private prosecution by direct summons.

Apart from the CPC designating the Legal Department as the principal party in all criminal matters, it has not defined the role it plays in private criminal proceedings. This implies that all the acts posed by the Legal Department during private criminal proceedings are based on presumptions. This is in the guise of practitioners trying to adapt private prosecution to public prosecution since there is no definition of the procedure in the CPC. It is clear that since the Legislator has failed to provide a definition and circumscription of the concept of private prosecution in the CPC, some of the acts of the various stakeholders are mere adaptations intended to render private prosecution operative as a mechanism for seeking criminal justice.

4. Failure to fix costs of proceedings

The CPC failed to provide for the amount of cost to be paid to defray the cost of criminal proceedings during private prosecutions and these amounts are left at the discretion of the judge. This signify that the amounts vary from judge to judge and from court to court. The demand for payment of deposits from private prosecutors can be exorbitant since they are not prefixed and this does not help the course of criminal justice as it has the tendency to turn away litigants from the Criminal Justice System. The amount to be paid as deposit is not determined in advance by any law, thus, it remains at the discretion of the judge. Against that backdrop, we suggest that a law fixing in advance the cost of the proceedings, as it is the case in France where article 1018 A of the General Taxation Code fixes the cost of proceedings for misdemeanours at 127 Euros and that for simple offences at 31 Euros be passed or the CPC and the General Tax Code be amended to that regard. This will put litigants on the know of the requirement of payment of deposit prior to instituting their action before the court to avoid declaring their actions

inadmissible for non-payment of deposit as was done in *The People of Cameroon & Essembong Athanase v. Nfontam Bernard & 1 Or.*³¹ and also in *The People & Dame veuve Naoussi nee Dongmo Madeleine v. Anouboussi Joseph & 1 Or.*³² Moreover, even when litigants have the money, they are reticent to pay the deposit for fear of the possibility of losing it when the suit fails. This is exacerbated by the fear of the possibility of an accused that has been discharged and acquitted to proceed against them by virtue of section 162 and 398 of the CPC.³³ It is our contention that, there is need to maintain the integrity of our Criminal Justice System, encouraging litigants to sue for malicious prosecution might tantamount to opening a floodgate of ‘vindictive litigations’ that do not necessarily serve the purpose of justice but a perpetuation of vengeance.

5. The Non-definition of Offences Subject to Private Prosecution

Offences are classified in Cameroon as felonies, misdemeanours, and simple offences according to the principal penalties provided for them and courts in Cameroon have been assigned respective jurisdictions over each class of offence. That is why it will be a violation of rules of procedure for a court to assume jurisdiction over a matter it has no competence to entertain. In *Phillips v. Botha*,³⁴ the Court found that a private prosecution had been instituted to enforce the payment of an illegal gambling debt which was not subject to private prosecution and court consequently dismissed the suit. Though we can contend that any offence can be prosecuted by way of private prosecution, in practice, the common trend is that private prosecution is only permitted in offences classified as misdemeanours or simple offence. This is based on the fact that the High Court has been divested of the ‘direct summons’ procedure which characteristically underlies private prosecution. The Court of First Instance, where the ‘direct summons’ procedure is permitted and in which most of the matters are prosecuted by the ‘direct summons’ procedure is the competent Court to hear and determine matters instituted by way of private prosecution. This practice that has been going on over the years has limited the scope of exercise of the concept of private prosecution. To warn-off this controversy, the circumscription of the type of offences that could be prosecuted by private prosecution should be made in the CPC or in another piece of legislation as it is done in most European countries.³⁵

³¹ Judgment N0.63/COR of 1 February 2022, (unreported).

³² Judgment N0.39/COR of 08 January 2021, (unreported).

³³ Sections 162 and 398 of the Criminal Procedure Code provide that an accused person who has been acquitted may proceed against the civil party who instituted the criminal action.

³⁴ 1999 (2) SA 555 (SCA).

³⁵ Jamil Ddamulira Mujuzi explains this by stating that two approaches have been taken with regard to private prosecution. The first approach is to the effect that a private prosecution will only take place once the public prosecutor has declined to prosecute. This is the case whether the offence is a serious one or minor. The second approach is that in some countries minor offences are not prosecuted by public prosecutors. They have to be

If private prosecution is not permitted before the High Court, then committal orders made after a preliminary inquiry into a complaint with a civil claim attached should not be made because it is still private prosecution. There is nothing in the CPC restraining a victim of a felony from seeking redress by way of complaint with a civil claim which is private prosecution. For instance, if a complainant made a complaint with a civil claim attached to an Examining Magistrate for attempted murder which is a felony, will the Examining Magistrate declare the complaint inadmissible? Or, when an Examining Magistrate is seised with a misdemeanor but in the course of the preliminary inquiry discovers that the offence is indeed a felony, will he commit the defendant for trial before the High Court? He will certainly commit the defendant for trial before the High Court because the law has not left him any other option, yet this is private prosecution by way of complaint with a civil claim which is supposed to be limited to only misdemeanours and simple offences.

(B) The Legal Impediments to the Exercise of the Right to Institute a Private Prosecution

The concept of private prosecution is intended for crime victims to participate in the criminal justice system but there exist some limitations that hamper on the exercise of the right to institute a private prosecution. These limitations are impositions of general principles of criminal prosecutions, or specific requirements for the exercise of private prosecution as imposed by the CPC that limit the use of private prosecution in seeking criminal justice. The principal obstacles are; laws granting amnesty for broad category of crimes, national statutes of limitation, the prohibition of double jeopardy (the principle of *ne bis idem*) whereby a person may not be brought to trial twice for the same offence, and laws on immunity from prosecution of heads of states, members of government or parliamentarians.

