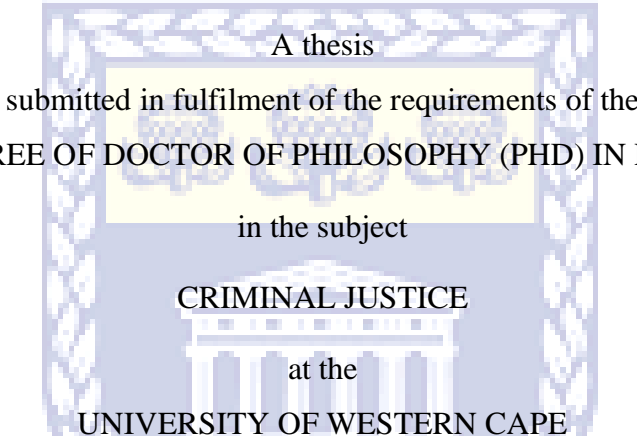


**INVESTIGATOR-PROSECUTOR COLLABORATION: A FRAMEWORK FOR
IMPROVING NAMIBIA'S CRIMINAL JUSTICE PROCESS**



A thesis
submitted in fulfilment of the requirements of the
DEGREE OF DOCTOR OF PHILOSOPHY (PHD) IN LAWS
in the subject
CRIMINAL JUSTICE
at the
UNIVERSITY OF WESTERN CAPE

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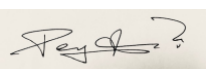
Supervisor: Prof Jamil Mujuzi

October 2021

DECLARATION

I declare that *Investigator-prosecutor collaboration: a framework for improving Namibia's criminal justice process* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

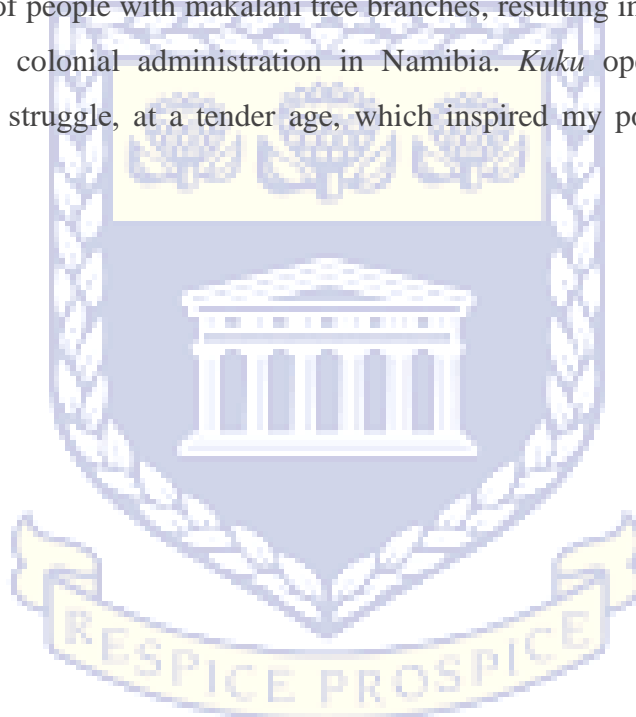
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DEDICATION

I dedicate this study to the memories of my maternal grandparents who also double as my godparents, Reverend David Shihepo (popularly known as “Nadihokololwe”) and Eva Tomas (affectionately known as “GwaNakoonde”), hereafter referred to as *Tatekulu* and *Kuku*, respectively. *Tatekulu* contributed to the development of the criminal justice process when he testified in *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) 294 (AD) against the flogging of people with makalani tree branches, resulting in the discontinuation of that practice by the colonial administration in Namibia. *Kuku* opened up to me about Namibia’s liberation struggle, at a tender age, which inspired my political activism in the later years.



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I am grateful to Professor Roan Koen, my supervisor for the first two years and Professor Jamil Mujuzi, who took over the supervision until the completion of the study. Their constructive criticisms and advice have improved the quality of the study. I am equally grateful to Prof Jairos Kangira of the University of Namibia who language-edited the thesis.

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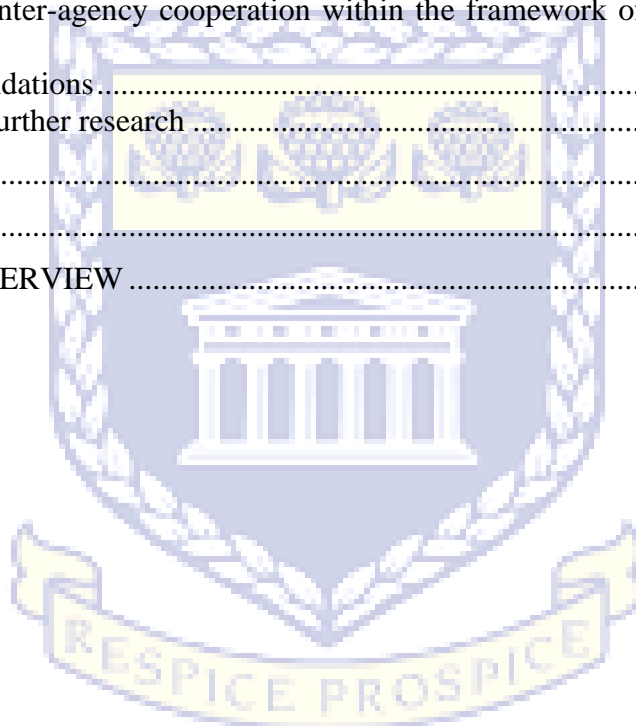
TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
TABLE OF CONTENTS	v
LIST OF ABBREVIATIONS AND ACRONYMS	viii
Abstract	x
CHAPTER ONE	1
INTRODUCTION	1
1.1 Introduction and background	1
1.2 Statement of the research problem	3
1.3 Significance of the study	4
1.4 Brief history of the prosecution in Namibia	5
1.5 Conceptual clarification	9
1.5.1 Adversarial system of prosecution	9
1.5.2 Inquisitorial system of prosecution	9
1.5.3 Common law legal system	10
1.5.4 Civil law legal system	11
1.5.5 Prosecution	12
1.5.6 Investigation	13
1.5.7 Investigation diary	13
1.5.8 Directive cooperation model	14
1.5.9 Communicative cooperation model	14
1.6 Literature review	14
1.7 Scope and limitations of the study	23
1.8 Methodology	24
1.8.1 Research design	24
1.8.2 Location of the study	25
1.8.3 Target population	25
1.8.4 Sampling technique	26
1.8.5 Sampling size and procedure	27
1.8.6 Data collection procedures	27
1.8.7 Data analysis	28
1.8.8 Data presentation	28
1.8.9 Research instruments	29
1.9 Research ethics	29
1.10 Epistemological and ontological contribution of the study	29
1.11 Outlining of the remaining chapters	31
CHAPTER TWO	33
MODELS, APPROACHES AND PRINCIPLES OF INTER-AGENCY COOPERATION	33
2.1 Introduction	33
2.2 Origins and characteristics of the inter-agency cooperation models	33
(i) Communication model	33
(ii) Cooperation model	34
(iii) Coordination model	34

(iv)	Federation model	34
(v)	Merger model.....	34
vi)	New models	35
2.3	Origins and characteristics of the approaches of inter-agency cooperation.....	35
2.4	Origins and characteristics of the principles of cooperation	37
2.4.1	Principle of neutrality	37
2.4.2	The principle of complementarity	38
2.4.3	The principle of objective and material truth.....	39
2.4.4	The principle of well-founded conclusions.....	39
2.4.5	The principle of legality	40
2.4.6	The principle of efficiency	41
2.5	Strengths and weaknesses of the inter-agency cooperation models	41
2.6	The advantages and disadvantages of the approaches	48
2.7	The advantages and disadvantages of the principles of inter-agency cooperation ..	49
2.8	Conclusion	56
CHAPTER THREE		58
A SURVEY OF INVESTIGATOR-PROSECUTOR COLLABORATION IN VARIOUS JURISDICTIONS ACROSS THE WORLD AS A BASIS OF RELATIVISING TRENDS IN THE NAMIBIAN SETTING.....		58
3.1	Introduction.....	58
3.2	The practice in common law countries	59
3.2.1	The United Kingdom (UK).....	60
3.2.2	Tanzania.....	62
3.2.3	India	63
3.3	The practice in civil law countries	66
3.3.1	France.....	67
3.3.2	Brazil.....	68
3.3.3	Cameroon.....	71
3.4	Police and investigation agencies prosecutions	73
3.5	Prosecutorial and judicial investigations	75
3.6	Conclusion	77
CHAPTER FOUR.....		80
AN OVERVIEW OF THE INVESTIGATION AND PROSECUTION AGENCIES IN NAMIBIA.....		80
4.1	Introduction.....	80
4.2	The structures of investigation agencies and their relation to the prosecution: a foundation for cooperation.....	81
4.3	Procedures followed in investigations and need for cooperation with prosecutors .	86
4.4	Techniques of investigations and the role of prosecutors	93
4.4.1	Searches	94
4.4.2	Entrapment and undercover investigations	97
4.4.3	Surveillance.....	100
4.4.4	Controlled delivery	101
4.5	The capacity of police investigators and justification for inter-agency cooperation	101
4.6	Investigating offences by members of the Namibian Police: a case of imperative inter-agency cooperation.....	102
4.7	Procedures for prosecution and the place of investigators.....	104

4.8	Conclusion	106
CHAPTER FIVE		108
FINDINGS ON THE TRENDS OF RELATIONSHIP BETWEEN INVESTIGATORS AND PROSECUTORS		108
5.1	Introduction	108
5.2	Distinctiveness of agencies	108
5.3	Absence of regulatory framework	109
5.4	Communication between agencies	111
5.5	Attitude of investigators and prosecutors	117
5.6	The differences in the capacity of the two agencies' officials	121
5.7	Conclusion	122
CHAPTER SIX		124
THE SIGNIFICANCE OF PROSECUTOR-INVESTIGATOR RELATIONSHIP		124
6.1	Introduction	124
6.2	The essence of cooperation between investigators and prosecutors	125
6.2.1	The necessity to produce relevant evidence	125
6.2.2	Capacity building and knowledge transfer	129
6.2.3	The evolution of sophisticated methods of committing offences and transnational crimes	130
6.2.4	To safeguard the criminal justice process from manipulated, hearsay and selective evidence	133
6.2.5	To avoid misleading the prosecution	135
6.2.6	To expedite the criminal justice process	136
6.2.7	To overcome challenges posed by lack of resources within investigation agencies	137
6.3	Conclusion	137
CHAPTER SEVEN		139
INTER-AGENCY COOPERATION AND THE QUESTION OF INDEPENDENCE OF THE PROSECUTION AND THE DOCTRINE OF SEPARATION OF POWERS		139
7.1	Introduction	139
7.2	The doctrine of separation of powers	140
7.3	Independence of the prosecutors in Namibia	142
7.4	Independence of the prosecution and accountability	148
7.5	Does the separation of powers and independence of the prosecution comply with international standards?	150
7.6	Guaranteeing separation of powers and prosecutorial independence under inter-agency cooperation	158
7.7	Conclusion	169
CHAPTER EIGHT		171
SUGGESTED FRAMEWORK AND FORMULA OF COOPERATION BETWEEN PROSECUTORS AND INVESTIGATORS IN NAMIBIA		171
8.1	Introduction	171
8.2	Instruments of cooperation	172
8.2.1	Legislation	173
8.2.2	Regulations and policies	177
8.2.3	Manual of Operations	182

8.3	Cooperation formula and principles.....	186
8.5	Inclusion of sexual offences in constant inter-agency cooperation coordination framework.....	193
8.6	Conclusion	194
CHAPTER NINE.....		196
CONCLUSION AND RECOMENDATIONS		196
8.1	Introduction.....	196
9.2	Trends of inter-agency cooperation in the Namibian criminal justice system.....	197
9.3	The significance of inter-agency cooperation in Namibia.....	197
9.4	Proposals regarding the interactions between investigators and prosecutors during the investigation of offences	199
9.5	Realising inter-agency cooperation within the framework of separation of powers 200	
9.6	Recommendations.....	200
9.7	Areas for further research	202
BILIOGRAPHY		203
ANNEX A.....		222
STRUCTURED INTERVIEW		222



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LIST OF ABBREVIATIONS AND ACRONYMS

ACC	Anti-Corruption Commission
APP	Authorised Professional Practice
ATMs	Auto Teller Machines
BCE	Before the Current Era
BIDE	Bureau of Intergovernmental Drug Enforcement
B Juris	Baccalaureus Juris
CCP	Code of Criminal Procedure
CDM	Consolidated Diamond Mines
CFA	<i>Coopération financière en Afrique centrale</i> (Financial Cooperation in Central Africa) – Central African Currency
CIC	<i>Code d’Instruction Criminelle</i> (Code of Criminal Instruction)
CPC	Communist Party of China
CPS	Crown Prosecution Services
DNA	deoxyribonucleic acid
ICC	International Criminal Court
ICTY	International Criminal Court for the former Yugoslav Republic
Kms	kilometres
LLB	Bachelor of Laws
LTRI	Legal Training and Research Institute
MIM	Murder Investigation Manual
MTC	Mobile Telecommunications Limited
NAMFISA	Namibian Financial Institutions Supervisory Authority
POCA	Prevention of Organised Crime Act
PPS	Public Prosecution Service
SCC	Special Criminal Court (of Cameroon)
SICO	Special International Crime Office
SK	<i>Sledstvennyi Komitet</i> (Investigative Committee)
UK	United Kingdom
US	United States of America
VOC	<i>Vereenigde Geocroyeerde Oost-Indiese Compagnie</i> (United Patented East Indian Company)

Abstract

This study discusses the significance of inter-agency cooperation, with particular reference to Namibia, analysing models, principles and approaches of interagency cooperation to determine a suitable model for Namibia. The study was based on research questions examining the trends in the Namibian criminal justice system, in respect of cooperation between investigators and prosecutors and the relevance of coordination between investigators and prosecutors in the prosecution process.

The study presents an overview of the practice in common and civil law legal systems. It recommends a hybrid of cooperation models for inter-agency agency-cooperation: a communicative cooperation model for less complex serious crimes; and a coordination model for more complex serious crimes and investigations ordered by the prosecution.

The study's findings are that prosecutors thoroughly read the dockets at every stage of the court procedure when the docket is received from investigators, but not during the investigation stage, except for crimes falling under the *Prevention of Organised Crime Act*, where prosecutors assist investigators from the initial stage of an investigation. However, for other serious crimes, including murder, it is not common for prosecutors to continuously assist investigators, but they provide advice through the investigation diary. Only in a few instances that they provide assistance. The study, thus, recommends that for a given category of serious crimes to be specified in legislation, regulation and policies, there should be interagency cooperation. Cooperation should adopt a hybrid of communicative cooperation model for investigations initiated by investigators, and coordination model for investigations ordered by the prosecution. Such cooperation should further be realised within the framework of separation of powers as prosecutors should only guide the process. Inter-agency cooperation should be adopted upholding the principles of neutrality, legality, complementarity, efficiency, objective truth and well-founded conclusions.

Key words:

collaboration, communication, cooperation, coordination, crime, inter-agency, investigators, offence, police, prosecutor

CHAPTER ONE INTRODUCTION

1.1 Introduction and background

Krone¹ states that while police and prosecutors should maintain separation of responsibilities, they should maintain mutual cooperation. He states that investigators will need advice from prosecutors throughout the investigation process, but this does not mean that prosecutors will take over control of investigation from the police. Officials from the two agencies will adhere to their respective division of labour. He maintains that involving prosecutors in an investigation ensures that investigators carry out their functions lawfully and effectively, because:

The prosecutor will also have some knowledge of the case prior to receiving a brief. The most appropriate charges can also be settled prior to the charging stage. This can provide significant resource savings in focusing the scope of an investigation and the later conduct of a prosecution.²

But Krone³ also cautioned that the involvement of the prosecution in an investigation should have limits so that it does not compromise the independence of an investigation. The two institutions should maintain a degree of independence and separation of powers between themselves. It should be noted that in Namibia, investigation agencies fall under the executive. The Prosecutor-General and the functions of this office fall under the judiciary⁴ although prosecutors are civil servants under the Ministry of Justice who, *ipso facto* fall under the executive. Prosecutors are almost involved in the investigation of cases at an initial stage. A prosecutor in the lower court receives a docket at a first appearance of the accused and thereafter receives the docket every time when the accused appears in court and gives instructions to the investigating officer.

The Crown Attorney's Office⁵ states that investigators and prosecutors have complementary roles. They are bound to collaborate, in order to ensure effective enforcement of criminal laws. Investigators may consult the prosecution for advice prior to launching an investigation in serious crimes, so that they are provided with the necessary information to enable them to

¹ Krone (1999) at 19.

² Krone (1999) at 19.

³ Krone (1999) at 19.

⁴ *Ex Parte: Attorney-General, Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*, 1998 NR 282 (SC).

⁵ Crown Office (1999) ss 7 – 3, 7 – 5.

follow correct procedures that will stand their investigation in good stead when the matter is brought before trial. Prosecutors further advise on the court brief, informing investigators on the obligations to disclose information, the privileges that they enjoy and the scope of disclosure provided in the law.

Collaboration between investigators and prosecutors is necessitated so that both institutions have one aim, to ensure an effective and a strong criminal prosecution process. Accordingly, the two institutions need to hold consultations from the pre-trial stage throughout the trial process.⁶ The conviction of criminals depends on the coordination between investigation and prosecution teams, because it is the evidence that is compiled by investigators and presented by prosecutors before the court during the trial that enables the judge to determine the guilt of the accused.⁷ Prosecution should comprehend what investigators go through during the legal process, so that they serve as complementary partners to investigators and, therefore, ensure a successful prosecution of the case.⁸

Navickienė⁹ states that in several European countries, including Belgium and Slovenia, the framework of cooperation between investigators and prosecutors is provided for in their respective national laws. There is, therefore, clarity for officials from the two agencies regarding when and how to cooperate. Junior officers do not have to wait for guidance from their superiors, since what they need to be guided on is documented. It prevents a situation where officials from the two agencies have to exercise discretion on matters in which they should cooperate, a situation which would give rise to inconsistencies in the cooperation practice. Meanwhile, there are no written guidelines in the Namibian criminal justice system on the methods of cooperation between investigators and prosecutors. In this case, experienced investigators and prosecutors may rely on the conventional practice, but for new recruits there could be challenges on how to interact with their counterparts from another agency.

⁶ Punjab Criminal Prosecution Service and Punjab Police and Civilian Capacity Building for Law Enforcement in Pakistan (CCBLE) (2011) at 5 – 6; Gashi (2010) at 7.

⁷ Varshney (2007) at 285.

⁸ Randhawa and Singh (2016) at 7.

⁹ Navickienė (2010) at 346.

In this introductory Chapter, the researcher gives a synopsis of the cooperation between prosecutors and investigators. The Chapter sets the questions that the study seeks to address and define important concepts that are central to the study. It further presents a background to the history of prosecution in Namibia, to enable the reader to comprehend the nature of prosecution and investigation in the current legal system. The study will look at the significance of having an established legal framework of cooperation versus *ad hoc* and discretionary cooperation between investigators and prosecutors and recommend a suitable model for Namibia.

1.2 Statement of the research problem

Investigators and prosecutors should present their cases beyond reasonable doubt, in order to convince judicial officers to rule cases in their favour. Efficient and effective presentation of cases thereof requires a properly coordinated criminal justice process and procedure. In the process of cooperation, it should be taken into consideration that agencies fall under different branches of government and, therefore, inter-agency cooperation should take place in accordance with the doctrine of separation of powers. This doctrine supposes that the distinctiveness of different branches of government, *i.e.*, executive, legislature, and judiciary, should be respected.¹⁰ The main questions of the study are: What are the trends in the Namibian criminal justice system, in respect of the cooperation between investigators and prosecutors? What is the significance of coordination between investigators and prosecutors in the prosecution process? The framework of the main questions seeks to find solutions to the following: What is the state of prosecutors' assistance to investigators in Namibia and what are the lessons that could be learned from other jurisdictions? What can be done to ensure prosecutor-investigator interactions in complex investigations within the framework of separation of powers? The assumption is that there is a need to have an integrated approach to improve the coordination between investigators and prosecutors to enhance the criminal justice process and minimise the number of cases that the state loses.

Therefore, the main objectives of this study are:

¹⁰ *Pieter Petrus Visagie v Government of the Republic of Namibia and Others* (SA-2017/34) [2018] NASC 411 (03 December 2018).

- To establish trends of inter-agency cooperation between Namibian investigation and prosecution agencies and analyse them in relation to practices in other jurisdictions.
- To establish prosecutorial independence in the Namibian context, the compliance of the Namibian prosecutorial independence with international standards and how prosecutorial independence can be guaranteed in inter-agency co-operation to comply with the doctrine of separation of powers provided for in the Namibian Constitution.
- To determine the significance of inter-agency cooperation between investigators and prosecutors and suggest areas of improvement in the Namibian criminal justice process.

1.3 Significance of the study

Generally, researches have been undertaken on the role of investigators and prosecutors in the criminal justice process and the issue of investigators and prosecutors' collaboration, but little has been researched about the effect of the coordination between investigators and prosecutors in the Namibian criminal justice system. The study, will therefore, be the first of its kind to assess in detail the effectiveness of the cooperation between the two agencies in the Namibian criminal justice process.

The study will contribute to limited literature on the Namibian criminal justice system, an area which is hitherto under-researched and will be useful to policy-makers in the formulation and revision of Namibian policies and laws pertaining to investigators and prosecutors in the prosecution of offences. It will also be useful to actors in the criminal justice process as they compare and contrast trends in various legal systems and adjust their operations into a framework in which successful prosecution of cases could conceivably be realised.

The study identifies deficiencies in the current practice regarding the collaboration between actors in the criminal justice system and makes recommendations for improvement. For example, some of the criminal cases involve police officers and it is their counterparts who investigate these cases. Tapping from the experiences learned from other countries, a new

framework on how collaborations between investigators and prosecutors in Namibia will be carried out in cases involving investigators is being recommended, to ensure that there is no compromise to justice in the legal process and that public trust in the criminal justice process is guaranteed and maintained.

Training is of significant relevance to the execution of duties of investigators and prosecutors. This is because during collaboration legally trained prosecutors give guidance to investigators who should be in position to comprehend the instructions. An investigation into the level of training of investigators will be made in order to determine whether investigators and prosecutors fully comprehend their complementary roles and if not, how best this issue can be addressed to advance quality in the investigatory and prosecutorial output of the two agencies.

The length of investigations has an impact on the finalisation of the cases. In the meantime, suspects are remanded in custody, in contrast with the fair trial provided in the Namibian Constitution. The effect of the coordinated approach in the investigation and prosecution of cases helps in expediting the investigation process and trial thereof. This is essential in alleviating the problems of incomplete investigations caused by the unavailability of witnesses or crucial evidence after a time lapse. This study points out how best inter-agency collaboration can enhance the efficiency and effectiveness of the criminal justice process.

1.4 Brief history of the prosecution in Namibia

Namibia was under the colonial rule of Germany from 1884 to 1915 and of South Africa from 1915 to 1990. The country became independent on 21 March 1990. During the German colonial rule, Namibia was called German South West Africa, while during the South African rule she was called South West Africa. The United Nations adopted the name Namibia in 1968, but South Africa continued to insist on referring to the country as South West Africa. In 1919, when the League of Nations entrusted South West Africa to Britain as a C-Mandate territory, Britain entrusted the territory to South Africa, which was a British colony by then. South Africa regarded this exercise as a mere confirmation of the steps that she had already

taken in 1915 to annex South West Africa. In the same year, South Africa passed the *South West Africa Mandate Act*¹¹ to realise the mandate of South West Africa.¹²

In 1919, South Africa passed the *Administration of Justice Proclamation*,¹³ establishing the High Court of South West Africa. In 1920, South Africa passed the *Appellate Division Act*,¹⁴ granting the Appellate Division of the Supreme Court of South Africa jurisdiction over the decisions and therefore to hear appeals of the High Court of South West Africa.¹⁵

By the time South West Africa became a mandated territory, the South African legal system was based on the Roman-Dutch law. The introduction of this law in South Africa is traced back to the year 1652, when Jan Van Riebeeck, a Dutch merchant landed at Cape Town to establish the refresher post of the Dutch East India Company, known in the Dutch language as *Vereenigde Geoctroyeerde Oost-Indiese Compagnie* (VOC). When the Board (Heeren Zeventien) of VOC pondered about the laws that would be applied in the Cape for the purpose of commercial transactions, they resolved that the laws of Holland were to be applied. Where there was a vacuum not covered by Dutch laws, Roman laws were to be applied. In 1795, Britain invaded the Cape, but passed a proclamation that the existing Roman-Dutch would continue to be applied. In 1823, the Colebrooke-Biggie Commission studied the Cape legal system and recommended that the system should be gradually replaced by the English legal system. Subsequently, the English civil and criminal laws were introduced in 1828 and two years later, in 1830, the English law of evidence was introduced. This was followed by English lawyers and judges entering the legal fraternity practice in the Cape and started applying English law, in instances where they did not know what the Roman-Dutch law states. Accordingly, since then the South African legal system has been a mixture of the Roman-Dutch and English law characterised by the adversarial legal system.¹⁶

The legislation governing prosecution when the High Court of South West Africa was established was the *Criminal Procedure and Evidence Act*.¹⁷ Prosecution in each Province in

¹¹ No. 49 of 1919.

¹² Geingob (2004) at 36 – 39; Mbuende (1986) at 69 – 72.

¹³ No. 21 of 1919.

¹⁴ No. 12 of 1920.

¹⁵ Amoo (2008) at 69 – 95.

¹⁶ Lenel (2002) at 2 – 6.

¹⁷ No. 31 of 1917.

South Africa was under the respective Attorney-General who prosecuted on behalf of the state. The Attorney General delegated the prosecution for cases in the Supreme Court to trial advocates in private practice, while prosecution in lower courts was delegated to police officers. The Attorney General falls under the direction of the Minister of Justice who had the right to instruct the former to commence or stop prosecution.¹⁸ In 1935, South Africa passed the *General Law Amendment Act*,¹⁹ of which section 108 provides that the Appellate Division should have jurisdiction over appeals and applications for leave to appeal in criminal and civil matters from the High Court of South West Africa and from any circuit court of the South West African territory. In 1959, South Africa passed the Supreme Court Act, integrating the High Court of South West Africa into the Supreme Court of South Africa as a Provincial Division.²⁰ In 1977, South Africa passed the *Criminal Procedure Act*,²¹ which regulated prosecutions in both South Africa and Namibia, until Namibia attained her independence in 1990. Currently, this Act is still the legislation governing prosecution in Namibia.

During the pre-independence period, prosecutors were appointed by the Secretary of the Justice Department in the Administration of South West Africa. Until the end of 1980, investigators or prosecutors in Namibia were only whites. In January 1981, John Walters was appointed as the first non-white prosecutor, stationed at Keetmanshoop Magistrate's Court. A month later Anna Husselman, another non-white was appointed, stationed at the Windhoek Magistrate's Court. In May of the same year, Petrus Unengu was appointed Prosecutor, stationed at the Keetmanshoop Magistrate's Court. In 1982, Elton Hoff was appointed Prosecutor at the Keetmanshoop Magistrate's Court. In 1986, three more non-white prosecutors were appointed, namely Alfred Siboleka, Sylvester Mainga and Francis Mukasa.²² These non-white prosecutors only appeared in the Magistrates' Courts and did not appear for cases at the High Court. It is only after independence when the prosecution came to comprise persons from all races. At the time of writing (September 2021), Hoff and Siboleka serve as Judges of the High Court of Namibia, while Mainga serves as a Judge of the Supreme Court of Namibia. Walters served as Ombudsman, from July 2004 to September

¹⁸ Keuthen (2007) at 11.

