

The Law and Latitude of Private Prosecution in Selected Jurisdictions: Expansions or Restrictions?

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Abstract

The right of a private person to lay direct complaint and prosecute same in criminal trials in Nigeria is regulated by statutes. Utilizing the provisions as regards this practice in the Kwara State Administration of Criminal Justice Law, the paper proceeds on a comparative analyses with other jurisdictions in examining the rationale for this right, the adequacy or otherwise of statutory provisions as to the utilization of the right and the possible abuses of the right. Reviewing the available literature, which is essentially statutory and judicial pronouncements, the paper argues that whereas there may be expedient reasons for its inclusion in the law there is the need modify the law. The paper also advocates a strict interpretation of the law, rather than a liberal approach.

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1. Introduction

Access to justice entails the right of a citizen to approach the courts or tribunals with minimal or no restrictions or inhibitions. Over the years, statutes have been enacted to aid access to justice. Access to justice presupposes the existence of accessible dispute resolution systems and the application of fair standards of justice.¹ However, criminal prosecution enjoys institutional prosecution because of the nature of crimes; it is a wrong of so serious a nature, that it is regarded as an offence, not merely against an individual, but against the State itself.² As a universal practice, States prosecute crimes generally. In some jurisdictions, private individuals are allowed to lay a complaint as well as prosecute for crimes committed against such individuals by way of direct complaint to the Court.

This paper examines Part XIII, section 116 (a) and (e) of the recently enacted Kwara State Administration of Criminal justice Law 2018 and Chapter XV, section 143 of the recently repealed Criminal Procedure Code Law of Kwara State and which allows private citizens to lay direct complaint of a crime to the Magistrate and the express procedure for carrying out such private prosecution. There are other statutes which vest prosecutorial powers in the individual citizen to complain and prosecute for crimes committed against such individual. An example of such law is section 178 (a) and (b) [iv] of the Enugu State Administration of Criminal Justice Law 2017.

¹Adenike Aiyedun and Ada Ordor; “Accessing Justice within Plural Normative Systems in Africa: Case Study of South Africa,” *African Journal of Clinical Legal Education and Access to Justice*. (2013) Vol 1, No. 1, p. 49.

²Tremear's Annotated Criminal Code of Canada, 5th ed. (1944) p. 1. Via <https://search.library.utoronto.ca> Accessed 31 December 2019.

2. The General Power of the State to Prosecute

The power to institute and discontinue prosecution for federal offences is usually vested in the Attorney-General of the State or Federation under section 174 of the 1999 Constitution. In Nigeria, various statutes allow private individuals to prosecute for certain crimes. It is our view that private prosecution must however be in respect of simple offences and where the offence is capital in nature or a misdemeanour with heavier terms of punishment, prosecution for such offences should be handed over to a law officer.

Subject to the following conditions, a private person is empowered to make a complaint under section 97 (3) of the Kwara State Administration of Criminal Justice Law 2018 and institute criminal proceedings by virtue of section 116 (e) of the Kwara State Administration of Criminal Justice Law 2018 and eventually prosecute an offender by virtue of section 59(1) Criminal Procedure Act; section 143 (e) Criminal Procedure Code; section 113 (1) (c) of the Kwara State Administration of Criminal Justice Law 2018. In essence, it is one thing to complain about a crime to the court and it is another thing to be empowered to institute criminal proceedings and eventually prosecute subject to the Attorney – General’s powers to take over or discontinue prosecution for any offence created by the laws of that state in line with section 211 of the 1999 Constitution.

- i. The Information must be indorsed by a Law Officer³ under section 342(a) of Criminal Procedure Act and section 258 (a) Administration of Criminal Justice Law of Lagos State.

³Blacks Law Dictionary defines Law Officer as follows: In most common law jurisdictions, law officer as a most senior administrator of justice such as an Attorney – General, Solicitor – General, or other high level minister or officer of justice. Garner, Black’s Law Dictionary (8th Edition) p. 2590

ii. He must enter into a recognizance in the sum of N100 together with one surety to be approved by the Registrar in the like sum under section 342(b) of the Criminal Procedure Act. The value of the recognizance in Lagos is N10, 000 by virtue of section 258 (b) of the Administration of Criminal Justice Law of Lagos State. A Private Prosecutor may sign Information in his own name under section 343 of the Criminal Procedure Act and this position was upheld in the case of *Akilu v Fawehinmi*⁴.

