

Received: 13-03-2025

Accepted: 05-03-2025

ISSN: 2814-1695

<https://doi.org/10.61867/pcub.v3i1a.205>

CTHLR 3(1): 118-131 (June, 2025)

THE EFFECTIVENESS OF THE THEORIES OF PROSECUTION IN PRIVATE PROSECUTION

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Abstract

The use of comparative and doctrinal methodology was applied in this paper. The doctrinal methodology was a desk-based research approach that comprised case laws and legal materials that are relevant to the paper. The comparative approach involved a critical analysis, evaluation of facts and write up in relation to the theory of prosecution by exploring relevant statutory materials and text books and treaties. Although there are various theories of prosecution, this paper focuses mainly on two theories of prosecution which are the servant of the law theory and the what and who theory of prosecution. It also discusses the effectiveness of the theories of prosecution in relation to private prosecution. It considers the importance of the theories and the expected responsibilities of the private prosecutor by imbibing the discussed theories. Finally, the paper recommends that private prosecution should embrace the servant of the law theory as it does not just promote justice but it ensures that priority is placed on the constitutional provisions of the rights a defendant and protection of crime victims

Keywords: Theories, Prosecution, Private Prosecution, Servant of the Law, What theory, Who theory

Introduction

The criminal prosecution process can be long and intricate and usually involves a whole lot of persons starting from the police or any other law enforcement agency, the prosecutors whether public or private, judges, the defendant and his counsel.¹ Criminal prosecution is not limited to just a body but it cuts across all the criminal justice system with the aim of promoting speedy, fair, and just administration of criminal justice. The diversity of each legal system cum jurisdiction brings about the peculiarity in the ways and institution of their criminal justice system. Criminal prosecution may either be public or private. Before a criminal trial can commence, the prosecutor has to make a prosecutorial decision as to whether a suspect should be charged for a criminal act or not and whether a criminal prosecution should be continued or discontinued.²

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¹ CDPP, 'Steps in Prosecution'

<<https://www.cdpp.gov.au/prosecution-process/steps-prosecution>> accessed 7 October 2022.

² Constitution of the Federal Republic of Nigeria 1999, ss 174 and 211.

Hence, the theories of prosecution are necessary to understand the concept of prosecution. They identify the responsibilities of a prosecutor, the aim of prosecution and what the private prosecutor is to consider before proffering a charge for a criminal act. The issues of who controls and makes sentencing decisions are also considered. However, there is neither a well recognised nor universally recognised theories about prosecution available in both legal and criminological texts. However, various scholars have highlighted their perspectives and propounded different theories of prosecution. Some theories focused on the work of the individual line prosecutors from a sociological view with emphasis on the subjective judgements of prosecutors. Some others concentrated on the institutional settings, court communities and the other criminal justice agencies.

This is to be able to highlight the significance of institutional requirements and challenges faced by the prosecutors. The theories also considered the relationship between the prosecutors and other players within the criminal justice system. The propounded theories of prosecution are justice theory, servant of the law theory, the what and who theory, sociological theory, criminological theory, economic theory, self-interest theory and fiduciary theory. For the purpose of this paper, the servant of the law theory and the what and who theory of prosecution was discussed.

The Servant of the Law Theory

According to Bellin a former prosecutor and a professor of Law,³ there is no normative theory on prosecution instead, he propounded the servant of the law theory which the court has used to describe the prosecutor as the servant of the law.⁴ He described the theory as more of a 'domestic theory' that aims to transform the American prosecutorial behaviour. The idea, according to Bellin, focuses on potential advantages for the American criminal justice system in which the primary purpose of prosecutors shifts from being an advocate for justice to being a servant of the law.⁵ This theory is expected to outline how the prosecutor is to serve in the interest of the law in regard to certain situations. Even though serving the law is clearer than seeking justice, yet, it could be an arduous task because

³ Jeffery Bellin is a Professor of Law at William and Mary Law School; he was also a prosecutor in Washington DC. His areas of concentration are Criminal Law, Criminal Procedure and Evidence; His most recent book is *Mass Incarceration Nation* published in 2022.

⁴ *Berger v United States* (1935) 295 US 78,88.