¹⁹ No. 46 of 1935, s 108.

²⁰ *Supreme Court Act*, No. 59 of 1959.

²¹ No. 51 of 1977b.

²² A-POMB (2019).

2021. Accordingly, they have played roles as actors in the criminal justice process of Namibia.

Prior to 1982, prosecution was carried out by police officers, who were not trained in law, but only received basic training as police officers. While they had skills in investigation, they had no sufficient knowledge in procedural and substantive law. It also follows that some police officers acted as investigators and later prosecuted the case during trial. In this case, the police acted as examiner and moderator and there were no independent competent prosecutors to ascertain whether an investigation had been carried out in compliance with the provisions of law as the colonial administration had a racial discrimination policy; only white police officers were involved in the prosecution of cases.²³

In 1982, the colonial administration abolished police prosecutors and prosecution was henceforth carried out by persons trained in the legal field, with either Baccalaureus Procuratoris (B Proc) or Bachelor of Laws (LLB) degree. They served in the four permanent magistrates' courts that existed by then, namely in Windhoek, Keetmanshoop, Tsumeb and Ondangwa. In towns, periodical courts were held for some days in a week. For example, in the south prosecutors were at the Keetmanshoop Magistrate's Court on Mondays and Fridays while on Tuesday, Wednesday and Thursday they served in the periodical courts held in Bethanie, Aus and Lüderitz, respectively. The following week they served in the periodical courts held at Mariental and Aranos. The number of courts were sufficient because the crime rate was generally low. This is, arguably attributed to the manner in which the colonial administration treated suspects and prisoners. People feared clashing with the law because having a low regard for the rule of law, the colonial government could subject them to physical assault and torture in police custody.²⁴

At independence, the Namibian Police was established and entrusted with the function of investigation of criminal offences, while the Office of the Prosecutor-General was established to carry out prosecutions. The structure and inter-agency cooperation between the two institutions will be discussed in Chapter Four and Chapter Five.

²³ A-POMB (2019).

²⁴ A-POMB (2019).

1.5 Conceptual clarification

1.5.1 Adversarial system of prosecution

In the adversarial legal system, investigations are carried out and when there is *prima facie* evidence established about a commissioning of an offence, the matter is brought before trial. At the trial, the state represented by the prosecutor should prove the accused's guilt beyond reasonable doubt based on the evidence gathered during investigation. There is no onus on the accused to prove their innocence. The disputing parties before court present evidence before the court. Meanwhile, role of the judge or magistrate is to listen to the presentation of the disputing parties and make a ruling based on what was presented before the court, and not to venture into investigating the matter. This means that any party that makes weak presentations before the court stands to lose the case, even if in reality the facts are advantageous to that party.²⁵ Accordingly, the court will establish the guilt at the trial based on the investigation. Meanwhile, the emphasis of the defence counsel is on the rights of the accused as his or her client, and rebuts the allegations made by the prosecution, maintaining that his or her client is innocent. Further, both the prosecutor and defence counsel have an opportunity to call their witnesses and cross-examine witnesses of the opposing party.

In an adversarial system, the prosecutor plays a role of an equivalent of a plaintiff in a civil matter, that he lays complaints against the accused. A prosecutor faces a defence counsel, who argues the case in favour of the accused, like a counsel for the defendant in a civil litigation. It should be noted that the state has an interest in the case, because an offence against the victim is regarded as an offence against the state and its laws thereof.²⁶

1.5.2 Inquisitorial system of prosecution

Inquisitorial system of prosecution is a legal system in which a judge plays an active role. A judge serves as the investigator and gives instructions for investigations to be carried out to

²⁵ Hodgson (2006) at 223 – 224; *S v Koch*, [2018] NAHCMD 290, para 9.

²⁶ Beck (2006) at 156 – 157, 181.

obtain information that he requires. The judge effectively controls police investigators. This system is applied in the countries that have adopted the civil law legal systems.²⁷

In the inquisitorial legal system, a prosecutor controls the police investigation and he is neutral in the process, with the sole purpose of establishing the truth. The judicial police adopt investigative methods of arresting suspects, carrying out preliminary investigations and search of properties. A prosecutor collects a dossier of information for the case file as part of his or her investigation. In the process of investigation, the defendant can point out exculpatory evidence that a prosecutor needs to include in the file and the prosecutor is obliged to include that evidence. At the trial, the judge has an investigative function, guided by the incriminating and exculpatory evidence in the file.²⁸

In inquisitorial jurisdictions, like in Costa Rica, before she changed to adversarial legal system, for crimes that warranted punishment over three years, the investigation was entirely the responsibility of the police. The role of the prosecutor is to draw up formal instruction and hands over the file to the examining judge. It is the examining judge who is involved in the collection of evidence with the help of the police. A prosecutor only comes in the picture when he is to appeal to the Appeal Court if he is not satisfied with the procedures adopted by the examining judge. After the examining judge, the dossier is handed over to the prosecutor for prosecution. The involvement of the examining judge helps strengthening the proficiency of investigation by otherwise low-skilled police officers.²⁹

1.5.3 Common law legal system

Common law legal system adopts the principle of *stare decisis*, meaning that previous decisions by the court are binding to the court hearing a matter. These decisions serve as a source of law and the court should consider them when making a decision on a case, unless the essential of law has changed, like a court in a democratic system cannot be bound by

²⁷ Echevarría (2005) at 27; Wolf (2011) at 67.

²⁸ Brants (2012) at 1076.

²⁹ United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, [S.a] at 307 – 325.

previous decisions taken in a non-democratic era. The *stare decisis* principle further asserts that decisions of a higher court are binding to lower courts in the same legal system.³⁰

Common law legal system follows the adversarial mode of trial. In common law, the court has a strict hearsay rule that a party may only state facts that it has knowledge about.³¹ Weak evidence or one that prejudices the other party is not admissible. Further, the court requires that the evidence produced should be the best available evidence, for example, if it is about a document, then the party should provide the original document. Documents presented must be authentic. The verification of authenticity is determined by testimony of persons who have seen the document being executed and/or the handwriting verification. Parties appoint their expert witnesses to present evidence that will form part of their pleadings. Accordingly, these experts provide opinions favourable to the respective parties that appointed them. During the pre-trial stage, parties should disclose evidence that they will adduce before the court.³²

1.5.4 Civil law legal system

Civil law legal system originated from the Roman law. One of its main characteristics is that the court solely uses statutory law and does not use case law in arriving at the decision. In the absence of any specified code, the court will apply the general principles of law applicable to the case. This system is largely common in many European countries, with France having a long-standing established system. Civil law legal system is sometimes referred to as the continental law system.³³

The procedural law followed by the civil legal system is the inquisitorial. Unlike in common law system, in the civil law parties to the case do not invite expert witnesses. There are court experts who are registered with the court, who are expected to be impartial. Their evidence is vital because in most cases their opinions influence the decisions of the court. Civil law legal system has no restrictions on the admissibility of hearsay evidence or the best evidence rule

³⁰ Mullerat (2008) at 6.

³¹ There is some exception to the rule, like when evidence corroborates other evidence, or in some bail applications – see Chapter four, section 4.3.

³² Pejovic (2001) at 833; Tetley (2000) at 702 – 703.

³³ Echevarría (2005) at 27; Wolf (2011) at 67.

as applied in common law. Any evidence is admissible in this legal system, provided that the Court would appraise the value of the evidence presented.³⁴

1.5.5 Prosecution

Prosecution is a process through which a suspect is brought before trial, to account for the offence that he has allegedly committed. Parties involved in the prosecution are a prosecutor, defence counsel and judge and/or magistrate. A prosecutor presents a case on behalf of the state, citing evidence of the commissioning of an act of crime by the accused. Prosecutors base their presentations on the evidence provided by investigators. At the prosecution, it is expected that the accused person should answer to the charges laid against him or her and present his or her side of the story. This is done through the defence counsel. The defence counsel presents the case on behalf of the accused, responding to the charges laid against his or her client, the accused, with the purpose of convincing the judge or magistrate about the innocence of the accused. In this process, the defence counsel endeavours to bring into dispute the evidence gathered by investigators, as presented by prosecutors. The task of the judge is to adjudicate, delivering a verdict by conviction or acquitting the accused.³⁵

The legal principle of prosecution is that prosecution should not be preoccupied with winning or losing the case, but to ensure that justice is realised. In this respect, prosecutors should not only weigh in on convicting the guilty, but also on protecting the innocent. The principle of fairness is, therefore, central to the prosecution process. Prosecutors are not private attorneys of a victim who will go out of the way to serve the victim's interests, but they are agents of objective justice, only interested in the punishment of an offender for the crime committed. It therefore follows that prosecutors should not decide that only credible evidence relevant to the alleged offence should be presented to the judge, but they are duty bound to present all legal proofs of the alleged offence.³⁶

³⁴ Pejovic (2001) at 817 – 842.

³⁵ Pejovic (2001) at 817 – 842.

³⁶ Bin Ariffin (2003) at 152; at; Gershman (2001) at 314.

1.5.6 Investigation

Investigation refers to the process of collecting information and gathering evidence about a criminal offence. An investigator examines the act of an offence that has taken place, the surrounding circumstances under which the act offence was carried out, reasons why the act took place, where the act of offence has taken place and who committed the offence. Criminal investigations are carried out by police officers or investigators from institutions created for that purpose, including prosecutors and judges, depending on a legal system that a given country has adopted.³⁷

Information collected for criminal investigations is collected from crime scenes or through searching premises or carrying out searches on any property owned by a suspect, including body searches. Investigators also obtain information from victims, witnesses and a suspect who committed an offence. After collecting data, the next step of investigation is to analyse the information and interpret it, in order to establish vital evidence pertaining to the offence. The evidence will be submitted by the prosecution team to the court. Pre-trial investigation focuses on the conditions that necessitated the commissioning of an offence in order to establish why an offence was committed. During the trial period, further investigation is made by calling witnesses, including experts to respond to some questions in order to establish further evidence about the commissioning of a criminal offence.³⁸

1.5.7 Investigation diary

An investigation diary is a docket with all information pertaining to the investigation of an offence, including communication between an investigator and a prosecutor. At the beginning of the diary is the information on the offence, the date and time and the police station where it was reported. The commencement of an investigation is also recorded in the diary. An investigator and prosecutor write instructions and report about the case investigation and exchange the file. For example, if a prosecutor wants further investigation conducted, he will enter such information in the case diary. An investigator will then carry out further

³⁷ Salet (2017) at 129, 133 – 134.

³⁸ Kazemikaitiene (2007) at 26, 27; Salet (2017) at 129, 133 – 134.

investigation and write in the file information on a further investigation that he carried out and send the file back to the prosecutor.³⁹

1.5.8 Directive cooperation model

This is a form of cooperation model that this study introduces to fill the gap in the inter-agency cooperation models formulated by Liddle and Gelsthorpe.⁴⁰ In this form of cooperation, the prosecution and investigation agencies consult each other, with one agency commanding and directing the other regarding the carrying out of investigations. Although this is a hierarchical form of a relationship, the commanding agency does not necessarily take over the investigation exercise, but it allows another agency to perform its work under supervision. The degree of supervision depends on the seriousness of the offence, with petty offences attracting minimal or no supervision.

1.5.9 Communicative cooperation model

This is another form of cooperation model introduced by this study. In this form of cooperation, two agencies consult and communicate between each other regarding investigation methods that should be adopted. The communication is of an advisory nature in which agency members advise each other on the approach that should be adopted in investigations. They retain their distinctiveness and do not necessarily carry out joint operations, but at the initiative of either of the agencies, prosecutors can come in the midst of investigation and provide advice on a given aspect of investigation, thereafter leaving investigators to continue with an investigation on their own.

1.6 Literature review

Academic literature on investigators and prosecutors in Namibia is limited to a few publications, focusing on examining the process and procedures of investigation and / or prosecution and the independence of the prosecution, but not on inter-agency cooperation.

³⁹ E-OLC (2019); *William Jonker v Minister of Police and Another, Jonkers v Minister of Police and Another*, (10702/2016) [2018] ZAGPJHC 693.

⁴⁰ Canton (2016) at 80 – 90.

These are publications by Barry,⁴¹ Indongo,⁴² Mapaure et al.,⁴³ Mujuzi,⁴⁴ Namandje,⁴⁵ and Nakuta and Cloete.⁴⁶

Mapaure et al.⁴⁷ highlights that the police and prosecution maintain their respective independence from one another. They have not recorded any form of cooperation between the two agencies. They only pointed out that it is necessary for the two agencies to have a Memorandum of Understanding that provides a framework for their cooperation. This is because both parties have a role in presenting the case before the court. Investigators gather facts and evidence and present them to a prosecutor who will argue the matter before the court. An investigator may also be required in court to testify *viva voce*, as a witness. To present a well-prepared case before the court, therefore, investigators and prosecutors' cooperation is imperative. Indongo's⁴⁸ publication focuses on the institution of the Prosecutor-General's office, but it does not discuss the relationship between the Prosecutor-General's office and investigation agencies. Barry's⁴⁹ publication focuses on investigation techniques and prosecution procedures as separate topics and he, too, did not discuss any form of cooperation between investigators and prosecutors. Mujuzi's⁵⁰ publication focuses on evidence obtained by investigators, having employed methods that violate human rights and does not specifically deal with inter-agency cooperation. Namandje's⁵¹ publications focus on explaining hearsay evidence, unlawful arrests and detentions and violation of privacy and not on inter-agency cooperation between investigators and prosecutors. Nakuta and Cloete's⁵²

⁴¹ Barry Z. B., 2007, *Challenges in the investigation, prosecution and trial of transnational organized crime in Namibia*, Resource Material series, Vol. 73, pp. 77 – 85.

⁴² Indongo L., 2008, The uniqueness of the Namibian Prosecutor-General, in Horn N. and Bösl L., *The independence of the judiciary in Namibia*, Windhoek: MacMillan Publishers, pp. 99 – 111.

⁴³ Mapaure C., Ndeunyema N. M. L., Masake P. H., Weyulu F., Shaparara L. A., 2014, *Pre-trial Criminal Procedure in Namibia*, Windhoek UNAM Press.

⁴⁴ Mujuzi J. D., 2016, The admissibility in Namibia of evidence obtained through human rights violations, in *African Human Rights Law Journal*, 16, 407 – 434.

⁴⁵ Namandje S., 2016, *The Law on Hearsay Evidence in Namibia*, Windhoek: PPC Press; Namandje S., 2019, *The Law on Liberty, Arrest and Detention*, Pretoria: Wuzze Books CC.; Namandje S., 2021, *The Law on Privacy and Rationality Standard*, Pretoria: Wuzze Books Distribution.

⁴⁶ Nakuta J. and Cloete V., 2011, *The Justice Sector and the Rule of Law in Namibia: the Criminal Justice System*, Windhoek: Namibia Institute for Democracy and Human Rights and Documentation Centre.

⁴⁷ Mapaure et al. (2014) at 48 – 50.

⁴⁸ Indongo (2008).

⁴⁹ Barry (2007).

⁵⁰ Mujuzi (2016).

⁵¹ Namandje (2016); Namandje (2019).

⁵² Nakuta and Cloete (2011).

publication focuses on the criminal justice process from arrest to trial and imprisonment, and not on inter-agency cooperation.

Accordingly, the literature review in this chapter focuses on the literature on general cooperation between investigators and prosecutors from other jurisdictions and from the international legal system. These will be applied to analyse inter-agency cooperation in Namibia in the subsequent chapters.

The literature on the cooperation between investigators and prosecutors discuss the actors and mode of cooperation between the two agencies and the impact that the relations have on the prosecution of cases. Navickienė⁵³ states that cooperation between investigators and prosecutors is manifested through team work between the two agencies working together and having common resources at their disposal, with the purpose of uncovering material facts about the commissioning of an offence, including also acts of failure to prevent such commissioning (omission). This study concurs with Navickienė, because both investigators and prosecutors have one common purpose, that justice should be served. Accordingly, they should pull resources together and have a coordinated action and process to bring a criminal offence before trial. It may not be always necessary that in the course of cooperation the two agencies will always pull resources together and carry out operations jointly. Cooperation takes place in various forms as it will be discussed in Chapter Three of this study. The essential point is that the two agencies should not work in isolation from each other, because there will be disadvantages to the criminal justice process, as discussed in Chapter Four of this study. Cooperation may be regulated by an Act of Parliament or by a policy adopted by the government, stipulating the types, forms, methods and instances in which cooperation between investigators and prosecutors is required. Cooperation may also be by way of an adopted practice, but this runs the risk of inconsistency because each official will use their own discretions, sometimes subjectively.

Garoupa, Ogus and Sanders⁵⁴ surmise that coordination between investigators and prosecutors is necessitated by the fact that legally trained personnel and investigation officers without a background of comprehensive legal training come from different backgrounds and

⁵³ Navickienė (2010) at 339 – 355.

⁵⁴ Garoupa, Ogus and Sanders (2011) at 238 – 239.

they have, therefore, different approaches to cases. Meanwhile, legally trained prosecutors focus on information required to convict an accused, like burden of proof and *mens rea*, amongst others, investigation officers focus on the characteristics of the offender and the need for prosecution to ensure compliance with law. This study is in agreement with this contention, because in terms of training, most of the police investigators in Namibia are recruits who have undergone basic investigation training or advanced investigation training as part of their police training, which takes place for a duration of six months.⁵⁵ Accordingly, this elementary training does not adequately equip them to approach cases in the same manner as legally-trained prosecutors will do, because the later undergo an in-depth tutoring. Hence, inter-agency coordination becomes essential to complement inadequate skills of investigators with advanced legal knowledge of prosecutors. In comparison with investigations from other countries like Cameroon, some *albeit* not all of the judicial police involved in investigations have undergone training in basic law and have passed examinations. Despite having undergone training, when they investigate offences, these judicial officers are directed by state counsels. Their training is an added advantage because they are able to comprehend the instructions coming from prosecutors.⁵⁶

Joe⁵⁷ compared the relationship between police investigators and prosecutors to the attorney-client relationship. A prosecutor's involvement in the case is triggered by the charges laid before the police or any other relevant investigation agency, after which an investigator provides information to a prosecutor to litigate the matter on behalf of the state. The relationship proceeds further when a prosecutor requests the police to provide further information in order to have sufficient *prima facie* evidence. Investigators also serve as links between prosecutors and witnesses. During the trial prosecutors call upon investigators and witnesses to testify in support of the evidence gathered during the investigation stage. This type of relationship is largely based on practices than on written guidelines.

This study however contends that there is a difference between inter-agency relations (among investigators and prosecutors) and attorney-client relationship. The Namibian High Court defines the attorney-client relationship as partisan, with the attorney required to advocate and advance the interests of the client as in the case of *Standic BV v Petroholland Holding (Pty)*

⁵⁵ K-WPOL (2019).

⁵⁶ *Criminal Procedure Code* (Cameroon) of 2005.

⁵⁷ Joe (2018) at 899.

*Ltd.*⁵⁸ Meanwhile, the relationship between an investigator and prosecutor is created without control by parties, as each party is guided by its respective legislation, rules and procedures or manual of operations. Further, these rules and procedures dictate that prosecutors should be allocated cases by their supervisors. Consequently, investigators do not select prosecutors who will prosecute their cases, unlike clients who choose their counsels. Similarly, prosecutors do not nominate investigators who they will be working with, unlike counsels who have a choice whether they will represent clients who approach them, or not. Prosecutors work with charges that are brought before them, irrespective of who investigators are. Further it is corroborated by a senior prosecutor⁵⁹ that, unlike the attorney-client relationship, police investigators have no control over the case once a prosecution has commenced because they cannot instruct prosecutors to withdraw prosecution. The discretion to commence and stop prosecution is vested in the prosecution authority.

Lack of coordination between investigators and prosecutors in one of the jurisdictions discussed in Chapter Three. The UK, for instance, had many acquittals.⁶⁰ The police carried out their investigations, collecting evidence and brought charges against suspects, without any guidance from the prosecution. At the trials, prosecutors were faced with legal drawbacks emanating from the investigations, particularly in complex crimes where the police employed sophisticated methods of covert policing techniques and undercover operations. This study corroborates that trend, for in Namibia, too, lack of inter-agency coordination has resulted in vital evidence from the scene being excluded, as investigators are not well appraised about the relevance of such information at the trial. By the time the prosecutor realises that deficiency, a long time has lapsed and it will be of no consequence to visit the scene.⁶¹

Halili⁶² asserts that inter-agency cooperation is efficient when it is institutionalised as an integral part of the institutional operations. This means that the cooperation is entrenched between the two institutions and individuals working within these agencies should conform to institutional arrangements. It is particularly applied to organised crimes, for which investigators and prosecutors share information and experiences to advance efficiency in the

⁵⁸ *Standic BV v Petroholland Holding (Pty) Ltd* (A 289/2012) [2020] NAHCMD 197 (27 May 2020) at para 27.

⁵⁹ A-SCPG (2019).

⁶⁰ Asia Development Bank-Organisation for Economic Cooperation and Development (2003: 18).

⁶¹ A-WPOL (2019); A-SCPG (2019).

⁶² Halili (2015) at 221 – 222.

criminal justice process. This study supports this proposition, because of the efficient manner in which cases are handled, when Namibian investigators and prosecutors handling offences involving assets forfeiture coordinate their investigations. These officers are housed in one building at the office of the Prosecutor-General and carry out inter-twinning operations when investigating serious crimes (see Chapter Five). In these operations, investigators are guided to strictly follow the law and not to open up their investigations to loopholes that will be used by the defence counsel to squash charges.⁶³

Glazer⁶⁴ maintains that a practice of cooperation between the investigation and prosecution agencies warrants an effective criminal justice process because it puts prosecutors in a position to evaluate on time the qualities in the evidence gathered and position the case for conviction. The efficacious schematisation of the prosecutor's docket depends on the input of the investigation agency. As stated above in the introduction, for the cases at the Magistrate Court, prosecutors receive dockets at first appearance. In this instance, there is generally insufficient time for prosecutors to acquaint themselves with evidence in the dockets, hence the postponement of cases to further dates. This study, therefore, supports Glazer's recommendations because, if there was inter-agency cooperation in the Namibian legal system, particularly when an integrated approach to an investigation has been adopted, a prosecutor would have known details of the investigation so that there will be no need to postpone cases and delay trials unnecessarily.

The Government of South Australia⁶⁵ states that the guidelines for its country provide a framework on matters that the investigators can cooperate with prosecutors. It states that the police can seek advice from the prosecution on matters related to grounds for criminal charges in respect of sufficient evidence, admissibility of evidence, and appropriate charges to be laid. The Office of the Director of Prosecution⁶⁶ in Ireland states that similar provisions are available in its country. Ireland's prosecution policy further stipulates that advice could also be sought on the nature of disposing off a matter, disclosure of evidence, cases stated, and proposals to discontinue summary matters. The prosecution policy further provides for the prosecution authority to refer matters for investigation when a prosecutor believes that a

⁶³ A-SCPG (2019).

⁶⁴ Glazer (1998: 578).

⁶⁵ Government of South Australia (2014) at 11.

⁶⁶ Office of the Director of Prosecution (Ireland) (2014) at 30.

criminal offence might have been committed, or when the court brings matters to the attention of the prosecution authority. The areas on which advice could be sought are important for a fair trial. Failure for evidence disclosure is one of the issues that cause the state to lose cases. Without appropriate guidance, inexperienced investigators fail to disclose some evidence, only to want to bring this at the trial. The Namibian High Court has ruled that failure to disclose evidence is against the provision of fair trial in Article 12 (1) of the Namibian Constitution, which does not only mean affording the accused adequate time and facilities, but also access to witness statements and other documentary evidence.⁶⁷

This study submits that admissibility of evidence is pertinent for the prosecution of a matter. Where investigators fail to cooperate with prosecutors and present inadmissible evidence, this shows weakness in the criminal justice process. Offenders will escape the wrath of law merely on the basis of negligible evidence and not on the basis of non-commissioning of an offence. In a course of a working relationship characterised by cooperation, prosecutors' guidance to investigators to collect sufficient evidence is, arguably, inevitable.

The relevance of inter-agency cooperation is not only in national legal systems, but also in the international legal system. In the cases of *Bagilishema*⁶⁸ and *Musema*⁶⁹ in the International Criminal Tribunal for Rwanda (ICTR), evidence collected by investigators without prosecutors' guidance was weak. In the *Musema* case, the Court blamed the inaccuracies in evidence presented partly to the errors by investigators in the methods used in taking statements during the pre-trial period. In the *Bagilishema* case, the court held that the prosecution had not established elements of specific offences that link the accused to those offences. The Tribunal is the precursor to the International Criminal Court (ICC). Thus, the ICC maintains inter-agency coordination in its investigations (see Chapter Two, section 2.5).

The proposition that the prosecution is better placed to guide investigators is supported by *Brammertz*⁷⁰ who argues that investigations need to be analysis-driven. This requires legal

⁶⁷ *S v Nowaseb* (3) (HC-MD-CRIMINALI-APP-CAL 46 of 2019) [2020] NAHCMD 78 (06 March 2020), at para 18; *S v Mbok* () [2020] NAHCMD 263 (15 June 2020), at para 73.

⁶⁸ *The Prosecutor v. Ignace Bagilishema (Trial Judgement)*, ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), 7 June 2001, at paras 659, 660, 664.

⁶⁹ *The Prosecutor v. Alfred Musema (Judgement and Sentence)*, ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, at para 665.

⁷⁰ *Brammertz* (2016).

input from prosecutors to indicate the legal elements of the legal theory applicable to the case. In this respect, a trial-focused approach is adopted in an investigation. There needs to be feedback between the two structures, whereby prosecutors inform investigators whether evidence collected is sufficient to prove an offence during the trial.

Even in the international legal system, inter-agency coordination between investigators and prosecutors at the ICTY resulted in the successful prosecution of the crime of genocide in Srebrenica, a small town on eastern Bosnia and Herzegovina where Bosnian Muslims lived, which was attacked by Bosnian Serb forces in July 1995. Prosecutors advised investigators to adopt an analysis-driven investigation, *i.e.*, to prove genocide it was not enough to establish during the investigation that individuals were murdered, but proof should be provided that the murders were committed with specific intent to destroy the group, partly or as a whole. The investigations provided the following evidence after exhuming bodies illustrating the intent of killings. Victims were blindfolded, proving that they were executed and not killed in combat. Victims included boys of tender age and adults, demonstrating that not all of them were of military age. Many victims were found without identity documents, revealing that a careful consideration was taken by the perpetrators of genocide to conceal victims' identities. Further, it was established that the killings were pre-meditated and highly organised because logbook records revealed that the military vehicles and equipment were re-positioned to carry out a calculated attack. With too much evidence of intercepted communications of military officers, investigators would have spent too much time analysing the records and become unfocused. But, with the guidance of prosecutors, investigators focused only on the intercepted communication of most senior officers and were able to gather vital information for the trial. The Chief Prosecutor recommends the joint-investigation approach for investigations in national jurisdictions to ensure successful prosecution of crimes in national courts.⁷¹

Inter-agency investigation entails regular discussions between a guiding prosecutor and investigator about the observation of relevant legal rules and procedures. Coordination looks at the scope of investigation, measures that will be employed by investigators weighing them

⁷¹ Brammertz (2016). The ICYT is now defunct, following the creation of the permanent court, the International Criminal Court (ICC) discussed under section 2.5 of this study, which adopted some of the jurisprudence from the Tribunal.

against feasibility in terms of the law. For example, Van de Bunt and Van Gelder⁷² stated that when the Dutch Parliament passed the *Special Powers of Investigation Act* in 2000, the position of prosecutors changed and they became more involved in complicated criminal investigations. Prosecutors monitor closely the sophisticated police investigations for organised and white-collar crimes, ensuring that the police apply correct methods of investigations.