1. Amnesty

A state can pass legislation granting amnesty with regard to specific episodes in the state's history. After the enactment of such laws, conduct that was previously criminal is no longer such with the consequence that prosecutors forfeit the right or power to initiate investigations or criminal proceedings and, any sentence passed for the crime is obliterated.³⁶ The rationale

prosecuted by private prosecutors otherwise such offences will not be prosecuted. Practice from many European countries shows that private prosecutions have been instituted especially for minor offences. These have included infliction of minor bodily injury in (Latvia, Ukraine, Bulgaria and Croatia), defamation (Austria, Lithuania, France, Serbia, Azerbaijan, Sweden, Bulgaria, Poland, Ukraine, Macedonia and Latvia), insult (Austria, Bulgaria and Estonia), libel (Georgia, Hungary, Poland, and Sweden) manslaughter (Finland), slander (Poland), abuse of office by judges (Finland), ill treatment (Hungary and Poland), and using illicit device to watch football matches (United Kingdom). See Mujuzi, J.D. (2016), at p.115.

³⁶ Antonio Cassese, (2003), *International Criminal Law*, Oxford University Press Inc., New York, p.312.

behind amnesty is that in the aftermath of periods of turmoil and deep rift, such as following armed conflicts, civil strife, or revolution, it is best to heal social wounds by forgetting past misdeeds, hence by obliterating all the criminal offences that may have been perpetrated by any side.³⁷ It is believed that in this way one may expeditiously bring about cessation of hatred and animosity, thereby attaining national reconciliation.³⁸

The CPC has provided for the possibility to discontinue criminal proceedings by stating in its section 62(1) (c) that criminal proceedings can be discontinued by amnesty. Amnesty is an act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted. The word amnesty is derived from the Greek word “amnestia” which denotes “forgetting”, and has come to be used to describe measures of a more general nature, directed to offences whose criminality is considered better forgotten. It is pardon extended by the government to forgive certain offences by pretending to act as if they never existed. Where an accused person can show proof that the offence he committed has been amnestied, he cannot be tried because it puts an end to the criminal prosecution where it is ordered before judgment on the merits in the case. Where an offence has been amnestied, it loses its criminality and consequently it cannot be prosecuted and criminal prosecutions are stopped against all those who participated in the offence as well as their accomplices.

The preamble, as well as article 26(6) of the 1996 constitution, section 73 of the Penal Code, and section 62(1)(a) of the CPC all prohibit the trial of any person who can establish he has been pardoned. Section 73 of the Penal Code clearly states that amnesty shall expunge a conviction and shall put an end to the enforcement of all penalties, whether principal or accessory, and of all preventive measures pronounced in consequence of the conviction, save confinement in a health institution and closure of an establishment. Unless otherwise expressed, an act of amnesty shall bar the commencement or continuation of any prosecution against the beneficiary. However, where the act of amnesty contains certain conditions to be fulfilled by the beneficiary, for example, where the subject of amnesty had already been sentenced, the conviction shall be expunged and the person shall be released but it will not relieve him of the liability for the expenses due to the Treasury in respect of a conviction which has become final and it shall not affect the right of the Treasury to any sums already collected in satisfaction of the expenses, fines, or confiscations, or that it can only apply to suspended sentences, or sentences not exceeding a certain period, or that the offender must have already been tried, or

³⁷ Ibid.

³⁸ Ibid.

must have served part of his sentence.

2. Statutes of Limitations

Some statutes lay down rules providing that after the elapse of a certain number of years, no prosecution may any longer be initiated with regard to some crimes. Some also provide that if a final sentence pronounced for a crime has not been served after a certain number of years, it is no longer applicable.³⁹ The rationale behind this kind of legislation is that the passage of time renders the collection of evidence very difficult as witnesses may no longer be available, or material evidence may have disappeared, or gotten lost.⁴⁰ Also, it is felt that it is better for society to forget, the more so because, once many years have gone by, the victims or their relatives may have reconciled to past crimes.⁴¹ Another reason for the enactment of statutes of limitation may be that as a result of the failure of prosecuting officers to search for evidence or find the alleged culprit, the deterrent effect of criminalization dwindles and eventually comes to naught; consequently, leaving open the possibility for prosecution no longer proves appropriate.⁴²

The concept of private prosecution just like other means of commencement of a criminal action is subject to certain time limitations. In other words, it can be time-barred after the expiry of the prescription period. Prescription period is the barring of prosecution following the failure to commence action within the prescribed limitation period. There are no special prescription periods for private prosecutions in the CPC. The prescription applicable to private prosecutions are the same as those applicable to public prosecutions as provided under section 65 of the CPC. Since private prosecutions are only permitted in the prosecution of misdemeanours and simple offences, by analogy, the limitation periods applicable to private prosecutions are those prescribed for misdemeanours and simple offences. Thus, by virtue of section 65 of the CPC, the limitation period to institute a private prosecution for a misdemeanor is three years except where there are special provisions in relation to certain offences. In the case of a simple offence, the period of prescription is one year. However, all these limitation period can be altered depending on whether any step was taken signifying an irrevocable intention to institute a private prosecution.

It is therefore ocular that the exercise of the right to institute a private prosecution is restrained to a particular time-frame to act. Failure to act within that time-frame is forfeiting that right to

³⁹ For example, article 132-2 of the French Criminal Code.

⁴⁰ Antonio Cassese, (2003), *op.cit*, p.316.

⁴¹ *Ibid*.

⁴² *Ibid*.

institute the private prosecution. These limitation periods constitute a serious barrier in the concept of private prosecution. The private prosecutor might not readily have the means to commence his action within the imposed time-frames thereby being limited to exercise his rights under the concept of private prosecution. Private prosecutions are costly and compelling private prosecutors to act within a particular time-frame could be even more costly. It is true that the state has committed to providing legal aid to indigent crime victims but how pragmatic is the Legal Aid Commission in fulfilling this mission? Time itself is a factor in any endeavour and time can be the reason for abandoning a private prosecution. We therefore think that affording private prosecutors more time will strengthen the victim's ability to participate in the criminal justice system meaningfully.