⁵ Jeffery Bellin, 'The Power of Prosecutors' (2019) 94 NYULR 171.

high expectation is placed on the prosecutor to serve the purpose of the law.⁶ Notwithstanding that it is expected that a prosecutor seeks justice, such prosecutor including a private prosecutor is to serve in the best interest of the law.

The law dictates what constitutes crime and punishes same. It also lays down the procedure which criminal proceedings/trials must follow particularly placing on the prosecution the burden of proof beyond reasonable doubt.⁷ The court has held in a number of cases that the proof beyond a reasonable doubt is a constitutional necessity.⁸ Some of the other rights the law provides for the defendant include right to a counsel,⁹ right to fair hearing,¹⁰ right to an interpreter.¹¹ When a prosecutor embraces all the available provisions of law and the rights available to a defendant, he would not be insistent on getting a defendant convicted at all cost. Such prosecutor would see the law as being served and it would not matter whether he losses or not. That is, whether the defendant was convicted, acquitted or the case dismissed for want of sufficient evidence or unlawful arrest or interrogation, as long as law has been served, he is deemed to have done his job and would be satisfied by it.¹²

The servant of the law prosecutor would place a priority on constitutional provisions on the rights of a defendant.¹³ He would decline and restrain from any situation or procedure that would breach the rights that the defendant is entitled to such as right to bail.¹⁴ A private prosecutor would have to imbibe these characteristics. Private prosecutors should

⁶ Laura Appleman, 'Local Democracy, Community Adjudication and Criminal Justice' (2017) 111 NWU LR 1413.

⁷ Constitution of the Federal Republic of Nigeria 1999, s 36(5).

⁸ Evidence Act 2011, s 137; *Jackson v Virginia* (1979) 443 U.S 307. see also the Nigerian Case of *The State v Danjuma* where the accused was charged with culpable homicide and was discharged on the ground that doubts were created by the material contradictions in the evidence of the prosecution's witnesses.

⁹ Constitution of the Federal Republic of Nigeria 1999, s 36 (6)(c) which provides that every person charged with a crime is entitled to either defend himself in person or he is represented by a legal counsel.

¹⁰ Constitution of the Federal Republic of Nigeria 1999, s 36(1) which provides that 'In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality' 36(4) provides that 'Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal...'

¹¹ Constitution of the Federal Republic of Nigeria 1999, s 36 (6)(e) provides for the right to an interpreter for every person that has been charged with a criminal offence.

¹² Austin Sarat, 'Beyond Discretion: Prosecution, the Logic of Sovereignty and the Limits of Law' (2008) 33 Law and Sociology Inquiry 387.

¹³ By so doing, the prosecutor gives regard to the constitution of the land which is the supreme law in every jurisdiction. Even where there is a conflicting provision of law with the constitution, the provisions of the constitution shall supercede.

¹⁴ Constitution of the Federal Republic of Nigeria 1999, s 35; ACJA (2015), s 158.

not seek conviction at all cost even in the name of justice. The statutory rights of the defendants have to be considered and it should not matter whether the defendant gets acquitted or is convicted.

When the theory of servant of the law is embraced by a private prosecutor, such a servant of the law prosecutor would not be robotic and mechanical in carrying out his duties by enforcing every criminal provision in every case. He would desist from prosecuting cases which do not have sufficient evidence to prove the defendant's guilt.¹⁵ A servant of the law prosecutor would dismiss simple cases especially the petty cases that would require heavy due processes, heavy investigations and high financial resources to prosecute.¹⁶ Therefore in carrying out his responsibilities, the servant of the law private prosecutor must act fairly without any fear or favour, impartially and objectively both to the defendant and the crime victim. The servant of the law theory will place on the private prosecutor a responsibility to consider the opinions and concerns of the crime victims where their personal interests are affected, he should also ensure that the victims are informed of their rights and updated on every development in the criminal proceedings.

A servant of the law theory would not solve all prosecutorial possibilities or choices but by it, a 'default position' would be ascertained. One may deduce that one of the reasons why Bellin propounded this theory is because of the complexity of the American criminal justice which also gives an unchecked power of discretion to the American prosecutor who seeks justice by all means in order to earn a conviction. In other to guide and assist the everyday prosecutorial decisions that a prosecutor has to make, Bellin proffered the essence of 'accessing evidentiary sufficiency' which is to be applied in line with the servant of the law theory.