Cooperation between investigators and prosecutors does not necessarily interfere with the separation of powers between the two agencies. The theory of separation of powers does take into account the reality of intertwined roles of investigators and prosecutors. Thus, in Australia the Department of Public Prosecution (DPP) is amenable to consultation in prosecuting crimes. Krone⁷³ states that:

Reports into the relationship between police and independent prosecutors have stressed repeatedly the need for communication and consultation between the two. In this way there is a moderation of the independence of each.

In support of the above assertion, this study acknowledges that prosecutors should act fairly and objectively, that they should not be drawn into taking over the investigative process of the case. However, independence should not imply a complete barrier between investigators and prosecutors, where they only meet when there is a delivery of a brief of evidence. Qosaj-Mustafa⁷⁴ propounds that to ensure efficiency in the administration of justice, independence and impartiality should be maintained, while a professional coordination is maintained between investigators and prosecutors. The coordination is meant to provide guidance in order to ensure that investigations are carried out lawfully. This is because when investigators have acted unlawfully, defence counsels are given leverage in their arguments to have their clients acquitted.

The literature on investigators and prosecutors cited above underscore that the relationship between the two agencies is of advisory nature. It is not meant for one agency to exercise control over the other. What the literature does not clearly state is whether in the criminal justice systems where cooperation is institutionalised cooperation is discretionary or mandatory and what happens if officials between the two agencies disregard cooperation.

⁷² Van de Bunt and Van Gelder (2012) at 134.

⁷³ Krone (1999) at 18.

⁷⁴ Qosaj-Mustafa (2014) at 11.

Further, the literature does not state the regularisation of the coordination forums between the two agencies, *i.e.*, the frequency at which officials from the two agencies meet. This study endeavours to fill this gap in the literature.

1.7 Scope and limitations of the study

The study covers prosecution and investigation agency relations from 1990 being the time when the Namibia Constitution was adopted which established the prosecution and investigation agencies in Namibia, until 2019 when data collection was carried out. The scope covers trends of cooperation between investigators and prosecutors for cases in both the High Court and lower courts, covering the two regions where the divisions of the High Court are located.

There is limitation with regard to literature on cooperation between prosecutors and investigators in Namibia, which is non-existent, although there is literature on cooperation between prosecutors and investigators in general, focusing on other countries. The available literature on inter-agency cooperation in other jurisdictions will be used to compare and contrast the Namibian scenario, given the fact that Namibia shares characteristics with some of those countries, in terms of the legal system and human resources capacity.

The unavailability of literature makes the study to largely depend on primary sources, which poses another challenge. There is limitation on data collection since some of the investigators and prosecutors deem their work to be highly sensitive and were, therefore, not available for the interviews, despite having indicated their availability earlier. There is another challenge that prosecutors and investigators who initially agreed to participate in the research were eventually not available, which means that the researcher had to identify new interviewees, thereby prolonging the period of data collection.

Another limitation is on the literature from Brazil, one of the jurisdictions discussed in Chapter Three to augment the recommended framework for inter-agency cooperation in Namibia. Judgements from the Brazilian Court and literature on the Brazilian legal system are in the Spanish language. The unavailability of translated judgements and literature in

English placed a limitation on the study to make substantial in-depth exploration of inter-agency cooperation trends in that jurisdiction.

Research materials like case diaries in the police dockets are important to determine the level of cooperation between investigating officers and prosecutors. From these materials one could establish the level and formula of cooperation between agency officials. However, these materials could not be availed to the researcher due to confidentiality. This limits the study insofar as analyses of case diaries are concerned.

1.8 Methodology

The following research methodology was adopted for the study.

1.8.1 Research design

The research design that the study was adopted was the case study design, focusing on the Namibian legal system. A case study provides an in-depth inquiry of into a system. The study has an element of comparative study, drawing from multiple examples from other jurisdictions from all geographic regions of the world, namely, Africa, Europe, Asia and America and from both the common and civil law legal systems.

Comparative study in law refers to the discussion of elements in different legal systems, with the purpose of improving the target legal system. Van Hoeke⁷⁵ asserts that the importance of comparative law is determined by the purpose of the study. He posits that if the study seeks to improve a legal system, it warrants to examine what other systems entail. He, however, cautioned that different contexts of legal systems should be considered before importing trends from foreign legal systems into the domestic legal system. The title and objectives of this study point out that the study is aimed at improving the Namibian criminal justice process. Accordingly, this design adopted a comparative framework entailed a comprehensive analysis of a number of examples, which were compared and contrasted in order to establish the appropriate model of cooperation that could be adopted into the

⁷⁵ Van Hoecke (2015: 2 – 3).

Namibian legal system.⁷⁶ Countries selected from these systems include both small and large states, as well as developing and developed countries. They include two Permanent Members of the United Nations Security Council, from both the common law and civil law jurisdictions. One of the countries discussed, Tanzania, is a member of the Southern Africa Development Community (SADC), a regional political and economic organisation to which Namibia belongs and it has adopted the English legal system, which is applied in the Namibian legal system too. The research was carried out by means of both the desktop and empirical research.

1.8.2 Location of the study

The empirical research was carried out in the Khomas Region and Oshana Region. The identified regions were determined by the location of the two Divisions of the High Court of the Republic of Namibia, the Main Division in Windhoek and the Oshakati Division, in addition to the lower courts that are also found in these regions. Accordingly, these are the only two regions where prosecutors from both lower courts and High Court are found and it was ideal to examine the cooperation of investigators and prosecutors at both levels of the judicial institutions.

1.8.3 Target population

The research focuses on investigators and prosecutors in the Magistrates' Courts in Khomas and Oshana Regions covering both junior and senior actors in the two agencies, from the age of 25 to 60 years. The assumption is that these officials are key to the investigation and prosecution of crimes in Namibia and have worked with both general and serious criminal cases. They are therefore well-placed to provide information necessary to assess inter-agency cooperation in Namibia. The age range covers both long time serving and new investigation and prosecution officers. These interviewees further have different levels of education, which include both undergraduate and graduate levels. The following are the participants in the primary data collection process:

- A-POMB P., senior prosecutor, Khomas Region

⁷⁶ Bryman et. al (2017) at 111 – 113.

- A-SCPG P., senior prosecutor, Khomas Region
- A-WPOL I., senior investigator, Khomas Region
- B-WLC P., senior prosecutor, Khomas Region
- C-WLC P., junior prosecutor, Khomas Region
- D-IPOL K., junior investigator, Oshana Region
- E-OLC P., junior prosecutor, Oshana Region
- F-ACC I., junior investigator, Khomas Region
- F-WPOL I., senior investigator, Khomas Region
- G-OSH P., senior prosecutor, Oshana Region
- H-OSH P., senior prosecutor, Oshana Region
- I-WPOL I., junior investigator, Khomas Region
- J-WPOL I., junior investigator, Khomas Region
- K-WPOL I., junior investigator, Khomas Region
- L-OSH P., senior investigator, Oshana Region
- M-WLC P., junior prosecutor, Oshana Region
- N-ACC I., junior investigator, Khomas Region
- O-ACC I., senior investigator, Khomas Region
- P-ACC I., junior investigator, Khomas Region
- V-WHC P., senior prosecutor, Khomas Region

1.8.4 Sampling technique

Generally, case study research designs adopt non-probability, also called purposive sampling techniques, focusing on a small size. Purposive sampling is representative in nature, as participants are selected on the basis of their knowledge and expertise, as well as relevance to the topic being researched, in order to provide the required information. When sampling is carried out in consideration of these factors, a theoretical sampling is adopted, *i.e.*, selecting interviewees on the basis of achieving theoretical saturation and rising theoretical focus.⁷⁷ The selected persons for sampling were representative of the huge number of prosecutors and

⁷⁷ Bryman et al. (2017) at p. 185; Denscombe (2017) at p 35; Kothari (2004) at 59; Taherdoost (2016) at p 23.

investigators. They were further selected partly through convenient sampling⁷⁸ due to, among others, the availability of interviewees and recommendations by some interviewees on who among their colleagues could also be interviewed. The sampling focused on officials who have been involved in the prosecution and investigation tasks for both short and long periods. This sampling technique is ideal for the sampling number which is relatively small and, therefore, does not need probability sampling.

1.8.5 Sampling size and procedure

Given the diversity of the target population, in terms of cultural background, education and experience, the non-probability sampling procedure has been adopted to select respondents from among the actors in the criminal justice process, the prosecution and investigation agencies. Qualitative researches use cumulative approaches to the sample size, in which a researcher adds participants to the research, until the required information is reached and adding further participants will not produce further information.⁷⁹ The size of respondents is 20, given the small population of prosecutors and investigators, since the entire population of Namibia is about 2,1 million according to the last census held in 2011 and the size of respondents is further reasonable as the research is carried in only two regions.⁸⁰

1.8.6 Data collection procedures

The study adopted both primary and secondary data collection procedures. Primary data is data that is original and is directly collected by the researcher as uninterpreted and has not been analysed. Primary data was collected by means of interviews carried out with the prosecutors, police and Anti-Corruption Commission (ACC) investigators to find out the practice in the process of the Namibian criminal investigations, prosecutions and cooperation between the two agencies. Interviews were in a form of structured questions, appended to this study as Annex A. They were open-ended questions to allow interviewees to make their inputs and provide a broader overview on various aspects pertaining to what they experienced about cooperation between investigators and prosecutors.

⁷⁸ Bryman et al. (2017) at p. 185.

⁷⁹ Denscombe (2017) at p. 45

⁸⁰ National Planning Commission (2012) at p. 2.

Secondary data is data that has been collected by someone else and already interpreted. It is, therefore, not originally collected by the current researcher. Secondary data was collected by means of literature review that was carried out extensively from the academic literature covering broad areas of prosecution and investigation in a number of countries, covering both inquisitorial and adversarial legal systems. The review has provided comprehensive information about the cooperation between prosecutors and investigators and the significance of their collaboration in the effective prosecution of criminal cases, as well as shortcomings of lack of inter-agency cooperation.

1.8.7 Data analysis

Qualitative data analysis refers to the arrangement and interpretation of collected data to discover and illustrate processes and practices of subjects of inquiry. Qualitative data analysis serves the purpose of discussing a given trend in broader details. This is done by focusing on a single case, like individuals or a group and their interrelations. That is explained looking and cause-effects, *i.e.*, why things are happening in the manner that they happen and how factors and actors correlate. The purpose is to arrive at a conclusion, after having made comparisons of various scenarios.⁸¹ Adopting a qualitative data analysis method, data collected has been coded, *i.e.*, it has not been presented in their original form but have been analysed and interpreted. The data coding and display method that were used have included quantification of qualitative data analysis where necessary.

1.8.8 Data presentation

It is stated in the literature on research methodology that communicating research findings could be challenging, as there could be a gap between the researcher and intended end-user like policy-makers. These gaps make it difficult for a successful implementation and application of the research outcome to applicable facets of political and socio-economic life.⁸² The findings will be presented in a user-friendly language, using both text, figures and tables.

⁸¹ Bryman et al. (2017) at p. 336; Flick (2013) at 5.

⁸² Ibem (2017) at 4496.

1.8.9 Research instruments

The research process method that the study has adopted is a qualitative data collection and analysis. Qualitative data collection is ideal for law studies, as a social science study. This field of study does not need quantitative data collection that use scientific methods and is therefore appropriate for pure science researches. Accordingly, face-to-face interviews were research instruments that were applied in the study. They are preferred to questionnaires as the latter has a low rate of responses. Further, interviews provide an opportunity for follow up questions and seeking further clarity. This provides for an opportunity to obtain voluminous information compared to questionnaires. Interviews provide an opportunity for a research to obtain privileged information because participants who are key players speak from the positions of their experience and expertise and from perspectives gained through their experience.

1.9 Research ethics

The empirical part of the study was granted ethical clearance by the University of Western Cape. The researcher acted diligently and safeguarded against unethical research activities. Research participants are treated with the respect and the researcher undertakes to honour confidentiality of information obtained from the interviewees. Further, information on the study has been explained to participants, including their rights to withdraw from the research at any time. Coded names were used in the study to ensure the confidentiality of participants. The researcher refrained from misinterpretations of collected data, in order not to cause harmful consequences to participants. Further, the researcher undertakes not to publish findings that will adversely affect the participants in any way. The researcher has maintained academic professionalism and ethical neutrality by presenting facts without being biased.

1.10 Epistemological and ontological contribution of the study

Epistemology is concerned with what is considered as acceptable knowledge and truth in an academic discipline and the approach that could be used to unravel this truth. Therefore, in law, epistemology is concerned with how we learn the truth about law. Since law is a social science discipline, an interpretivist approach is the ideal epistemological position to be

adopted as it distinguishes human objects and behaviour from natural science, unlike positivism which adopts a natural science inquisitive model. It is advocated that in order to understand these dynamics of knowledge about law, it is ideal to first understand the individual's comprehension of law. Individuals' internalisation of law impacts on their acceptance of the legal rules and the trends in the legal system. To understand and establish knowledge about law, one needs to comprehend the tenets of investigation, including the dynamics such as procedures, actors and foundations of law. These elements provide insights on the underlying factors that determine cooperation.⁸³

Mc Kay⁸⁴ states that epistemology in law is a scientific investigation that should look at the relations of various factors to law. In respect of this study, it makes an epistemological contribution to the body of knowledge and truth about the investigation and prosecution collaboration as a doctrine of the criminal justice process. This is further analysed in terms of the type of jurisdiction in which inter-agency cooperation takes place, relative to other types of jurisdictions. For a common law system, which is applicable to Namibia, the process is constructed in a quasi-hierarchical, yet complementary structure, in which the prosecution agency instructs the investigation agency to carry out investigations that produce evidence relevant to the facts of law and, in some instances, provide guidance throughout the process.

Ontology refers to the knowledge construction of objects, properties, methods and manners, i.e., what of these does really exist.⁸⁵ Accordingly, ontology is about what is it that we learn about law and legal ontology advances a proposition that the essentials of law like rights, behaviour and property do really exist. In respect of this study, the ontological examination focuses on individual investigators and prosecutors and their conducts in the Namibian criminal justice process. Therefore, the ontological contribution that the study makes is about positive or negative attitudes and style adopted by investigators and prosecutor towards cooperation among themselves. Individuals with positive attitudes endeavour to augment their opportunities to have matters successfully prosecuted. They maintain engagements with their counterparts from another agency on the basis of complementarity. This involves establishing the culpability, weighed against the need for a fair trial that is anchored on the

⁸³ Bryman et al. (2017), at pp. 12 – 14; Forrest (2007) at 74, 76; Weiler and Paulus (1997) at 548.

⁸⁴ McKay (2014) at 20.

⁸⁵ Ekuobase and Ebietomere (2013) at 182; Wahlberg (2010) at 17 – 18, 43.

foundation of impartiality and justice. Individuals with negative attitudes focus more on competing about authority over the criminal justice process between themselves and their counterparts from another agency.

1.11 Outlining of the remaining chapters

Chapter Two discusses models, principles and approaches of inter-agency cooperation, looking at their disadvantages and advantages. This is to establish a workable formula that fits the Namibian setting, to be recommended in the subsequent chapters.

Chapter Three presents a survey on the trends of cooperation between investigators and prosecutors in various jurisdictions across the world. The survey focuses on both inquisitorial adversarial systems of prosecution, of the civil and common law legal systems, respectively, which invariably include prosecutorial investigations and police prosecutions. The purpose for this survey is to examine trends that could work in the improved Namibian criminal justice process.

Chapter Four presents an overview of the prosecution and investigation agencies in Namibia, their structure and the laws governing their operations. The chapter looks at the techniques and procedures adopted in investigations, which necessitate inter-agency cooperation. Chapter Five is based on the empirical research and an evaluation of the empirical data that has been made to determine the number of prosecutors working closely with the investigators vis-à-vis those who are working by themselves. This evaluation is made by looking at propositions advanced in the literature on criminal justice system about the collaboration between agencies and officials working as investigators and prosecutors. The chapter addresses the following research questions: What are the trends in the Namibian criminal justice system, in respect of cooperation between investigators and prosecutors? Also, how common is it in Namibia for prosecutors to assist the investigators?

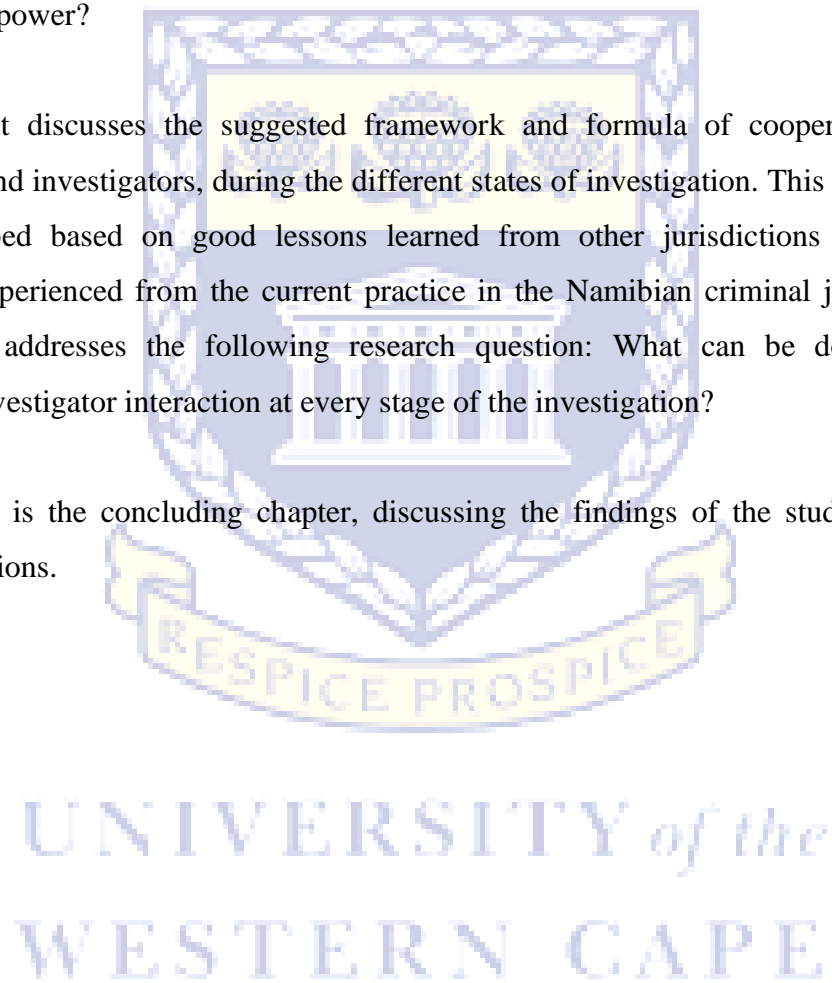
Chapter Six discusses the significance of cooperation between prosecutors and investigators. The chapter refers to examples from other criminal justice systems as an illustration of the essence of the cooperation. It then looks at what is the impact of the absence of a legal framework of investigators' and prosecutors' cooperation in Namibia, based on empirical

research. The chapter further addresses the following research question: What is the relevance of coordination between investigators and prosecutors in the prosecution process?

Chapter Seven discusses cooperation within the context of the doctrine of separation of powers and independence of the prosecution. The chapter looks at this doctrine in the Namibian prosecution agency context and how this can be reconciled with inter-agency cooperation between investigators and prosecutors. The chapter addresses the following research question: How can inter-agency cooperation be realised within the framework of separation of power?

Chapter Eight discusses the suggested framework and formula of cooperation between prosecutors and investigators, during the different states of investigation. This framework has been developed based on good lessons learned from other jurisdictions and from the challenges experienced from the current practice in the Namibian criminal justice process. The chapter addresses the following research question: What can be done to ensure prosecutor/investigator interaction at every stage of the investigation?

Chapter Nine is the concluding chapter, discussing the findings of the study and making recommendations.



CHAPTER TWO MODELS, APPROACHES AND PRINCIPLES OF INTER-AGENCY COOPERATION

2.1 Introduction

Models of cooperation and approaches to investigator-prosecutor relations exist in all legal systems, namely, common and civil law legal systems. The models and approaches describe the underlying characteristics of cooperation between the two agencies. Models of cooperation and approaches differ from one jurisdiction to another; one jurisdiction may adopt different models of cooperation. However, adopting different forms of cooperation models renders a system inconsistent. It is advisable that one model is adopted in a legal system for consistency. This chapter discusses the origins of inter-agency cooperation models and approaches to cooperation between investigators and prosecutors. In the absence of Namibian case law related to the models, the chapter will cite cases from the Canadian and South African jurisdictions, as Namibian judges regularly cite cases from these two jurisdictions. In addition, for the principles guiding inter-agency cooperation, the chapter will further cite cases from the Indian jurisdiction, because this jurisdiction has cases decided after many years in which the principles of inter-agency cooperation are found.

2.2 Origins and characteristics of the inter-agency cooperation models

The models on inter-agency cooperation were formulated in 1984 by Loraine R. Gelsthorpe, then a post-graduate student in Criminology at Cambridge University. The models are influenced by a number of factors related to historic, institutional and individual circumstances⁸⁶ The following are five models that Gelsthorpe formulated. Their advantages and disadvantages are discussed later on in the chapter.

(i) Communication model

This model is characterised by cooperation between investigators and prosecutors, which is limited to communication between the two agencies. Agencies refrain from going beyond the

⁸⁶ Liddle M. and Gelsthorpe L., 1994, *Crime Prevention and Inter-Agency Co-Operation*, London: Home Office, at 2; European Crime Prevention Network, 2012, European Crime Prevention Network, Brussels: European Crime Prevention Network Secretariat.

framework of solely communicating. They acknowledge the role that each agency plays with respect to the work related to both agencies, without one agency encroaching upon the domain of another. Communication may be from one agency or it can also be a two-way traffic communication. Agencies may also disclose information to one another, in part or in full.⁸⁷

(ii) Cooperation model

In this model, agencies maintain consultations on issues of mutual concentration, but they maintain separate identities. Agencies mutually define a problem, mutual, which they would set to cooperate in resolving. There is distinctiveness of institutions, in terms of their structure and resources. Further, agencies can carry out joint operations and one agency may agree to another to take a lead and initiatives.⁸⁸

(iii) Coordination model

In this model agencies also agree on a problem that is mutually pertaining to their work. Agencies cooperate in a methodical way, maintaining their distinctiveness, but they combine resources to address the problem that pertains to their mutual programmes.⁸⁹

(iv) Federation model

In this model agencies maintain separate identities but they collaborate on key focus pertaining to their programmes. They only have a central focus that brings them together. They further work together by operating unified services.⁹⁰

(v) Merger model

In this model there is no distinctiveness between agencies. The work in joint operations on matters of mutual concern, drawing resources from a common pool. In this case their

⁸⁷ Liddle M. and Gelsthorpe (1994) at 2.

⁸⁸ Liddle M. and Gelsthorpe (1994) at 2.

⁸⁹ Liddle M. and Gelsthorpe (1994) at 2.

⁹⁰ Liddle M. and Gelsthorpe (1994) at 2.

contributions cannot be distinguished from outside as they have a seamless relationship. Liddle and Gelsthorpe⁹¹ also stated that in the course of inter-agency cooperation, some agency members participate supportively, silently, opposing as monitors and for the sake of publicising their own activities.

vi) New models

This study has added two forms of cooperation to Liddle and Gelsthorpe's list, namely, the directive cooperation and communicative cooperation models (see Chapter One).

2.3 Origins and characteristics of the approaches of inter-agency cooperation

In 1998, Elizabeth Glazer of the United States Attorney's Office for the Southern District of New York wrote about what she called the traditional model of investigator-prosecutor relationships.⁹² New Zealand academic Stephanie Beck further developed the formula and/or approaches to inter-agency cooperation between the police and prosecutors in 2006.⁹³ The formula of cooperation between investigators and prosecutors is modelled on various approaches based on the extent to which the two agencies are involved in the investigation and initiation of a prosecution. These are investigator-dominated approaches, equal control approach and prosecutor-dominated approach.⁹⁴ The European Parliament introduced another inter-agency cooperation approach in 2014, namely, the strategic and operational cooperation.

The equal control approach is closely related to the communication mode of inter-agency cooperation. Under the equal control cooperation approach, each of the two agencies has a distinct role that does not hinder the power of another agency. Under this formula, investigation remains a domain of the police or investigation agency, which is not subject to instruction or direction from the prosecution to institute charges and investigation over offences. At the same time, investigators have no exclusive role in the investigation process, but prosecutors have an advisory role to play. When an investigation is finalised, it is left to a

⁹¹ Liddle M. and Gelsthorpe (1994) at 8.

⁹² Glazer (1998) at 576 – 577.

⁹³ Beck (2006) at 181 – 182; Glazer (1998) at 576 – 577.

⁹⁴ Beck (2006) at 181 – 182; Glazer (1998) at 576 – 577.

prosecutor to decide whether there is sufficient evidence that warrants prosecution. The two agencies serve one purpose, to ensure that an offence is investigated and prosecuted, but their responsibilities are independent from each other, albeit complementary of one another. The equal relationship approach is based on the mantra of distinct division of labour, in which the prosecutor will not be aware about the target of the investigation agency.⁹⁵

The investigator-dominated approach of inter-agency cooperation is characterised by the power of the investigator to decide on the charges and referral of the matters for prosecution. In this approach, the powers of prosecutors are limited and they cannot initiate prosecutions as they wish without the police having granted consent.⁹⁶ The process and decision-making are entirely under the control of investigators. Investigators carry out their investigations independently without direction or supervision from prosecutors. Guidance is provided to investigators only at their own request. Prosecutors cannot impose themselves on investigators to provide guidance. They take a back stage in this approach.

The third formula is the prosecutor-dominated approach, characterised by a prosecutor instructing, directing and controlling investigators and a prosecutor will further decide whether the offence should be prosecuted.⁹⁷ In this case, investigators work at the command of prosecutors and do not act independently. It is a hierarchical relationship of a superior and a subordinate. While they may initiate investigations, they can also carry out investigations at the instruction of prosecutors and when prosecutors instruct them, they are compelled to carry out the investigation and are not at liberty to ignore instructions from prosecutors.

Another approach of cooperation in a form of formal strategic or operational cooperation.⁹⁸ Strategic cooperation is signified by formalised and regularised bilateral meetings at a senior level to address strategic issues, including legislation and policy frameworks, best practices and exchange programmes between agencies. Their decisions cascade to the lower echelon of the two agencies, who dutifully implement them to avoid being considered insubordinate. At operational level, middle managers and junior officials meet to exchange information on matters under investigations and look at the training needs, among others. The formula of

⁹⁵ Beck (2006) at 181 – 182; Glazer (1998) at 576 – 577.

⁹⁶ Beck (2006) at 181 – 182; Glazer (1998) at 576 – 577.

⁹⁷ Glazer (1998) at 576 – 577.

⁹⁸ European Parliament (2014), at 27.

cooperation can also be informal, where the two agencies' functionaries meet on an *ad hoc* basis to address specific issues.