3. The Prohibition of Double Jeopardy (Ne bis in idem)

Under the principle of double jeopardy, the Prosecution Department may not institute proceedings against a person for a crime that has already been the object of criminal proceedings in the same or another court and for which the person has already been convicted or acquitted. E.F. Hann Jr.⁴³ writes that although the purpose of the criminal law is to prevent and punish offences against the people, it is also does much to secure just treatment for the accused. Just as the civil law protects a person from continuous persecution by one who has an alleged claim against him, so the criminal law provides that the state cannot repeatedly try a man for the same offence. The weapons furnished to the accused in the latter field of law are the pleas of double jeopardy and of *autrefois convict* or *autrefois acquit*.

Section 62(1)(e) of the CPC provides that criminal proceedings shall be discontinued after a successful plea of *autrefois convict* or *acquit* as a defence to accused persons being prosecuted for the same offence by the same court or another court. Though there is strong argument for the distinction between double jeopardy and the pleas of *autrefois convict* and *autrefois acquit*,⁴⁴ we cannot contain that argument in this work. However, it should be noted that all the pleas are a creation intended to provide relief to a suffering accused person caught in the toils of criminal justly or unjustly for the same criminal offence.

4. Immunity

Local or international legislations may provide for immunity from prosecution to certain category of persons. Immunity is a legal privilege attributed to certain persons and recognized

⁴³ E.F. Hann Jr., (1933), "Pleas of Double Jeopardy and *Autrefois Convict* or *Acquit*", *Dickinson Law Review*, vol. 37, Iss. 2, p.135.

⁴⁴ *Ibid*, at p.140.

by national and international law which enables them to exercise their functions free from outside constraints or pressures, including legal ones.⁴⁵ In *Nguele Nguele Felix & 1Or., v. The People of Cameroon & 1Or.*,⁴⁶ the Court held that certain persons benefit from immunity while others cannot be prosecuted directly without having recourse to the provisions of section 634(2)(3) of the CPC. Courts may be barred from exercising their jurisdiction by national provisions granting immunity from prosecution to national states' agents, or they may be precluded from trying foreigners who enjoy immunity under their own national legislation, or they may be foreclosed by international rules affording immunities to foreign dignitaries who either are discharging their functions on the territory or are in transit there, on their way or from the country where they are fulfilling their mission.⁴⁷ While some states have local enactments that define immunity of persons clearly, for example section 323 of the Penal Code precludes the application of section 318, 319, and 322 against a spouse, against a legitimate or adoptive or adopted ascendant or descendant, or against his natural ascendant up to the second degree either living with him or after recognition, or to a surviving spouse in respect of necessities belonging to the deceased spouse, others are ambiguous on the subject matter. For instance, the United States of America's Foreign Sovereign Immunity Act of 1976 is silent as to what actually constitute sovereign immunity.⁴⁸ This was the issue for determination in *Tachiona v. Mugabe*,⁴⁹ a Federal District Court examined whether the Federal Sovereign Immunity Act FSIA 1976 may be used to breach Head of State immunity in respect of a head of state who is individually named in the suit. The plaintiffs who were Zimbabweans citizens alleged that the President of Zimbabwe, Robert Mugabe, other government officials and Zimbabwe's ruling party, had waged a campaign of violence against them. They claimed that this campaign included murder, torture, terrorism, rape, beatings, and destruction of property. These acts were committed, plaintiffs alleged, with a view to suppressing political opposition groups prior to Zimbabwe's June 2000 parliamentary elections. The plaintiffs further contended that FSIA applies to claims against individuals as agents or instrumentalities of the foreign state, and that foreign immunity ceases when such individuals act beyond the scope of their authority. The court deferred to the State Department's suggestion of immunity, as has been the practice prior to the FSIA, and ruled that the government officials, not the ruling political party over whom it found

⁴⁵ Morfaw E. Nkafu, (2022), "Immunity of State Officials and Repression of International Crimes", PhD Thesis, Faculty of Law and Political Sciences, University of Dschang, p,36.

⁴⁶ SLR 4 (2016), pp.91-108.

⁴⁷ Morfaw E. Nkafu, (2022), *op.cit*, p.321.

⁴⁸ Ndiva Kofele-Kale, (2006), *The International Law of Responsibility for Economic Crimes: Holding State Individuals Liable for Acts of Fraudulent Enrichment*, Ashgate Publishing Limited, England, pp.283-284.

⁴⁹ 169 F. Supp. 2d 259 (SDNY 2001).

jurisdiction, retained immunity.

(C) Practical Challenges to the Exercise of the Right to Institute a Private Prosecution

The courts, judges, bailiffs, and litigants face various problems during the course of private criminal proceedings. Generally, these problems stem from the lack of definition of certain practical modalities necessary for the proper adjudication on criminal matters by way of private prosecution. They include amongst others, vices in the bailiff act seising the court, difficulties in effecting service by private prosecutors, and the weight given to the evidence adduced by private prosecutors.

1. The Bailiff Act in Private Prosecutions

Instituting private proceedings by way of direct summons simply entails the complainant causing the bailiff to issue an act of accusations against an accused person ordering him to appear before a particular court on a particular day to answer to the charge contained in the act. This bailiff act is usually a source of contention as most charges preferred and drafted by the bailiffs are usually defective and don't meet the standards of a charge as required under section 41 Of the CPC.

