

# **The Office of the Attorney General in East Africa: Protecting Public Interest through independent prosecution and Quality Legal Advice**

**By Godfrey M MUSILA\***

## ***Abstract***

*Based on the theme ‘Constitutionalism in East Africa’ which is the broad focus of the current report, this paper considers the role of the Attorney-General in the three East African countries in advancing constitutionalism and the rule of law. In particular, it comparatively reviews the record of the AGs relating to their customary twin function – law enforcement (public prosecutor) and chief government legal advisor. In this regard, the paper examines whether the ‘public interest’ is always upheld, or whether it is the key animator in the execution of the stated functions, in particular that of law enforcement. By examining the place of the AG within the government structure and their relationship with certain political players such as the minister of justice where this applies, it discloses a general lack of independence that has undermined their law enforcement functions and the rule of law. Partly for this and other reasons advanced, the paper makes a case, with respect to Kenya, for reorganization to separate completely the prosecutorial and advisory functions. In conclusion, it proposes strategies of strengthening prosecution in East Africa as one of the remedies available to redress human rights violations and enhancing the rule of law.*

## **1. Introduction**

The institution of Attorney-General (AG) has a long pedigree.<sup>1</sup> The term has traditionally been used to refer to any person who holds a general power of attorney to represent a principal in all matters. In the common law tradition, anyone who represents the state, especially in criminal prosecutions, is such an attorney.<sup>2</sup> In contemporary times, in most common law jurisdictions, the Attorney-General (AG) is the main legal adviser to the government and in some jurisdictions may in addition have executive responsibility for law enforcement or responsibility for public prosecutions. One therefore finds at least two traditions among these countries – those that vest both the advisory and prosecutorial functions in the AG, and those in which the functions are separated, where law enforcement is performed by a Director of Public Prosecutions (DPP). This paper examines the exercise of both functions in the three countries with a view to: 1) establishing competence and factors that motivate the performance of their duties; 2) establishing whether ‘public interest’ has been a central consideration in this regard; 3) making a case for the total separation of the roles in the case of Kenya; and 4) making recommendations for the strengthening of human rights protection in the region through public prosecutions.

## **2. A word on constitutionalism**

Although the modern concept of constitutionalism is confusing and does not lend itself to easy definition, contemporary commentary reflects agreement that the term entails at least two ideas – limitation of government functions in a way that protects citizens from government

---

\* LLB (Hons)(Nairobi), LLM (Pretoria), PhD (Candidate) (Witwatersrand, Johannesburg) and Research Fellow, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). The author wishes to heartily thank Emmanuel Wetangula, Cheggy Mziray and Juster Kaiza for their assistance. (E-mail:musila79@yahoo.co.uk)

<sup>1</sup> Until the advent of public prosecutors, in the United States commonly called district attorneys at the county or district level, criminal prosecutions were conducted by private persons, usually lawyers, who would be appointed attorney general by receiving a bill of indictment from a grand jury

<sup>2</sup> Although an official may be designated, as is often the case, as the permanent AG, anyone who represents the state in the same way, even if only for a particular case, is an AG

excesses, and secondly effective accountability of relevant actors within constitutional limits.<sup>3</sup> Manga notes that seen this way, ‘constitutionalism has certain core, irreducible and possibly minimum content of values with a well defined process and procedural mechanisms to hold government accountable.’<sup>4</sup> With regard to the AG, this would entail that as a constitutional, public functionary and member of government, the exercise of his/her duties must be constitutionally limited and subject to appropriate measures of accountability. Although elusive, commentators have identified some ‘core elements’ of constitutionalism in light of which, to the extent of their relevance, the discussion on the AG’s functions is considered in this paper: the recognition and protection of fundamental rights and freedoms; the separation of powers; an independent judiciary; the review of the constitutionality of laws; and the control of the amendment of the constitution.<sup>5</sup>

### 3. Public interest

Discourse on the effectiveness, propriety and legality of the actions of functionaries are often underpinned with a further elusive notion – ‘public interest,’ which is central to policy debates, politics in general, democracy and the nature of government itself. While it may be easy to say that such and such public officer has not acted in the ‘public interest’ as has been the case with the office of the AG, it is not always easy to pin down with certainty what this means. A brief exploratory note is therefore necessary before proceeding to subject the AG’s functions to scrutiny on this basis.