2.4 Origins and characteristics of the principles of cooperation

This study identifies six principles that governs inter-agency relations between investigators and prosecutors. These principles have their origins in court judgements.

2.4.1 Principle of neutrality

The Oudh Chief Court⁹⁹ in India underscored the principle of neutrality in 1933, in the case of *Ghirrao and ors. v Emperor*.¹⁰⁰ It supposes that investigator-prosecutor relationship is based on the premises that a crime is committed against public order and it must be prosecuted following the due process of justice. Further, the principle of cooperation underscores the canon of neutrality in the process before the court. Neither of the two agencies should push its agenda against the suspect, against conformity with the principle of the rule of law.¹⁰¹ A suspect is held against what is legitimately believed to be an offence, supported by *prima facie* evidence.¹⁰²

The principle of neutrality implies impartiality and unbiasedness in the prosecution of a crime is among the factors that justify cooperation among the police and prosecutors. Impartiality is required for a trial to be fair. In the case of *Aupindi v Shilemba and Others*,¹⁰³ the Namibian Supreme Court held that while complete neutrality may not be a requirement, it is required that judicial officers should be impartial. Arguably, this is also applicable to officials involved in the investigation process. It is, thus, necessary for investigators to cooperate with prosecutors who are well vested with the values of fairness in the criminal justice process. This cooperation will enable prosecutors to guide investigators, when necessary, to bring forth investigations that are unbiased and solely seek for the fulfilment of justice and which

⁹⁹ Amalgamated in to the Allahabad High Court from 1948.

¹⁰⁰ *Ghirrao and ors. v Emperor* Cri LJ 34 (Oudh H.C.) 1933.

¹⁰¹ In the case of *Rally for Democracy and Progress v Electoral Commission of Namibia*, 2010 (2) NR 487, at para 23, the Namibian Supreme Court held that the rule of law supposes that any exercise of public power should be done in accordance with the law and no one should usurp the power of the state vested in the legislature by acting outside the framework of law.

¹⁰² Bhardwaj (2017) at 01-07.

¹⁰³ *Aupindi v Shilemba and Others* [2017] NASC 24.

are both fair to the perpetrators, victims and the society thereof. As prosecutors are the ones who present cases before the presiding judicial officers in the court, they are more accustomed to issues that judicial officers look at and require in the furtherance of impartiality, unbiasedness and fair trials.¹⁰⁴ In discharging their prosecutorial function, regard has to be given to the fact that all relevant information has been presented before the court. This is to ensure that justice is done to the case. Such information should be presented without prosecutors having been unduly influenced by investigators to go out of way to bring vexatious information before the court.

2.4.2 The principle of complementarity

The Indian High Court underscored the principle of complementarity in 1967 when Justice Vaidyalingam held in the case of *Abhinandan Jha & Ors vs Dinesh Mishra*¹⁰⁵ that the functions of the judiciary and the police are complementary. The learned judge's assertion also includes the notion that there is complementarity role between investigators and prosecutors. The prosecution complements the efforts of the investigation agency independently and further based on the principle of a fair and just criminal justice process in which no party will be subjected to undue prejudice. The principle was further echoed by the Justice Rosenberg of Court of Appeal for Ontario, Canada, who averred that the relationship between the two agencies was complementary, with due consideration to their respective independence.¹⁰⁶

The principle of complementarity is further illustrated in the multi-disciplinary teams of the International Criminal Court, in which professionals from multi-cultural and inter-disciplinary fields work together on investigations, discussed below (see section 2.5).¹⁰⁷ This inter-agency cooperation includes national prosecution officials complementing investigation agency officials to ensure that valid and impartial evidence is obtained.

¹⁰⁴ Kjelby (2015) at 61-83.

¹⁰⁵ *Abhinandan Jha & Ors vs Dinesh Mishra* 1968 AIR 117, 1967 SCR (3) 668

¹⁰⁶ Rosenberg (2009).

¹⁰⁷ International Criminal Court (2003) at 2; International Criminal Court (2005). Namibia is party to the ICC, having ratified the Rome Statutes on 25 June 2002.

2.4.3 The principle of objective and material truth

Cooperation between investigators and prosecutors is further necessitated by the principle of objectivity and material truth. This principle was underscored in the case of *R. v. Curragh Inc*¹⁰⁸ by Justices McLachlin and Major dissenting. That is that investigation should objectively reflect the reality that exists independently of the investigator's personal perspective. He should refrain from bringing subjectivity into the evidence that he is collecting. Material truth should be provable. Further, facts should be reported with a high degree of accuracy, avoiding purposeful inaccuracies.¹⁰⁹ State officials or even members of the investigation agency commit some of the offences. It is, therefore, important that prosecutors should guide investigations to bring about objective and factual results and avoid advancing information that seeks to suppress the truth, while omitting to disclose information that seeks to enhance material truth or preventing the defence team from accessing such information. Investigations should not be compromised by subjectivity based on the character of a suspect, or personal conscience of an investigator. Attacking the character of a suspect impedes and undermines the fundamentals of the truth-finding process. Further, it is known that some offences are committed because of recidivism. In Namibia, this refers to repeated offenders.¹¹⁰ In this case, investigators may become biased towards offenders and design their investigations based on their perception about offenders. In this regard, it is necessary to bring in prosecutors to provide professionalism to investigation processes and ensure credible results thereof.

2.4.4 The principle of well-founded conclusions

Cooperation between the prosecution and investigation agencies is obligated by the principle of well-founded conclusions. This principle was underscored in the case of *Mahupelo vs Minister of Safety and Security*.¹¹¹ The Court affirmed a common law principle that suggests that for a prosecution to be initiated or maintained, there should be a probable cause. Accordingly, it held that only when a case is well-founded and that the evidence at hand is reliable that a prosecution should be initiated.

¹⁰⁸ *R. v. Curragh Inc.*, 1997 CanLII 381 (SCC), [1997] 1 SCR 537.

¹⁰⁹ *Embulaeva and Ilrickaya* (2018) at 2.

¹¹⁰ United Nations Office on Drugs and Crime (2020).

¹¹¹ *Minister of Safety and Security* Case No. I 56/2014.

The principle was further underscored in the case of *Khumalo v. Minister of Police and Another*,¹¹² when the South African High Court underscored that investigations should reflect well-founded conclusions, otherwise they undermine the criminal justice process, signifying unreasonableness and dereliction of duty. Similarly, the American Bar Association (ABA) Criminal Justice Standard¹¹³ recommends that the prosecution should work closely with investigators to bring to the attention of the latter legal issues that could arise from investigations and ensure that they adopt investigation techniques, which produce conclusions that comply with the law. It is, thus, advisable that there is coordination between the two agencies in investigations to ensure that their conclusions are founded on law and fact. Sometimes investigators use unlawful means to elicit information from suspects. It is cautioned that, while various means could be employed to determine the truth when a suspect refuse to answer questions from an investigator, this means should not override the rights of a suspect.¹¹⁴

2.4.5 The principle of legality

The principle of legality has its origin in France, following the 1789 French Revolution, when it was established as one of the principles of the state.¹¹⁵ This principle ensures constraining abuse of state power by the investigation agency. In the Namibian context, it means that the work of public officials should be lawful, otherwise it lacks legitimacy.¹¹⁶ In their investigations, the police does act outside the parameters of permissible methods of investigation and misusing authority over the suspects who are being investigated as stated in the case of *Mahupelo v Ministry of Safety and Security*.¹¹⁷ Cooperation with the prosecutors, particularly in guided investigations, serve as a control measure and it guards against investigators abusing their powers in the process of investigation and ensuring that all facts and evidence brought before trial have been procedurally secured.¹¹⁸

¹¹² *Khumalo v. Minister of Police and Another* CASE NO: 17132/15, para 37.

¹¹³ American Bar Association (2008).

¹¹⁴ Embulaeva and Ilrickaya (2018) at 3.

¹¹⁵ Drăghici and Stoian (2015) at 512.

¹¹⁶ *Rally for Democracy and Progress vs Electoral Commission of Namibia and Others*, supra.

¹¹⁷ *Mahupelo v Ministry of Safety and Security* Case No. 56/2014.

¹¹⁸ Varshney (2007) at 285.

2.4.6 The principle of efficiency

This study introduces another principle of inter-agency cooperation: the principle of efficiency. When there is collaboration between investigators and prosecutors, prosecutors are able to guide investigators on the scope of investigation, which will result in investigators leaving out unnecessary information that does not add any value to the case. This saves time and resources used by investigators. The collection of pertinent information with the guidance of prosecutors mitigates the prolonged process of sending investigators back and forth to gather more evidence. Since prosecutors' endeavour to ensure that only relevant evidence is gathered, the result of this is the efficiency of the criminal justice process because the process of investigation and prosecution that follows would conceivably be completed within a reasonable time.

Zaimaru¹¹⁹ asserts that successful investigation is concluded when there is cooperation between investigators and prosecutors. The police cannot produce successful investigation when they work in complete isolation from the prosecution. The lack thereof leads to delays in cases as sometimes there is lack of knowledge on the part of investigators. Lack of proper investigation of cases compromises the quality of evidence for the purpose of prosecution. It further leads to unnecessary postponements of cases.

2.5 Strengths and weaknesses of the inter-agency cooperation models

Inter-agency cooperation models have their strengths and weaknesses. The strengths of the communication model are that it complies with the doctrine of separation of powers, which is discussed in Chapter Seven of this study. There is a clear demarcation of identities, structure and systems of the two agencies. The Namibian Supreme Court has underscored this principle in the case of *Kruger v Minister of Finance*¹²⁰ by advocating that each institution should remain in its lane as far as its mandated functions are concerned. In so doing, one branch should refrain from ordering another branch to perform certain duties as this symbolises encroaching in the area generally reserved for another branch.

¹¹⁹ Zaimaru [s.a.] at 206.

¹²⁰ *Kruger v Minister of Finance* A 358/2015.

A key phrase to look at in the above-stated *Kruger's Case*¹²¹ is “order another to perform certain duties”. When an agency has the power to order another, it means that the ordered agency must comply with the order. However, in a communication model, when an agency advises, request or inform another agency, that agency may or may not follow the advice or request. It is the spirit in a communication model that agencies should not impinge on the territories marked for others, but rather endeavours to liaise among each other for common objectives.

The weakness of the model is that an agency can hide behind the separation of powers doctrine as a way of avoiding cooperation with another agency. This could include withholding of information from one another, which could be vital to carrying out an investigation effectively. Moreover, withholding information by investigators to prosecutors is failure of an obligation. This was stated in the case of *R v McNeil*,¹²² where the Court maintained that while an investigation agency is separate and independent for the prosecution agency the two agencies act on the same first party position and investigators are not a third party. The challenge of an agency hiding behind the doctrine of separation of powers in cooperation between investigators and prosecutors in Namibia could be best addressed when there is a documented framework of cooperation as discussed in Chapter Eight of this study.

The advantages of the cooperation model are that, like the communication model, it fosters communication between prosecution and investigation agencies, without compromising the separation of powers between the two agencies. The importance of this level of cooperation is stated in the Canadian *Federal Prosecution Service Deskbook*,¹²³ which states that there must be an involvement of the crown counsel in the investigation process at an early stage and throughout the investigation period. It maintains that intensive cooperation is required as there is perceivably a joint responsibility between the agencies for the preparation of disclosure materials. The Deskbook further provides that in their cooperation, agencies should be cognisant of the fact that they are distinct and independent institutions.

Inter-agency cooperation that adopts the cooperation model involving joint operations is

¹²¹ *Kruger v Minister of Finance* A 358/2015.

¹²² *R v McNeil* [2009] 1 SCR 66.

¹²³ Federal Prosecution Service of Canada, 2008, *The Federal Prosecution Service Deskbook*, Ottawa: Federal Prosecution Service, sections 2.2 and 54.3.1.3.

expedient, as it saves time spent on correspondence and consultation between investigations and prosecutors. Justice is arrived at within a possible short time, because prosecutors do not spend time sending files back to investigators for further investigations.¹²⁴ In this respect, prosecutors are part of the team and are readily available to provide guidance. Redoubled resources bring about redoubled efforts. The red tapes are cut so that there is no need to involve bureaucratic procedures of investigators seeking appointments with prosecutors to seek guidance. There are no disadvantages of the cooperation model, because collaboration is done mutually and there is no self-imposition of one agency over the other.

Inter-agency collaboration is also practised in the international legal system. As stated above (see section 2.4.2), the ICC has adopted multi-disciplinary teams in criminal investigations, comprising prosecutors and investigators. ICC prosecutors further work in close cooperation with investigators from national investigation authorities.¹²⁵ The ICC's investigative team's interdisciplinary character is illustrated by a number of prosecutorial, investigative and related professionals, who cooperate in the process of investigations.¹²⁶ Multi-disciplinary composition of investigation teams arguably affords an investigation an opportunity of interactions between different professionals involved in the criminal justice system which will benefit them in terms of skills enhancement for investigations in the future. After investigators have gathered evidence, with guidance from prosecutors, prosecutors are able to make substantive legal inputs in the investigations and provide overall management and supervision of evidence, further evaluating evidence to establish compliance with definitional elements of crimes. If they are not satisfied with evidence, they can direct further gathering of evidence and if they are satisfied, they would recommend filing of charges or indictment.

The advantages of the coordination model are that operating in a systematic way symbolises sound planning, as the work is structured and orderly. The advantages of this inter-agency cooperation model are that justice is served in a less costly manner, because resources are

¹²⁴ M-WLC (2019).

¹²⁵ International Criminal Court (2003), at pp 8 – 9; International Criminal Court (2005), at p 2; International Criminal Court, 2005, *Regulations of the Office of the Prosecutor General*, Regulation 32;

¹²⁶ International Criminal Court, 2005, *Second Report of the Prosecutor of the International Criminal Court to the Security Council, pursuant to Resolution 1953 of 2005*.

united and the time spent on investigation is shortened. Accordingly, it enables productivity of the criminal justice process.¹²⁷ A senior prosecutor¹²⁸ maintains that,

Early involvement of prosecutors in investigations helps eliminate cases that are not worth prosecuting and keeps on the roll cases that are worth prosecuting...when they are involved from the beginning, as experts from criminal law, cases with sufficient evidence are set for trial... it helps to reduce the workload of the presiding officers, so that they are not bothered with cases where there is no sufficient evidence.

The above-quotation follows that a prosecutor-guided investigation at pre-trial stage saves the time of the court. The prosecutor will be able to establish whether available evidence warrants the matter to be brought before trial, failure of which he will advise accordingly. This does not only save time and ensure efficiency of the criminal justice process, but it further saves the state from an embarrassment of withdrawal or dismissal of cases prematurely. The combination of resources affords agencies an opportunity of savings, provided that resources will not be combined at the expense of depleting resources of one agency while saving for the other agency. This is the weakness of the model because it has not clearly spelt out as to how the combination of resources will be made, *i.e.*, the ratio of the agencies. Another weakness is that the agency that puts in more resources may feel entitled to dominate the investigation process.

Further weaknesses of the coordination model are illustrated by the US jurisdiction. In Maine State, US, the Bureau of Intergovernmental Drug Enforcement (BIDE) adopted an integrated approach in investigations, where investigators and prosecutors closely work together in the investigations, jointly drawing up plans for new cases and comparing notes on ongoing cases. Once the prosecution is informed about a case, a prosecutor is assigned to work with an investigator throughout. In other parts too, prosecutors work closely with investigators, even coaching them for cross-examinations, but they do not necessarily direct them on what to say. It has however been observed that the close working relations between the police and prosecutors develop into a trust, that prosecutors will no longer be strict with scrutinising evidence presented by the police. This results in matters brought before trial without sufficient evidence. This is illustrated by numerous convictions that were later overturned, following DNA tests which proved that the convicts were not responsible for the offences for

¹²⁷ Navickienė (2010) at 345 – 341.

¹²⁸ H-OSH (2019).

which they were found guilty.¹²⁹ It is further maintained that despite integrated working relationship, the police are uncooperative with prosecutors when it comes to cases involving their colleagues.¹³⁰

The advantages of the federation model are like of the other models mentioned above, *i.e.*, distinctiveness of structures. Agencies are brought together by an area on which they focus, pertaining to their common interests and they are not perpetually working together even where it is not necessary. Only at necessary moments that their activities may overlap.

Canadian High Court recognises this in *R. v. Beaudry*, where Justice Sharron stated that:

In my opinion, the proper functioning of the criminal justice system requires that all actors involved be able to exercise their judgment in performing their respective duties, even though one person's discretion may overlap with that of another person.

The Court recognised the fact that while the two agencies are distinct, their activities could possibly overlap, since they serve the common interest, *i.e.*, that justice be served.

The disadvantages of the federation model include the operating of unified services by agencies, which is not possible under agencies that ought to maintain separation. It also contradicts the distinctiveness of structures that the model posits. Taking direction from the court judgement quoted above, continuous overlapping of activities between the two agencies is not recommended for the purpose of upholding the distinctiveness of agencies. Accordingly, in the case of *Abhinandan Jha & Ors vs Dinesh Mishra*,¹³¹ the Court cautioned that the functions of the judiciary and police are complementary and not overlapping.

The advantages of the merger model are that an agency that has depleted its resources will still be able to function, by drawing from the resources of another agency. This is particularly the case with the Namibian Police and ACC investigators who complain about limited financial resources availed to them by the treasury, which led to the agencies not carrying out some investigations, particularly forensic investigations.¹³² In the merger model, investigators could use facilities of the prosecution agency, including vehicles, when they need to travel to places, thereby making some savings on their budget or solving transport problems when

¹²⁹ Buchanan (1989) at 2; Castberg [*s.a.*] at 135, 140.

¹³⁰ Castberg [*s.a.*] at 135.

¹³¹ *McBride v Minister of Police and Another* 1968 AIR 117, 1967 SCR (3) 668.

¹³² Smith S., 2021, Lack of funds threatens ACC investigations, in *The Namibian*, 1 March; Ikela S, 2019, N\$ 4.6 billion police budget is not enough: Ndeitunga, in *New Era*, 10 April.

their resources are constrained.

Advantages of joint operations and combined resources in the merger model are that it addresses the problem of under-staffing in one agency. The Namibian Police as one of the investigation authorities faces challenges of understaffing, resulting in investigators being overworked, and investigations dragging on. This was stated by a senior prosecutor¹³³ who said:

In Namibia, we have a backlog of criminal cases. Some of these cases are cases that are still pending for further investigation. Some of them are supposed to be completed within six months. For example, cases of common assault or theft. These cases are not supposed to be on a roll for five years. Where there is no collaboration, you will have delays in the completion of investigations.

In addition to the challenges of a competent human resources capacity, the Namibian Police has constrained financial resources and the necessary technology to carry out investigations.¹³⁴ Inter-agency cooperation that adopts the cooperation model involving joint operations are expedient, as it saves time spent on correspondence and consultation between investigations and prosecutors. Justice is arrived at within a possible short time, because prosecutors do not spend time sending the files back to investigators for further investigations.¹³⁵ In this respect, prosecutors are part of the team and readily available to provide guidance. Redoubled resources bring about redoubled efforts. The red tapes are cut so that there is no need to involve bureaucratic procedures of investigators seeking appointments with prosecutors to seek guidance.

Moreover, as stated below (see Chapter Four), there is no policy document stipulating how investigations are to be carried out. Accordingly, it is the prosecutors that will be in a position to guide investigators on what steps to follow and what information to look for in the process of investigation, but this service is not mandatorily available.

One of the disadvantages of the merger model are that it does not promote administrative autonomy of agencies. Investigation agencies should reflect administrative autonomy so that their activities can reflect their independence from one another, even when there is cooperation. Administrative autonomy is stated in the case of *McBride v Minister of Police*

¹³³ A-SCPG (2019).

¹³⁴ Barry (2007) at 81.

¹³⁵ M-WLC (2019).

*and Another*¹³⁶ in which Justice Kathree-Setiloane stressed that the police is entitled to structural and operational independence. This study submits that structural and operational independence includes financial autonomy. This means that the police or any investigation agency should have its own adequate resources to work according to its own programmes. When they are constrained and at the mercy of the resources of another agency, there will be competing priorities between agencies, because the prosecution too will have its own priorities to attend to. Further, an agency that puts in resources in activities will inherently feel superior and would like to dominate the process.

One advantage of the directive cooperation model is that the prosecution is involved in the investigation process, to provide the necessary direction to investigators in order to ensure that correct methods are adhered to, but there is limitation that they cannot take over the investigation exercise. The disadvantages of this model are that it reflects an encroachment upon one agency by another, when officials from one agency are commanding officials from another agency.

One of the advantages of a communication cooperation model is that there is consultation between two agencies that uphold the separation of powers doctrine, yet ensuring that investigators are properly advised on the process of carrying out their duties. In the Canadian case of *R v Regan*,¹³⁷ the court adopted the position that the investigation and prosecution agencies are distinct, but maintain cooperation, signified by effective consultation between the Crown and the police. The disadvantage is that investigators can choose to ignore the advice of prosecutors at their own peril, since they are under no obligations on their part to follow the advice. It further means that prosecutors would have wasted their resources to provide advice.

¹³⁶ *McBride v Minister of Police and Another* (06588/2015) [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) (4 December 2015).

¹³⁷ *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at para 64.

2.6 The advantages and disadvantages of the approaches

The approaches have both positive and negative aspects, which impact on the effectiveness of inter-agency cooperation. The advantages of the equal control approach are that, like the communication model, no agency is encroaching upon the domain of another. There exists mutual respect between agencies, while at the same time there is recognition from each agency that in order to succeed in their work, the two agencies need each other's assistance. No agency feels superior or inferior to another, because there is no hierarchical relationship between them, unlike in the continental system where prosecutors and investigators have a hierarchical relationship, because the former serve as a supervisor to the latter in the investigation process.¹³⁸

There are shortcomings, too, under the equal control approach. Under the equal relationship approach, one agency is missing essential parts of the offence. It disregards the fact that investigation strides determine the opening up or closing of a prosecution opportunity.¹³⁹ Further, at the trial the two agencies will need each other. Prosecutors need to advance the findings of the investigation before a presiding judicial officer and further need the assistance of investigators to secure witnesses in the case. Similarly, new investigators, like any other witness, would need prosecutors to go through with them in their statements before trial. However, this can be mitigated when there are written regulations and policies in place, stipulating when and in which areas the two agencies are compelled to coordinate an investigation.

One of the advantages of an investigator-dominated approach is that, like the equal control approach, there is separation of powers between agencies. There is freedom in taking decisions and no fettered authority. One disadvantage of investigator-dominated approach is that the absence of oversight could result in lack of accountability. The United Nations Office on Drugs and Crime¹⁴⁰ advocates that police officials should be monitored not only by their superiors, but also by external organs, so that they can become effectively accountable. The external organ that is best suited to monitor the police when carrying out investigations is, arguably, the prosecution agency. Further, when the investigation agency feels that it does

¹³⁸ Soubise and Woolley (2018), at 610.

¹³⁹ Glazer (1998) at 576 – 577.

¹⁴⁰ United Nations Office on Drugs and Crime (2011), at iv.

not necessarily need the prosecution agency, it is a misplaced notion because prosecutors will use what investigators gathered during an investigation.

One of the advantages of the prosecutor-dominated approach is that prosecutors are well vested with the law, compared to investigators. They will be able to steer investigators into the right direction regarding the process of investigation and the information required. Further, this approach leaves room for investigators' independence in routine matters, as it is only applicable to complex matters. The disadvantage is that this approach does not enable the independence of the investigation agency in complex matters. Ideally, investigators should carry out their activities independently under the guidance of prosecutors, meaning that prosecutors monitor and advise the investigators, but not to command them.¹⁴¹

The advantage of formal strategic cooperation is that agency members have an opportunity to share their programmes, plans and challenges that need concerted efforts from all agencies. It is generally comparable to a retreat in an organisation. Retreats are important because they provide an opportunity for innovations, taking stock and reflecting on the activities to be undertaken.¹⁴² They are opportune moments for creative thinking and temporal withdrawal from daily routines to refresh the minds. Sokoine¹⁴³ states that regular meetings between prosecutors and investigators could potentially bring about simplified investigations and contentious issues between the two agencies could be ironed out and a closer relationship forged. There are no disadvantages per se for this approach, as it is a platform that provides an opportunity for shared ideas, values and visions of the agencies.

2.7 The advantages and disadvantages of the principles of inter-agency cooperation

There are no disadvantages associated with the principles of inter-agency cooperation as these principles advocate for compliance with the law. These disadvantages will erstwhile be advocating the opposite of the advantages. For example, if the advantages of the principle of well-founded conclusion are that conclusions were founded following correct procedures, disadvantages will imply the opposite. Accordingly, this section will only focus on the advantages of inter-agency cooperation.

¹⁴¹ Van de Bunt and Van Gelder (2012) at 134.

¹⁴² Grodsky (*I.S.a.*).

¹⁴³ Sokoine (2016), at 535.

One advantage of the principle of neutrality is the fairness of the investigation. When there is no biasedness on the part of investigators and prosecutors, this complies with article 12 of the Namibian Constitution, which provides for a fair trial.¹⁴⁴ Fair trial does not only refer to the trial in the Court, but it refers to the entire process that took place, including investigation. This was stated in the case of *State v Teek*,¹⁴⁵ where the Court surmised that:

The respondent submitted that the irregularities committed during the investigative processes violated his right to a fair trial and vitiated the proceedings...it is not necessary to decide this issue. Nonetheless, it is important to mention but a few of the irregularities to demonstrate how the sub-standard investigative process by the police may be destructive to the criminal justice system. Often, such sub-standard investigation does, in and by itself, result in innocent people being wrongly convicted or guilty people being wrongly acquitted.

The Court maintained that the investigation was selective, thus favouring the state. But, under the principle of neutrality, the parties involved in the process owe their duty and obligation to law and not to the state or the suspect.

The advantage of the principle of objective truth is that the investigation and prosecution cooperate to present all evidence that reflects the material facts related to the case. Information is gathered and presented with due regard to legal and factual merits which should meet the condition of truthfulness. Any evidence that does not reflect the truth is deemed not appropriate to be heard by the court and is, therefore not entertained.¹⁴⁶ This was observed in the case of *S v Koch*,¹⁴⁷ where the accused was charged with sexual offences against minors. In this case, the court held that the investigation was poorly conducted. Investigators did not make attempts to gather additional evidence to complement allegations by complainants. The Court maintained that there was no evidence provided that linked the

¹⁴⁴ *Constitution of the Republic of Namibia*, article 12:

‘(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released’.

¹⁴⁵ *State v Teek* Case No.: SA 12/2017, at para 82.

¹⁴⁶ Wendel W. B., 2015, Whose truth? Objective and subjective perspectives on truthfulness in advocacy, in *Cornell Law Faculty Working Papers*, Paper 116.

¹⁴⁷ *S v Koch* [2018] NAHCMD 290.

accused to the rape and there were fabrications and suggestibility.¹⁴⁸ The accused was, therefore, acquitted on the charge of rape.