2. Difficulties in Effecting Service by the Private Prosecutor

Even where the charge is not defective, litigants usually phase difficulties in effecting services either because the accused person is evading service or his abode is not known. Under such circumstances, proceedings are usually stalled as adjournments become commonplace. Furthermore, the uncertainty as to whether who amongst the Court, the bailiff or the private prosecutor should serve the Legal Department with the copy of the direct summons for them to open their administrative case file also contributes to the ineffectiveness of private prosecutions as a mechanism for seeking criminal justice. While some practitioners insist that it is the Court, others hold that it is at the diligence of the private prosecutor and the upshot is that there is a likelihood of delay in the proceedings which might be prejudicial to the civil party/private prosecutor.

3. The Credibility of Evidence Adduced by Private Prosecutors

Evidence adduced by private prosecutors is usually self-serving evidence intended to win a conviction and consequently a civil claim. The fact that all victims of criminal offences must show that they have direct interest from the suit⁵⁰ which must be shown by some advantage to be gained or some profit made usually measured in monetary terms has led to the fabrication of

⁵⁰ Section 75 of the CPC.

evidence in Courts. In the case of *The People of Cameroon & Tsamo Madeleine v. Sopjeu David*,⁵¹ the Court held that since the offence of destruction and theft could not be established by the prosecution, the civil party could not also claim damages because there was no evidence linking the accused person directly to the offence. The desire to prove direct interest as required by law has subjected the evidence of private prosecutors to the strictest of examinations because their action has no other intention than to gain some financial advantage from the suit. Courts therefore usually treat evidence tendered by private prosecutors with circumspection which very often leads judges to be accused of bias.

4. The Overbearing Powers of the Legal Department

The designation of the Legal Department as the principal party in all criminal matters with its accompanying powers has subjected the initiative of the private prosecutor to its mercy. As principal party, the Legal Department has the power to open and close the prosecution's case even that initiated by the private prosecutor without the consent of the private prosecutor/civil party. All these inherent powers given to the State Counsel without the same powers ascribed to the private prosecutor have left many wondering if there is truly private prosecution in our criminal procedure.⁵² The CPC has clearly put private prosecution within the whims and caprices of the Legal Department with the potential that private prosecution can suffer undue delay in proceedings, discrimination, abuse, financial loss, and consequently injustice.

The private prosecutor's ulterior motive is to win a conviction and a civil claim by holding criminals accountable for their crimes while simultaneously protecting their constitutional rights with the design to produce justice.⁵³ If the Legal Department is given powers to make submissions on the civil claim with the possibility of them asking the Court not to find liability against the defendant, will the private prosecutor not suspect perversion of justice and develop mistrust for the justice system? It is our contention that the powers of the Legal Department should be limited to ensuring that social interest and public order are protected while leaving civil claims completely to the civil party/private prosecutor. In this way, the private prosecutor would be satisfied that he participated in the process according to his will thereby making private prosecution trustworthy.

The CPC, the piece of legislation on the subject of private prosecution has proven lagging in

⁵¹Judgment NO. 642/COR of 09/10/2020, (unreported).

⁵²Ewang A. Sone, (1997), "Can the state prosecutor discontinue a private prosecution by entering a nolle prosequi? F. NEKO v. Sam Mofor (1971), Appeal NO. WCCA/11/71, (unreported), Judgment per O'Brien Quinn, J.", *Juridis periodique*, NO. 31, July-August-September 97, p.39-44.

⁵³A.B Danbazau, (2007), *Criminology and Criminal Justice*, 2nd Ed., Ibandan, Nigeria, Spectrum Books Limited, p.177.

meeting the aspirations of individuals undertaking private prosecution. The hollow circumscription of the concept in the CPC has only led to arbitrariness and the hijacking of the private initiative of the private prosecutor by the Legal Departments. The private prosecutors are encountering a lot of difficulties because they don't have the power and means to investigate offences, they can't arrest criminal offenders and consequently can't identify their offenders properly, they can't afford the cost of the proceedings because the judges at times demand exorbitant amounts as they are not prefixed by the CPC, and they find a lot of difficulty navigating through the process which is complex, cumbersome and time-consuming. However, the direct control and involvement of private prosecutors in the process gives them a better 'feel' over the process unlike in public prosecutions where they usually feel removed from the process. This control over the process can generate great benefits from the process, not only for the private prosecutor but for the entire society if the practicability of private prosecution is strengthened.

IV. STRENGTHENING THE CONCEPT OF PRIVATE PROSECUTION

There is no gainsaying that one of the reasons the Cameroonian legislator introduced the right of private prosecution in the criminal justice system was to enhance access to justice and to an extent, private prosecution has been employed by litigants but if the ratio of application of private prosecution is compared to that of public prosecutions, it indicates that the utilization of private prosecution is still very limited. This is due to a series of challenges encountered by litigants in the exercise of the right of private prosecution as discussed above. However, to expunge the drawbacks on private prosecution and ensure the maximum exploitation of the right of private prosecution, the government must take pragmatic measures that will empower litigants to be more assertive in the exercise of their right to institute a criminal action before the courts. This is so because the state has the primary duty to ensuring that its citizens enjoy their human rights as accorded them under international human rights law. Thus, it is the responsibility of the state to adopt pragmatic measures geared towards the strengthening of the exercise of the right of private prosecution. Some of the measures the state can take to improve the use of private prosecution in seeking justice include creating more awareness of the right of private prosecution, ensure the full operation of the Legal Aid Commission, intensify the fight against poverty, enact legislation fixing costs in criminal proceedings, limit states' intervention in private prosecution, promote the role of ombudspersons, and witness protection programs amongst others.