The term ‘public interest’, often contrasted with private or individual interest, at a basic level refers to the ‘common well-being’ or ‘general welfare’.<sup>6</sup> While there is little, if any, consensus on what exactly constitutes public interest because of variance with circumstances, it refers generally to collective or majority interests based on agreed, constitutionally or otherwise, societal values and philosophy such as equality, open and democratic society, rule of law among others. In the United States and many parts of the Commonwealth, ‘public interest litigation’ based on a not-so-concrete ‘body of law’ has emerged and become fairly well developed over the years.<sup>7</sup> Through this, Non Governmental Organisations (NGOs), activists, lawyers among others have brought proceedings aimed almost always at law reforms on specific issues. In broad terms, since as a society we aspire to a certain way of life and government – democracy, constitutionalism, rule of law and respect for human rights, actions

---

<sup>3</sup> See CM Fombad ‘Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: lessons and perspectives from Southern Africa’ (forthcoming) 6; BO Nabueze, *Constitutionalism in the emergent states* (1973) at p. 1; S Gloppen, *South Africa: The battle over the constitution* (1997), at 43

<sup>4</sup> Manga, as above

<sup>5</sup> See Manga, as above; L Henkin, ‘Elements of constitutionalism’ 60 *The Review* (1998), pp.11-22; Sartori Giovanni, *The theory of democracy revisited* (1987); Bo Li, ‘What is constitutionalism’ <[http://www.oycf.org/Perspectives/6\\_063000/what\\_is\\_constitutionalism.htm](http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm)>(accessed on 6<sup>th</sup> November 2006); Walter F. Murphy, ‘Constitutions, constitutionalism and democracy’ in Douglas Greenberg, et al (eds), *Constitutionalism and democracy: Transitions in the contemporary world* (1993), pp. 3-25

<sup>6</sup> See generally E Rekosh, ‘Who defines the public interest?’ (2005) *Sur Int’l J on Human Rights* yr 2 No. 2 p 167

<sup>7</sup> *Black’s Law Dictionary* defines ‘public interest litigation’ as ‘a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected’. For a general discussion on ‘public interest litigation’, see generally V Jaichand ‘Public interest litigation strategies for advancing human rights in domestic systems of law’ (2004) *Sur Int’l J on Human Rights* yr 1 No. 1 p 127

that offend against these ideals must be said not to be in keeping with public interest at any one time.<sup>8</sup> However, since it is not always evident, a specific situation has to be scrutinized to establish what public interest consideration is in issue.

When one subjects the AG's functions to enquiry to establish whether it is in the public interest, the bench mark necessarily is, in a society that strives to entrench constitutionalism, the rule of law and a culture of human rights, whether such exercise is in keeping with these broad societal goals and values. The reason is not far to seek: depending on the variety of cases he/she may deal with or prosecute and other functions that may be conferred upon that office by law, the AG is an anticorruption campaigner, consumer advocate, public trustee, human rights defender rolled into one.<sup>9</sup> For instance, in Tanzania, the AG is enabled by law 'notwithstanding any written law to the contrary', to join and to be heard 'in any proceedings of suit or administrative body' considered to be of public interest.<sup>10</sup> This clearly illustrates that the AG is the ultimate defender of the 'public interest' in whatever guise and must be guided at all times by this consideration in their duties.

With respect to the functions under consideration in this paper, only the Ugandan constitution specifically mentions 'public interest' in the context of law enforcement functions enacting that:

[i]n exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.<sup>11</sup>

As disclosed below, these considerations, though not provided for in the Kenyan and Tanzanian constitutions find support in case law relating to law enforcement. In Tanzania, adherence to tenets that advance the public interest by the AG, DPP and subordinates are codified.<sup>12</sup> In view of this provision, the proper position would be that in the exercise of his/her functions, for instance where the AG or DPP seeks to institute or withdraw criminal charges against an individual, his/her actions must be subject to judicial scrutiny requiring justification especially where the case in issue has attracted wide public interest and where certain fundamental questions such as the rule of law and fundamental rights are in issue. In complete opposition to the transparency view, some have wrongly supported non disclosure of motives arguing that in exercising *nolle prosequi* powers for instance, where the AG or DPP may terminate a prosecution whether commenced by his/her office or a private party does not require him/her to give reasons.<sup>13</sup> This approach is clearly inimical to at least one tenet of constitutionalism – that requiring accountability within constitutional limits of public functions. It is equally at variance with the practice in major commonwealth jurisdictions. This argument is developed later on.