If prosecutors and investigators adopt a cooperation model in terms of Liddle and Gelsthorpe's typology carrying out investigations jointly, the gaps in complying with law would be closed. Prosecutors will be advising investigators against fabricating evidence, because such course of action does not further the interest of the administration of justice. An example from one of the jurisdiction discussed in Chapter Three is that in Seattle, US, police and prosecutors jointly interview sexual offence victims who are minors, in order to establish facts and make conclusions on evidence to ensure that the prosecution of the matter will be successful.¹⁴⁹ Under the principle of objective and material truth, an investigation is not carried out of emotions and preferences of an investigator or prosecutor. The principle of truth-seeking in the course of inter-agency cooperation in an investigation was further underscored in the case of *Boucher v The Queen*¹⁵⁰ that the purpose of justness of judicial proceedings should be upheld and not to prioritise winning or losing the case. This was further underscored in the case of *Shaik and Others v the State*¹⁵¹ when Justice underscored the essence of persons involved in investigations to act without fear, favour of prejudice in the course of their duties.

The advantage of the principle of complementarity is that agency officials assist one another in the investigation process, by way of prosecutors supporting or adding to what investigators have come up with and not to thrash the work of the police to replace it with that of the prosecutors. Their cooperation is premised on consultation but investigation is carried out largely independently, which does not mean overlapping.

The advantage of the principle of legality is that the investigation is carried out in adherence to the rule of law.¹⁵² It acknowledges the supremacy of the Constitution and laws of the country, to which investigators and prosecutors are accountable in the investigation process through to the trial. There is no interference with fundamental rights of individuals by

¹⁴⁸ *S v Koch*, [2018] NAHCMD 290, at para 121.

¹⁴⁹ Seattle School District No 1 and Seattle Police (2018).

¹⁵⁰ *Boucher v The Queen* [1995] SCR 16 at 23 – 24.

¹⁵¹ *Shaik and Others v the State* 2008 (2) SA 208 (CC), at para 53.

¹⁵² Drăghici and Stoian, 2015, at p 513.

investigators. This principle contributes to the efficiency of the Courts' decision-making process.

A senior prosecutor¹⁵³ maintained that one of the shortcomings of lack of inter-agency cooperation that results in acquittals is the violation of fundamental rights of suspects by investigators, a situation that could be avoided if their investigations were prosecutor-guided. Even when the cooperation is based on the investigator-dominated formula, the mere fact that there have been inputs from prosecutors in the investigation enables investigators to comply with respect for human rights. When the issue of violation of human rights in the investigation is brought up at the trial, it leaves prosecutors without answers and the accused is acquitted. A high rate of acquittals arguably encourages the increase in crime, as criminals become knowledgeable of the weakness in the investigation techniques of the police and how to use them in the court to squash charges laid against them.¹⁵⁴

It is common to have fundamental rights violations during the investigation stage. The Courts have emphasised the importance of respecting the fundamental rights of the accused. It was stressed in the judgement of *S v Shikunga*,¹⁵⁵ in which the Court held that:

There is however a competing consideration of public interest involved...it extends to the importance of insisting that the procedures adopted in securing such punishments are fair and constitutional and that the public interest is prejudiced when they are not.

The Court asserted that irregularities should not be condoned and, accordingly, when the violation of fundamental rights taints the conviction, such conviction should not stand. The Court thereby made it clear that prosecutors cannot be allowed to affirm the law in the course of pursuing inappropriate procedures. Conviction would only stand when the violation of fundamental rights has not caused prejudice to the accused and conviction not tainted thereof. The test is whether the admission of the evidence would render the trial unfair or would be detrimental to the administration of justice.¹⁵⁶

¹⁵³ A-WPOL (2019).

¹⁵⁴ A-WPOL (2019).

¹⁵⁵ *S v Shikunga* 1997 NR 156 (SC) at 170 J to 171 B.

¹⁵⁶ *Ndede vs Republic* (1991) KLR 567.

The Court further underscored the fundamental rights of suspects in *Sankwasa v State*,¹⁵⁷

Justice Ueitele surmised that:

[A] suspect is entitled to the constitutional rights during pre-trial proceedings. I therefore echo the words of Satchwell, J when he said ‘The constitutional right of an accused person does not only relate to fundamental justice and fairness in the procedure and the proceedings at his trial. It also includes the right to be treated fairly, constitutionally and lawfully by policing authorities and state organs prior to the trial.

The leaned judge underscores the obligation of the police to respect the rights of suspects during the investigation process. This includes refraining from obtaining information from the suspects by irregular means, an aspect that prosecutors generally guard against, when they are guiding police investigations.

The advantage of the principle of well-founded conclusions is that the conclusion made in the investigation would have been reached through following correct procedures. The question of law and fact plays a great role in the process of investigation, ensuring that there is no ill-conceived manipulation of the process of gathering information. In Namibia, there are investigation conclusions that have been manipulated. For example, in the case of the former Supreme Court Judge, Pio Teek, who was charged with sexual offences against minors, the court disapproved the manipulative manner in which investigators manipulated the process, including withholding from the Court during the trial exculpatory evidence favourable to the accused.¹⁵⁸ The Court held that the investigation was riddled with attempts by the police to bring a fabricated case against the appellant.¹⁵⁹ The Court maintained that police investigations should be made in a fair manner and not carried out selectively just to secure conviction of an accused.¹⁶⁰ Adhering to the principle of well-founded conclusion will guard against some of these irregularities.

The advantage of the principle of efficiency is that the criminal justice process is expedited, thereby addressing the problem of a well-known legal maxim “justice delayed is justice denied”, which is dated back to around 2 Before Current Era (BCE).¹⁶¹ This refers to a lapsing of time that could have been avoided. For example, when investigators take long to

¹⁵⁷ *Sankwasa v State* Case No. 70/2012.

¹⁵⁸ *State v Teek*, Case No.: SA 12/2017, at para 83.

¹⁵⁹ *State v Teek*, Case No.: SA 12/2017, at para 63.

¹⁶⁰ *State v Teek*, Case No.: SA 12/2017, at para 89.

¹⁶¹ Sourdin and Burstyn (2014).

complete an investigation, because they do not receive assistance from prosecutors, delay is avoidable by letting investigators cooperate with prosecutors.

Under the current practice of non-coordination between investigators and prosecutors, when an investigator passes on the docket to a prosecutor at the High Court, it remains with the prosecutor and an investigator will only see it three days before the trial date. This arrangement is problematic because it is at that stage that an investigator will find out that subpoenas need to be served to witnesses, causing further delays in the process. Some witnesses would be in distant locations and serving them subpoenas and bringing them before court can present a logistical strain. This is further worsened by the fact that prosecutors feel that it is not their problem, but exclusively that of investigators to find witnesses and ensure that they are brought to Court.¹⁶² This could possibly be avoided if there was a regulatory framework which stipulates areas of cooperation between prosecutors and investigators.

Lack of coordination between investigators and prosecutors results in investigations being sent back and forth from prosecutors to investigators. Without coordination of investigations, investigators and prosecutors waste time blaming each other while delaying the criminal justice process to the prejudice of suspects and victims. This absence of *ad idem* on the part of investigators and prosecutors creates an obstacle to speedy justice and in a year, only a few cases will have been finalised by the Court.¹⁶³

When the police arrest suspects and carry out investigations that are not coordinated with guidance from prosecutors and take long to complete investigations forcing prosecutors to withdraw a case, as stated above, by the time when the matter returns to court some witnesses may no longer be available. The ends of justice will be defeated as offenders will leave the courts scot-free, a trend that could conceivably be avoided if there was a framework in place for inter-agency cooperation.¹⁶⁴

¹⁶² I-WPOL (2019); J-WPOL (2019). The practice of keeping dockets with prosecutors for all offences prosecuted at the High Court had been adopted because of the trend of dockets disappearing when kept by the police.

¹⁶³ C-WLC (2019); O-ACC (2029).

¹⁶⁴ H-OSH (2019).

In Namibia, the courts have disapproved delayed justice because of the prejudice that it causes to the accused, particularly if he is acquitted at the end of the trial. This is because while the accused is presumed to be innocent, the mere fact that he is an accused portrays him in a negative image from society. He carries the stigma of a criminal. Because of the doubt that is cast on the integrity of the accused by the public, the accused endures mental strain and he carries a heavy burden on his shoulder until pronounced not guilty by the court.¹⁶⁵ The accused further faces discrimination, prejudices and adverse penalty from society, before he is cleared by the court.

Non-adherence to the principle of efficiency, *i.e.*, the delay in justice causes further traumatisation of victims. The process of interviews by investigators brings to victims sad memories of offences committed against them. When there is guided investigation, prosecutors will ensure that all relevant questions are asked at once, unlike when investigators carry out investigations on their own, only for the investigation diary to be sent back to an investigator by a prosecutor to gather further evidence, an exercise that will cause the victim to endure another trauma. A rape victim would not like to reminisce the ordeal that she went through during the act of rape.¹⁶⁶

Varshney¹⁶⁷ asserts that speed is a *sine qua non* for efficient criminal justice system. A lengthy criminal justice process does not manifest a fair trial, a fundamental right provided for in the Namibian Constitution.¹⁶⁸ When an investigation takes long, it hampers the criminal justice process. This was stated in the case of *Feliuano Abilio Jano Miguel and Others vs The State*,¹⁶⁹ in which Justice Liebenberg stated that:

[E]xperience has shown that the time afforded by lower courts for purposes of investigation of cases is, more often than not, exceptionally long – even where the facts are simple and uncomplicated. Not only is this practice demoralising to the accused, it also affects persons such as witnesses and interested parties who lose faith in the criminal justice system when proceedings are unjustifiably protracted.

The learned judge maintained that it is contrary to the interest of justice to prolong trials as a result of investigations not being completed and this defeats the aspirations of the fair trial enshrined in article 12 of the Namibian Constitution. With inter-agency cooperation in place,

¹⁶⁵ *S v Teek*, case No. SA 12/2017. This is also the case in South Africa – see *S v Dzukuda & Others; S v Tshilo* 2000 (2) SACR 443 (CC);

¹⁶⁶ A-SCPG (2019).

¹⁶⁷ Varshney (2007: 287).

¹⁶⁸ *Constitution of the Republic of Namibia*, article 12.

¹⁶⁹ *Feliuano Abilio Jano Miguel and Others vs The State* Case No: CA 11/2016.

the work of investigators will be complemented by their corresponding colleagues from the prosecution agency to expedite the investigation process.

A senior prosecutor¹⁷⁰ asserted that in Namibia cases in which there is cooperation between prosecutors and investigators are finalised in the shortest possible time. She maintained that:

[W]e see cases of preservation and cases of forfeiture move faster than other criminal cases, because of that cooperation. The police know what prosecutors want and prosecutors knows what is lacking from an investigation, at an early stage.

Speedy completion of cases brings relief to both the accused and victims. In case of conviction, victims are soothed when they see offenders paying for their sins. Inter-agency cooperation further minimises errors and uncertainty in investigations and ensures that investigators do not miss pertinent evidence.¹⁷¹ Accordingly, the principle of efficiency in inter-agency cooperation ensures that there is no unnecessary delay in the criminal justice process and minimises the prejudices and other inconveniences caused to the accused.

2.8 Conclusion

The models and approaches of inter-agency cooperation were not developed in the recent years. Scholars Gelsthorpe and Glazer formulated the models in 1984 and 1998, respectively, with Beck developing the approaches further in 2006. This study introduced two models, including the communicative cooperation model that will be applied as the theoretical framework for the Namibian inter-agency cooperation outline in Chapter Eight.

The principles applicable to inter-agency cooperation were developed many years ago, with the oldest dating back to the 18th century while others were developed at the beginning of the 20th century, except one that was developed in the recent years. The principles and models have been adopted in the international legal system, as illustrated by the ICC criminal investigations.

This study, too, introduced the principle of efficiency to the list of principles. Both the models and approaches have advantages and disadvantages. At the centre is the separation of

¹⁷⁰ A-SCPG (2019).

¹⁷¹ Dandurand (2009) at 23.

powers and independence of agencies from each other. Some models and approaches promote this framework, while some interfere with it. Accordingly, a model or approach that interferes with the doctrine of separation of powers will not be recommended for inter-agency cooperation in Namibia.



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CHAPTER THREE

A SURVEY OF INVESTIGATOR-PROSECUTOR COLLABORATION IN VARIOUS JURISDICTIONS ACROSS THE WORLD AS A BASIS OF RELATIVISING TRENDS IN THE NAMIBIAN SETTING

3.1 Introduction

Before discussing trends of cooperation between investigators and prosecutors in Namibia, it is ideal to first look at the trends of inter-agency cooperation in various jurisdictions in order to build on examining and understanding the ideal framework that should be followed in the Namibian context. The purpose is to contextualise the Namibian legal system that will follow in the next chapters, while at the same time providing a hint in this chapter on the research question: What are the trends in the Namibian criminal justice system, in respect of cooperation between investigators and prosecutors? As the study seeks to recommend a model and policy framework that could conceivably be applied to the Namibian criminal justice system, it is appropriate to base such recommendations on empirical evidence from other legal systems in the world, having examined the strengths and weakness, opportunities and threats of practices in those systems.

This chapter looks at cooperation between investigators and prosecutors from selected countries from both the common law and civil law legal systems. The rationale, as explained above (see Chapter One, section 1.8.1), being that they cover common and civil jurisdiction and thus provide better perspectives for an ideal Namibian framework. In discussing these countries, the chapter will also cover prosecutions by investigation agencies and investigations by prosecution agencies. These prosecution and investigation systems are not applied in the Namibian legal system; hence it is essential to discuss them and weigh their workability. The chapter further examines the formula and underlying principles governing inter-agency cooperation in these countries. The purpose is to identify what legal system is the model of Namibia's inter-agency cooperation and what system can contribute to inter-agency cooperation formula in Namibia.

Though South Africa is not discussed in this chapter, discussing the context of the Namibian inter-agency cooperation in the next chapters will also include reference to the South African cooperation model. This is because the Namibian legal system originated from South Africa (see Chapter One) and the South African jurisprudence is largely applied in the Namibian

Courts; sometimes South African judges are appointed to serve as acting Judges in the Namibian courts and South African lawyers do represent parties in cases before the Namibia courts. Further, while discussion on Namibia's inter-agency cooperation will largely be based on the countries discussed in this chapter, the study will not compare the Namibian legal system exclusively to these countries. This is because there are some countries that share similarities with the Namibian legal system. For example, Wells¹⁷² states that Namibia, South Africa, US and Canada legal systems share a common legal-historic past, with their evidentiary rules anchored in the English common law. Therefore, a country like Canada that shares commonalities with the Namibian legal system cannot be ignored in this study. For example, there are similarities with regard to unconstitutionally obtained evidence, as it is maintained that:

All these countries abandoned parliamentary sovereignty at some stage in their history, and adopted a written constitution as the supreme law... Canada employ an exclusionary rule expressly provided for in its Constitution, whereas Namibia and the United States of America apply a judicially created exclusionary rule.¹⁷³

It is important to compare and contrast these countries that share commonalities, assessing the similarities and differences in their respective jurisdictions. Producing admissible evidence partly depends on inter-agency cooperation and, therefore, reference will be made to the Canadian legal system although it is not discussed in this chapter. Further, reference will also be made to some common law systems where it is necessary to make an argument relevant to the Namibian criminal justice practice.

Because Namibia is a member of the international community through among others, her membership to the United Nations, reference will also be made to the international legal systems, like the ICC which was established under the auspices of the United Nations and further that she is party to the ICC (see Chapter Two, section 2.4.2, footnote no. 107).

3.2 The practice in common law countries

Cooperation between investigators and prosecutors in common law systems materialises more in serious crimes, where investigations involve intricate matters that need strict observance and compliance with the law. In this case, investigators seek advice from

¹⁷² Wells (2013) at 13.

¹⁷³ Wells (2013) at 13.

prosecutors, so that they are not found to be wanting in the procedures that they have adopted in the investigations of offences. In general, however, cooperation is not mandatory. Accordingly, in minor cases where acts complying with definitional elements of offence are easily distinguishable investigators can carry out their investigations without the involvement of the prosecutors. Once the docket file has been submitted to the prosecution, prosecutors should present the matter on behalf of the state and maintain an active role at the trial. After submitting the file investigators still need to cooperate with prosecutors, as the latter may request further information and point out to the weakness in the investigation. They hold the key whether or not to present the case for trial. Interactions between an investigator and a prosecutor are recorded in the case diary.¹⁷⁴

3.2.1 The United Kingdom (UK)

Cooperation between investigators and prosecutors in the UK is regulated by a written policy document. For example, the framework of investigation of sexual offences is provided in the *Guidance on Investigating and Prosecuting Rape*.¹⁷⁵ It is stated in the Guidelines that in carrying out investigations for sexual offences, investigators should cooperate with rape specialist prosecutors when they would like to liaise with the media. ‘Should’ is a peremptory word which makes consultation with prosecutors mandatory. Any investigator who fails to consult with a prosecutor is, therefore, guilty of violating the Guidelines. Unfortunately, the Guidelines do not provide any punitive measure to investigators who would be found to be wanting. This provision is made to ensure that they are advised on information that could be released to the media, for example, so that it can assist in tracing witnesses, while sensitive information will be protected. Prosecutors become involved in the investigations of cases involving statutory charges at an early stage, working together with investigators to formulate a strong case against suspects.

To ensure efficient investigation, some investigators hold prior consultations with prosecutors before commencing investigations and the latter provide guidance to investigators on essential evidence that should be collected. If there is prior consultation with prosecutors, especially in complex cases, prosecutors will be able to objectively provide a fair assessment

¹⁷⁴ O’ Connor (2012) at 23.

¹⁷⁵ National Policing Improvement Agency (2010) at 36, 38 – 39.

of the case and the proceedings to be followed. Whenever specialised services have been used in investigations, like experts' evidence from medical practitioners for example, results are shared with the prosecution before the evidence is brought to court. Cooperation between the police and prosecution has further advanced, that officers from the two agencies co-share offices in order to work closely on cases. It is, however, equally cautioned that prosecutors should not assume the responsibility of the functions that should be performed by investigators.¹⁷⁶

The ADB-OECD¹⁷⁷ states that an improvement regarding successful prosecution of crimes in the UK developed, following coordination between investigators and prosecutors. The Crown Prosecution Services deployed a team of its lawyers to provide early advice to the police both before and during investigations. Investigators were able to adopt sensitive and intensive enquiries to obtain evidence that will be admissible in the court. Senior investigation officers keep an organised record of investigations, which enabled them to explain and justify at the trial decisions that have been taken during the course of investigation, an aspect that was a challenge to them before inter-agency cooperation between the CPS and the Metropolitan Police Services.

In Namibia, a practice close to the afore-said aspect of the UK's inter-agency cooperation is found in serious crime investigations, where police investigators are housed in the office of the Prosecutor-General, as discussed in Chapter Five of this study. Notably, this type of cooperation is only applicable to police investigators. This could be due to the fact that investigators from other investigation agencies, like the ACC for example, have advanced training in legal matters, compared to police investigators. It is, however, important that similar *modus operandi* should be applied to investigation agencies. Since investigators have no prosecutorial expertise, they may not appreciate some fundamentals of investigations that the court would look at. Accordingly, they need to work closely with prosecutors to avoid procedural activities in their investigations, including unlawful arrests.

The formula of cooperation between the two agencies in the UK is a regularised operational cooperation that is based on the principle of well-founded conclusion in the investigation of

¹⁷⁶ Asia Development Bank-Organisation for Economic Cooperation and Development (2003) at 17; Mahmutović and Huskanović (2017) at 70.

¹⁷⁷ Asia Development Bank-Organisation for Economic Cooperation and Development (2003) at 18 – 19.

offences. The relationship signifies the equal control formula of cooperation as the role of the prosecution remains advisory, with the investigation of offences vested in the investigation agency. The process is characterised by the absence of either agency interfering in the work of another. The afore-said formula of cooperation is also applicable to England and Wales, where the investigation of cases rests with the police who arrest, detain and investigate crimes. Cooperation between investigators and prosecutors starts before charges are laid. The police do not lay charges before consulting the prosecuting authority. The police consult with a prosecuting lawyer to be advised on laying the charges. The prosecuting authority further renders advice to the police by telephone after hours.¹⁷⁸ This, however, does not mean that prosecutors do not exercise oversight function over investigators on their own volition, by imposing their supervisory authority over the police. Further, prosecutors exercise discretion regarding which cases brought to them by investigators have met the threshold of prosecution.

The cooperation adopts the coordination model, with the two agencies combining their resources to establish reliable evidence about an offence. The underlying principles of the mode of cooperation adopted in the UK are the principle of material truth and principle of well-founded conclusion. By acknowledging the need for fair assessment in complex matters, the legal system objectively recognises the significance of establishing true facts. This is achievable by weighing between the orientation of investigators to establish facts and the obligation of prosecutors to ensure that due process has been followed that the investigation would produce well-founded results. But there still remains a problem regarding the agency that put in more resources when they are combined, as that agency might want to dominate the process at the expense of another (see Chapter Two, section 2.5).

3.2.2 Tanzania

There is cooperation between prosecutors and investigators in Tanzania, as the Director of Criminal Investigation has the power over the coordination of investigations.¹⁷⁹ The Director can order for an investigation of an offence that comes to his or her attention to be carried out

¹⁷⁸ Ministry of Justice (New Zealand) (2011) *Examining the Prosecution Systems of England and Wales, Canada, Australia and Scotland*, a background document to the Review of Public Prosecution Services in New Zealand, Wellington: Ministry of Justice, at 11.

¹⁷⁹ *National Prosecution Service Act* (Tanzania), No. 27 of 2008, s 16.

by an investigation agency, including which agency should carry out the investigation. Further, the Director can order that a State Attorney coordinates an investigation and every investigation officer is compelled to comply with such instruction. This means that there are two types of models. Where a Director of Public Prosecution has not given instructions and the investigation is, therefore, not coordinated by State Attorneys, investigators would, arguably, work independently, signifying a communication model of inter-agency collaboration. Where a Director of Public Prosecution gives directions for an investigation to be carried out and investigators in various investigation authorities are placed under the coordination of State Attorneys it signifies a directive cooperation model, as there is a command and directive given by the prosecution to investigation agencies. It further signifies a prosecutor-dominated approach to investigation. Since the coordination of an investigation is placed under a State Attorney, it follows that such an Attorney may also direct how the investigation should be carried out. The difference between the Namibian and Tanzanian legal system is that the Namibian system features a cooperation model, with investigators reaching out to prosecutors for guidance in complicated offences, but there is no hierarchical relationship involving commanding and directing.

It should be noted that unlike in the UK, there is no written policy on inter-agency cooperation in Tanzania, but that cooperation is by convention and laws governing the investigation and prosecution authorities. These laws do not specify in detail how this cooperation should be rolled out in an investigation process, like the *National Prosecution Services Act*,¹⁸⁰ for example.

3.2.3 India

In India, investigations are carried out by the police or the Central Bureau of Investigation, an investigation agency of the central government, while the prosecution falls under the leadership of the Director of Prosecution. Prosecutors at the District Magistrate Courts are appointed following successful performance in the examinations administered by the Public Service Commissions of the respective states.¹⁸¹ Meanwhile, their counterparts in the Session

¹⁸⁰ No 27 of 2008.

¹⁸¹ *Code of Criminal Procedure (India)*, 1973, s 24; Sharma (1997) at 186 – 187; Government of India, 2005, *Criminal Investigation Bureau Manual (crime)*, New Delhi: Government of India.

Court and High Court are appointed by the state government directly from the bar, following a selection by a District Magistrate in consultation with a Session Judge in the case of Session Courts and a consultation between the state government and the High Court in the case of prosecutors for the High Court.

The Civil Investigation Bureau (CIB) Manual (crime) serves as a documented policy framework on inter-agency cooperation to guide the cooperation between the police and prosecutors in India, but that is for the Criminal Investigation Bureau. Other investigation agencies like the police do not have manuals regulating their cooperation with investigators. Similarly, the Standard Operating Procedures on trafficking in persons for commercial sexual exploitation for the Goa State,¹⁸² which was an initiative of a non-governmental organisation, does not detail cooperation mechanism between investigators and prosecutors, except just stating that an investigator may consult a prosecutor. This creates a gap of cooperation, even at an operational level as discussed below.

Prior to 1973, there was cooperation between the two agencies because the prosecution agency was part of the police.¹⁸³ After the 1973 reforms, the prosecution agency was disconnected from the police and there was no cooperation between the two institutions, except for the prosecutors working at the Session Courts. In instances when the police seek advice from the Session Court prosecutors, prosecutors do not make in-depth study of the case file and do not, therefore, provide substantive advice. Police investigators are not kept in the know about the status of the case that they have investigated, after the prosecutors have brought the case before the Court. They are kept in the dark about the trial. Overworked prosecutors have little time to attend to investigators for advice during investigation and as a result, investigators experience problems in their investigations, with lack of appraisal during investigations, resulting in failing prosecutions, where crime perpetrators are acquitted as a result of technical aspects of the case, signifying incoherent facts and information.¹⁸⁴

But for investigations that are carried out by the Central Bureau of Investigations, prosecutors from the Bureau work closely with investigators, guiding them with regard to the evidence that will make prosecution viable. If there was a written policy framework, it could provide

¹⁸² Anyay Rahit Zindangi (ART) (2016) at 181.

¹⁸³ Sharma (1997) at 196.

¹⁸⁴ Sharma (1997) at 197; Randhawa and Singh (2016) at 6 – 7.

guidelines on how the prosecution should relate to investigators after they have brought the case before the court. Communication between the two agencies during this time remains important, because investigators are relevant to the trial, especially when witnesses are required to testify.¹⁸⁵

The Indian legal system has police prosecutors. Section 25 of the *Indian Code of Criminal Procedure* provides for appointments of police officers from the rank of Inspector and above as Assistant Public Prosecutors in the District Magistrate Court, provided that such police officer did not participate in the investigation for which an accused is being prosecuted.¹⁸⁶ The appointment of these officers is made when there is no Assistant Public Prosecutor to prosecute any particular case. The Namibian legal system differs from the Indian system that it has no prosecutorial police officers. The only investigators involved in prosecution are ACC investigators, as provided for in the law (see section 3.4 below). In practice, however, no prosecution has been carried out by ACC investigators since its establishment in 2005. The appointment of investigation agencies officers, who are inevitably associated with their colleagues in their respective agencies who are involved in investigations, brings to a relationship between investigators and prosecutors, the characteristics of a federation model. While prosecuting police officers maintain separate identities from prosecutors, as police officers, their work is integrated with that of prosecutors. As discussed in Chapter Two, the federation model has shortcomings in respect of the doctrine of separation of powers. The shortcomings will further be discussed below in respect of police/investigation agency officials' prosecutions.

Inter-agency cooperation in India signifies a mixture of communication and cooperation models. Cooperation between investigators and prosecutors in India is at an operational level where prosecutors do not impose themselves on investigators, but simply make themselves available for advice and guidance to investigators.¹⁸⁷ Generally, police officers are not fully equipped with knowledge on legal matters and their level of investigation is poor, sometimes lacking valuable information and evidence necessary in the prosecution.¹⁸⁸

¹⁸⁵ Sharma (1997) at 197.

¹⁸⁶ *Code of Criminal Procedure* (India) (1973) s 25.

¹⁸⁷ Government of India (2005), at 70, para 7.13.

¹⁸⁸ Randhawa and Singh (2016) at 6 – 7.

Cooperation between investigators and prosecutors is characterised by a formula of equal control with an emphasis on division of labour between the two agencies. Central Investigation Bureau investigations are based on the cooperation model, as officials from the two agencies jointly work together as officials of the Bureau, whereas investigation by other police units are based on the communication model, involving a one-way traffic consultation of prosecutors by the police.