Accessing Evidentiary Sufficiency- In every criminal prosecution, making a decision to charge the suspect is always the first prosecutorial decision to be made.¹⁷ Here, the prosecutor has to decide whether to accept the case brought by the police and a decision also has to be made as to whether the suspect is to be charged, where he is to be charged

¹⁵ Evidence Act (2011), s 175; *Omuoha v The State* (1989) 2 NWLR (Pt 101) 23.

¹⁶ Jeffery Bellin and Shevarma Pemberton, 'Policing the Admissibility of Body Camera Evidence' (2019) 87 Fordham Law Review 1425.

¹⁷ Bruce Green, 'Urban Policing and Public Policy- The Prosecutor's Role' (2017) 51 GA Law Review 1179.

and what he should be charged for. Hence, the prosecution must be able to show that crime has been committed and the act was carried out by the defendant especially in the instance where the private prosecution can institute a criminal charge without the approval of the Attorney General.¹⁸ It would be legally difficult for the prosecution to maintain a charge where there is no probable cause to show and believe that the defendant committed the crime.¹⁹ A private prosecutor's approach to charging criminal acts against a suspect must be one that is 'readily provable'; one without any traces of reasonable doubt as stipulated by the law.²⁰ That the prosecution is carried out by the private prosecutor should not warrant indiscriminate and unnecessary charging on his part.

Assessing evidential sufficiency is neither just descriptive nor definitive, it extends to whether the defendant will get convicted based on the admissible evidence. The servant of the law prosecutor would not charge for a criminal act based on instinct or intuitive feeling of guilt or justice, or just for the purpose of public safety or the desire to please the interest of the public.²¹ Instead, the focus would be on outcomes that would promote the applicable laws. Once the prosecution is satisfied that a crime has been committed by the defendant, and has sufficient evidence to prove its case against the suspect, the next step is choosing the charge that the defendant will be prosecuted for.²² The servant of the law theory when imbibed by private prosecution would enable the prosecutor to have power to dismiss the case totally or where he decides to charge the defendant, it would not be an indiscriminate charge.²³ Such private prosecutor would be expected to file only charges that are consistent with the interest of justice and which serve the purpose of the law. As a servant of the law, the private prosecutor has to be certain that the admissible evidence will sustain the charge against the defendant beyond a reasonable doubt. The servant of the

¹⁸ Evidence Act 2011, s 135, in *Aderemi Aderounmu v Federal Republic of Nigeria* [2019] LER CA/L/782C/2018 Per E Tobi JCA stated that 'it is trite position of law that to secure conviction, the prosecution must not only connect the Defendant to the offence but in doing so the standard of prove required is; prove beyond reasonable doubt. This means the Respondent must prove all the ingredients of the offence for which the Defendant is charged with....'

¹⁹ Jeffery Bellin, 'Theories of Prosecution' (2020) 108 CLR 1220; Where a case is not proved beyond reasonable doubt, where there is no probable cause and where there is no reasonable suspicion to hold the defendant liable, sustaining a charging against the defendant would be an impossible task on the part of the prosecutor.

²⁰ Evidence Act 2011, s 135; Onyeka Igwe, 'Proof Beyond Reasonable Doubt and Customary Criminal Law and Practice in Nigeria: A Legal Perspective'

<<file:///C:/Users/hp/Downloads/PROOFBEYONDRASONABLEDOUBTANDCUSTOMARY.pdf>> accessed 10 August 2022.

²¹ Model Rules of professional Responsibility [2020], r 3.8.

²² Jeffery Bellin, 'Theories of Prosecution' (2020) 108 CLR 1203.

²³ *ibid.*

law prosecutor must be wary of making discretionary decisions that lack legal direction and provisions. This according to Bellin is best achieved by applying a prosecutorial discretion referred to as ‘rule of lenity’²⁴ which introduces the issue of prosecutorial nullification.²⁵

The servant of the law approach's main drawback is that it opposes prosecutorial nullification. Whereas, where it is right and necessary, justice embraces nullification.²⁶ To the servant of the law prosecutor, the constitution takes priority over any criminal legislation in a situation where the charge against the defendant is a threat to the defendant’s constitutional rights.²⁷ The servant of the law theory would ensure that a private prosecutor carefully takes necessary measures to prevent the collapse of the legal system.