#### 4. The role of the Attorney-General

---

<sup>8</sup> Many laws articulate some of their more stringent or invasive provisions on this basis. For instance, dissemination of potentially libellous matter (that invades individual rights to privacy) is under certain conditions justifiable in the public interest (right of the public to information as well as the need to promote a vibrant democracy).

<sup>9</sup> See for instance arts 8 (2) (a)(b)(c)(d) Tanzanian Office of AG Act which vest in the AG powers of Administrator General, Registrar General, Official Receiver and Public Trustee

<sup>10</sup> Art 17 (1) (a) Tanzanian Office of AG Act

<sup>11</sup> Art 119 (5) Constitution of Uganda

<sup>12</sup> See Code of Ethics, fn 47 below

<sup>13</sup> See KB Mensah 'Discretion, *nolle prosequi* and the 1992 Ghanaian constitution' (2006) vol 50 *Journal of African Law* p 48

#### 4.1 The advisory function

The three constitutions vest in the AG the power to advise the government on all legal matters, noting in broad terms that he/she ‘... shall be the principal legal adviser of the government.’ In this capacity, the AG has the duty to: a) give legal advice and legal services to the government on any subject; b) to draw, scrutinise for legal and policy soundness, all contracts, agreements and international legal undertakings in respect of which the government or one of its agencies has an interest; and (c) to represent the government in courts or any other legal proceedings to which the government party.<sup>14</sup> Since all references are to ‘government’ the advisory role extends to the executive, parliament and to the extent conceivable and possible, the judiciary. As an ex-Officio member of the National Assembly, he advises parliament on its legislative functions and in particular, oversees the drafting of all bills, including those initiated by private members in respect of which he is required ‘to afford professional assistance’.<sup>15</sup>

As an advisor, the AG clearly is a public servant and is expected to act at all times in the public interest, as reflected in the laws governing that office. A number of issues are relevant in this regard. First, for its importance to the decision making process at the highest levels of government, it demands elevated levels of competence. The Ugandan and Tanzanian constitutions rightly underscore the necessity for competent legal advice and representation of a prospective AG, imposing specific minimum legal and other qualifications.<sup>16</sup> Secondly, the ability of the AG to act independently is another central consideration. It is possible, as has happened in the past, that a country could be committed to burdensome financial undertakings and exposed to lecherous corruption that could have deleterious effects to the economy arising from incompetent legal advice and representation. Lamentably, the history of the three countries is littered with inexplicable decisions of a legal nature that have plunged them into deep indebtedness, perpetrated the scourge of corruption and abuse of human rights. The recent Anglo Leasing and related contracts in Kenya illustrate with clarity how lack of proper legal advice and perhaps a disposition on the part of the AG to act without question at the behest of political players augurs badly for the interests of the general public.<sup>17</sup> In Uganda, politically motivated legal advice by the AG, (who also doubles up as Minister of Justice) to the Electoral Commission to reject the presidential candidature of President Museveni’s challenger in the last elections on dubious grounds was rejected, underscoring the need for independent democratic institutions.<sup>18</sup>

Quite clearly, constitutionality of all bills passed by parliament into law, as well as their conformity with the country’s international obligations must be key concerns for the AG. Yet recent experience discloses otherwise. Numerous laws enacted by parliament have been found to be at variance with one or other provision of the constitution and declared unconstitutional. The most notable in Kenya relates to the law establishing the Kenya Anti-Corruption Authority (KACA).<sup>19</sup> The myriad of bad laws perhaps speaks directly to the incompetence at the AGs Office.

---

<sup>14</sup> See arts 3, 4 & 250 Constitution of Uganda; art 26 Kenya Constitution; art 59 Tanzanian Constitution and s 8 Office of the Attorney-General (Discharge of Duties) Act, 2005 (Tanzania)

<sup>15</sup> See art 94 (d) Ugandan Constitution; art 8 (1) (c) & (h) Constitution of Tanzania

<sup>16</sup> See in particular art 119 (2) Ugandan Constitution; arts 59 (2), 109(8) Constitution of Tanzania

<sup>17</sup> The contracts in issue, supposedly concluded with the AG’s legal sanction have cost the tax payer millions of shillings and reversed the fight against corruption in Kenya

<sup>18</sup> See fn 36

<sup>19</sup> *Mwai Gachiengo & Another v Republic* Nairobi H.C Misc Applic. No 302 of 2000 (Unreported)