Inter-agency cooperation in India is in furtherance of the principle of impartiality and unbiasedness where investigators are required to cooperate with prosecutors, for the latter need to guide investigators, in cases when it is necessary – like investigations by the Central Bureau of investigations, to attain the fulfilment of justice. Cooperation between the Central Bureau of Investigation and prosecutors further advances the principle of efficiency in the criminal justice process (see Chapter Two). Guiding the Bureau's investigators would ensure that only relevant evidence is collected; it guards against wasting the time of the court and reducing the time of completing investigation and prosecution of a case.

3.3 The practice in civil law countries

Cooperation between investigators and prosecutors is inevitable given the role of the actors involved in investigations and prosecutions of cases, namely the police, prosecutor and judge. The role is that police officers assist prosecutors and judges in criminal investigations and they inform the prosecutors about crimes, upon coming to their notice. In most civil law jurisdictions, a prosecutor carries out investigations and presents a dossier to the investigating judge, who too carries out an investigation before the case is then heard by the sitting judge. In some civil law jurisdictions, like Germany and Sweden which are not part of the countries discussed in this study, investigation is carried out by the prosecution agency there are no investigative judges.¹⁸⁹ In other jurisdictions, judicial police carry out investigations as discussed below.

¹⁸⁹ O' Connor (2012) at 18 – 19.

3.3.1 France

French prosecutors have a leading role in both investigations and prosecutions of criminal offences. In order to prevent this arrangement where too many roles are concentrated in one entity, the Code of Criminal Procedure (CCP) was adopted, but prosecutors continue to dominate the investigation and prosecution process. The police is required to inform prosecutors of any offence reported to it. Given this arrangement, a prosecutor arrives at the scene immediately after the police officer has informed him and henceforth directs the police's investigation. After completing the investigation, the police officer is required to provide his investigation dossier to the prosecution. The decision to prosecute is then left to the discretion of the prosecutor and the role of the police ends at the investigation. This means that the police cannot compel the prosecution to bring the matter before trial, if the latter does not feel so. A prosecutor brings the matter before trial by looking at the circumstances of each case. This arrangement ensures the investigator-prosecutor cooperation in the investigation of an offence, with the police being able to tap from the competence of the prosecutors.¹⁹⁰

Following the 2004 amendments to the CCP, the discretionary power of the prosecutor to prosecute became more regulated; if an offender is known and the act falls within the definitional elements of a crime, the prosecutor is required to consider prosecution. Section 40-1 provides that:

Where [a prosecutor] considers that facts brought to his attention ... constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking the implementation of a public prosecution, the district prosecutor with territorial jurisdiction decides if it is appropriate:

1. to initiate a prosecution;
2. or to implement alternative proceedings to a prosecution, ...
3. or to close the case without taking any further action, where the particular circumstances linked to the commission of the offence justify this.

The provision implores upon prosecutors to consider prosecution, except when non-prosecution is justified, or when it is not appropriate to prosecute. This provision prevents arbitrary decisions by the prosecutors to decline prosecution. Accordingly, the relationship between investigators and prosecutors here is that of a prosecutor dominated approach, but it differs for other approaches in the sense that prosecution of an offence is mandatory. In that

¹⁹⁰ Taleb and Ahlstrand (2011/13) at 528; Tomlinson (1983) at 147.

case the prosecution has no choice to decline prosecution. This is based on the principle of responsive justice that an offence committed should be responded to.

The practice in the French legal system prior to 2004 has some similarities with that of the Namibian investigation and prosecution agencies. The police carry out investigations, but the decision to prosecute rests with the Prosecutor-General. However, the current practice in the French legal system differs from the Namibian practice as the prosecution is not compelled to carry out prosecution. In the event that the Prosecutor-General declines prosecution, she is not necessarily obliged to provide reasons justifying non-prosecution. Declining to prosecute largely results from lack of evidence, particularly in investigations of offences that are carried out without inter-agency cooperation.

There is nothing of Liddle and Gelsthorpe's model that can be wholly applied to the relationship between investigators and prosecutors in France. The cooperation between the two agencies depends on the discretion of the two agencies as there is no written policy on how the two agencies should relate to each other in their work. While it has some features of communication model in terms of two-way traffic communication, the prosecution encroaches upon the domain of the investigation, insofar as it dominates the investigation process by giving directions at the beginning. This comes close to a directive communication model of inter-agency cooperation. Further, the relationship has some features of cooperation model, insofar as the two agencies can consult, but they do not carry out joint operations as propounded by the model. The prosecution gives directions on investigation, and then leaves the gathering of evidence to the police and only come in after investigation has been completed.

3.3.2 Brazil

In Brazil, investigations are carried out either by the Federal Police (national police) or Civil Police (state police).¹⁹¹ Brazil adopts an inquisitorial system, in which victims choose whether they would like to be assisted or not. Police investigations are carried by way of police inquiry, carried out by a police chief or commissioner. These investigators are law graduates and they carry out investigations under the supervision of prosecutors. In this

¹⁹¹ Macaulay (2002: 6).

exercise prosecutors cannot command the police, but can only request the investigation procedures to be followed.¹⁹² There is no policy on inter-agency cooperation as the two agencies merely derive authority to do their respective work from the Brazilian Constitution, as it will be discussed further below.

The Brazilian Constitution provides that prosecutors should exercise external control across activities by the police under supplementary laws mentioned in the Constitution.¹⁹³ But these supplementary laws are concerned with conditions of service and professional conducts of prosecutors and nothing about inter-agency cooperation. Arguably, in its current form, the Constitutional provision could be interpreted by saying that the relationship of prosecutors with the police is of a prosecutor-dominated approach, characterised by directive-cooperation model, whose degree of supervision will depend on what prosecutors understand to be meant by “external control”.

There is a difference in the Brazilian and Namibian investigations. Brazilian police investigators are law graduates, yet they carry out investigations under prosecutors’ supervision and guidance, while Namibian investigators are not trained in basic law (see Chapter Four) and in some instances work without prosecutors’ supervision. Having inter-agency cooperation among two agencies with legally trained personnel arguably benefits the investigation process as both agencies’ personnel understand pertinent issues related to substantial and procedural criminal law.

Police investigations last between 30 to 90 days.¹⁹⁴ When they exceed the timeframe provided, investigators should request prosecutors to grant them extension. The form of cooperation manifests the equal control approach, in which each agency recognises the domain of another. The cooperation is rolled out on the basis of the complementary working relations to attain a fair and just criminal justice process. Only in a few instances that there have been joint ventures between prosecutors and investigation, in which cases prosecutors take a lead by commanding investigators.

¹⁹² Mendonça (2014) at 65 – 67.

¹⁹³ *Constitution of the Federative Republic of Brazil* (2010), article VII.

¹⁹⁴ Mendonça (2014) at 65.

There is no timeframe put on the Namibian criminal investigations and prosecutors do not dictate to investigators the date of completing investigations. This is why some investigations take a relatively long period to complete. The duration put on Brazilian investigations promotes efficiency because investigators who fail to deliver within the set time frame are required to provide reasons for non-delivery. This could also be used in performance appraisals of investigators and incentivising investigations will, arguably, guard against delayed justice.

The Brazilian Constitution empowers prosecutors to carry out investigations.¹⁹⁵ There are some cases investigated by public prosecutors in Brazil, especially cases of corruption and high-level crimes involving politicians. Prosecutors have also investigated cases involving police officers and other offences where police investigators have not been keen to investigate. Prosecutors' investigations are similar to investigations by the police, as prosecutors can ask questions to witnesses directly, and make use of witness experts. Prosecutors' investigations have produced better results in comparison to police investigations.¹⁹⁶ Investigations by the prosecutors ensure that the principle of objective material truth is maintained and that the criminal justice process is both fair to the perpetrators, victims and the society.

After an investigation, a prosecutor will decide whether or not to sue. Unlike in some jurisdictions, including Namibia (see Chapter Two) where prosecutors exercise discretionary power, and in Brazil it is mandatory that when there is some evidence, then a matter should be prosecuted. There is, however, an exception in two instances, namely (i) when the non-conformity to criminal law of act committed is insignificant, and (ii) for some minor offences, for which offenders accept light penalties, rather than letting their cases to be investigated and tried¹⁹⁷ Mandatory prosecution makes the relationship between two agencies equal. While investigators cannot force prosecutors what to do, prosecutors, too, cannot at will ignore the efforts of investigators. In respect of Liddle and Gelsthorpe's models, the Brazilian investigators and prosecutors' relationship signifies a communication model, *i.e.*, maintaining their distinct identities and communicating, with prosecutors supervising investigators, but not necessarily taking lead and initiatives like under the cooperation model.

¹⁹⁵ *Constitution of the Federative Republic of Brazil*, 2010, 3rd ed, art 129 (III).

¹⁹⁶ Mendonça (2014) at 65 – 66.

¹⁹⁷ Mendonça (2014) at 64.

The principle underlying inter-agency cooperation in Brazil is the principle of constraining the abuse of state power by the investigation agency. It is a necessary check-and-balance approach that guards against arbitrary process of investigation and unfettered wielding of power by investigators. It serves the purpose of keeping investigators within the prescribed limits of investigation procedures and guard against the miscarriage of justice. Prosecutors' supervision ensures that investigators refrain from using methods that compromise the integrity of the criminal justice process. Although prosecutors do not command investigators what to do, save when there is a joint operation, mere supervision serves to prevail upon investigators to adhere to lawful investigation procedures. The intervention of prosecutors guarantees unbiased investigation that solely fulfils the course of justice and fairness to the suspects, victims and the society at large. This is in tandem with the principle of impartiality.

3.3.3 Cameroon

In Cameroon, a bi-justice system of common law and civil law legal systems exists, and in this hybrid system, the discussion in this section focuses exclusively on the civil law system. Areas that fall under the civil law legal system constitute 80%. In this area, the inquisitorial criminal procedure is applied and its foundation is the *Code d'Instruction Criminelle* (CIC). The accused does not necessarily need to be present in the court during the trial. He or she can be tried and sentenced in absentia.¹⁹⁸

A commissioning of a crime is reported to the State Counsel, who will refer the matter for investigation to an investigation agency. The police and gendarmes, a paramilitary police agency, are responsible for the arrest of suspects. They are obliged to report all arrests, whether made with or without warrants, to the State Counsel. For cases where suspects are caught in action, the police should present them to the State Counsel within 24 hours. Complex cases are investigated by the judicial police, while petty offences are investigated by the public security police. Investigations, including searches, are conducted under the direction of the State Counsel, who is vested with the power to carry out investigations, but in practice delegated these to the investigating agencies.¹⁹⁹

¹⁹⁸ Mandeng [*s.a.*] at 159 – 160.

¹⁹⁹ Mandeng [*s.a.*] at 162 – 163.

It is not uncommon for prosecutors in inquisitorial systems, including part of Cameroon that adopts this system, to provide direction to investigators regarding their investigation. This guidance is binding and the police is compelled to comply with it.²⁰⁰ The State Counsel in Cameroon only intervenes in the investigations of serious crime, like murder or offences involving senior government officials. The State Counsel can instruct investigators to change the methods and techniques of investigation.²⁰¹

There is also a specialised Judicial Police of the Special Criminal Court (SCC), but this unit is specifically for cases involving misappropriation of funds totalling 50 000 000 of *Communauté financière d'Afrique* (CFA – Financial Community of Africa).²⁰² The Procureur-Général who heads the SCC, controls and supervises investigations by the Judicial Police.²⁰³ This prosecutor-dominated approach of investigation has produced tangible results, described by Agbor²⁰⁴ that:

[T]he establishment of the SCC and the calibre of the individuals investigated, arrested, prosecuted and convicted by this Court are evidence that such an institution was more than needed in order to defeat this invisible enemy of the Cameroonian people.

The SSC investigations reflect a directive cooperation model, because prosecutors closely follow the investigation process, giving directives rather than just advices to investigators about salient evidence that they should gather.

There is a mixture of differences and similarities between Cameroonian and Namibian investigations. The difference is that in Cameroon, in order not to waste time and resources, a crime is reported to a State Counsel, who will assign investigation to the investigation agency. This means that if a State Counsel notices that there are no merits in investigating the case, a case will not be assigned for investigation. The danger here is that some offences may not be obvious in some cases until they are investigated. In Namibia, police or ACC investigators investigate offences once they are reported to them. At this stage prosecutors are not in the know although investigators may also, on their own accord, but not as a

²⁰⁰ Sobczyk (2005) at 90, 92.

²⁰¹ Mandeng [*s.a.*] at 162 – 163.

²⁰² The exchange rate of USD to CFA at the time of writing (August 2021) is USD 1 = CFA 551). Agbor (2017) at 21.

²⁰³ Agbor (2017) at 21.

²⁰⁴ Agbor (2017) at 21.

requirement by law, approach prosecutors to seek advice if an act warrants an arrest and investigation thereof. The practice of Cameroonian investigations involving search and seizure has similarities with the Namibian practice, where serious crime investigations are carried out by investigators housed in the office of the Prosecutor-General and carrying out investigations under the supervision of prosecutors (see Chapter Five).

In the Cameroonian legal system, the formula of cooperation is a mixture of both equality approach and prosecutor-dominated approach, where prosecutors avail investigators' latitude to carry out investigations, without patronising them, that reflects an equality approach to investigations. It further signifies a mixture of directive cooperation model for SSC investigations, but the rest of investigations symbolises communication model, given the fact that the prosecution is not encroaching upon the domain of investigation agency. But where prosecutors intervene and give directions to investigators in serious offences, not to arm-twist investigators but to shape investigations towards procedural requirements, this manifests a prosecutor-dominated approach to investigations. Such approach illustrates a directive-cooperation model, with the prosecution recognising that the investigation agency is distinct, but the prosecution still extends influence to that area. In the case of corruption cases that fall under the SCC, the prosecutor-dominated approach reflects control and therefore it is a form of a directive-cooperation model in which investigators do not act independently. These models are adopted as a practice, rather than as a rule, because there is no legal or policy framework regulating cooperation between the two agencies.

The underlying principles of cooperation between Cameroonian investigators and prosecutors are the principle of objectivity and material truth and the principle of well-founded conclusion. Prosecutors provide guidance to investigators for the purpose of producing provable evidence that has been established as a result of an investigation that has considered compliance with both substantive and procedural law.

3.4 Police and investigation agencies prosecutions

Some systems have adopted police prosecutorial services, where the police can prosecute in some matters. For example, it was stated above that police officers from the rank of Inspector and above are able to prosecute in India as Assistant Public Prosecutors. The rationale is that by the time when officers attain the rank of Inspector, they would have acquired the

necessary skills and expertise to prosecute, including in-service training to upgrade their education to the required level. Accordingly, police prosecutors are required to have attended, among others, a four-year law degree training, one-year certificate in law or public prosecution, and a three-month public prosecutorial training. They only prosecute in the Magistrates' Courts and in the performance of their prosecutorial duties they fall under the supervision of the Director of Public Prosecution as the head of the prosecution agency.²⁰⁵

The Central Bureau of Investigation in India has its own prosecutors who prosecute cases in the court. The Bureau is, however, a separate entity from the police, but is headed by a Director who is drawn from the police and is staffed by officials from the government, especially the Inland Revenue agency and the Indian Police Services. The Indian Police Services as an institution does not prosecute cases, but pass them over to the prosecution, an agency where police officers are sometimes appointed to serve.

The Namibian police had prosecutorial functions only before independence as discussed in Chapter One. Currently, the ACC is the only investigation agency with prosecutorial functions. *The Anti-Corruption Act*²⁰⁶ provides that the Prosecutor-General may appoint any staff member of the ACC who has the necessary legal qualifications, including the Director-General, to prosecute the matter in court or conduct criminal proceedings. Like other prosecutors, the person so appointed from the commission to prosecute the matter will exercise his power under the direction and control of the Prosecutor-General. In Tanzania, too, the Director-General of the Prevention and Combating of Corruption Act²⁰⁷ can prosecute matters involving corruption, including those that have been investigated by police officers, subject to the direction of the Director of Public Prosecution.

In the legal systems where there are police prosecutions, cooperation between investigators and prosecutors manifests an integrated approach, as officials of both agencies belong to one establishment. It is further based on the coordination model, because in their supervision and directing of investigation, prosecutors are pulling resources together with investigators in order to address the offence. While a distinction in terms of the separation of powers is drawn between police officers from two the units, *i.e.*, investigation and prosecution, it is imperative

²⁰⁵ Tibasana (2001), at 173.

²⁰⁶ No. 8 of 2003, s 31 (1).

²⁰⁷ *Prevention and Combating of Corruption Act* (Tanzania), No. 11 of 2007, s 10 (2).

for officers to maintain an equal control approach cooperation in order to ensure that there is sufficient evidence placed before the court.

Since police prosecutorial services exist in jurisdictions where there are prosecuting authority, it should conform to the regulations governing public prosecutors and in exercising these functions, the police acts under the supervision of the public prosecution authority, reporting to the Deputy Director who reports to the Director of Prosecution.²⁰⁸ Since such police officers are under the overall subordination of the Public prosecution authority, the latter has the inherent power to review and decide on the prosecutions carried out by the Police. It further follows logic that the police cannot exercise discretion to carry out prosecutions or decline prosecution, against the command of the Deputy Director of Prosecution.

The shortcomings of investigators' prosecutions with regard to the separation of powers and independence of the prosecution were underscored by the Indian High Court in the case of *Krishan Singh Kundu v State of Haryana*.²⁰⁹ The argument centred around an appointment of a police officer as Director of Prosecutions of the State of Hyarana. When this matter was argued before the Court, Justice Agnihotri held that it could not have been the intention of Parliament to have police officers in charge of the prosecution agency because that effectively put all prosecutors under the effective control of a police officer, who ultimately report to the Inspector-General of Police. When a head of a prosecution agency report to a senior police officer, it will compromise their independence. The learned judge maintained that even if the power of the appointment and dismissal of prosecutors is vested in State Governments, it follows logic that a State Government would generally act on the advice of senior police officers who exercise control and authority over police officers serving as prosecutors, thereby making the independence of the prosecution fallacious.

3.5 Prosecutorial and judicial investigations

Countries with inquisitorial legal systems adopt prosecutorial and judicial investigations, with prosecutorial offices leading investigations. Prosecution services in some countries with

²⁰⁸ *Code of Criminal Procedure (India)*, 1973, ss 25 and 25A.

²⁰⁹ *Krishan Singh Kundu v State of Haryana* [1989 Cri.LJ 1309 (P&H)], para 10.

adversarial legal systems, too, like the US have their own investigators. However, in these countries primary investigations are still carried out by the police and the prosecution investigators only supplement investigations carried out by police officers.²¹⁰

With regard to prosecutorial investigations, three guiding principles are important, namely that (i) there should be sufficient evidence before a decision to lay charges is made; (ii) an innocent person should not be prosecuted just for expediency; (iii) sufficient evidence should be gathered to convict the guilty accused.²¹¹ The two could be collapsed in the first issue – if there is no enough evidence then there should not be a prosecution. It is thus incumbent upon prosecutors to assist investigators in gathering chargeable offence evidences and avoid frivolous charges. They should further ensure that innocent persons are not hassled in the courtrooms, while real culprits escape the wrath of law.

Prosecutorial investigations are carried out under the principle of neutrality, whereby the duty of the investigator is to establish the truth and not to persecute suspects. This is in line with the principle of constraining abuse of state power by investigators. Accordingly, both incriminating and exculpatory evidences are considered in investigations. Prosecutors lead criminal investigations, rather than leaving this role to the police, because it is believed that trained lawyers would adhere to procedural fairness in the investigation, compared to police officers who are not legal experts.²¹²

In some instances, the relationship between investigators and prosecutors remains at the level of functional cooperation, as police officers are not obliged to notify prosecutors about an investigation that they have commenced with. But, when the police have apprehended a suspect, they are required to inform the prosecutor in order for the latter to become involved in the criminal justice process at an early stage. After carrying out an investigation, the police submit their investigation dossier to the prosecution. The prosecution advises the police to improve on aspects of the investigation, if there is some essential information missing. In addition, prosecutors may also take over the investigations from the Police and carry those investigations out themselves, particularly in cases of severe offences. Prosecutors may

²¹⁰ Castberg [s.a.] at 140; Human Rights Watch (2014).

²¹¹ Pope (2011) at 6.

²¹² Siegismund (2003) at 61.

further carry out searches themselves, though generally searches are carried out by the police after obtaining a warrant of search from the prosecutor.²¹³

In some jurisdictions with investigative prosecutorial services, prosecutors do not necessarily need any assistance from the police, when they are to investigate matters involving police officers or politicians. They are able to successfully investigate serious crimes like bribery and irregular financial transactions involving high-level business executives and politicians.²¹⁴ A single dominant approach becomes applicable to these types of investigations, as the involvement of the police, if any, is very minimal.

The legal systems that adopt prosecutorial investigation manifest a prosecutor dominated relationship between investigators and prosecutors. Police investigators are led by prosecutors on what to investigate and how to launch their investigations. The basis for this is the principles of impartiality and of objectivity and material truth. This is because prosecutors, often, more than investigators, would know what evidence is relevant in law and what methods of collecting such evidence are permissible.

Namibia does not have prosecutorial investigations. However, she can import some of the principles of prosecutorial agencies' investigations into investigations carried out by investigation agencies in Namibia. For example, the principle of sufficient evidence before arrests and charges are laid. This will save the state from unnecessary litigations arising from unlawful arrests. Further, in the investigations of offences by investigators, Namibia can adopt prosecutorial investigations to ensure the independence of such investigations.

3.6 Conclusion

In the jurisdictions discussed in this chapter, it is found that a written cooperation framework between investigators and prosecutors is only found in the UK. Both developed and developing countries practise inter-agency cooperation, with models differing from one country to another. Namibia is not a developed country and the next chapters will illustrate similarities in inter-agency cooperation practice in Namibia. It is further interesting to note

²¹³ Sobczyk (2005) at 90, 92; Zaimaru [s.a.] at 205, 208, 210.

²¹⁴ Tachi (2002) at 120.

how models of inter-agency cooperation in Namibia, which has an adversarial legal system, will draw similarities from both adversarial and inquisitorial legal systems.

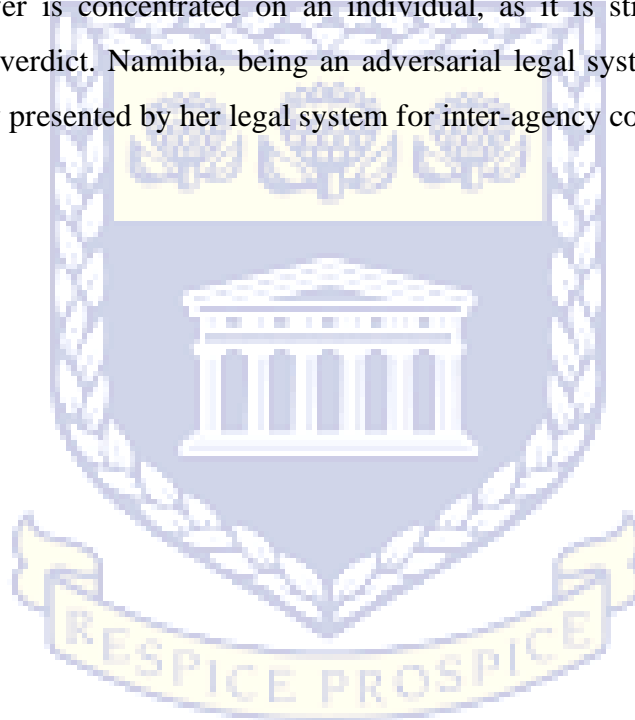
It is noted that in Cameroon, although there is no written cooperation framework, the inquisitorial nature of their system created an enabling environment for a prosecutor-dominated approach to inter-state agency cooperation, with State Counsels supervising police investigations. The existing legislative framework itself already facilitates a directional communicative model of cooperation between State Counsels and police investigators. Without a written cooperation framework, Namibia being an adversarial system country would not be in the same situation like Cameroon. Only a communication model could be realised, which has its shortcomings as discussed in the next chapters.

A written framework is more explicit on what is required from investigators in relation to prosecutors and vice versa in the course of carrying out their respective duties on taking an offence through the criminal justice process. This becomes an important instrument for inexperienced junior officers and it serves to provide guidance to them. This helps us to understand the effect of unwritten policy framework in Namibia and its effect on the efficiency and effectiveness of the Namibian criminal justice process. In countries where there are no written guidelines on the cooperation between investigators and prosecutors, prosecutors and investigators rely on the legislation governing their respective agencies and use these to find mechanisms of cooperation. There is a risk to have cooperation on this arrangement, as it is based on discretion, rather than as a mandatory practice. The disadvantage of this is that there will be no consistency in cooperation between the two agencies within one country. It is also for that reason that there is no cooperation between investigators and prosecutors in some jurisdictions, as each agency feel that they have a better procedure of taking the offence through the criminal justice process.

Cooperation between the two agencies in the afore-mentioned countries comes in a form of (i) investigators consulting prosecutors to be advised on laying the charges, so that they can have sufficient evidence to prosecute the matter before the court; (ii) prosecutors supervising investigators during the course of investigation, but in some instances leave investigators to carry out their tasks independently; (iii) prosecutors directing investigators on investigations. In this directive cooperation approach between investigators and prosecutors is hierarchical with prosecutors having the power to direct investigators what evidence to gather and how to

gather it whereas in other jurisdictions; (iv) prosecutors carrying out joint-investigations with investigators; and (v) prosecutors carrying out investigations that would ordinarily be carried out by investigators. The next chapters will look at the model that Namibia has adopted.

An adversarial system presents an opportunity for cooperation between investigators and prosecutors. This is unlike other criminal justice systems which adopt the inquisitorial system characterised by judicial investigation, while parties to the dispute have no pivotal role in the investigation of the case. For example, the investigation role is assumed by a judge. In this case, too much power is concentrated on an individual, as it is still the judge who will eventually deliver a verdict. Namibia, being an adversarial legal system country, can make use of an opportunity presented by her legal system for inter-agency cooperation.



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CHAPTER FOUR AN OVERVIEW OF THE INVESTIGATION AND PROSECUTION AGENCIES IN NAMIBIA

4.1 Introduction

Chapter Four presents an overview of the prosecutors and investigation agencies in Namibia, their structures and the laws governing their operations. These structures help to explain the models and methods of investigations applied by these investigation agencies and their relationship with prosecutors. Further, they illustrate the significance of having corresponding structures between the Police and the prosecution, in respect of smoothening the operational cooperation between investigation agencies and the prosecution agency.

The Namibian investigation agencies that this study focuses on are the Namibian Police and the ACC. The two agencies are the main investigation agencies,²¹⁵ whose daily operations and core functions include investigations that end up being handled in the criminal justice process. The establishment of the Namibian Police is provided for in the Namibian Constitution.²¹⁶ The Namibian Police is headed by the Inspector-General, who is appointed by the President on the recommendations of the Security Commission.²¹⁷ The ACC is an independent body established by the Act of Parliament.²¹⁸ The Act states that:

There is established an independent and impartial body known as the Anti-Corruption Commission with such powers, functions and duties as are provided for in this Act or any other law.²¹⁹

The ACC is headed by the Director-General and Deputy Director-General, who are appointed by the National Assembly for a period of five years, upon nomination by the President.²²⁰ Both the Director-General, Deputy Director-General and staff of the ACC are subjected to the provisions of the *Public Service Act*,²²¹ and the Commission is, therefore, considered as an agency of the Public Service.²²²

²¹⁵ Other bodies with investigative powers are highlighted shortly. below

²¹⁶ *Constitution of the Republic of Namibia*, 1990, art. 118.