The servant of the law theory opines that it would be almost impossible for a prosecutor committed to ‘serving the law’ to bend or break the law by over-charging, he would not engage in stringent plea bargains, will not keep anyway from the defendant all that will help his case, he will not bring up unfounded cases and would avoid making misleading closing arguments.²⁸ A private prosecutor at every time is to be mindful of this as the theory encourages cooperation with the defence counsel. It will encourage open file discovery, transparent plea-bargain and proper charging practices. It will also focus on other players²⁹ to promote the enactment and applicability of relevant laws and legal changes as it relates to private prosecution.

The ‘WHAT’ and ‘WHO’ Theory of Prosecution

Ronald Wright³⁰ a renowned criminal justice scholar and former attorney with the US Department of Justice and Rodney Engen³¹ in analysing their views on the theories of

²⁴ Rules of lenity depicts the default to the less severe option when the legislature tries to dictate a standardless choice.

²⁵ Roger Fairfax Jr, ‘Prosecutorial Nullification’ (2011) 52 BCL.R 1243; Kernel Murray, ‘Populist Prosecutorial Nullification’ (2021) 96 NYU LR 173.

²⁶ *ibid.*

²⁷ Jeffery Bellin, *Commentary: Waiting for the Justice* (Slate 2018)

²⁸ Jeffery Bellin, ‘The Power of Prosecutors’ (2019) 9 NYULR 1.

²⁹ These includes the Police, Judges, Law-makers and everyone involved in the criminal justice system

³⁰ He is a professor of law and his area of concentration is on the work of criminal prosecutors.

³¹ Engen is an associate professor at the University of Arkansas with area of interest in criminology, criminal justice and sentencing.

prosecution highlighted two (2) comprehensive inquiries to describe their idea of theories of prosecution³² These are the ‘What’ and the ‘Who’ theory of prosecution.

The ‘what’ theory focuses on what the main objectives of the prosecutor entails and the factors the prosecution has to consider when charging for a criminal act or when negotiating a plea bargain.³³ It concerns the end result expected by the prosecution in the course of prosecuting a criminal act. One of the reasons for prosecuting a criminal act is to minimize or control crimes and this could be by maximizing the sanction attached to the crime.³⁴ The prosecutor may create a set of capital offences and try to maximize the convictions for such capital offences.³⁵ The law already provides what constitutes capital offences alongside sanctions attached to them. The private prosecutor may in this circumstance, consider the gravity of the crime committed to determine the type of crime that the defendant will be charged with be it a simple offence or a capital offence. The theory provides that the prosecutor may increase the number of convictions while paying little attention to the sentence attached to the conviction.³⁶ Here, seeking to increase the number of convictions would depict seeking conviction at all cost. A private prosecutor should not be a private persecutor.

The ‘what’ theory according to Wright and Engen highlight crime control issues that influence the decisions arrived at by judges and prosecutors.³⁷ The charge against the defendant will vary based on the type of crime and gravity of the crime committed.³⁸ The prosecutor considers more than the seriousness of the crime and the available evidence when subjective judgements about the defendant’s culpability and dangerousness are

³² Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 *Marquette Law Review* 1.

³³ Jeffery Bellin, ‘Theories of Prosecution’ (2020) 108 *CLR* 1203; Alexander Heinze, ‘Prosecutors and Trials’ in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021) 117.

³⁴ Oluyemisi Bamgbose and Sonia Akinbiyi, *Criminal Law in Nigeria* (Evan Brothers 2015).

³⁵ Stefano Ruggeri, ‘Public Prosecutors in Criminal Investigations: A Comparative Law Study’ in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021) 3.

³⁶ Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 *Marquette Law Review* 1.