(A) Legislative reforms

There are a number of issues in the CPC that are poorly defined and have given room to arbitrariness in the application of rules in private prosecution. This includes but not limited to the arbitrary fees to be paid to the bailiffs and the courts, incongruities in the law on legal aid, and the non-provision of any review process where the state decides to discontinue or stop a private prosecution. There should be a distinction here between review of evidence as provided under section 463 of the CPC and review of the prosecution's decision to discontinue a prosecution. Section 463 of the CPC provides that where the Court of Appeal annuls a judgment in accordance of section 3 of this same CPC, it shall review the evidence and decide the case on the merits. The Court relied on this provision in *Amuche Louis Atanga v. The People of Cameroon & 1 Or.*,⁵⁴ to hold that,

section 463 of the CPC empowers the appellate court to review evidence, that is, live evidence and deliver a judgment on the merits of a case where only the judgment of the lower court is invalid and it is annulled for violating the provisions of section 389(2) of the CPC. In such a case, the evidence to be reviewed is live and legal because the proceedings conducted in the lower court are valid.

What the Court of Appeal does under section 463 of the CPC is to review the evidence as may have been adduced by the parties. Whereas review of the prosecution's decision to discontinue criminal proceedings is questioning the prosecutorial correctness of the discretion of the prosecutor to discontinue a suit.

Furthermore, and most importantly, the concept of private prosecution itself is not properly defined thereby plunging the procedure into confusion with constant confrontation between stakeholders because their respective roles are not well defined. There is therefore need for the state to undertake a reform of the law to properly address these issues by defining strategies for more effective implementation of the right of private prosecution that will render it accessible to all.

(B) Limit State intervention in Private Prosecution

There is no denying that the state has the right to intervene and stop private prosecutions especially where they have the tendency to hurt public morals or jeopardize state interest. However, the frequent and uncensored states' interventions in private prosecutions are an affront to the exercise of the right of private prosecution. The attitude of public prosecutors

SLR 4 (2016), pp.50-59.

deliberately frustrating private prosecutors in the exercise of their rights must be stopped. This can be achieved by holding the Legal Department accountable to their actions in all private prosecutions. They should report to the *Procureur-General* on all private prosecutions in their jurisdictions and all actions taken in the action at the close of the proceedings. Furthermore, the *Procureur-General* should accentuate his control over Legal Departments with a particular interest on matters prosecuted by way of private prosecution. When Legal Departments know that constant controls are effected by the *Procureur-General* and they are constantly called upon to furnish explanations on their actions in all private prosecutions, the unorthodox refusal to enter appearance or illegally retaining files of private prosecutors will be brought to a halt.

(C) Creating awareness

Lack of awareness of the right of private prosecution greatly affects its use in seeking justice and securing a remedy. The state must therefore find ways to increase access to information on private prosecution and in so doing; the state can adopt the following techniques in creating awareness; Intensify the vulgarization of the right of private prosecution through town hall meetings, seminars, symposiums, posting and distributing flyers, and create digital and online tools that will facilitate access to information, and make it mandatory for all Legal Departments and Judicial Police, or all authorities having the charge of criminal prosecution to inform litigants, at the time of the lodging of a complaint of the alternative to press charges by way of private prosecution.

(D) Fix the Costs of Proceedings

As suggested elsewhere in this work, a law fixing in advance the cost of the proceedings should be passed or the CPC and the General Tax Code be amended to that regard. This will put litigants on the know of the requirement of payment of deposit prior to instituting their action before the court to avoid declaring their actions inadmissible for non-payment of deposit. If an amount is fixed in advance to defray the costs of private prosecution of offences, there will be uniformity in the application of the law and litigants will not be surprised with the discretionary demand for deposits which many a time they can't afford.

V. THE ADVANTAGE AND DISADVANTAGE OF PRIVATE PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM

The functions of the State Counsel are perceived through the exercise of sovereign powers conferred upon him by law. Sovereign powers are unique rights possessed by the state that

enables it to carry out its official functions for the public benefit.⁵⁵ These rights are exercised as a matter of supreme dominion through the agency of the State Counsel with tremendous impacts on individuals and institutions. He ensures the enforcement of laws, regulations and judgments and may, in the interest of the law, make submissions it considers necessary before the Court.⁵⁶ In criminal matters and without prejudice to the rights of the civil party, he searches for offences, institute and carry out prosecutions, and issues all warrants or detention orders as provided by the law.⁵⁷ He directs and controls the operations of the officers and agents of the judicial police and can at any time and place, act as a judicial police officer.⁵⁸

The impact of the actions of the State Counsel can have devastating consequences on an individual or institution. An individual may be sentenced to prison or to pay a fine through a prosecution initiated by the State Counsel and this can impact greatly on the liberty or finances of that individual. This individual might lose employment due to this tainted criminal record resulting from the criminal actions taken by the State Counsel. In a similar manner, a corporation may be dissolved, temporarily or permanently closed, or caused to pay a fine through the actions of the State Counsel. These are few examples of the kind of power wielded by the State Counsel and the possible impacts it might have on the society. The possible impacts from the exercise of prosecutorial powers of the state are so great that it has been questioned whether it is prudent to delegate it to private actors? This question can be answered by looking at the advantages and disadvantages of delegating prosecution function of the state to private actors.

(A) Advantages of Private Prosecution

Proponents for the delegation of prosecutorial function argue that the State has much to benefit from the delegation. They contend that public good is achieved through the wide spread deterrent effects from criminal prosecutions and provides some avenue for government to save up some valuable time and resources that can be diverted to other areas of development.

1. Deterrence

All criminal actions must have the effect of discouraging an act or an event by instilling fear of the consequences of the criminal action. A well-managed successful private prosecution sends out a strong deterrent message in the society. This is because criminal litigation carries the threat of a custodial sentence and a criminal record, acting as a further deterrent to wrongdoers. The

⁵⁵ Bryan A. Garner, (2009), *Black's Law Dictionary*, 9th Ed., USA, West Group Publishers, p.1523.

⁵⁶ Section 29(1) of Law NO. 2006/015 of 29 December 2006 on the Judicial Organisation.

⁵⁷ *Ibid*, para. 2.