²¹⁷ *Constitution of the Republic of Namibia*, 1990, art. 32 (4) (c) (bb).

²¹⁸ *Anti-Corruption Act*, No. 8 of 2003.

²¹⁹ *Anti-Corruption Act*, No. 8 of 2003, s 2 (1).

²²⁰ *Constitution of the Republic of Namibia*, 1990, art. 94A (5) and (6).

²²¹ No. 13 of 1995.

²²² *Anti-Corruption Act*, No. 8 of 2003, ss 2 & 4; *Constitution of the Republic of Namibia*, s 94A (5) & (6).

There is also the Financial Intelligence Centre of the Bank of Namibia which investigates matters pertaining to money laundering²²³ and investigators from the Ministry of Environment and Tourism for offences related to the violation of nature conservation laws.²²⁴ Other investigators are from the Ministry of Home Affairs for offences related to the violation of immigration laws²²⁵ and from the Ministry of Finance for offences related to tax laws.²²⁶ Investigators from the Ministry of Fisheries and Marine Resources investigate offences related to the violation of the laws regulating the sea and marine resources.²²⁷ In all cases, investigations from the government ministries and the bank are carried out with the collaboration of the Namibian Police as it will be discussed in this chapter. It therefore suffices for the purpose of this study to only focus on investigations by the Police and the ACC.

The Namibian Constitution and the *Criminal Procedure Act*²²⁸ serve as the main authority of prosecution authority in Namibia. The power to prosecute is vested in the Prosecutor-General, who is appointed by the President on the recommendation of the Judicial Service Commission.²²⁹ The Prosecutor-General is a person who is eligible to practice in all courts in Namibia. The Prosecutor-General is authorised by law to prosecute all criminal matters in any court, namely lower courts that are presided by magistrates and in the High Court and Supreme Court, presided over by the respective court's judges and headed by the Judge-President and Chief Justice, respectively.²³⁰

4.2 The structures of investigation agencies and their relation to the prosecution: a foundation for cooperation

In order to understand the framework of inter-agency cooperation discussed in this chapter, the study will present the structure of investigation agencies and how it could be related to

²²³ *Financial Intelligence Act*, No 13 of 2012, ss 7 & 8.

²²⁴ *Nature Conservation Ordinance*, No. 4 of 1975, s 80.

²²⁵ *Immigration Control Act*, No 7 of 1993, ss 10 & 42.

²²⁶ *Value Added Tax Act*, No. 10 of 2000, s 49.

²²⁷ *Sea Fisheries Act*, No. 29 of 1992, s 7.

²²⁸ No. 51 of 1977a.

²²⁹ *Constitution of the Republic of Namibia*, 1990, article 88, ss 1 & 2.

²³⁰ *Constitution of the Republic of Namibia*, 1990, article 88, ss 1 & 2; *Criminal Procedures Act*, No., 51 of 1977a, s 2.

the structure of the prosecution agency and determine whether they are currently serving the purpose of inter-agency cooperation.

With regard to the police, section 13 of the *Police Act*²³¹ grants power to the police to investigate any offence or alleged offence. Investigators from the ACC derive their investigating powers from the *Anti-Corruption Act*.²³² The Commission was established with the purpose of, among others, taking measures to prevent corruption in both public and private institutions, including the investigation of practices of these institutions that need to be revised to combat corruption. The Act further provides for the appointment of investigation officers by the Director-General of the ACC to investigate allegations of corrupt practices.²³³

The *Criminal Procedure Act*²³⁴ and the Namibian Constitution,²³⁵ respectively, provide that the authority to institute and conduct investigations vests with the state and that the Prosecutor-General carries out these functions. The Prosecutor-General further prosecutes in appeal matters in the High Court and Supreme Court.²³⁶ The Prosecutor-General is only eligible to prosecute criminal matters within a twenty-year's period after a crime arises, after which the matter will be subjected to prescription. This excludes offences that fall under the death penalty prior to independence.²³⁷ The Court has referred to the issue of prescription on the case of *Ayoub v Minister of Justice and Others*²³⁸ in the context of extradition, in which Justice Parker agreed that provisions of the extradition law should be read in conjunction with prescription in the Criminal Procedure Act.²³⁹

In the prosecution of cases, the Prosecutor-General appoints prosecutors who carry out of the prosecution in the name of the state.²⁴⁰ Judicial officers, like Magistrates and Judges are also empowered to appoint prosecutors when there is no prosecutor available for a criminal matter

²³¹ No. 19 of 1990.

²³² No. 8 of 2003, s 3.

²³³ *Anti-Corruption Act*, No. 8 of 2003, s 31.

²³⁴ No 51 of 1977a, s 2.

²³⁵ *Constitution of the Republic of Namibia*, art 88 (2) (a).

²³⁶ *Constitution of the Republic of Namibia*, art 88 (2) (b).

²³⁷ *Criminal Procedure Act*, No. 51 of 1977a, ss 3 and 18. In terms of section 18, offences that would have been punishable by death penalty upon conviction before independence (and life imprisonment after independence) do not prescribe.

²³⁸ (A 82/2012) [2012] NAHC 145 (11 June 2012) para 5.

²³⁹ *Criminal Procedure Act*, No. 51 of 1977a, s 18.

²⁴⁰ *Criminal Procedure Act*, No. 51 of 1977a, s 4.

before the court to discharge prosecuting functions.²⁴¹ A prosecutor appointed by a judicial officer falls under the control of the Prosecutor-General, like all other prosecutors who are appointed by the Prosecutor General.²⁴²

Although the Prosecutor-General is eligible to appear in all courts, in practice the current Prosecutor-General does not appear in Court to prosecute matters, due to the workload in his or her office. The Prosecutor-General reads many dockets for offences under Schedule 1 of the *Criminal Procedures Act*,²⁴³ The Prosecutor General further approves all indictments in complex criminal matters and further advises and guides advocates in the two divisions of the High Court (Windhoek and Oshakati) on how prosecution should be conducted. Other functions are administrative duties, like placement of prosecution officers. Given the shortage of staff, the Prosecutor-General further decides on matters of rape and wildlife offences that come from Regional Courts. The Prosecutor General also deposes to affidavits relating to the extradition of fugitives who have fled from Namibia. The Prosecutor General further deposes to affidavits in all civil applications brought against the Prosecutor General, like in matters of malicious prosecution, for example, and those that are brought in terms of Chapter 5 and Chapter 6 of the *Prevention of Organised Crime Act*.²⁴⁴

²⁴¹ *Criminal Procedure Act*, No. 51 of 1977a, s 5.

²⁴² *Criminal Procedure Act*, No. 51 of 1977a, s 8 (3).

²⁴³ No. 51 of 1951, in order to decide whether or not a crime should be prosecuted. Schedule 1 lists the following offences: "Treason; sedition; murder; culpable homicide; rape; indecent assault; sodomy; bestiality; robbery; assault; when a dangerous wound is inflicted; arson; breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; theft, whether under the common law or a statutory provision; receiving stolen property knowing it to have been stolen; fraud; Forgery or uttering a forged document knowing it to have been forged; offences relating to the coinage; any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine; escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody; any conspiracy, incitement or attempt to commit any offence referred to in this Schedule".

²⁴⁴ No. 29 of 2004. Sections 5 and 6 of the act reads as follows:

Assisting another to benefit from proceeds of unlawful activities

5. A person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into an agreement with anyone or engages in any arrangement or transaction whereby -

(a) the retention or the control by or on behalf of that other person of the proceeds of unlawful activities is facilitated; or (b) the proceeds of unlawful activities are used to make funds available to that other person or to acquire property on his or her behalf or to benefit him or her in any other way, commits the offence of money laundering.

Acquisition, possession or use of proceeds of unlawful activities

6. Any person who - 1 (a) acquires; 2. (b) uses; 3. (c) has possession of; or 4. (d) brings into, or takes out of, Namibia, property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.

By establishment, at the Main Division of the High Court in Windhoek, the Prosecutor-General is assisted by the Chief Prosecutor.²⁴⁵ This position was initially to perform administrative work for the Office of the Prosecutor-General. However, due to a number of cases at the Oshakati Division of the High Court, the holder of this position is located there, hence, as stated above, administrative work is performed by the Prosecutor-General.

The Windhoek Regional Magistrate's Court, Katutura District Magistrate's Court and the District Magistrate's Court in the city centre next to the High Court, hereafter referred to as the Lüderitz Street Magistrate's Court, are each headed by the Control Prosecution Officer (Chief Legal Officer), who also serves as the administrative heads of these courts. The Regional Magistrate's Court at Oshakati, too, is headed by the Control Prosecution Officer. The Lüderitz Street Magistrate's Court has five prosecutors and two prosecutors for traffic fines and offences.²⁴⁶ The Katutura Magistrate's Court in Windhoek has 14 courts and nine prosecutors.²⁴⁷

There is no investigation guideline document and no law-making mandatory provision for investigations when a matter has been reported to the police. As a result, the decision on investigation is left to the discretion of the investigating officer. The following question was put to police investigators, regarding the policy framework of cooperation: What is the foundation of cooperation between investigators and prosecutors in enhancing efficiency in the Namibian criminal justice system, in the absence of a legislative framework? A senior investigator stated in an interview that:

From the prosecution, there are Prosecutors' Guidelines that prosecutors need to follow. Much of them entail what should a prosecutor instruct police to do in a particular case, for example, if a prosecutor requires a telephone print, what he should instruct the police. In the absence, this is a guiding document that regulate how to work with the police.²⁴⁸

While the *Prosecutor's Guide* informs prosecutors what information they should obtain from the police,²⁴⁹ there is nothing informing investigators in which areas they should cooperate with prosecutors. It is, therefore, not helpful to only have one member of the agency having a

²⁴⁵ A-SCPG (2019).

²⁴⁶ G-OSH (2019).

²⁴⁷ C-WLC (2019).

²⁴⁸ G-OSH (2019).

²⁴⁹ Office of the Prosecutor-General ([s.a.], at pp 73 – 74).

guiding document. A policy providing for cooperation should cover operations of both agencies and should be binding. Further, the Guide states that prosecutors should monitor and guide investigation,²⁵⁰ without specifying which type of investigation, whether serious crime or any type of crime, and at what stage and how guidance should be provided, so that one can establish the mode of cooperation envisaged.

The discretion of an investigator to decide on an investigation could be better exercised, when there is a guideline framework on investigations. For example, in the UK, there is an Authorised Professional Practice (APP) and the Murder Investigation Manual (MIM).²⁵¹ The Manual states that where there is a need to apply special investigation measures, the Crown Prosecution Services should be consulted. It further provides for meetings between the Police and Crown Prosecution Services for guidance in investigations involving vulnerable witnesses.²⁵² The provisions guidelines are useful to investigators who find themselves involved in investigations that require special measures. At the same time, it is arguable that the guideline framework should serve to guide investigators, but it should not constrain them with regard to the initiatives and techniques that they would employ to carry out investigations with the aim of presenting credible evidence to the prosecution, provided that such techniques are lawful. With the guideline framework in place, the two agencies can then adopt the communicative cooperation model, in which investigators will benefit from prosecutors regarding the manner of approaching investigation. Having a reference document reduces uncertainty, *ad hocism* and encourages uniformity of cooperation formula in the country. Guidelines are generally a useful tool to new investigators whose experience and expertise in investigation complicated matters is limited. Seasoned investigators can rely on their previous experiences on how to make a breakthrough when confronted with the complexities of investigation.

The duty of the police or any investigator is to establish whether a crime has been committed. In that case, an investigator has discretion on whether the matter warrants an investigation. Further, Justice Damaseb averred in a judgement delivered in the Namibian High Court²⁵³ that an investigator has a duty to collect adequate information that would assist the court to

²⁵⁰ Office of the Prosecutor-General ([s.a.]), at p 74.

²⁵¹ Fox (2014) at 4.

²⁵² National Centre for Policing Excellence (2006) at 209.

²⁵³ *Maletzky v Zaaluka; Maletzkey v Hope*, Case No.: I 492/2012; I 3274/2011.

arrive at an informed verdict. The court will only arrive at the guilty verdict if the act or omission committed meets the definitional elements of an offence in law, an aspect that could be a challenge to investigators who may not have comprehended all issues pertaining to the rights of suspects in an investigation, necessitating cooperation with prosecutors in the investigation process.

4.3 Procedures followed in investigations and need for cooperation with prosecutors

When a case is reported to the police, it is registered in the occurrence book by the officer in charge at the charge office. Generally, constables and sergeants are the officers that are found in charge offices. After registration at the charge office, the matter will be transferred to the crime register.²⁵⁴ A case docket is then created, in a form of a file folder, where details of the crime will be entered and all other necessary supporting documents thereof. The charge sheet should have the particularity of an act, like the date, time and month, so that it can avail the accused the defence of alibi, if it is applicable.²⁵⁵

When a suspect is charged, the docket is sent to a prosecutor, who will look at the information provided by an investigator. A prosecutor will then guide an investigator about the information required and send back the file to an investigator. When an investigation is completed, for minor offences tried in the lower court, prosecutors request investigators to bring back the docket two days prior to the trial. This is according to a directive from the Prosecutor-General and not according to a policy. However, in the absence of written inter-agency cooperation which stipulate interactions between investigators and prosecutors during an investigation, in practice sometimes investigators bring the docket to prosecutors on the date of the trial, leaving a prosecutor with little or no time to thoroughly read the docket, which will necessitate further postponement of a trial. It is further stated that different regions have different dates as to when investigators bring back the file to prosecutors.²⁵⁶ The delay in bringing the docket to prosecutors reflects non-adherence to the principle of efficiency discussed above (see Chapter Two). For offences that are tried in the Regional Court and

²⁵⁴ Mukumbira (2012) at 3.

²⁵⁵ *S v Koch*, 2018, at para 9.

²⁵⁶ M-WLC (2019).

High Court, the file is sent to the Prosecutor-General for a decision and it remains with the prosecution. An investigator only accesses the docket three days prior to the trial.²⁵⁷

It should be noted that police officers in charge of offices who take down information when offences are reported are not investigators and accordingly, they have challenges with regard to recording cases, since they are not trained in the field of investigations. In their recording, they can omit important information related to elements of a crime, which may result in a prosecutor thinking that there is no case to prosecute, when in fact it is the case is prosecutable.²⁵⁸ Investigations that are carried without prosecution collaboration have weaknesses when it comes to definitional elements of a crime. In an interview, a prosecutor²⁵⁹ stated:

When investigators take down sentences from witnesses in cases like assault by threat, they compile charges that do not indicate any definitional element of a crime, which would give an impression that there is no case to prosecute. However, when I interview a complainant, it becomes clear that there is evidence of an offence committed in terms of definitional elements of a crime.

Information cited above provided by the prosecutor illustrates that when there is no communicative cooperation between investigators and prosecutors in the investigation of offences, it leaves investigations without substance of facts required in law. That a prosecutor is able to establish these facts after interviewing a complainant attests to the importance of inter-agency cooperation in investigations.

The above scenario further demonstrates that it is recommendable to adopt the UK criminal justice systems inter-agency cooperation model, where prosecutors are available all the time for consultation with the police, in order to ensure that pertinent information is recorded and the offence will, therefore, be prosecuted effectively. However, as a developing country, Namibia has challenges of human and capital resources to have these arrangements in place. There are further problems that most of investigations of less serious offences prosecutors do not read the dockets at an early stage, but only when investigators finalise an investigation and submit the dockets to the prosecution, which are sometimes brought to prosecutors on the date of the trial. In some instances, by the time investigators bring back the files to prosecutors, they would not have attended to all instructions provided by prosecutors in the

²⁵⁷ M-WLC (2019).

²⁵⁸ G-OSH (2019).

²⁵⁹ E-OLC (2019).

investigation diary.²⁶⁰ This illustrates that there is generally no effective collaboration in the investigation process, particularly for minor offences, except for selected serious offences where the police and prosecutors maintain operational collaboration in the investigation process as discussed below (see reference to Stoffels murder investigation under 5.4)

With regard to common law tradition of police investigations, the practice is that upon reporting of a crime, investigation commences immediately. Methods used in investigation include interviewing suspects, witnesses and victims. For minor offences, they can immediately be presented to court following their registration. However, major offences will require the prosecution authority to decide whether there will be prosecution. During the investigation period prosecutors advise investigators and guide them on the aspects of gathering information, so that they comply with the law.²⁶¹ This is in line with the principle of constraining the abuse of state power. Investigators are precluded from gathering evidence using inadmissible methods of investigation.

The procedures followed in the reporting and investigating a crime should be stringent in order not to leave police officers with little room to manoeuvre whether or not to investigate the matter. In the absence of a written policy document regarding investigation of reported crimes, there is a risk for investigators to use discretion to underplay serious matters that warrant investigation. This is particularly possible in instances discussed by Fox²⁶² where there is no framework in place in which victims could hold to account investigators regarding their discretion to investigate a reported matter. Accordingly, victims of crime have access to the relevant information on the progress of their investigations and they should be able to appeal to the Head of a Directorate under which a given crime falls. This will keep investigators to take prudent measures to investigate and press charges for offences. When the Head of Investigation does not reply to the request of a victim satisfactorily, a victim should be able to appeal to the prosecution the failure of the investigator to bring charges before the court so that the prosecution can seek the Court order to compel an investigator to take the charges to the prosecutor. Approaching the prosecution, rather than the court will make the process accessible to all victims, including those who would not otherwise have money to seek the court order.

²⁶⁰ F-WPOL (2019).

²⁶¹ Brown (2015) at 60, 93.

²⁶² Fox (2014) at 7.

Corruption cases are investigated by the ACC, following the furnishing of information orally or in writing by any person on acts that are believed to be of corrupt practice.²⁶³ The ACC assesses the furnished information to establish if there are reasonable grounds to carry out an investigation.²⁶⁴ The ACC may also on its own motion initiate an investigation. The ACC assumes investigation power on any matter under the police investigation or for which the police investigation is about to commence, in which case the police is obliged to comply with the Commission's assuming of investigation exercise. The ACC further assumes similar investigation power over cases being investigated or about to be investigated by any investigation authority other than the police.²⁶⁵

The process of investigation commences as soon as the whistle blower has brought the matter to the attention of the ACC, or as soon as the ACC picks up information by other means. A whistle blower can report the matter anonymously or can have his identity known. There is always an investigator on standby for the whistle blower to report acts of corruption. When an investigator receives the matter, it will be registered on the system and be referred to the Head of Investigations, who will peruse the matter and refer it to the Director-General. The Director-General will consider whether the matter falls within the mandate of the ACC before deciding on its investigation.²⁶⁶

Investigations by the ACC are Commissioned by the Director-General, Deputy Director General or by any other staff member who holds a senior rank to that of an investigator. The instructions to investigate may be given orally or in writing. Where special expertise is required in a particular investigation, the Director-General may, with the concurrence of the Prime Minister, appoint a special investigator on a temporary basis.²⁶⁷ The practice has been that the Head of Investigation assigns a docket to a group of investigators led by a Chief Investigator. The Chief Investigator selects an investigator or investigators who will be investigating the matter. Investigators collect information immediately when a case is assigned to them and they take witness statements that will be used as evidence in court.²⁶⁸

²⁶³ *Anti-Corruption Act*, No. 8 of 2003, s 17.

²⁶⁴ *Anti-Corruption Act*, No. 8 of 2003, s 19.

²⁶⁵ *Anti-Corruption Act*, No. 8 of 2003, s 20.

²⁶⁶ N-ACC (2019).

²⁶⁷ *Anti-Corruption Act*, No. 8 of 2003, s 13 & 14.

²⁶⁸ O-ACC (2019).

While it remains a fact that some ACC investigators are law graduates, this study submits that they still need to cooperate with prosecutors in their investigations because prosecutors have the knowledge of court procedures and judgements in which the court has set the rules. Accordingly, they are able to establish which investigation will pass the test of lawful procedures in court. Investigators do not have similar knowledge.

The *Anti-Corruption Act*²⁶⁹ provides that the commissioning of investigation of accounts at financial institutions should be made in writing. Failure to adhere to this provision results in authorised investigations that have not been made in writing rendered invalid by the Court. This was held in the case of *S v Lameck*,²⁷⁰ where Justice Liebenberg held that in order to protect the privacy of the suspects, only the Director-General or Deputy Director-General in person, or an investigator who is so authorised in writing may access the account of the suspect. The learned judge ruled that the investigation officer who accessed the accounts of the accused in this case had acted *ultra vires* when he approached three banks where the accused held accounts with summons issued by the ACC, as he had no written authority to access the bank accounts of the accused. These are some of the loopholes in the investigations that are not carried out in collaboration with prosecutors.

Investigations by the ACC precede the summonses issued to suspects. In the case of *S v Lameck*²⁷¹ where summonses were issued to the accused before an investigation was carried out by the ACC, Justice Liebenberg held that it was unlawful that the decision to investigate the allegations against the accused was based on the affidavit by the investigator, which was only made after summons to obtain documentary evidence from the three banking institutions, MTC and the Ministry of Home Affairs and Immigration had been issued and served. The learned Judge ruled that the summons issued by the ACC prior to the initiation of an investigation contemplated in section 18 (3) of the *Anti-Corruption Act*²⁷² was outside the procedures provided for in the law. In another investigation where guidance was not sought from prosecutors, investigators lost the case of *Bernard Esau v Magistrate of Windhoek and*

²⁶⁹ No. 8 of 2003, s 27.

²⁷⁰ *S v Lameck*, CC 11/2010) [2018] NAHCMD 214.

²⁷¹ *S v Lameck*, [2014] NAHCMD 186.

²⁷² No. 8 of 2003.

Others,²⁷³ on the basis of unlawful criminal justice procedures. Later, investigators coordinated with the prosecutors and followed correct criminal justice procedures.²⁷⁴

A senior prosecutor²⁷⁵ states that one common reason for dismissal of cases is inadmissible evidence, resulting from the manner in which evidence was obtained by the police, or wrongful arrests. For example, with regard to collecting evidence for serious crimes, which require mobile telephone print-outs, like some cases of robbery, investigators are required by section 179 and 180 of the *Criminal Procedure Act*²⁷⁶ to serve the subpoena to the Mobile Telecommunications Company (MTC) in Windhoek, where their head office is located. Sometimes investigators do not comply with this requirement. A senior prosecutor²⁷⁷ corroborates this, saying that there are instances when police obtained evidence from MTC unlawfully and only when prosecutors' guidance was sought that a subpoena was properly served to the MTC and evidence was obtained legally.

The discretionary power of the ACC to investigate the matter is unfettered. Once the ACC decides, no one can prevent the agency in carrying out its investigation. Similarly, the ACC cannot fold its arms when there are reasonable grounds that an act of corruption has been committed. This was stated in the case of *Hailulu v The Director of the Anti-Corruption Commission*.²⁷⁸ Justice Damaseb held that the courts should not prevent investigators from carrying out their duties, as these institutions are charged with the responsibility to conduct investigations for criminal acts and pursue prosecutions for such acts and that the public expect these institutions to carry out their duties without fear and favour. If there are persons who are aggrieved by investigations, they will have an opportunity to prove their innocence in Court and should not prevent the laying of evidence before the court as that will create a

²⁷³ *Bernard Esau v Magistrate of Windhoek and Others*, HC-MD-CIV-MOT-GEN-2019/00465. The case was about a wrongful arrest resulting from lack of coordination between investigators and prosecutors as the ACC acting on public pressure ignored some criminal justice procedures that on 23 November 2019, the ACC arrested former Namibian Minister of Fisheries, Bernard Esau, on charges of corruption. Esau made an urgent application in the High Court on 24 November 2019 and Justice Prinsloo held that the warrant of arrest was invalid and ordered the release of the former Minister.

²⁷⁴ Beukes (2019) at 1; Menges and Shinoovene (2019) at 1. With correct procedures followed following coordination with prosecutors, it resulted in the re-arrest of the former Minister and his co-accused and the state has further managed to successfully oppose bail applications that at the time of writing (September 2021) the former Minister and his co-accused were still in detention.

²⁷⁵ G-OSH (2019).

²⁷⁶ No. 51 of 1977a.

²⁷⁷ V-WHC (2020).

²⁷⁸ *Hailulu v The Director of the Anti-Corruption Commission* [2013] NAHCMD 205.

perception that powerful persons with resources can inhibit the due process of law. The learned judge maintained that while the Court recognises the principle of presumption of innocence until proven guilty, mockery of justice should not be entertained by allowing the guilty to suppress investigation and prosecution. Demonstrating the essence of inter-agency cooperation between investigators and prosecutors to ensure that evidence has been gathered in compliance with the law, the learned judge added immediately that investigations should be carried with due consideration to lawful procedures. Should this not happen, the appellant is entitled to ask the Court to exclude improperly obtained evidence.

The issue of lawful procedures to be followed that Justice Damaseb stressed has been underscored in other judgements in the Namibian High Court. For example, in the case of *Simataa v Magistrate of Windhoek and Others*,²⁷⁹ Justice Tomassi held that investigations should be guided by the Act and that infringement on the right to privacy should only take place when it has passed the standard set by legislation, which requires, among others, placing before a judicial officer justifiable sufficient and objective information. In the case of *New Force Logistics CC v The Anti-Corruption Commission*,²⁸⁰ too, the Court underscored the importance of safeguarding individual rights and that courts will not turn a blind eye to the rule of law and fundamental rights provided in the Namibian Constitution.

When the ACC completes an investigation, it refers the matter to the Prosecutor-General for prosecution. The referral of the matters to the Prosecutor-General by the ACC is obligatory and not exercised at the discretion of the investigators or Director-General. This is because of the pre-emptory word “must” in section 31 (1) of the *Anti-Corruption Act*,²⁸¹ which says that:

If, upon completion of an investigation by the Commission, it appears to the Director-General that a person has committed an offence of corrupt practice under Chapter 4 or any other offence discovered during the investigation, the Director-General must refer the matter and all relevant information and evidence assembled by the Commission in connection with the matter to the Prosecutor-General.

The obligatory referral requirement for the Namibian corruption investigators precludes ACC investigators from exercising discretion on whether or not to refer the case to the prosecution, even after establishing that an offence has taken place. This is a good practice of checks-and-balance between investigators and prosecutors, particularly that there is a vacuum of inter-

²⁷⁹ *Simataa v Magistrate of Windhoek and Others* 2012 (2) NR 658, at 668, para 55.

²⁸⁰ *New Force Logistics CC v The Anti-Corruption Commission* 2018 (2) NR 375, at 388, at para 59 – 60.

²⁸¹ No. 8 of 2008, s 31 (1).

agency cooperation legislative framework. The matter is left to the Prosecutor-General to decide whether the matters should be prosecuted, as the Prosecutor-General is the one who is vested with prosecution powers.²⁸²

Investigations should produce facts, and not on hearsay information. Hearsay evidence is inadmissible in the Namibian Courts in certain circumstances, particularly when it brings the administration of justice into disrepute²⁸³ and result in the state losing the case. There is, however, exception. For example, it is admissible when the evidence corroborates other evidence.²⁸⁴ It is also admissible in bail applications, but it still carries little weight than when evidence was presented by the person who has knowledge of the facts.²⁸⁵ In the appeal case of *S v Shikunga*,²⁸⁶ Justice Mahomed held that when the irregularity in obtaining evidence is not severe that it has not tainted the verdict, the verdict of a court should stand. Given their limited in-depth knowledge of evidence gathering procedures, particularly on inadmissibility of evidence, and the complex nature of inadmissible evidence arising from case law, investigators need support from prosecutors to guide them in collecting relevant evidence. This will be conceivably realised through inter-agency cooperation, particularly the communicative cooperation model, which affords agencies an equal approach to investigation, but ensures that the investigation agency benefits from inputs from the prosecution agency, on matters that the latter has sufficient knowledge.