While these are not meant to excuse the AG's office failure in its advisory role, some reasons can be advanced here.<sup>20</sup> First, the important function of advising government on legal matters is of such serious magnitude that it should not be joined with any other that may detract from focussed and specialised attention. This is indeed the proper function of an AG. As government advisor, the function covers all ministries and numerous public corporations and commissions where applicable. To vest in this office the additional function of chief prosecutor, with the attendant heavy workloads unsurprisingly results in a botched job. This reason alone justifies separation of the two functions as advanced later on. Second, AGs offices are largely understaffed and do not necessarily attract the best qualified legal minds who shun the paltry salaries on offer. Offering competitive packages would not only serve to enhance competence in this office but also dissuade badly remunerated functionaries from corrupt ways. Third, lack of proper legal training, and limited further (refresher) and job-specific training presents few opportunities for state counsel to learn or better themselves at their job. Further, lack of incentives, in particular the lack of career advancement opportunities in an environment of patronage does little for the morale of those involved. Fourth, the fiction that the AG has security of tenure in the case of Kenya, and cannot therefore be dismissed other than by tribunal inquiry or resignation has perpetrated incompetence. Unlike the Tanzanian constitution<sup>21</sup> which clearly stipulates that the AG holds office at the will of the President, the Kenyan and Ugandan ones are silent, although as a Minister, the AG in Uganda may be fired by the President. The idea of having an AG with security of tenure is fundamentally unsound. To analogise this legal and logical paradox, if anyone can hire and fire an attorney, why should the public be saddled with an attorney of questionable competence and cannot remove them without recourse to onerous procedures? The logic of revering constitutional offices does not support the perpetration of practices inimical to the core constitutional values referred to. Lastly, the fact that there may be loopholes in the law, or that conditions are as bad as they sound doesn't not excuse state counsel, including the AG to disregard all basic tenets that should guide their functions. Bad ethics must have something to do with the state of affairs.

#### 4.2 Law enforcement function

While in Uganda and Tanzania the Director of Public Prosecutions (DPP) established as a separate office is in charge of law enforcement (public prosecutions),<sup>22</sup> the DPP in Kenya is not a completely separate office. The DPP is subordinate to the AG who holds the ultimate prosecutorial powers and exercises the 'extraordinary' powers attendant thereto notably *nolle prosequi*.<sup>23</sup> In the former case, this is exclusive to the DPP, who may terminate, as the AG in Kenya, any criminal prosecution commenced either by his/her office or any private party.<sup>24</sup>

To act in public interest requires independence. Constitutionally, all the three countries comply with the requirement for independence, generally providing that in their prosecutorial (law enforcement functions) the AG (or DPP) is not under the control or direction of any

---

<sup>20</sup> See T Maliti 'Two Wakos are better than one: Why Kenya's AG Drafts Bad Laws' *The East African Standard* Monday, February 12, 2001

<sup>21</sup> Art 59(5) a Constitution of Tanzania; art 119 (1) Constitution of Uganda

<sup>22</sup> Art 120 Constitution of Uganda; art 59B Constitution of Tanzania, Criminal Procedure Act (1985) and Office of the Attorney-General (Discharge of Duties) Act, 2005 (Tanzanian Office of AG Act). While general prosecutorial powers and administration of justice is exercised by the DPP in Tanzania, the AG seems to retain 'residual' powers to prosecute. See art 8 (1) (a) & (b) Office of AG Act

<sup>23</sup> S 26 Constitution of Kenya (2001)

<sup>24</sup> Art 120 (3) (c) & (d) Constitutions of Uganda

authority.<sup>25</sup> Nevertheless, practice seems at variance with these express stipulations. On occasion, the AG, especially in his law enforcement function has acted in a manner that leads commentators to question their independence. Nowhere is the lack of independence and failure to act in the public interest more evident than the exercise of the powers of *nolle prosequi*. Due to the politicization of the function and abuse, some have argued for its limitation or total abolishment.<sup>26</sup> Indeed, commentary on how this power has been exercised, and generally how the office of the AG in Kenya has performed is scathingly critical.<sup>27</sup> History is replete with examples of prosecutions conducted for reasons other than public interest, thus amounting to political witch hunts and in some cases to settle personal scores.<sup>28</sup>

At least two reasons for the abuse of *nolle prosequi* may be advanced here. First, the fact that its exercise has been tarnished by political considerations is perhaps the key one. Denials by AG of political compromise haven't helped to repair tarnished image.<sup>29</sup> Second, as explained further below, the courts have not, and still do not always subject *nolle prosequi* requests to necessary scrutiny that would unearth improper motives. It may not be entirely off the mark to argue that the judiciary has been complicit in this abuse.