⁵⁸ Section 137 of the CPC.

fundamental reason for having a criminal law backed by sanctions is deterrent or preventive: so long as its provisions are enforced with some regularity, it constitutes a standing disincentive to crime and reinforces those social conventions and other inhibitions which are already in place.⁵⁹ Criminal law provisions are generally enforced by criminal prosecutions with the purpose of discouraging certain behaviours, particularly by fear, in the society. The general goal of deterrence is to reduce the need for immediate actions to create deterrent and dissuasion effects that become so ingrained that hesitation to commit an offence becomes habitual.⁶⁰ The delegation of prosecutorial function will invariably orchestrate an increase in the number of criminal prosecutions and consequently the fear of the criminal sanctions will be widespread. A society where there is fear of the law is susceptible to causing the reign of peace and tranquility in the society. States are therefore better interested in delegating their prosecutorial function to private actors to achieve the scarcer peace in the world today through the deterrent effect of its criminal law.

2. Savings in Time and Resources

Victims supported by public prosecutions will endure a case progression timeline dictated by an overstretched and under-funded police force and Legal Department; especially if the case is regarded by these organisations as low priority.⁶¹ Private prosecutions can provide a far faster route to conclusion, with shorter proceedings with often less overall costs in comparison to protracted, publicly-run criminal cases.⁶² This is one of the most significant advantages of private prosecutions; timeliness and immediacy of legal proceedings.⁶³ Government supported services may have long waiting lists and you could end up waiting months for proceedings to be dealt with. This is especially true if your case is not classed as high priority, which is a common occurrence in criminal and civil proceedings.⁶⁴ Saving time in many cases often means saving money. The procedure is fast and expedient thereby limiting wastage of time that characterises public prosecution and ultimately providing the private prosecutor with gains in time. When the State delegates its prosecutorial function to private actors, it might be aiming to ease up some resources that might have been wasted in the long and time consuming public prosecutions. These extra gains from the privatisation of the prosecutorial function can work the public good of providing extra resources that might have been chopped up in a public prosecution. States are therefore better interested in delegating their prosecutorial function to

⁵⁹ Andrew Ashworth et al., (2013), *Principles of Criminal Law*, 7th Ed., Oxford, *Oxford University Press*, p.13.

⁶⁰ Information culled from www.rand.org (accessed on 07/02/2024).

⁶¹ Information culled from www.rahmanravelli.co.uk (accessed on 16/02/2024).

⁶² Ibid.

⁶³ Information culled from www.wilfordsmith.com (accessed on 16/02/2024).

⁶⁴ Ibid.

private actors to gain more resources that can be employed in other development projects in society.

3. Increase Publicity

Private prosecutions can also act as an effective deterrent as a consequence of the powers and sanctions at the disposal of the criminal courts, including custodial sentences, confiscation proceedings and a criminal record following a conviction. Successful prosecutions can also result in a high level publicity and severe reputational damage following a conviction, in addition to acting as a deterrent in many cases.⁶⁵

4. The Protection and Promotion of Human Rights

States are the primary duty-bearers of human rights obligations according to the standards of international law. It is for this reason that international human rights treaties and customary law imposes three obligations on the states: the duty to respect; the duty to protect; and the duty to fulfil.⁶⁶ While the balance between these obligations may vary according to the rights involved, they apply to all civil, political, economic, social and cultural rights and the states must provide a remedy at the domestic level for human rights violations.⁶⁷ It is on this basis that states, generally speaking, however, create ‘the legal, institutional and procedural conditions that rights holders need in order to realise and enjoy their rights in full’.⁶⁸ In the furtherance of these widely accepted principles of international human rights, states are readily divulging some segments of its sovereignty for the common good of the population. Prosecutorial discretion, being sovereign power, can be delegated to private actors by state to enhance access to justice and the respect for human rights of persons in general.

5. Economic Development Benefits

Justice is the bedrock of all civilized societies and citizens must have a sense of protection from the justice system wherein their rights can be ascertained without prejudice. A healthy justice system must ensure that contracts are enforced, property rights are protected, and investments secure. A judicial system with a doubtful integrity, independence, and impartiality cannot be a catalyst for economic development. Economic development, the duty of the state, hinges on the rule of law through which the integrity, independence, and impartiality of the judiciary must be perceived and equal access guaranteed to all citizens. States therefore strive to ensure the rule of law in its society by making sure that laws are enforced and criminal law enforcement is part

⁶⁵ Ibid.

⁶⁶ Inter-Parliamentary Union, *Human Rights, Handbook for Parliamentarians*, (2016), N0.26, p.31.

⁶⁷ Ibid.

⁶⁸ Ibid, at p.33.

of the broader judicial power that seeks to curtail behaviours that undermine the rule of law. This intricate relationship between the rule of law and economic development makes it incumbent on the state to guarantee the rule of law by inviting more participants in the exercise of its prosecutorial discretion.⁶⁹ The extension of prosecutorial discretion to private actors that means more criminal offences will be prosecuted, the rule of law ensured, the integrity of the judiciary guaranteed, and investments secured with a likelihood of encouraging economic development.

6. Circumventing the 5% Deposit on the Civil Claim

One of the major advantages of private prosecution of a private prosecution is that where the victim suffers economic loss as a result of the act of the accused, and there is a criminal connotation of the act of the later, although the rights can be vindicated through a civil claim, bringing by way of private prosecution permits the victim to circumvent the 5% of the claim deposit requirement in civil actions. It is therefore a means provided by the law in certain circumstances for men of straw to obtain damages. This is usually a panacea in environmental litigations by communities against corporate bodies who are pollutants. The claim made is usually hundreds of millions or billions, but thanks to private prosecution, the victims who may not be able to deposit 5% of their claim, may obtain justice.