3. Power of a Private Prosecutor to Discontinue Prosecution

A private prosecutor may discontinue a Criminal proceeding under section 75 Criminal Procedure Act and section 115 (4) of the Kwara State Administration of Criminal Justice Law 2018 after giving satisfactory reasons for such withdrawal.⁵ It is worthy to note that the effect of the withdrawal will depend on the stage and hence, all the earlier provisions on the effect of a Police withdrawal apply here *mutatis mutandis* going by the provisions of section 75 (1) (a) and (b) of the Criminal Procedure Act as well as section 115 (4) (a) of the Kwara State Administration of Criminal Justice Law 2018 and the provisos to those sections.

It should be noted also that where an application to withdraw a Criminal Charge by a private prosecutor is granted, the Magistrate may, in addition to such other orders, award cost against the private prosecutor by invoking the provisions of section 75(2) Criminal Procedure Act and section 115 (4) of the Kwara State Administration of Criminal Justice Law 2018. The essence of the cost is to assuage the feelings of the defendant and compensate the Court for the time expended in the criminal trial.

⁴No.2 [1989] 2 NWLR (Pt.102)122

⁵A private prosecutor may also discontinue a Criminal proceeding under section 75 Criminal Procedure Act and section 73 of the Administration of Criminal Justice Law of Lagos State

It will serve as a cautionary measure to any prosecutor with inadequate evidence to prosecute for crimes.

4. Private Prosecution Limitations under the Administration of Criminal Justice Legislations

Without prejudice to the powers of the Attorney – General, the Administration of Criminal Justice Act vests the power to prosecute criminal cases to the Attorney – General or Counsel in the Ministry of Justice assigned to prosecute such cases or to private legal practitioners assigned by the Attorney – General to prosecute such cases or any such Authority vested with the power of prosecution. Section 106 of ACJA did not expressly repeal section 23 of the Police Act though ACJA repealed the Criminal Procedure Code and Criminal Procedure Act as it applies to the Federal Capital Territory. Rather, private complaint is suffers limitation of action restrictions within 2 years under section 100 of the Kwara State Administration of Criminal Justice Law whereas a similar provision under Enugu State Administration of Criminal Justice Law pegged the limitation period to 6 months while the Administration of Criminal Justice Act pegged the period within which a private person may lay a complaint within 6 years.

Other states give effect to private prosecution as well. For instance, states such as Kaduna State under section 119 provides for private prosecution. Edo State also enacted the same provision under section 103 and Kogi State adopted the same provision by virtue of section 104 while Oyo State did not shy away from giving effect to this provision by virtue of section 107 of her ACJL. River State provides for the power of the Attorney – General to prosecute all offences in her courts under section 106 of the ACJL of River State. The Administration of Criminal Justice Law of 2017 as it applies to Enugu States empower a private prosecutor to prosecute for offences in line with ACJL of Enugu State and any other law

made by the National Assembly pursuant to sections 178 (b) (vi) and 181 [c] of the Enugu State ACJL 2017. By virtue of section 489 of the Kwara State Administration of Criminal Justice Law 2018, private prosecutor does not include a private person prosecuting on behalf of the State or a public officer prosecuting in his official capacity. It is this view of this writer that the right to prosecute should not be made an all comers affair to avoid abuse of prosecutorial powers without prejudice to the right to complain for a crime or perceived criminal activities. This is because it is contrary to the public policy for prosecution of crimes as an act or omission committed against its victims and more especially against the state. Private prosecution because of the resultant effect must be statutorily regulated and must not be left totally in the hands of private citizens without prejudice to the vital roles citizens play in the fight against crime. Private prosecution should not be for vengeful mission under any guise. Private prosecution is different from laying direct complaint. Hence, jurisdiction which are yet to incorporate similar provision in the ACJL should beware of this lacuna.

