



## **THE DIRECTORATE OF PUBLIC PROSECUTION**

The Directorate of Public Prosecution (herein DPP) is the government appointed office responsible for prosecuting criminal cases on behalf of the state. They oversee the work of the prosecutors to ensure that indeed justice is served in accordance with the law. The Directorate of Public Prosecutions is headed by the Director of Public Prosecutions who is a presidential appointee as per Section 51A of the Constitution.

### **THE HISTORY AND ESTABLISHMENT OF DPP**

The DPP Office was first established in Botswana in 1972 under the State Proceedings Act but later, reestablished and reconstructed by the Constitutional Amendment of 2005. The establishment of the Directorate is provided for in section 51A of the Constitution<sup>1</sup>. The provision stipulates that 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.

The constitution provides for an independent and accountable DPP Office separate from the Attorney General's office which previously bore the responsibility of the prosecution of criminal cases. In the past, prosecutorial responsibility being held by the Attorney General's office was quite a contested issue since it gave government power and control over the prosecution process; this could potentially result in cases being pursued for political reasons rather than for the pursuit of justice. The establishment of the DPP was therefore seen as an important step in ensuring the independence of the prosecution process and in upholding the rule of law in Botswana. The DPP is now responsible for prosecuting criminal cases on behalf of the government, and operates independently of both the government and the judiciary.

### **Functions of the DPP**

The DPP's main role is to ensure that justice is served by prosecuting criminal cases, including international crimes. The DPP is the dominus litis<sup>2</sup> and is vested with absolute discretion to conduct any criminal proceedings in the manner that she deems fit. As stipulated under section 51A(3) of the Constitution the DPP shall have power to institute, take over and continue or discontinue any criminal proceedings before any court other than the martial court. 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

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<sup>1</sup> L.B Sechele (2013) The Independence of the DPP: (A case of Botswana) Presentation by the Director of Public Prosecutions, p1-14

<sup>2</sup> Means that they are the person who is actually behind legal proceedings even if they are brought in the name of someone else.



such person. The DPP can withdraw any criminal proceedings instituted by her or by any private prosecutor in an effective and efficient manner.<sup>3</sup> This involves investigation and prosecution of criminal cases, providing legal advice to law enforcement agencies, and conducting appeals in criminal cases. The DPP also plays an important role in ensuring that cases are heard and decided in a timely manner, which is essential for maintaining public confidence in the justice system.

Another important function of the DPP is to provide legal advice to law enforcement agencies. This includes advising on the legality of investigations and arrests, as well as providing guidance on the appropriate charges to be brought in a given case. This advice is essential for ensuring that criminal cases are properly prosecuted and that the rights of defendants are respected.

In addition to its prosecutorial role, the DPP also plays an important role in developing and implementing policies aimed at improving the criminal justice system in Botswana. This includes working with other stakeholders to develop and implement programs aimed at reducing crime and improving access to justice for all citizens.

The DPP works with the Botswana police service, the Botswana prison service and other law enforcement agencies to ensure that criminal cases are properly investigated and properly prosecuted. It also works closely with courts to ensure that cases are heard and decided in a timely and fair manner. It is essential to uphold the rule of law by prosecuting criminal cases in ensuring that justice is served.

### **Appointment, Tenure and Removal from Office**

The Director of Public Prosecutions is appointed by the President. Section 113 of the Constitution provides that the tenure 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 earlier. The stipulation of tenure is an important factor in the independence of an office holder as it gives them security that they will not be abruptly removed from office. The section further provides for instances in which removal shall be warranted; 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 misbehavior or for incompetence. The Constitutional enshrinement of the removal from office gives security of tenure, as one is able to govern themselves according to the provision and cannot be unduly removed other than as provided. In addition it provides that 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 he or she shall appoint a tribunal which shall consist of a

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<sup>3</sup>B.R Dinokopila.(2009). The prosecution and punishment of international crimes in Botswana,1077-1085.