(B) The Disadvantages of Private Prosecution

States, since time immemorial, have been delegating its prosecutorial functions to private actors but at what cost? The delegation of prosecutorial functions to private actors has been heralded for providing public good and multiplying the deterrent effects of criminal prosecutions, yet it can generate the opposite effect on the criminal justice system as it is encumbered with inconveniences that impact negatively on the image of the whole procedure. These inconveniences may stem from concerns raised pertaining to the entire procedure with regard to due process considerations such as fairness in the process, moral rectitude of the private actors, productivity in terms of results, and the degree of transparency and accountability of the stakeholders.

1. Fairness Concerns

Any crime represents a threat to stability and it is society's interest, through its government, to maintain order through punishment of any misdeeds.⁷⁰ However, it is also in the interest of the

⁶⁹ A. Deseau et al., (2019), op.cit. p.4.

⁷⁰ Roza Pati, (2009), *Due Process and International Terrorism*, Leiden, Boston, Martinus NIJHOFF Publishers, p.5.

community to abide by the requirements of fairness in its search for truth and justice, bearing in mind that human rights are owed by the state to all individuals within their territory.⁷¹ A series of questions have been raised as to whether the process is balanced between the private prosecutor and the defendant. In private prosecutions, the gathering of evidence by the victim/investigator is entirely the handiwork of a private entity, and most often, the defendant is not even aware of the investigations being conducted against him. The defendant has no knowledge of the evidence against him thereby putting the defendant in an already disadvantaged position to validly defend himself. The prosecution is led by the private prosecutor or lawyer hired by him who is interested in the proceedings as the victim of the offence. Under such circumstances, it is difficult to comprehend fairness when an organisation investigating a case, and prosecuting it, while it is the same organisation that is the alleged victim of the offence. The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.⁷² This responsibility carries with it the specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.⁷³ A public prosecutor must remain focused on the impartial administration of justice – a goal that is inconsistent with single-minded focus required of the attorney representing a private party.⁷⁴ The fact of having the victim of the criminal offence as the prosecutor already raises conflict of interests' issues that invariably affect due process standards in a criminal proceeding.

2. Ethical Concerns

Private individuals can rely on the services of counsel to initiate and prosecute criminal matters in court. In the exercise of his duty as private prosecutor, the counsel still retains his right of defence counsel to his client. This representation in private prosecutions imposes a dual function on the counsel, prosecutor and defense counsel simultaneously.⁷⁵ The question arises therefore whether the private prosecutor can serve both the client's interest in pursuing the accused person and the public's interest in the case? Some scholars hold that the fact a lawyer can serve the

⁷¹ Ibid.

⁷² *Berger v. United States*, 295 U.S. 78 (1935).

⁷³ Mathew S. Nichols, (2001), "No One can Serve Two Masters: Arguments Against Private Prosecutors," *Capital Defense Journal*, Vol.13, Issue 2, Article 3, p.291.

⁷⁴ Ibid.

⁷⁵ Anne B. Poulin, (2010), "Conflicts of Interests in Criminal Cases: Should the Prosecution have a Duty to Disclose?" *American Criminal Law Review*, vol. 47, issue 3, pp. 1135-1183, available at www.ojp.gov as seen on 09/08/2022.

dual function of prosecutor and private practitioner can be a source of conflicts of interests and potential corruption. They contend that It does not take much imagination to envision the potential for corruption and conflicts of interest when a lawyer who controls the tremendous power of criminal investigation and prosecution also represents private clients. In their illustration of the potential for conflict of interest where counsel serves in this double capacity, they use the example of the danger of a part-time prosecutor using information obtained in the course of an official criminal investigation to benefit a private client.⁷⁶ A part-time prosecutor might be tempted to decline a justified prosecution of the prosecutor's private client, to initiate an unjustified prosecution against a private client's adversary, or to use the threat of a criminal investigation or prosecution to coerce an opponent into submission or concession.⁷⁷ These arguments don't constitute any accepted scientific arguments because they are based on imaginations and speculations. Being corrupt is a matter of choice and allowing interests to conflict in the performance of one's duty is subject to each and every individual's ability to uphold morals. There is no empirical evidence to show that a person will be automatically corrupt because he held two functions at the same time; thus, these arguments, until scientifically proven, remain subjective.

3. Underperformance Concerns

The office of the prosecutor is as daunting as the office of a lawyer and as Stephanos Bibas suggests that the prosecutor may have a huge number of personnel and institutions to supervise and control coupled with the numerous case files and reports to write almost on a daily basis. Adding these tasks to that of maintenance of clients, servicing, running the office, mentoring junior colleagues, and taking care of support staff, can be challenging with a huge potential for underperformance. The upshot will be the scarce time will be divided between tasks with a consequent divided attention with the potential of low performance and poor results. Moreover, experience has shown that counsels devote more time to lucrative suits than low priority suits.⁷⁸

This might result to a prosecutor-lawyer, to leave low priority criminal cases unprosecuted with the probability that there might be an increase in petit crimes. States therefore should refrain from leaving its prosecutorial function in the hands of private actors especially as this might lead to confusion and underperformance in the administration of criminal justice.

⁷⁶ Ibid.

⁷⁷ Roger A. Fairfax Jr., (2009), "Delegation of the Criminal Prosecution Function to Private Actors", *University of California at Davis Law Review*, Vol. 43, Issue 2, p.438.

⁷⁸ Stephanos Bibas, (2004), "Plea Bargaining Outside the Shadow of Trial", *Harvard Law Review*, Vol. 117, Iss. 17, pp. 2463-2471.