5. An Examination of Private Prosecution Provisions under the Kwara State Administration of Criminal Justice Law 2018

Part XIII, section 116 (a) and (e) of the recently enacted Kwara State Administration of Criminal justice Law 2018 provides:

Subject to the provisions of any other law, criminal proceedings may in accordance with the provisions of this law, be instituted

- (a) In a magistrate Court, by a complaint whether or not on oath or upon receiving a First Information Report;
- (e) by a charge filed by a private prosecutor subject to the provisions of this Law.

Retrospectively,

Subject to the provisions of Chapter XIII and XIV, a court may take cognizance of any offence committed within the local limits of its jurisdiction-

- a) When an arrested person is brought before it under section 40 or 41;⁶
- (e) If from information received from any person other than a police officer it has reason to believe or suspect that an offence has been committed.

Comparatively, section 143 (a) envisaged arrest by a Police officer as an examination of section 40 and 41 of the CPC Law of Kwara State reveals. Section 143 (b) of the same law did not contemplate any other person other than a law enforcement agent or agency. The Attorney – General is the legislative intendment of section 143 (c) above. Section 143 (d) and (e) envisaged direct complaint from either the victim of the crime or any other person other than a police officer. This then means that the procedure adopted by filing a direct complainant by a lawyer on behalf of the complainant is not permissible under sections 1 and 143 (d) and (e) of the Criminal Procedure Code because of the use of the word ‘any person’ other than a police officer. It is our view that the using a person other than the ‘complainant’ is stretching the express provision of the law too far. This has been taken care of by the Kwara State Administration of Criminal Law with the express provision for the category of persons which can institute criminal

⁶Section 40 of the Criminal procedure Code Law of Kwara State provides that a police officer making an arrest without a warrant or a re-arrest under section 39 shall without unnecessary delay take or send the person arrested before a court competent under Chapter XV to the cognizance of the case or before the officer in charge of police station. In the same vein, section 41 of the Criminal procedure Code Law of Kwara State provides for procedure where the offender has refused to disclose his name or address.

prosecution in section 116. It is our humble view that the class of persons recognized under the Criminal Procedure Code Laws of other States which have not adopted the provision of section 116 of the Kwara State Administration of Criminal Law should be limited to the Attorney General, Police Officers, Public Servants and the complainant, to construe the provisions of sections 1, 143, 146 and other extant provisions of the Criminal Procedure Code Law of Kwara State otherwise will be doing injustice to the legislative intendment of the law. It will therefore mean that all Tom, Dick and Harry can then claim they fall within the meaning of any person. For instance, a company is a person in law.⁷ Can Zenith Bank Plc file a complaint on behalf of the Complainant in another case? Can the Vice – Chancellor of the University of Ilorin also file a complaint on behalf of another citizen? In furtherance of these posers, can the Emir of Kano who is a person in law also file a complaint on behalf of another complainant and prosecute on his behalf? Are the aforementioned persons not persons in law? They are persons by the provisions of the interpretation Act 2004 but the express mention of a thing is to the exclusion of all others hence the maxim *Expressio unius est exclusion alterius*. In *Sambo v Ndatse*,⁸ the court had cause to re-emphasize the importance of the provisions of Section 143 of the Criminal Procedure Code Law in issue when it held that:

In the instant appeal Section 211 (1) (b) & (c) of the Constitution of the Federal Republic of Nigeria, 1999 and Section 143 (d) and (e) of the Criminal Procedure Code (CPC) Capt. 39, Laws of Taraba State of Nigeria 1977, empower the appellants to initiate the Direct Complaint

⁷Section 35 of the Companies and Allied Matters Act LFN 2004 and the celebrated case of *Salomon v. Salomon Co Ltd.* (1897) AC 22; 45 WR 193.