³⁷ *ibid.*

³⁸ Chelsea Thomas, ‘Legal and Ethical Principles for the 21st Century Prosecutor’ <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2190&context=student_scholarship> accessed 19 October 2022; Jan-Williem Van Prooijen, ‘Motives for Punishment’ <<https://doi.org/10.1093/oso/9780190609979.003.0002>> accessed 12 October 2022.

made.³⁹ The seriousness of the crime and the criminal history of the defendant play a major role when making a judgment.⁴⁰ However, this should not be a decision to be made by the private prosecutor rather the judge who is also a part of the criminal justice system should be left to make the decision based on the fact before the court and all relevant evidence tendered by the prosecution.

The 'Who' theory addresses the issue of who controls charging and who makes sentencing decisions. It regards the prosecutor as being a part of a complicated institutional and organizational system where outside forces, organizational imperatives, and personal interests are all taken into consideration to reach a prosecutorial decision.⁴¹ Here, the prosecutor seeks individual objectives instead of seeking to control crime.⁴² There are other persons involved and who also have one impact or the other on the work of the prosecutor. The prosecutor has to perform his work in line with the judges and defence counsel, he also has to consider the comments from the community and also perform within the available resources and boundaries set by the law makers.⁴³ So aside the individual motives and objectives of the prosecutor, the theory raises a question of 'who decides on criminal prosecution?'⁴⁴ Is it the prosecutor or the prosecuting institution as a body or some of the other parties involved in the criminal justice system? One of the commonest influence on the prosecutor's work comes from within the office of the prosecutor where he is given instruction and directives from the head of the organisation who is the chief prosecutor and in some states referred to as the Director of Public Prosecutions (DPP).⁴⁵ The chief prosecutor determines the way by which the middle

³⁹ Austin Sarat, 'Beyond Discretion: Prosecution, the Logic of Sovereignty and the Limits of Law' (2008) 33 *Law and Sociology Inquiry* 387.

⁴⁰ Nora Demleitner, 'Prosecutors and Sentencing' in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021).

⁴¹ Ronald Wright and Rodney Engen, 'Change Movement and Theories of Prosecutors' (2007) 91 *Marquette Law Review* 1.

⁴² Jacqueline Hodgson, 'Prosecution in Adversarial and Inquisitorial Procedures: The Weakening of Professional Autonomy' in David Nelken and Claire Hamilton (eds), *Research Handbook in Comparative Criminal Justice* (Elgar 2022).

⁴³ Askarali Haydarov, 'Attorney Investigation in the United State' (2022) 6 *Tematics Journal of Law* 47.

⁴⁴ Ronald Wright and Rodney Engen, 'Change Movement and Theories of Prosecutors' (2007) 91 *Marquette Law Review* 1.

⁴⁵ For example, in Nigeria, the Director Public Prosecutions heads the Department of Public Prosecutions and he is the Chief Prosecutor of the State. He has the final say on any legal advice forwarded to the Ministry of Justice by the Police.

management of the office interprets and follow his prosecutorial decisions and leaving no chance to the prosecutor under him to make the final prosecutorial decision.⁴⁶

The outcome of prosecutorial decisions made by organizational imperatives may be driven by certain contemplations instead of considering what is apt or proper in a given case. For example, cases that might have been won may have been rejected; others may be reduced to a lesser charge just because the office is more interested in a particular case or because the office has allocated more resources to some other cases.⁴⁷ Prosecutorial decisions made by the office of the DPP are what guide the initiation of private prosecution in jurisdictions where the approval of the Attorney General or DPP is needed before a crime can be prosecuted. Where there is no need for such approval, the prosecutorial decision will be left in the care of the private person or the private legal practitioner to determine whether or not a charge should be initiated against the defendant.

In the ‘who’ theory, the prosecution of crime is not limited to just the prosecutorial body to decide on, it involves interactions and discussions with other government institutions.⁴⁸ This may be the interplay between the prosecutors and the police, or between prosecutors and defence counsel or prosecutors and the courts. The prosecution is a part of the ‘working group’ in the court and he is expected to have a cordial relationship with other components of the ‘working group’.⁴⁹ This would make it almost impossible for the prosecutor to depart from what is expected of him to make a charge and process cases and norms that have been developed by the working group to ensure a sustainable and decent working condition and the ease of handling cases smoothly within a busy system.⁵⁰ This process has been described as the ‘inter-organizational exchange’ wherein the institution accommodates the needs of one another.⁵¹ A private person or private legal practitioner

⁴⁶ Stephen Singer, ‘Elections, Powers, and Local Control: Reining in Chief Prosecutors and Sheriffs’ (2015) 15 UMLJ 319.