Another instance, perhaps a more contemporary one in which the independence of the AG arises with respect to corruption, in particular under the Corruption and Economic Crimes Act of 2003 (Kenya), which vests on the one hand the powers to investigate corruption and related crimes in the Kenya Anti Corruption Commission and prosecutorial powers in the AG. The recent skirmish between the AG and KACC in Kenya has demonstrated challenges and constitutional imprudence of vesting investigatory and prosecutorial powers in separate bodies, especially without appropriate collaborative mechanisms.<sup>30</sup> It is much worse when the bodies appear to be at odds with each other.

As opined above, there is merit in the view that part of the problem with the poor performance of the AG's office lies with lack adequately trained personnel in the right numbers. This is particularly evident with respect to prosecutions. One may not have a choice, but to confer much of this role to poorly trained police officers with only but an inkling of human rights issues implicated in their work is a bad thing. The courts on their part have in the past failed to enforce compliance with fundamental human rights guarantees. The constitutionality of police prosecutions aside,<sup>31</sup> something needs to be done to entrench a culture of human rights in police work.

---

<sup>25</sup> S 26 (6) Constitution of Kenya; S 119 (6) Constitution of Uganda

<sup>26</sup> See Nation editorial, 'Scrap or limit AG's powers to terminate court cases' Tuesday, May 31, 2005 and G Warigi 'The writing is on the wall for AG' *Sunday Nation*, May 29, 2005

<sup>27</sup> See for instance G Warigi 'Justice does not live here any more' *Sunday Nation*, May 22, 2005; J Kadida 'Wako stops case against the VP' *Daily Nation* Friday, May 06, 2005; J Kadida 'Wako stops case against himself' *Daily Nation* Wednesday, March 09, 2005; P Mwaura 'Criminal libel: Why was the AG shy?' *Nation Saturday*, January 22, 2005

<sup>28</sup> Standard Team 'Kenya: A Peek At Njonjo's Bully Era' *The East African Standard* October 29, 2006 documenting the tumultuous times of the all powerful former AG. See also O Oloo 'Must Amos Wako Go?' Kenya Democracy Project <<http://demokrasia-kenya.blogspot.com/2005/05/must-amos-wako-go.html>>(accessed on 10 November 2006)

<sup>29</sup> The Nation Correspondent 'Wako denies being influenced over Delamere and Lucy cases' *Daily Nation* Monday, May 23, 2005;

<sup>30</sup> Standard Team 'Kacc: Evidence is sufficient to prosecute graft cases' *The Standard*, Friday October 20, 2006

<sup>31</sup> A claim that police prosecutions are unconstitutional may not entirely be without merit, given that it may constitute a convergence of investigatory and prosecutorial powers in the executive arm of the state and may be said to offend against the *audi alterem partem* doctrine

### 4.3 Judicial review and enforcement of public interest by the courts

Irrespective of the unequivocal stipulation by the constitutions of the three countries that the AG in the exercise of his/her functions ‘is not subject to the direction or control of any other person or authority,’ and arguments that the AG need not give reasons when invoking termination powers, prosecutorial power is not unlimited. It is subject to at least three peremptory considerations: the bill of rights, in particular the rights of accused persons; the proper administration and effective functioning of the courts; and public policy (interest) as the overarching factor. The Kenyan constitutional court articulated in the landmark case *Githunguri v Republic*,<sup>32</sup> which has been followed in numerous other cases<sup>33</sup> that notwithstanding the AG’s (or DPP) prosecutorial discretion to commence and terminate proceedings, the High Court ‘has inherent power and duty to secure fair treatment of all persons who are brought before it or subordinate courts and to prevent abuse of the process of the court.’ Importantly, the court stated that while the AG has unfettered discretion to institute and conduct prosecutions, this must be exercised in a *judicious* way – not oppressively, arbitrarily and in a manner contrary to *public policy*.