⁸ (2013) LPELR-20857.

against the respondent and they need not show any special relationship with the deceased persons or demonstrate an interest more substantial than that of the general public to be enabled in that behalf as wrongly opined by the learned trial judge. Interestingly, in this case the complaint in question, having already passed the rigorous 'quality control' tests put in place by the same statute for its cognizance, was accepted by the Magistrate Court and respondent's plea to it taken before the same Court turned around to strike it out for reasons only of the means by which it was brought to its attention.⁹

In the case of *Oniyide v Oniyide*¹⁰ the Court of Appeal held that the Criminal Procedure Code Law of Kwara State, a reproduction of the Criminal Procedure Code Law of 1960 of Northern Nigeria, permits the initiation and prosecution of criminal proceedings by a private person. The Court of Appeal went further by juxtaposing the provisions of section 211 of the 1999 constitution and the provisions of section 143 of the Criminal Procedure Code Law of Kwara State when it stated thus:

These provisions of the 1999 Constitution, especially the portions I have highlighted, clearly confer power of, and contemplate, institution of criminal proceedings by three different bodies or persons, namely:

- (1) The Attorney-General of the State and officers of his Department;
- (2) Any other authority which may have been conferred powers by statute to initiate criminal cases. Other authority here clearly refers to and include Governmental Authorities and agencies like the Police, the Economic and Financial Crimes Commission and sundry other authorities which

⁹ *Sambo v Ndatse* (2013) LPELR-20857 at p. 32.

¹⁰ (2018) LPELR-44240(CA).

daily initiate and prosecute complaints in our Courts, especially the lower Courts.

The Court of Appeal went further to define 'persons' as provided in the Kwara State Criminal Procedure Code Law as follows:

Last but no less important is 'persons', which in the provision is not only unqualified but also deliberately separated from Attorney-General and 'any other authority' by the disjunctive 'or' thus suggesting that neither of the two already mentioned is intended as 'the person' used in the provision. In any event, the word 'person' must be given its ordinary natural meaning of ordinary persons, after all the golden rule of construction is that words be given their literal meaning. It is here provisions like Section 143 and 152 of the Criminal Procedure Code Law of Kwara State conferring powers on private persons to initiate criminal proceedings, and for the Courts of Kwara State not only to take cognizance of such complaint but also try them if satisfied with their substance, comes into play and is undoubtedly validated by Section 211 of the 1999 Constitution, incredible as that may sound on first impression.¹¹

We respectfully agree with the reasoning of the Court of Appeal as stated above on the meaning of the word 'persons' and we, with the greatest respect disagree with their lordships on expanding the meaning of the word to include persons not expressly stated in the law such as a private legal practitioner seeking prosecutorial powers where none is conferred. In other to buttress this line of interpretation of the word 'person', the South African case of *National Society for the Prevention of Cruelty to*

¹¹ *Oniyide v Oniyide (Supra)*.

Animals v Minister of Justice and Constitutional Development & Another,¹² readily comes to mind. In that case, the applicant argued that the law which permitted natural persons to institute private prosecutions and prevented companies and associations from doing so violated section 9 of the South African Constitution which protects the right to equality.

The court held that the discrimination in question was not unfair. The Criminal Procedure Code has stated those who other than the complainant can complain on his behalf and this includes a public officer and expressly excludes a private legal practitioner under the criminal procedure code laws of the various states in the Northern part of Nigeria. This has been cured by section 116 (e) of the Kwara State Administration of Criminal Justice Law. The fact that a practice is rampant before it is judicially tested does not make it legal or lawful. The laying of complaint before a magistrate as stated under section 143 of the repealed law in discourse is different from private prosecution. The jurisprudence behind private prosecution must be allowed to develop and grow. As a lawyer, the role of the complainant's counsel is to refer the complainant to the Magistrate whose duty is to invoke section 116 of the Kwara State Administration of Criminal Justice Law by examining the complaint and where it is not in writing, take it down in writing or use its discretion to request the complainant to lay his complaint on oath. It is not an opportunity of a new brief for the private counsel to prosecute without any express authority from the public prosecution agencies of government or statute.

Under the repealed Criminal Code Law of Kwara State, the alternative allowed by law is for the complainant to search for a public officer who should lay the complaint before a magistrate. The office of the Attorney – General is also contemplated by the

¹²*National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* (29677/2013) [2014] ZAGPPHC 763 (8 October 2014).

legislation in question. This is because section 174 of the 1999 Constitution expressly confers the overall power for public prosecution on the Attorney – General of a state in cases of state offences. For a person in law to institute public prosecution of an alleged crime, he must have derived its power of prosecution expressly from statutes. Such statute cannot be implied because of the nature of crime as an infraction against the State. To imply same may lead to societal anarchy. The question now is who is the complainant? If it is the complainant; he must have a right of direct complaint before the Court.