Chairman and not less than two other members, who hold or have held high judicial office; and 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. Where a tribunal 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 misbehavior or for incompetence, the President shall remove such person from office. The use of the wording 'shall' indicates that the President has to act on the advice of the tribunal, the only questionable issue with this provision is that the appointment of the tribunal is solely on the President, it would be better for the optics of democracy to have other contributors to this decision. A recommendation could be to have the Leader of Opposition in Parliament be another member of the tribunal to reduce the influence of the President on the composition of the Tribunal.

### **Challenges and Limitations**

As indicated by Section 51A(1) 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. Furthermore the Director of Public Prosecutions is subject to the administrative supervision of another office, the office of Attorney General. It is paramount that checks and balances are set out in place for any democratic institution ensuring there is no abuse of power, however it is necessary that such checks and balances are not used in order to hinder the independence of said institution.

According to Subsection (6) it 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 word "shall" makes it mandatory for the DPP to consult the Attorney General. The consultation presupposes a discussion which is not binding on the DPP, based on the wording of the provision in so far as it states that the consultation is "before the exercise of powers" by the DPP. The interpretation is therefore that a consultation under this proviso does not affect the functional independence accorded the DPP in subsection (6). This proviso is intended to facilitate the constitutional mandate of the Attorney General as principal legal advisor to the Government. 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. 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.<sup>4</sup>

The jurisdiction of the DPP is excluded under the Botswana Defence Force Act and Customary Courts Act. The DPP does not have jurisdiction to undertake criminal proceedings in the court of martial law, furthermore advocates and attorneys have no right of audience in customary court. The matters would have to be in the other courts of Botswana for the DPP to have jurisdiction. That being the case however, matters in the court of martial and customary court can be taken to High Court for appeal following the due process.

### **The Question of Independence**

The DPP falls under the list of institutions that are mentioned when the question of administrative independence in Botswana's institutions arises, usually from academia and/or civil society. One of the biggest criticisms of Botswana's constitution is the excessive executive power given to the president, especially appointing power. Along with the DPP, the President also appoints the Chief Justice, Attorney General, Auditor General, the Directors of the DCEC, DISS, the Ombudsman and the Secretary of the IEC. Although some of these appointments have provisions that are meant to provide accountability and curtail abuse of power by the president such as the appointment of a Tribunal that determines if the Director of Public Prosecutions should be removed from office, their functions are such that they need to be totally independent of any influence from the president, if at all the aim is adherence to democratic principle.

Although the DPP has avoided the kind of negative public attention and perception that has unfortunately followed other institutions like the DCEC and the DISS, the conversation of independence cannot totally exclude it. In recent times, Botswana has seen a rise in corruption and criminal allegations against politically influential and exposed people. Considering that the decision to prosecute or otherwise, lies with the DPP, there may be perceptions of bias regarding its decisions as they pertain to some of these individuals. Doubts regarding the interests of the criminal justice system should always be avoided or dispelled if any. In the case of the DPP specifically, there seems to still be public trust in the institution but the legal guarantee of its administrative independence will go a long way in ensuring public acceptance of its decisions regarding cases of high public interest.

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<sup>4</sup> L.B Sechele (2013)The Independence of the DPP: (A Case of Botswana) Presentation the Director of Public Prosecutions, p1-14



## Botswana Centre for Public Integrity

*"Integrity in action"*

Botswana is by no means the worst democracy there is, however, there are changes to the country's institutional and legislative framework that could be made, to tighten the screws around accountability, transparency and checks and balance systems.

### **Conclusion**

Botswana's DPP is one of the institutions that maintains public trust, although it has not escaped the scrutiny and criticism of being under the extensive appointing powers of the president, especially as it relates to oversight institutions. In the discharge of its duties, the DPP has administrative autonomy over the prosecution of cases, on behalf of the government. Of course, there are challenges to the role of DPP, including the fact that it requires a level of agreement with the Attorney General, in the absence of which, some matters may not receive proper justice, on account of either party and their lack of integrity as the case may be.