Consistent with the above view, the High Court reserves the power to scrutinize the AG’s actions for conformity with the constitution and public interest. One commentator has stated of the DPP’s selection of cases to prosecute in the UK, a particularly relevant context for Commonwealth East Africa that ‘... the basic issue in all cases is whether, in the whole of the circumstances, the public interest requires that the proceedings should be taken in a particular case.’<sup>34</sup> All cases that advance constitutionalism, protection of human rights, the rule of law and other constitutional values would clearly be in the public interest.<sup>35</sup> Conversely, when the AG terminates a prosecution that would otherwise advance these ends, his/her actions must be said to militate against the public interest. As this paper discloses, our juridical history is littered with this unsavory reality. For a society that seeks to advance good governance and constitutionalism, it is unacceptable that despite a long established principle, the AG is allowed, clearly motivated by factors other than public interest and the fundamental guarantees of those involved, to terminate cases that would otherwise advance a common cause.

## 5. Independence and relationship with the Ministry of Justice

Two relationships are relevant here – that between the AG and the Minister of Justice and that between the AG and other governmental departments and entities. As the key government legal advisor, advice from departmental legal counsel is subordinated to him/her. This means that the AGs influence, whether good or bad is bound to affect the work of such entities. In Tanzania, where the issue is well regulated by law, in house ministry and departmental counsel all take instructions from the AG, whose advice represents official government

---

<sup>32</sup> *Githunguri v Republic*, in the Matter of the Constitution of the Republic of Kenya, Miscellaneous Criminal Application n 180 of 1985

<sup>33</sup> *Republic & others Ex parte Kipng’eno Arap Ng’eny*, Nairobi HC Misc Crim Applic No 406 of 2001 at 13 noting that it will examine the AG’s conduct to establish whether it is within ‘lawful boundaries’

<sup>34</sup> See Bernard M Dickens ‘Control of prosecutions in the United Kingdom’ (1973) *International and Comparative Law Quarterly* vol 22 at 11 noting that ‘... the basic issue in all cases is whether, in the whole of the circumstances, the public interest requires that the proceedings should be taken in a particular case.’ See also Glanville Williams (1956) *Criminal Law Review* p 222

<sup>35</sup> See *Kipng’eno* case (n 32 above) p13 articulating that the AG’s prosecutorial power ‘is a necessary power to protect common good’

view.<sup>36</sup> Two recent cases in Uganda illustrate the potentially harmful effects for fundamental guarantees and the rule of law in a case where the advisory role of the AG is exercised on grounds other than sound legality, especially where such politicized advice is directed at influencing the decisions of constitutional institutions in favour of dominant political players. In one case, the AG, who is also a Minister of Justice, had advised the Independent Electoral Commission to exclude a presidential candidate on grounds unrelated to the electoral process.<sup>37</sup> In the second case, the AG advised government to disregard recommendations of the Inspectorate of Government, an independent constitutional body charged with exclusive investigative and prosecutorial discretion relating to corruption, after the IGG had called for the rescinding of power generation license on account of alleged corruption.<sup>38</sup> Regarding the first issue, the case of Kenya and Uganda is illuminating. In Kenya, where the previously discarded ministry has been revived by the Kibaki administration, there is a Minister responsible for the Justice docket separate from the AG. This has created an acrimonious and potentially dangerous situation for constitutional guarantees since their roles are not at all clear. Commentators have questioned the need for such a ministry pointing to duplication of functions and lack of clear delimitation that may not augur well for the rule of law.<sup>39</sup> The minister, who should handle matters political and policy, has, since the creation of that office, been accused of overreaching and in dictating to the AG in the performance of his law enforcement and professional duties. At some point, the AG and DPP were said to be locked in a war of words with the Minister.<sup>40</sup> It must be pointed out that while having a ministry of justice and an AG at the same time is not bad in itself as this is the case in a number of jurisdictions, what is important is how powers are delimited so as not to unduly politicize and compromise whatever nonpolitical function the AG may exercise.<sup>41</sup>

## 6. The AG, separation of powers and judicial independence

The separation of powers and the independence of the judiciary are key ingredients in establishing constitutionalism and the rule of law. Apart from the possibility of political compromise, the questionable practice of *nolle prosequi* and prosecutorial power equally speaks to the absolute necessity that judicial independence be upheld. The history of the three countries reveals long periods of judicial subservience to the executive that led to massive abuse of human rights. The unwillingness of courts to adjudicate on the basis of established doctrine and principle coupled with politicized public prosecutors had spelled doom for