If it is a private legal practitioner, he is not a party to the charge before the court and the essence of the direct complaint has been defeated under the old law but cured in the new law because nowhere was a private prosecutor mentioned in the old law under section 143 of the Criminal Procedure Code law of Kwara State whereas it is now expressly vested with prosecutorial powers under section 116 (e) of the Kwara State Administration of Criminal Justice Law 2018. This is enough reason for the Court to dismiss this allegedly indirect and involuntary complaint practice in which a private legal practitioner inhibits access to justice because it is alien to the legislative intent of section 143 and other extant provisions of the Kwara State Criminal Procedure Code Law.

It is our further view that if the legislature had intended the provision to cover a legal practitioner as we have in section 143 of the Criminal Procedure Laws of Kwara State, it would have been so stated as the use of the words ‘legal practitioner’ would have been inserted among the class of persons stated in the law under examination. This is an eye opener to states which are yet to enact the Administration of Criminal Justice Law to tow the same path and cure this ambiguity.

In Oniyide’s case, the Federation of Women Lawyers prepared and signed a Criminal Complaint Process to prosecute

the Respondent on behalf of the Appellant by under section 143 of the Criminal Procedure Code Law of Kwara State as espoused above. The Appellant used the letterhead paper of the aforesaid organisation to commence direct criminal complaint at the Magistrate Court in Ilorin and this formed the basis of a preliminary objection by the Respondent at the Magistrate Court where he was arraigned and made to take his plea. This ground of Preliminary objection among others was upheld by the magistrate and the Appellant filed an appeal at the Kwara State High Court. The High Court dismissed the appeal of the appellant and upheld the cross appeal of the Respondent. Dissatisfied, the appellant filed this appeal at the Court of Appeal seeking to prosecute her husband for domestic violence among other offences. In *Oniyide v Oniyide*,¹³ the Court of Appeal struck out the letter of complaint submitted to the Magistrate Court on behalf of a complainant by Federation of Women Lawyers (FIDA), Ilorin Branch, when it held thus:

....we therefore uphold the decision of the lower Court that the letter of complaint dated 14th September, 2015 was filed and initiated by FIDA on behalf of the appellant and that the letter of complaint haven been initiated by FIDA was incompetent and same is liable to be struck out.¹⁴

The basis for the letter being struck out is due to reasons earlier argued above that it is not an all comers affair.

It is apposite to add that the issue under examination is not the propriety or otherwise of a private practitioner prosecuting for a crime, it is that there must be express provision in any statute before cases bothering on penal provisions could be safely

¹³ *Supra*.

¹⁴ *Oniyide v Oniyide* (*Supra*).

prosecuted by a private legal practitioner to avoid abuse of state powers. Our fear is the tendency to abuse section 143 of the Criminal Procedure Code Law of Kwara State. Doherty,¹⁵ writing on the subject opined that private persons may institute criminal proceedings against a person alleged to have committed an offence by laying a complaint before a court. In practice, citizens usually lay their complaints at the police station. And citing Section 143 (d) of the Criminal Procedure Code Law and Section 77(a) of the Criminal Procedure Act, the same learned author reconfirmed this position as follows:

Criminal proceedings may also be instituted in the Magistrate's Court both in the Southern and Northern States of Nigeria by laying a complaint before a magistrate. A complaint is an allegation made before a magistrate that any named person has committed an offence. In practice, complaints made before the magistrate are laid by police officers, although a private person can lawfully lay a complaint before a magistrate.¹⁶

There is nowhere the learned author stated or opined that the complaint should be taken over by a private legal practitioner for prosecution. While we agree that criminal prosecution by a private legal practitioner will assist the court of law because a lawyer is an officer of the court, we humbly hold the view that penal provision by its nature should not be implied.¹⁷ It should be expressly conferred in the interest of justice for all the parties.

¹⁵Doherty Oluwatoyin, *Criminal Procedure in Nigeria, Law and Practice*, Blackstone Press Ltd. Oxford, opined at pages 66 - 70 at p. 66.