⁴⁷ *ibid.*

⁴⁸ Jeffery Bellin, ‘Theories of Prosecution’ (2020) 108 CLR 1220, 1223.

⁴⁹ Ronald Wright, ‘Community Prosecution and Building Trust Across a racial Divide’ in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021) 413.

⁵⁰ Peter Nardulli, Roy Flemming and James Eisenstein ‘Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process’ (1985) 76 Journal Criminal Law and Criminology 1103.

⁵¹ Se Won Park, ‘Every Reasonable Chance Plus two: How the Red Hook Community Justice Center Bridges the Gap Between the Community and the Justice System’ (2022) 23 Cardozo Journal Conflict Resolution 575;

should be ready to be involved in this process. In some circumstances, the interaction between prosecutors and other governmental bodies results in the development of formal guidelines that prosecutors must abide by. Some of these institutions are in control of the funds allocated to the prosecutor, some determine the standard of the evidence in the case file or the seriousness of the punishment that is passed.⁵² This type of relationship according to Wright denotes the magnitude at which agencies are arranged and the extent to which decisions at certain stages have influence on the results of the next stage.⁵³

The theory also includes the relationship between the prosecutor and the community which is referred to as ‘community prosecution’.⁵⁴ One of the aims of prosecution includes the safety of the community and public order. The prosecution interacts and relies on the community by holding meetings and taking surveys to decide which cases to prosecute first. The prosecution looks beyond the convictions it has bagged and engages in a victim and community centered stance on the work that is needed to be done.⁵⁵ Crime prosecution is not just the focus of the work but crime prevention which is meant to promote the feeling of security and wellbeing in the neighborhood.⁵⁶ Additionally, community prosecution strengthens and promotes connections between the prosecutor and other governmental organizations. The chief prosecutor coordinates and engages the police, social service agencies and any other group that can contribute to a healthier community.⁵⁷ In a way, the community cannot be ignored as it is an important player in prosecutorial decisions and choices.⁵⁸ It would only be right for a private person or private legal practitioner to reflect both the ‘what’ theory and the ‘who’ theory of prosecution.

Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 *Marquette Law Review* 1.

⁵² Ronald Wright, ‘Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation’ (2005) 105 *Columbia Law Review* 1010.

⁵³ Ronald Wright, ‘Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation’ (2005) 105 *Columbia Law Review* 1010.

⁵⁴ Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 *Marquette Law Review* 1.

⁵⁵ Se Won Park, ‘Every Reasonable Chance Plus two: How the Red Hook Community Justice Center Bridges the Gap between the Community and The Justice System’ (2022) 23 *Cardozo Journal Conflict Resolution* 575.

⁵⁶ *ibid.*

⁵⁷ Joshua Kelnfeld, Stephanos Bibas and Richard Bireschbach, ‘By the People: Restoring Democracy in Criminal Justice’ <[file:///C:/Users/hp/Downloads/SSRN-id4107451%20\(1\).pdf](file:///C:/Users/hp/Downloads/SSRN-id4107451%20(1).pdf)> accessed 20 October 2022.

⁵⁸ Josh Bowers, ‘Grassroots Plea Bargaining’ (2007) 91 *MLR* 85.

Charging of crime under the ‘who’ theory may involve choosing sides within the prosecutor’s office.⁵⁹ Engaging the lower cadres to make simple charges for a crime may empower them and make them feel relevant and useful as opposed to the chief prosecutor and those at the higher cadre who have risen above the level of charging simple offence by them.⁶⁰ Most importantly, transparency should be a virtue to be upheld at any point in time when a charge is being made. The public should be able to identify the party responsible for the decision of the prosecutor as this would help them to be able to change leadership or prevail on leadership to make or revise policies or even spending priorities where necessary. The public might not be comfortable with the prosecutorial decision arrived at and transparency makes it possible for the public to know the right institution or body to channel its grievances to. Where the prosecution of a criminal act is handled privately, the public would be aware and they would be able to direct their grievances to the right channel. This would also promote transparency in private prosecution.