<sup>36</sup> Arts 15(1) & (2), 21, 22 and 23 Tanzanian Office of AG Act

<sup>37</sup> The Ugandan Electoral Commission's rejection of this advice on grounds of its constitutional independence (art 62 Ugandan Constitution) was later vindicated by the Constitutional Court (Feb 2006) which confirmed that this did not offend against art 119(3) of the Constitution which grants the AG sole advisory powers for government. See at Uganda Presidential and Parliamentary Elections 23 February 2006 European Union Election Observation Mission Report at 6, 14, 16 & 22 at <[http://ec.europa.eu/comm/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/uganda/final.pdf](http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/uganda/final.pdf)>(accessed on 13 November 2006)

<sup>38</sup> 'ICG calls for withdrawal and rescinding of power generation license' (2006) *Policy Review Newsletter* Vol 6 Issue 6 p 1

<sup>39</sup> There are ample lessons in history showing that the Minister will tend to encroach on the AGs powers. The woes of Kenya's shortest serving AG, James Karugu (1980-1981) who succeeded Charles Njonjo show how, Njonjo, soon after becoming Minister of constitutional and home affairs had began encroaching on the former's functions. Coupled with his attempts at influencing the prosecution of his cousin (Njonjo's), Karugu was reportedly pressured to resign. See Maliti n 20 above

<sup>40</sup> M Muiruri 'No hope for speedy justice' *The Kenya Times* 9<sup>th</sup> June 2006

<sup>41</sup> Countries with a Minister of Justice and AG include:

human rights in the region.<sup>42</sup> While a more detailed discussion of this question is beyond the remit of this paper, one cannot miss to observe that complete independence of our judiciaries, lack of which has facilitated malpractice and human rights abuse by the AG (DPP), is still beyond attainment.<sup>43</sup> To the extent that the AG, through political action or influence, especially where he/she doubles as minister of justice may impinge on the ability of the judiciary to dispense its adjudicative function without interference, they may be said to undercut the entrenchment of the rule of law and respect for human rights.

## 7. Separating the adviser and prosecutor roles: what arguments?

As both Uganda and Tanzania have completely separate advisory and law enforcement (prosecutorial) functions, comments at this regard relate in large part to Kenya where this is not so. References to the other two countries permit a comparative view of how effective such separation has promoted constitutionalism and the rule of law, and to inform the discussion on Kenya.

Any proposal to separate the adviser and prosecutor roles currently vested in the AG in Kenya would not be new. Such unsolicited recommendation was made in 1990 to the 19-person Kenya African National Union (KANU) Review Committee appointed to seek views into how to revitalize the then sole political party.<sup>44</sup> The idea was that the political (advisory) function be separated from the non-political (prosecutorial) one to be exercised by a DPP with the political function reserved for the AG or a Minister for Justice (in case a DPP office is not created). The review committee appointed by the Chief Justice was asked to focus not on s 26 powers but, on the 'efficient functioning' of departments falling under the AG's office. The committee was disbanded almost as soon as it had been constituted and in the end a DPP office answerable to the AG, and not as a separate entity. As currently set up, the DPP is subordinate to, and vulnerable to the manipulation of the AG. A recent occupant of the office has lamented this fact after he was sacked apparently for 'pursuing too vigorously' politically sensitive cases.<sup>45</sup>

Numerous reasons, some of which are already disclosed in the discussion above can be made for the appropriate separation of the two roles. 'Appropriate', because where such separation negates or inadequately responds to the need for separation, such endeavor is futile as Kenya's earlier reforms demonstrate. The numerous constitutional court rulings declaring various statutes unconstitutional for instance raise other fundamental issues which further necessitate a split. First, the AG has too many duties and even where he is assisted, has no time and capacity for effective supervision resulting in bungled trials, badly drafted laws and legal advice and service of questionable quality such as that that results in approval of illegal

---

<sup>42</sup> See KG Adar 'The Internal and external contexts of human rights practice in Kenya: Daniel Arap Moi's operational code' *African Sociological Review* (2000) 4 (1) p 74 at 77

<sup>43</sup> For a more detailed and systematic inquiry into the question see generally See Linda van de Vijver (ed) *The Judicial institution in Southern Africa. A comparative study of common law jurisdictions* (2006). See also S Gloppen, A Kibandama & E Kazimbazi 'The Role of Courts in the Transition Dynamics in Uganda-Background Notes' March 2005 at <<http://www.cmi.no/uganda/?id=8&Monthly-Updates>> (accessed on 12 November 2006)