¹⁶Doherty, *Ibid* at p.66

¹⁷Rule 30 of the Rules of Professional Conduct for Legal Practitioners provides that a lawyer is an officer of the Court and accordingly, he shall not do any act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice.

6. Comparative Analysis of Private Prosecution Provisions in Selected Jurisdictions

In England, one of the elements in the history of private prosecution is that for many years, prosecution was primarily carried out by lawyers in private practice. It was not until 1985 that the Crown Prosecution Service was established.¹⁸ There were earlier initiatives for representation of the accused person before courts. An example is the Bow Street Runners in London.¹⁹ It was not until the 19th century that police forces became established, and even then no institutional support was provided for the prosecution process.²⁰ Some police forces appointed a police solicitor, others referred cases to private firms of solicitors; the solicitors then briefed counsel in general practice. It was only in 1985 that a state agency staffed by lawyers who were made responsible for conducting prosecutions – the Crown Prosecution Service – was established.²¹ The rationale for the English common law was the view that it was not only the privilege but the duty of the private citizen to preserve the King's Peace and bring offenders to justice. In the same vein, section 16 (2) (e) of the Criminal Procedure Act 2011 and section 6 (c) of the Criminal Disclosure

¹⁸Peter Handford, Criminal Prosecutions in Western Australia: A view from the Nineteenth Century. www.austlii.edu accessed 12 January, 2020

¹⁹See John Beattie, *The First English Detectives: The Bow Street Runners and the Policing of London, 1750-1840* (Oxford UP, 2012).

²⁰Douglas Hay and Francis Snyder, 'Using the Criminal Law, 1750-1850: Policing, Private Prosecution and the State' in Douglas Hay and Francis Snyder (eds), *Policing and Prosecution in Britain 1750-1850* (Clarendon Press, Oxford, 1989) 3 (Hay and Snyder, *Policing and Prosecution*). For an account of the legislative attempts to introduce a public prosecution system, see Philip B Kurland and DMW Waters, 'Public Prosecutions in England 1854-79: An Essay in English Legislative History' [1959] *Duke LJ* 493.

²¹Prosecution of Offences Act 1985 (UK)

Act 2008 recognized the right to private prosecution in New Zealand.²²

Canadian criminal law is derived from English law both in terms of substance and procedure. Therefore, except as altered, varied, modified or affected by the Criminal Code, Canadian Criminal Code would also toe the path of vesting prosecution for crimes in the hands of the Crown.

In the United States there is no place for a private prosecutor at all.²³ France and Germany have adopted systems that exclude private prosecutors, except in setting the state's action in motion.²⁴ In Scotland, too, a system of public prosecutions is vested in the Lord Advocate.²⁵ The right and duty of public prosecution in Scotland lies not in the hands of the police, nor of the private prosecutor (subject to a minor qualification), but in the hands of the Lord Advocate, who discharges the responsibilities of his important office through the medium of Crown Counsel and the Crown Office.

²²Patricia Kameri Mbote and Migai Akech, Kenya: Justice Sector and the Rule of Law. A Review by AfriMAP and the Open Society Initiative for Eastern Africa. March 2011, pp 285–291

²³The Administration of Criminal Justice in the United States (1955, American Bar Foundation), 84-88; Dression, Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction (1955) 65 Yale L.J. 209;

²⁴Dression, Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction (1955) 65 Yale L.J. 209. For further reading on the position in Germany, Grosman, The Prosecutor (1969), 13-14; "The Office of the Attorney General", Report of the National Associations of Attorneys-General (1971), 11-22. See also Jeschek, The Discretionary Powers of the Prosecuting Attorney in West Germany(1970) 18 Am. J. of Comp. L. 508; Langbein, Controlling Prosecutorial Discretion in Germany(1974) 41 U. Chi. L. Rev. 439; and Herrman, The Rule of Compulsory Prosecution; and The Scope of Prosecutorial Discretion in Germany(1974) 41 U. Chi. L. Rev. 468

²⁵ The office of the Lord Advocate in Scotland is equivalent to that of the Attorney –General.