The ‘who’ theory of prosecution where not properly adhered to, will lead to an unfavorable assessment of charge and a preference for less quality provisions in the criminal code as the players involved in the prosecutorial decisions would be too many.⁶¹ Every player would want to have a say. However, the main objectives of prosecution will determine the need for a quality criminal code where it is necessary and how the prosecutors will pursue the objectives is also of importance. Where prosecutorial decisions embrace inequality in the application of the law, justice will be compromised. Nevertheless, prosecutorial decisions must embrace public good. Overall, to uphold justice in accordance with the servant of the law principle, a private person or private legal practitioner must be properly directed on what the defendant should be charged with and who should bring the case. The trial of the defendant should not be a do or die issue. The defendants have rights and the rights are to be upheld by the servant of the law private prosecutors.

Effects of the Theories of Prosecution on Private Prosecution

⁵⁹ India Thusi, ‘The Pathological Whiteness of Prosecution’ (2022) 110 CLR 795; Belen Lowrey-Kinberg, John Gould and Rachel Bowman, ‘Heart and Soul of a Prosecutor: The Impact of Prosecutor Role Orientation on Charging Decisions’ (2021) 49 CJB 1.

⁶⁰ Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 Marquette Law Review 1.

⁶¹ Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 Marquette Law Review 1.

The theories of prosecution paves way for a smooth criminal prosecution be it public prosecution or private prosecution. In all jurisdictions, the prosecutor is a center base to the functions and objectives of the criminal process.⁶² Therefore, in carrying out his responsibilities, the private prosecutor must act fairly without any fear or favour, impartially and objectively.⁶³ The private prosecutor has to consider the opinions and concerns of the victims when their personal interests are affected, should also ensure that the victims are informed of their rights and updated on developments in the criminal proceedings.⁶⁴

The way by which evidence is gotten and the way by which statement made by the defendant is gotten are important under the law and where there is any contravention such evidence and statement should not be tendered.⁶⁵ Necessary information about the case must not be kept away from the other parties by the prosecutor except in instances where such information will affect the fairness and justice of the criminal proceedings.⁶⁶ As provided in section 6 of the ACJA, facts that are material to the defence but which the prosecution does not intend to use should be disclosed to the defence to help ensure that the rule of law is respected and an innocent person is not convicted.⁶⁷ As soon as it is discovered that the investigation conducted contravenes the law, the private prosecutor should drop the criminal proceedings. This will reflect the true position of a servant of the law theory in a private prosecutor.

Conclusion and Recommendations

The servant of the law theory is relevant as it depicts and promotes the stands expected of a private prosecutor as the theory outlines how the private prosecutor is to serve in the interest of the law irrespective of the situation, he finds himself. As the private prosecutor is seeking justice, he should also focus on serving the purpose of the law which includes fairness and excludes seeking justice at all cost. The servant of the law theory portrays that

⁶² UNODC, 'Public Prosecutors as the "Gate Keepers" of Criminal Justice' <<https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/2--general-issues--public-prosecutors-as-the-gate-keepers-of-criminal-justice.html>> accessed 15 September 2022

⁶³ *ibid.*

⁶⁴ Satyajit Boolel, 'Challenges in Crime in the 21st Century' <<https://dpp.govmu.org/Documents/Publications%20and%20Communique/hopac.pdf?csf=1&e=VbeSTk>> accessed 10 January 2023.

⁶⁵ *ibid* standard item 4.

⁶⁶ High Court Federal Capital Territory Civil Practice Directions 2017, order 5.

⁶⁷ Administration of Criminal Justice Act 2015, s 6.

priority be placed on constitutional provisions regarding the rights of a defendant. Operating under the servant of the law theory would make the private prosecutor to refrain from engaging in situations that would berate and tamper with the rights of the defendant. Servant of the law theory promotes that private prosecutor should not make conviction at all cost a do or die affair in the name of justice. Thus, the rights of the defendants should be put into consideration not withstanding whether such defendant gets acquitted or not. Additionally, according to the servant of the law theory, it is the private prosecutor's duty to take into accounts the opinions and concerns of crime victims when those interests are at stake. He also has a responsibility to keep victims informed of their rights and updated on any developments in the criminal case.