4. Accountability and Transparency Concerns

The delegation of prosecutorial powers to private actors raises accountability issues. Prosecutors exercise a lot of powers and in the exercise of this powers, their decisions may have long-lasting consequences not only for putative criminal defendants and victims of criminal conduct, but also for law enforcement strategy, correctional resources allocation, and social policy more generally.⁷⁹ When private actors are contracted to perform the prosecution function, they exercise this power without the democratic check that theoretically applies to public prosecutors.⁸⁰ Furthermore, because much of the prosecutorial decision making is done outside of public view, the lack of accountability associated with prosecution outsourcing is all the more worrisome.⁸¹ Although the decision making processes of public prosecutors are notoriously opaque, the decision making of private attorneys may be even less transparent, given that they may be exempt from free information laws and work in spaces far removed from other public actors.⁸² Accountability and transparency in private criminal prosecutions can be more concerning in our setting considering the fact that there exist no mechanisms to properly check the work of lawyers generally.

5. Equal Protection Concerns

There is a high propensity for the abandonment of private suits initiated by viable private individuals as compared to private suits initiated by poor individuals. Criminal prosecutions premised on economic power of persons don't serve the course of justice as they breed inequality in the administration of justice. A rich individual who suffers injury as a result of an offence committed against him can easily make financial sacrifices in view of carrying out criminal proceedings against the criminal wrongdoer as compared to a poor individual who is in a weak financial position but who has suffered a similar injury. This inequality in private criminal prosecutions can be view from two different perspectives; firstly, a rich individual can readily have the means to hire the services of counsel while the financially disadvantaged individual may not have the means. And, even if he has the financial means, it might be pernicious for him to afford the services of counsel at that material time when he needs to assert his rights in a criminal court.⁸³ Secondly, an accused person privately prosecuted may be worse off than had he been prosecuted by a public prosecutor who, because the public prosecutor

⁷⁹ Roger. A. Fairfax Jr., (2010), "Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization", *University of Chicago Legal Forum*, Volume 2010, article 10, p.265.

⁸⁰ *Ibid.*

⁸¹ Roger A. Fairfax Jr., (2009), *op.cit.*, at p.444.

⁸² *Ibid.*

⁸³ Michael E. O'neille, (2010), "Private Vengeance and the Public Good", *University of Pennsylvania Journal of Constitutional Law*, Vol.12, Iss.3, p. 718.

arguably bears a larger responsibility for pursuing justice than the victim-oriented private prosecutor; thus, he will be more balanced and objective in his prosecutorial approach.⁸⁴ This suggests that all criminal prosecutions are better off being undertaken by public officials who have no particular interest in the cases they prosecute. Their charges are defrayed by the Public Treasury and their personality is not engaged in the proceedings unless they act in a manner tending to show their personal interest in the suit against the general public interest of protecting social interests and public peace. However, denying a rich man the right to prosecute his matter in the manner he desires because a poor person does not possess similar means is in itself a bias. Moreover, it has not been showed anywhere that rich persons are a hindrance to poor person's pursuit for criminal justice. Judging the viability of private prosecutions on economic power of litigants in itself is lame and must be discountenanced for it only sabotages rich persons and the justice system as if criminal prosecutions depended solely on the financial strength of litigants.

6. Malicious Prosecution Concerns

Malicious prosecution consists of instituting criminal or civil proceedings for an improper purpose and without probable cause.⁸⁵ The institution and prosecution of a criminal action may result in harassment, annoyance, inconveniences, loss of time, legal expenses, confinement, injury to reputation, interference with property, and perhaps, the invasion of other interest such as tempering with correspondences.⁸⁶ Individuals who are subject to any criminal proceeding may suffer any of the above prejudice justly or unjustly and may want reparation for the prejudice suffered when there is a strong belief that the prosecution was unjust.⁸⁷ This is premised on sections 162 and 398 of the CPC that have empowered accused persons to proceed against the civil party who instituted the criminal action for malicious prosecutions. This new criminal action is to repair the damage done to the accused person in the first suit and this has led many scholars to question whether private prosecutions are for the 'public good' or for 'private vengeance'? In the case of *Sheldon Appel Co. v. Albert & Olier*,⁸⁸ the California Supreme Court observed that,

while the filing of trivial lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the

⁸⁴ Ibid.

⁸⁵ Bryan A. Garner, (2009), 9th Ed., *op.cit*, P.1044.

⁸⁶ Njulefac Protinus, (2021), "An Appraisal of Compensation for Illegal Detention and Malicious Prosecution under Cameroon Criminal Procedure Code", International Journal of Law Management and Humanities, vol.4, Iss.6, p.1002.

⁸⁷ Ibid, at p.1001.

⁸⁸ (1989) 47 Cal.3d 863,871.

imposition of sanctions for trivial or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded.

Those who contend that it is for private vengeance are skeptical that entrusting prosecutorial discretion into private hands will only open a floodgate of private prosecutions that don't serve public good. They fear that private prosecutions can be a medium for venting anger at their former prosecutors without necessarily pursuing the goals of criminal prosecutions, thus, prosecutorial discretion should not be put to private hands.

VI. CONCLUSION

The transfer of prosecutorial function to private actors though justified by some advantages, its implementation is fraught with challenges. These challenges that stem basically from the poor theoretical design of the concept of private prosecution in the CPC, have orchestrated a series of practical problems that if not properly managed, can hamper on the effectiveness of private prosecution as a mechanism for seeking criminal justice in Cameroon. Nevertheless, private prosecution is a mechanism to reckon with in the enhancement of access to justice in Cameroon. It provides litigants with an alternative route to seising the court rather than relying solely on the traditional public prosecutions. It has enhanced the general functionality of the Criminal Justice System in two ways; it has increased the accessibility to the Criminal Justice System because more persons now participate in the proces, and it has reduced delays in the administration of criminal justice because individuals can now seise the court directly without employing the investigative services of the Judicial Police and the Legal Department. This is not to say that the State should stop ameliorating it by adopting pragmatic measures that will assure litigants when they exercise the right to institute a criminal action before the Court by way of private prosecution.

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