The South African Criminal Procedure Act allows private prosecution and includes safeguards in order to prevent persons from misusing the right to institute private prosecutions.²⁶ South African legislations encourage private prosecution though with limitations. For instance, section 7 of the Criminal Procedure Act limits the circle of potential private prosecutors. In essence, only a private person who ‘proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the said offence’ may institute and conduct a private prosecution.²⁷ While section 8 of the Criminal Procedure Act of South Africa allows the institution of private prosecution for public bodies on certain conditions, there is no such provision for companies and legal persons.

In the recent past in Kenya, many Kenyans are strongly disenchanted with the criminal justice system and deeply distrust the Kenyan Police Force (KPF).²⁸ To make matters worse, the Attorney General, who has the sole and constitutional responsibility of determining who should be prosecuted for the commission of an offence, has often exercised the power to prosecute very selectively.²⁹ Indeed, there have been cases where the Attorney – General has failed to prosecute where judicial inquiries have recommended prosecutions. The report of the

²⁶ Schönteich, M., Minnaar, A., Mistry, D., Goyer, K.C. ‘Private Muscle – Outsourcing the Provisions of Criminal Justice Services’ (2004) ISS Monograph No 93, Pretoria: Institute for Security Studies, Chapter 5; Schönteich op cit (note 4), pp. 172 ff.

²⁷ Jens Christian Keuthen, The South African Prosecution Service: Linchpin of the South African Criminal Justice System? *A minor dissertation submitted to the University of Cape Town* in fulfilment of the requirements of the degree Master of Laws (LL.M.), 2007. Pp 71

²⁸ Patricia Kameri Mbote and Migai Akech. Kenya: Justice Sector and the Rule of Law. A Review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011

²⁹ *Ibid*

Akiwumi Commission is a case in point. This report recommended the investigation and prosecution of listed police officers, provincial administrators and politicians who were allegedly involved in tribal clashes.³⁰

7. Recommendations

Various State Houses of Assembly are therefore urged to emulate the Kwara State House of Assembly and others which has repealed the Criminal Procedure Code Law and enact the Administration of Criminal Justice Law by taking into cognisance the need to expressly provide for private prosecution without creating any ambiguity in the procedure for approaching the courts by citizens without recourse to public prosecution institutions. In the same vein, there is the need to amend any provision of the ACJL in the various States to toe the path of ACJA as it obtains in the Federal Capital Territory and Enugu State ACJL 2017. The proposed amendment in the other states which are yet to enact the ACJL must expressly define 'complaint to include a complaint made on behalf of the complainant or victim of the crime by his legal practitioner. This will be in line with section 2 of the Canadian Criminal Code which defines the term "prosecutor" to include "the Attorney-General or, where the Attorney-General does not intervene, means the person who institutes proceedings to which the Canadian Criminal Code applies, and includes counsel acting on behalf of either of them" and section 116 of the Kwara State Administration of Criminal Justice Law. Under Part 24 of the Canadian Criminal Code, concerned person with summary conviction procedure, the term "informant" is defined to include a person who lays information.

In other words, the Administration of Criminal Justice Law should be enacted in all the States of the Federation to define the

³⁰*Ibid.*

scope and limits of private prosecution without imputing unintended provisions into the legislations under review.

The judiciary should be vigilant in instances where citizens want to deploy the legal mechanisms for concocted prosecution and personal vendetta.

8. Conclusion

It portends grave danger for Nigeria's nascent democracy if every citizen is licensed to institute criminal prosecution on behalf of the state without legal restrictions and conditions precedent. Section 143 of the repealed Criminal Procedure Code Law of Kwara State is not a blanket license for private legal practitioner to institute criminal prosecution at the beck and call of private citizens as it is still obtainable in States which are yet to enact the ACJL. We are of the view that a further judicial pronouncement and departure from the respected views of the learned jurists in cases such as *Oniyide v Oniyide*³¹ will further deepen the jurisprudence of our criminal justice system. The innovation of section 116 of the Kwara State ACJL, section 106 (e) of ACJA and section 178 [vi] and 181 [c] and [e] of Enugu State ACJL 2017 and the various jurisdictions from Australia to Canada and South Africa as it applies to vesting prosecutorial powers in the Crown should be sustained by our various State Houses of Assembly in their drive towards enacting the Administration of Criminal Justice Law.

³¹ *Supra*.