

Chapter 14

An Overview of Prosecutorial Powers in Kenya

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ABSTRACT

Individual liberty, which traces its roots to the renaissance, is the core of every democratic society. When the state powers of prosecution are invoked, the idea of individual liberty comes into sharp focus. The colonial era in Kenya saw the misuse of prosecution power to dominate and eliminate threats to the stability of the colonial masters. This practice and misuse of prosecutorial power were carried forward by successive governments demonstrating utter disregard for individual liberties. This chapter identifies this as a historical fault line to the independent prosecutorial powers. There was a great departure after the promulgation of the Constitution of Kenya in 2010 paving the way for prosecutorial independence. The structural independence of state powers of prosecution seems to complement the functional operations of the office of the Director of Public Prosecution. The chapter will consider whether this is an identifiable or implicit fault line with the potential to threaten individual liberty.

INTRODUCTION

Individual liberty which traces its roots in the renaissance is the core of every democratic society. One of the instances where individual liberty comes into focus is when there is an occurrence of criminal activity. The society on the one hand will insist and rightly so, on accountability for the criminal conduct and on the other hand the rights of the individual accused will react to the accusation. When the

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state powers of prosecution are invoked, the rights of the individual and their liberty comes into sharp focus. The international society has agreed on certain irreducible minimums when it comes to human rights and dignity including where criminal conduct is concerned. These include the right to a fair trial which is an inalienable right, presumption of innocence, right to challenge and adduce evidence, among others. When the State, which legitimately holds the monopoly of instruments of violence, seeks to deny an individual of their liberty, there is a need to ensure that it is absolutely necessary. This calls for proper checks and balance to ensure that there are no excesses and overlaps. The main aim of this chapter is to examine the historical outlay of prosecutions in Kenya with a view to offering proper context for the structural and accountability mechanism of prosecutorial powers under the 2010 Constitution. For the purpose of this chapter, the history of prosecution will be confined to the period preceding the colonialism era and briefly highlight significant events of the independent governments. There is need to engage in a study of how the African societies dealt with crime and criminal conduct and to examine how each society construed the concept of justice. To better understand the historical foundation of prosecutorial powers, this chapter considers the transition from the traditional societies to the colonial era and later legal transitions such as independence, multiparty democracy, and the constitutional era. These will be the sub themes for this chapter.

African Traditional Societies

What did traditional societies look like and how did they prosecute offenders? To answer this, there is need to look at the institutions in the traditional societies with the lenses that they were legitimate. (Muigua, 2018) argues that traditional African societies had mechanism to resolve conflicts including proper procedures for dealing with crime which were as adequate as modern-day institutions. These traditional societies had different forms of punishment including caning, fining offenders, or the community when there was a breach (Osamba, 2001). The available evidence suggests that institutions were handling all matters using known rules that existed and coherence and order in application of these rules or in other words, there was no disharmony within these institutions.

The transition from the existing traditional institutional framework of dealing with crime and criminal activity was not a seamless transition. Consequently, the introduction of the colonial institutional framework was a disruption to the existing order. This disruption was conceptualized by placing all traditional laws (traditional institutional framework) under the British East African Protectorate. This was institutionalized by the famous *reception clause* in the East Africa Order in Council of 12th August 1897 which made all statutes of general application in England applicable

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