<sup>44</sup> See Maliti, n 20 above

<sup>45</sup> See S Kanchory 'Dont shoot the messenger to stem fury on *nolle prosequi*' *Daily Nation* Monday, June 06, 2005. Anglo Leasing and Murgor stating he was never allowed to do his work. See <<http://demokrasia-kenya.blogspot.com/2005/05/very-friendly-message-to-mr-murgor.html>> on the lack of independence of then DPP and numerous politically terminated cases notably that against the First Lady for assault and murder charge against grandson of aristocratic farmer Thomas Cholmondeley

and risky contracts. Administrative logic alone speaks for change. Second, the competence and adequacy of staff in the AG's employ is questionable. In a rare public admission, the AG had in his defence after the Kenya Anti-Corruption Authority (KACA) was declared unconstitutional stated that his office did not have enough draftsmen/women.<sup>46</sup> Given that sometimes draft laws are required within tight timelines the product will almost certainly be shoddy. Due to the poor remuneration and bad working conditions, it is hardly surprising that this is the case. Thirdly, parliament, which has many lawyers within its ranks, seems not to contribute much in the production of sound legislation.<sup>47</sup> Little or non involvement by the general public and in particular special interest groups in the legislative process means useful resources are not tapped. Vigilance of all stake holders, in particular civil society is vital. As the election case in Uganda demonstrates, even where the two functions are separated, the AG may advise the government to act in ways that offend against what is good for the general public to the benefit of partisan agenda.

## 8. Conclusions: strengthening human rights through prosecutions

To strengthen at least one avenue of redressing human rights violations - through prosecution of perpetrators, a number of reforms, some already evident from the preceding discussion are necessary. Apart from ensuring the correct configuration of prosecutorial powers and advisory roles that reduces or eliminates factors that militate against proper performance the following comments may be informative. The AG or DPP does not act alone. Steps to improve delivery – prosecution and quality legal advice must target their subordinates too. Comments here reflect this view. There is need for professional competence in drafting, legal advice & representation and prosecution. In particular, correct advice to the government on the implications of its international human rights obligations is necessary. Conduct of prosecutions must reflect the fact that the AG is the public guarantor, together with other relevant organs, of human rights. Since police prosecutions will remain a reality until the state can marshal sufficient resources, it is necessary to train and those legally authorised in issues relating to human rights. At another level, measures must be taken, including better remuneration to attract the right people in sufficient numbers into the public service. Nevertheless, since their ability to deliver implicates factors beyond professional competence, it may be necessary to institute and implement a binding Code of Ethics for all state law officers including the AG such as that currently in force in Tanzania.<sup>48</sup> The code, which reflects, but goes beyond usual stipulations regarding the practice of advocates<sup>49</sup> demands of state law officers, among others integrity, honesty, competence and quality of service to the government and the public in a diligent, conscientious, and efficient manner.<sup>50</sup> Stiff punishments, including dismissal from service must accrue for those who breach the code.<sup>51</sup>

Proper constitutional and legal frameworks favourable to human rights are necessary, especially in Kenya where constitutional reforms are still alive. The importance of a dispensation that sufficiently entrenches rights and remedies and enables human rights actors to intervene, probably as *amicus* in processes where human rights are in issue cannot be overemphasised. While the courts as in the case of Kenya have to an extent checked the

---

<sup>46</sup> T Maliti (n 20 above)

<sup>47</sup> See S Mburu 'Chief Prosecutor lays blame on Parliament' *Sunday Nation*, August 21, 2005 on DPP blaming parliament for acquittals and termination of cases

<sup>48</sup> Code of Ethics for State Attorneys and other Law Officers, (Code of Ethics) art 27 Tanzanian Office of AG Act and Annexed Schedule

<sup>49</sup> Art 2 Code of Ethics

<sup>50</sup> Arts 3, 4, 5 & 6 Code of Ethics

<sup>51</sup> Art 28 Tanzanian Office of AG Act

functions of the AG in favour of liberties, more needs to be done. Efforts aimed at increasing access to justice must be intensified. Indeed, access to justice remains one of the main challenges in human rights protection in the region. Legal aid remains inadequate or entirely unavailable. Public interest litigation, through which specific issues of public interest could be advanced, and in which NGOs can play a major role, is still largely an alien concept. Efforts and resources need to be pooled in this regard. A judiciary that dances to the tunes of the executive of the day is bad for human rights. To obtain compliance with human rights, in particular secure remedies for violations through prosecutions, targeted reform measures must go beyond the AG or DPP. All stakeholders must join in this endeavour.