4.4 Techniques of investigations and the role of prosecutors

Namibia's methods of investigation for serious crimes discussed above are universal practices. They are applied in other jurisdictions. Both Weston, Lushbaugh and Well in Tawracki, Sr.²⁸⁷ and Barry²⁸⁸ state that police use various methods of investigations including the use of informers, carrying out surveillances, telecommunications interceptions, search of properties, seizure of items and undercover operations, among others. In Brazil, the police use wiretapping in drug related investigations, but in general they do not use new techniques

²⁸² Wood, Rosay, Poste and TePas (2011) at 339.

²⁸³ *S v Malumo and Others*, Case No. 32/2001, at para 13, Mujuzi (2016), at 411-412.

²⁸⁴ *Aupindi vs Shilemba*, Case No. SA 7/2016, at para 39.

²⁸⁵ *Mashuna v S* (HC-NLD-CRI-APP-CAL-2018/00010) [2018] NAHCNLD, 49, at para 18.

²⁸⁶ *S v Shikunga* 1997 NR 156 (SC) at 170 J to 171 B.

²⁸⁷ Tawracki, Sr. (2011).

²⁸⁸ Barry (2007) at 80.

in investigations.²⁸⁹ In the US, for high level crime like terrorism, the police enlists the service of confidential informants. Among these are terrorist suspects who have been apprehended and turned to informants in exchange of dropping charges against them.²⁹⁰ The success of investigation techniques depends on the collaboration between investigators and prosecutors.

The ACC adopts, among other techniques, surveillance methods that have led to the arrest of civil servants, police officers and businesspersons involved in bribery, kickbacks and money laundering.²⁹¹ It further conducts searches, after obtaining warrants of searches issued by a Judge of the High Court or a Magistrate under whose jurisdiction falls the property to be searched and seized, following an application by the Director-General or Deputy Director-General of the ACC. The applicant should attach an affidavit describing the nature of an investigation to be conducted, the suspicion that triggered the investigation and the need justifying the search and seizure for the purpose of the investigation. After having been satisfied that a corrupt practice has taken place or is likely to take place and that items connected with the investigation of a corrupt practice are on the premises upon which application for search and seizure is being made, a Judge or Magistrate would issue a warrant of search and seizure. The warrant should specify the premises that would be searched and authorised officers who will carry out the search.²⁹² Given the complex technicalities in this type of investigations, it is important that ACC investigators do cooperate with the prosecutors as their police counterparts do (see discussions below).

4.4.1 Searches

Search as a method of investigation is conducted after investigators have applied for and have been granted a warrant of search by a Magistrate. It is required that a search warrant should specify the name of the investigating officer and such officer should be involved in the search. Further, items seized during the search should be brought before a magistrate. This was stated in the case of *Van Rensburg v S*.²⁹³ In this case, a search warrant was issued by the

²⁸⁹ Mendonça (2014) at 66.

²⁹⁰ Barnes (2012) at 1636.

²⁹¹ United Nations Office on Drugs and Crime (2016) at 212 – 213.

²⁹² *Anti-Corruption Act*, No. 8 of 2003.

²⁹³ *Van Rensburg v S* [2017] NAHCMD 44.

Magistrate of Oranjemund. The warrant was addressed to “all policemen”. Failure to have the warrant specifying the name of a police officer who carried out the search resulted in the Court declaring the search warrant invalid. Further, the Court disqualified the warrant due to the fact that the search was actually carried out by employees of the Bank of Namibia and the Namibian Financial Institutions Supervisory Authority (NAMFISA), with the role of a police officer being non-existent. Justice Siboleka ruled that the seizure of the items by employees of the Bank of Namibia and NAMFISA was unlawful and these employees acted ultra-vires.

Like in the case of search and seizure by police investigators discussed above, the search and seizure by the ACC investigators, is required to comply with the law. This was held in the case of *S v Lameck*.²⁹⁴ In this case a warrant of search was issued to the ACC, addressed to all authorised officers of the ACC. Justice Cheda held that warrants are required to substantially comply with the law. The learned judge surmised that substantial compliance requires that the warrant should sufficiently state the particulars of the investigation officers, in order to enable persons affected to properly identify the officer responsible for the execution of the warrant of search. The learned Judge adopted the principle in the case of *Simataa v Magistrate of Windhoek and Others*,²⁹⁵ where Justice Tomassi held that failure to specifically state the officer that will execute the warrant renders the warrant unlawful and, therefore, invalid. This anomaly illustrates that it is necessary for ACC investigators to work closely with prosecutors. Corruption offences are serious crimes that investigators and prosecutors should have collaboration in the course of carrying out the investigation. This would enable prosecutors to identify defects in warrants.

On a closer examination, it is arguable that the Namibian investigation process of the criminal justice process follows a similar process of six steps discussed by Weston, Lushbaugh and Well as cited by Tawracki, Sr.²⁹⁶ The first step in this process is that an investigator receives information about the commissioning of an act or omission, which implores upon him or her that there is a need to carry out an investigation. The second step is gathering information, using forms of investigations that will be discussed below. In the third step, the gathered information is then evaluated and stored in a referenced manner that it could be retrieved when there is a need to make use of it. During the fourth step, other

²⁹⁴ *S v Lameck* [2014] NAHCMD 186.

²⁹⁵ *Simataa v Magistrate of Windhoek and Others* 2012 (2) NR 658, at 668, para 55.

²⁹⁶ Tawracki, Sr. (2011) at 24.

investigators can revise and evaluate the collected data whereas the prosecutor can assess the eligibility of the gathered information for prosecution. The fifth step is the presentation of the investigators report to the prosecutor for indictment, followed by the sixth step of plea bargaining, trial and the verdict by the court.

Failure to issue a warrant complying with the law in the cases discussed above illustrates yet another importance of the collaboration with prosecutors in investigations and, responding to one of the research questions: What is the relevance of coordination between investigators and prosecutors in the prosecution process? This study argues that had prosecutors been engaged they would possibly have identified the shortcomings in the search warrants and guide that it should specify names of investigators involved in the investigations. Investigators will also be guided regarding who should lead investigations.

It should be noted that investigation in the form of search without a warrant may be carried out when a police officer believes that obtaining a warrant of search will defeat the purpose of justice.²⁹⁷ When there is communicative cooperation between investigators and prosecutors, prosecutors will be able to guide investigators in carrying out some seizures, even the absence of warrants, so that pertinent evidence is not lost as a result of the time factor, *i.e.*, while applying for seizure warrants. The directory word “may” in the legislation in respect of search without warrant implies that investigators have discretion on what to investigate. In the case of *Tjipepa v Minister of Safety and Security*²⁹⁸ the police searched and seized property and arrested the plaintiff without a warrant of search. When the plaintiff brought an action before the Court, Justice Ueitele stated that the police are only required by law to have a suspicion based on reasonable grounds. In this particular case the plaintiff was not successful. The significance of inter-agency cooperation in criminal investigations is relevant as in the absence of collaboration with prosecutors to advise on the merits of

²⁹⁷ *Criminal Procedure Act*, No. 51 of 1977a, s 22 reads as follows:
Circumstances in which article may be seized without search warrant:

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 2- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or (b) if he on reasonable grounds believes (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and (ii) that the delay in obtaining such warrant would defeat the object of the search.

²⁹⁸ *Tjipepa v Minister of Safety and Security* [2014] NAHCMD 193.

discretion in terms of the law, this discretion can be abused and applied against the norms of equal treatment of suspects.²⁹⁹

Further inter-agency cooperation in searches requiring telephone print-outs are necessary. A senior prosecutor³⁰⁰ underscored the role that prosecutors play in investigating techniques requiring telephone print-outs, like in cases involving robbery. Prosecutors advise investigators to obtain print-outs from the Mobile Telecommunications Limited (MTC). These print-outs should be requested by serving a subpoena on MTC's Head Office and serving subpoenas on branch offices will invalidate an investigation. For investigators from Oshakati, they need to travel to Windhoek to serve the subpoena on MTC Head Office. Although this could take time due to transport arrangements, thereby causing some delays in the investigation, it is the appropriate thing to do to ensure that the investigation complies with the provisions of law.

4.4.2 Entrapment and undercover investigations

Entrapment refers to the luring of a suspect into committing a crime, inducing him or her providing him or her with attractive opportunities to commit a crime. Entrapment is set up and carried out by investigators disguised as people involved in crime activities for which a suspect is being entrapped.³⁰¹ Undercover refers to a disguise by an investigation officer to get closer and gain trust of the suspect for the purpose of investigating an offence. An undercover can also participate or associate himself or herself with a criminal activity.³⁰² Third party working for the police or disguised police officers are used in these operations. They infiltrate the groups suspected of committing criminal acts and try to gain their trust and confidence.³⁰³ The difference between entrapment and undercover is that under entrapment, investigators pro-actively pushes a suspect in committing a crime whereas undercover operatives monitor the suspect and observe what he does in order to establish his connection to a crime.³⁰⁴ Entrapment results from undercover operations.³⁰⁵

²⁹⁹ Howell (2014) at 296 – 299.

³⁰⁰ G-OSH (2019).

³⁰¹ Levanon (2016) at 51.

³⁰² Kruisbergen et. al (2011) at 402.

³⁰³ Giurea (2013) at 141.

³⁰⁴ Buchanan (1989) at 3.

³⁰⁵ *S v Nangombe* (SA 2/93) [1994] NASC 3.

The investigation technique of trap is generally used in the investigations of persons suspected for illicit diamond dealings and drug trafficking. The police uses informers who will pose as diamond buyers in order to trap the suspects. The Namibian legal system adopted the public policy and fairness approach, which looks at the impropriety of investigation methods, unlike the common law approach which did not consider excluding evidence from improper methods of investigations.³⁰⁶ In *S v Nangombe*,³⁰⁷ the court found in favour of appellant and reduced the sentence, maintaining that the appellant's resistance to theft was corroded by the police. The Court further castigated the reward system of the diamond company, the consolidated Diamond Mines (CDM), which pays 70% to persons who lead to the retrieval of stolen diamonds, including security officers. In this case the security officer received R 331 000 from CDM.³⁰⁸ Justice Dumbutshena maintained that innocent men are convicted as a result of evidence brought by people who are led by interests of lucrative rewards, which the Court should guard against as it amounts to the abuse of the legal system.³⁰⁹

In the case of *S v Shitungeni*,³¹⁰ Justice Levy bemoaned the reward system as immoral, creating perjurers and liars out of good security officers and positive criminals³¹¹ out of weak security officers by driving them to trap innocent persons and induce them to stealing diamonds, just to get rewards. In *S v Maasdorp and Another*³¹² Justice O' Linn held that:

[I]t could be argued that but for the trap, and even though the accused were keen to enter into the transaction, they may not have entered into any transaction, if the opportunity was not presented to them by the trap.

The learned Judge thereby issued caution against the abuse of the trapping techniques. He asserted that trappings should be used for the suspects that are involved in illicit diamonds, who would have committed an offense even if no attractive opportunity is presented. But law enforcement officers should not induce innocent persons to buy diamonds when they are not

³⁰⁶ *Canadian Charter of Rights and Freedom*, 1982, s 24.

³⁰⁷ *S v Nangombe* (SA 2/93) [1994] NASC 3.

³⁰⁸ The value of this amount paid in 1992 at the time of writing (September 2021) is R 1 7 46 265 – 42 (US\$ 122879.46).

³⁰⁹ *S v Nangombe* (SA 2/93) [1994] NASC 3.

³¹⁰ *S v Shitungeni*, Case No. 25/93 at 13.

³¹¹ The judge explained that they are made positive criminals because when they are offered reward higher than what they could earn in a life time, they will go out of their way just to trap people, irrespective of whether they are suspected illicit diamond dealers or innocent persons.

³¹² *S v Maasdorp and Another* [1992] 3.

involved in the trade at all.

The public policy and fairness approach was also adopted by the Canadian legal system, following the adoption of *Canadian Charter of Rights and Freedom* which provides for the exclusion of evidence obtained through the infringement of people's rights and freedom and potentially bringing the administration of justice into disrepute, if admitted.³¹³ Public policy uses the test of whether in the normal course of events, without the intervention of the police the accused would have committed an offence. If the answer is in the negative, then the accused has a defence of entrapment. This is because the law enforcement agencies have provided exceptional incentives to an otherwise law-abiding citizen to commit an offence.³¹⁴

The public policy approach is further similar to the approach by the South African legal system, which is based on the *Criminal Procedure Act*,³¹⁵ which provides for exclusion of evidence obtained through impropriety when the conduct of an investigator provides an opportunity to the accused to commit an offence and admissibility of evidence will bring the administration of justice into disrepute. Accordingly, in *Kotzé v The State*,³¹⁶ in the South African Supreme Court held that traps are controversial because they adopt deceptive methods in which people that are ordinarily not guilty of criminal behaviour will be induced by the conduct of undercover agents to commit acts of crime. In *S v Zurich*³¹⁷ entrapment was used, and the South African Supreme Court held that it did not infringe upon the right of the appellant. This entrapment was carried with cooperation between investigators and prosecutors. With the guidance of prosecutors, investigators carried their operations in accordance with lawful procedures, that the Court did not find investigators to be wanting as it did in the Namibian case of *S v Nangombe*³¹⁸ when it reduced the sentence. It is, therefore, advisable for the two agencies in Namibia to adopt a cooperation mode in which prosecutors join investigators at an early stage and provide advice in order for the police to adopt legally compliant investigation procedures.

³¹³ *Canadian Charter of Rights and Freedom*, 1982, s 24.

³¹⁴ Levanon (2016) at 38.

³¹⁵ No. 51 of 1977b, s 252 A.

³¹⁶ *Kotzé v The State* (429/08) [2009] ZASCA.

³¹⁷ *S v Zurich* 2010 1 SACR 171 (SCA).

³¹⁸ *S v Nangombe* (SA 2/93).

Undercover investigation methods have proven to be one of the challenging investigation methods for the Namibian Police. This is because the Namibian population is relatively small (2.2 million) and further that many registered police informers are known. As a result, the police uses unregistered informers to penetrate serious crime syndicates, in order to provide the necessary information to them. Registered informers are fulltime and at the discretion of the Inspector-General of Police may be paid a salary. Unregistered informers are temporary and occasional informers who are compensated for the valuable information that they provide. An occasional informer provides information that he or she comes across and then assists the police, whereas a temporary informer is assigned to work on information required for a case.³¹⁹

In some instances, undercover operations are declared unlawful, when they involve entrapment. Kukura³²⁰ states that for undercover operations to pass the defence of entrapment³²¹ in court, investigators should act with due diligence and take into consideration the following. They should have a legitimate purpose to undertake an investigation, which should be carried out without employing coercive or persistent methods. They should provide evidence that the suspect was disposed to commit a crime without having been entrapped given, among others, previous arrests and convictions, eagerness to commit a crime and familiarity with the terminologies of a particular crime.

4.4.3 Surveillance

Another technique is surveillance, characterised by keeping a place under a watchful eye to find out about movements and activities that will take place there that could lead to some evidence required by the investigators to establish evidence against a suspect. For example, in the case of *Prins v The Government of the Republic of Namibia*,³²² it is stated that when the police was investigating a case of theft of government property held at an irrigation

³¹⁹ Barry (2007) at 84; New Era, 2020, Word on the block by the Namibian Police - The important role of police informers, 10 October

³²⁰ Kukura (1993) at p 32.

³²¹ In the case of *S v Nangombe* (SA 2/93), the court held that entrapment is not a defence in Namibia and in the case of *S v Kramer*, 1991 (1) SACR 25 Nm at 30 c-g, the court held that entrapment traditionally regarded is a necessary evil and, therefore, legal. However, in other instances the Namibian Court has castigated the entrapment system and called for its discontinuation and while it while entrapment has not been a defence for conviction, it has been considered in mitigating the sentence (see *S v Koekemoer and Others*, 1991(1) SACR, *S v Nangombe* (SA 2/93) [1994] NASC, *S v Shitungeni*, Case No. 25/93).

³²² *Prins v The Government of the Republic of Namibia* I 1361/2004) [2013] NAHCMD 259.

plantation, owned by the plaintiff, the police used surveillance method to ensure that the plaintiff did not interfere with their investigation since he was informed that the police was investigating a case of theft of government property at his plantation. Surveillance methods of investigation are also used in collaboration with customs and immigration officials at international airports. When Namibian nationals travel frequently to countries like Brazil, South Africa and Angola, they are profiled on the systems and are put under surveillance to be investigated for drug trafficking.³²³

4.4.4 Controlled delivery

The Namibian Police also use controlled delivery as an undercover method of investigation, to investigate the illicit drug trafficking. There is, however, no legislation providing how controlled delivery technique should be applied. Investigators rather rely on the provisions on controlled delivery stipulated in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which Namibia acceded to in March 2009.³²⁴

4.5 The capacity of police investigators and justification for inter-agency cooperation

The United Nations Office on Drugs and Crime recommends that effective investigations depend on the training of investigators. Some crimes are so specialised that they require a thorough understanding and specialised skills.³²⁵ The capacity of investigators from the Namibian police necessitates inter-agency cooperation between investigators and prosecutors. A senior prosecutor³²⁶ maintains that:

In cases of money laundering, fraud and corruption, investigators lack capacity to investigate offences in accordance with the procedures. This is where it is necessary for prosecutors to come in.

On comparison, investigators in Namibia are low-ranking officers who have not received adequate training. This impacts on their ability to carry out systematic criminal investigations, warranting cooperation with prosecutors. In order to be effective, investigators

³²³ Barry (2007) at 84.

³²⁴ Unengu (2107) at 146.

³²⁵ United Nations Office on Drugs and Crime (2006) at 8.

³²⁶ V-WHC (2020).

need to attend in-service training and workshops to acquaint themselves with evolving techniques and legislation, so that they can effectively play their roles in criminal investigations and contribute to the efficiency of the criminal justice process. In-service training manuals should be prepared, which will also serve as consultation materials for investigations in the performance of their duties after training.³²⁷

4.6 Investigating offences by members of the Namibian Police: a case of imperative inter-agency cooperation

In Namibia, offences committed by police officers are not investigated by just any police investigator. There is a dedicated Unit, the Compliance and Discipline Unit, headed by a Commissioner, where investigators for offences committed by police officers are located.³²⁸ Despite this arrangement, there is still a challenge of investigating offences committed by members of the investigation authority as long as there is no independent institution which investigates offences committed by members of the Namibian Police.

In South Africa, offences committed by police officers are investigated by the Independent Police Investigative Directorate, a unit within the Police Services.³²⁹ This is unlike the Intelligence Services, where there is an office of the Inspector-General of Intelligence Services, which is an independent and outside institution that has an oversight over the South African Intelligence Services, providing the checks and balance.³³⁰ The establishment of the

³²⁷ United Nations Office on Drugs and Crime (2006) at 8.

³²⁸ Namibian Police, 2002, *Administrative Manual Discipline, Conduct and Behaviour (Chapter 11)*: Windhoek; Namibian: Government Gazette, at s K.

³²⁹ *Independent Police Investigative Directorate Act*, No. 8 of 2011. Section 2 of the Act provides that the objectives of the Act in establishing the Directorate are “to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service 20 and Municipal Police Services; [and] to make disciplinary recommendations in respect of members of the South African Police Service and Municipal Police Services resulting from investigations conducted by the Directorate”.

³³⁰ *Intelligence Services Oversight Act*, No. 40 of 1994. Section 6 of the Act provides that the Inspector-General is accountable to the Parliamentary Joint Standing Committee on Intelligence to whom he or she reports activities and the performance of his or her functions at least once a year. Section 7 states that the functions of the Inspector-General of Intelligence includes, *inter alia*, “to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence; to review the intelligence and counter-intelligence activities of any Service; and to perform all functions designated to him or her by the President or any Minister responsible for a Service; to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph (a), the commission of an offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and

Independent Police Investigative Directorate has, however, not completely brought public confidence in the Police.³³¹

Chomba³³² maintains that when members of the Namibian Police are to investigate cases of human rights abuses committed by their colleagues while in the course of their duties, it amounts to biting a hand that feeds them. This is because police investigators are financially supported in their investigation by the same authority that they are investigating. It is, therefore, unlikely that such investigations will result in prosecution. He cited an example of the Caprivi Treason trial where many of the accused persons in custody complained about torture by the police, yet these torture acts were not investigated as the state gave precedence over the treason trial itself. However, a senior prosecutor maintains that to date, there have not been instances of biasedness or prejudice observed in the investigations carried out by this Unit.³³³

Notwithstanding the claim on zero biasedness, this study submits that investigation by the Compliance and Discipline Unit for serious human rights violations and other serious offences would have symbolised good practice, if there is inter-agency cooperation to guide police investigators against protecting their colleagues. It would further ensure that conflicted investigators are properly directed and they will not circumvent investigation procedures to produce flawed results. Alternatively, these types of investigations need prosecutorial investigation models in which prosecutors carry out investigations, while police investigators take a back stage in the investigation process. It is further suggested that even in case of prosecutorial investigations, investigation for police officers should be carried out by prosecutors from other regions who are not closely associated with the police officer concerned. This is because there is a perceived conflict of interest when police cases are investigated by local prosecutors, who would have established good working relations with police officers who are being investigated potentially compromises those investigations.³³⁴ Another alternative is that investigations involving crime by the police should fall under the Ombudsman, provided that the necessary amendments are effected in the Namibian

Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member.

³³¹ Olutola and Bello (2016) at 224.

³³² Chomba (2008) at 108.

³³³ A-SCPG (2019).

³³⁴ Levine (2016: 1447).

Constitution and the *Ombudsman Act*.³³⁵ This is particularly because the Ombudsman is already involved in investigations involving the abuse of power by public officials, including the police.³³⁶

4.7 Procedures for prosecution and the place of investigators

When the accused is to be summoned to answer to an indictment, a writ is issued out by the Chief Clerk to the Prosecutor-General, who will present the indictment. Every original indictment and every copy of an indictment delivered to the deputy-sheriff for service a notice of trial must be endorsed by the Prosecutor-General or a prosecutor delegated by the Prosecutor-General. The Prosecutor-General should ensure that the accused who has been indicted is called for a Criminal Case Management. Within a period of not less than 10 days before the Criminal Case Management conference commences, the prosecution may deliver to the accused and the Registrar of the High Court, a memorandum containing all factual allegations that the prosecution intends to use and therefore wants the accused to consider for reasons of making an admission at the trial. Following the Case Management Conference, the prosecution should agree with the accused the date of the trial.³³⁷

Indictment follows investigation by investigators. This is where the relevance of inter-agency cooperation is evident. Prosecutors have a duty to scrutinise information placed before the prosecution by investigators. In *Sithole and Others v S*,³³⁸ the Court held that a comprehensive indictment and summary of substantial facts were necessary and they should clearly set out the offence, time, place and property. That was to enable the accused to understand the charges and it was in line with principle of fair trial enshrined in the Namibian Constitution.³³⁹

Statements in the docket form the basis of indictment. Contradictory statements should be identified from the docket, because they will render the prosecution of an offence impossible, particularly when they are serious and there is no justification for them. What would be the

³³⁵ No .7 of 1990.

³³⁶ *Constitution of the Republic of Namibia*, 1990, art 91.

³³⁷ *Rules of the High Court*, 2014, ss 33, 34, 37 (7) and 114.

³³⁸ *Sithole and Others v S* (25/2016) [2017] ZAFHC 160.

³³⁹ *Constitution of the Republic of Namibia*, article 12.

cause for contradictory statements in the docket? Since investigators in the common law system are not lawyers, unlike in the inquisitorial systems, these investigators are amenable to make mistakes, hence the necessity to collaborate with prosecutors to eliminate irregularities and contradictions in their investigation. Should there be insufficient evidence in the docket, before a plea by the accused, the prosecutor should withdraw the case and send the matter back to investigators for further investigation. Similarly, if after the plea by the accused the prosecutor realises that there is no sufficient evidence to prosecute the matter, the prosecutor should advise the Prosecutor-General for proceedings to be stopped.³⁴⁰

In practice, not all prosecutorial decisions on offences are decided for by the Prosecutor-General. Dockets for offences that are investigated by police officers of the rank of Chief Inspector and below are brought to Control Prosecution Officers for a decision whether or not to prosecute. Meanwhile, serious offences like murder, rape and corruption that are investigated by police officers of the rank of Deputy Commissioner and above, are referred to the Prosecutor-General for a decision.³⁴¹

The common law principle of prosecution in respect of determining the culpability of the accused provides that the prosecution is required to prove beyond reasonable doubt that the accused is guilty. This is to avoid the accused to be convicted when reasonable doubt exists, as this infringes upon the provisions of article 12 of the Namibian Constitution, namely the presumption of innocence.³⁴² Both the *African Charter on Human and Peoples' Rights*³⁴³ and the *International Convention on Civil and Political Rights*,³⁴⁴ underscore the universal value of presumption of innocence of suspects until proven guilty by the court. Accordingly, it is recommended that investigations should be centred on objectivity and not on falsified facts. Objectivity is one of inter-agency cooperation principles discussed in Chapter Two of this study. This should, however, not be understood to mean that all investigations require inter-agency collaboration.

³⁴⁰ A-SCPG (2019); *Criminal Procedure Act*, No. 51 of 1977, s 6.

³⁴¹ A-SCPG (2019).

³⁴² *Prosecutor-General vs Gomes & Others*, CASE NO: SA 62/2013.

³⁴³ *African Charter on Human and Peoples' Rights*, 1981, article 7 (b) (Namibia ratified the Charter in July 1992).

³⁴⁴ *International Convention on Civil and Political Rights*, 1966, article 14 (2) (Namibia ratified the Charter in November 1994).

It was stated above that the Office of the Prosecutor-General has an internal policy on guided investigations, but this only assists prosecutors when receiving information.³⁴⁵ Accordingly, it is important to have a legal framework. A legal framework is enforceable that when investigators or prosecutors are in breach of it, they will be held accountable. Under the current arrangement, a prosecutor can refuse to assist when approached by an investigator to provide guidance. Similarly, an investigator can choose to carry out an investigation without seeking assistance from prosecutors.

It is sometimes misunderstood that the role of the prosecution is to ensure conviction. Owasanoje³⁴⁶ states that the role of the prosecution is to help the administration of justice by presenting evidence and facts as gathered by police or other investigators about the accused before trial, in order to determine whether or not it was the accused who committed an act that has elements of a crime. This principle speaks to the core of a fair trial. It is about establishing true facts about the offence committed. The Namibian High Court also affirmed this principle in the case of *Mwambwa v Minister of Safety & Security*.³⁴⁷ where it stated that there is duty on the prosecution not to obtain conviction, but to pursue justice. It was also adopted by the Supreme Court in the case of *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa*³⁴⁸ where it was stated that pressing for conviction where there are no case rests on an illegitimate case than bringing the lawbreaker to justice. This question can further be better answered by analysing the manner of gathering information, *i.e.*, was evidence gathered under a prosecutor-guided investigation or were investigators working on their own? In some cases, when prosecutors work on their own without prosecutors' supervision, they tend to leave out exculpatory evidence and the purpose of their investigation is no longer objective truth, but to find a suspect guilty of an offence.

4.8 Conclusion

Two main agencies from where Namibian investigators are drawn from are the ACC and the Namibian Police, with the ACC having more skilled investigators, whose level of training

³⁴⁵ V-WHK (2020).

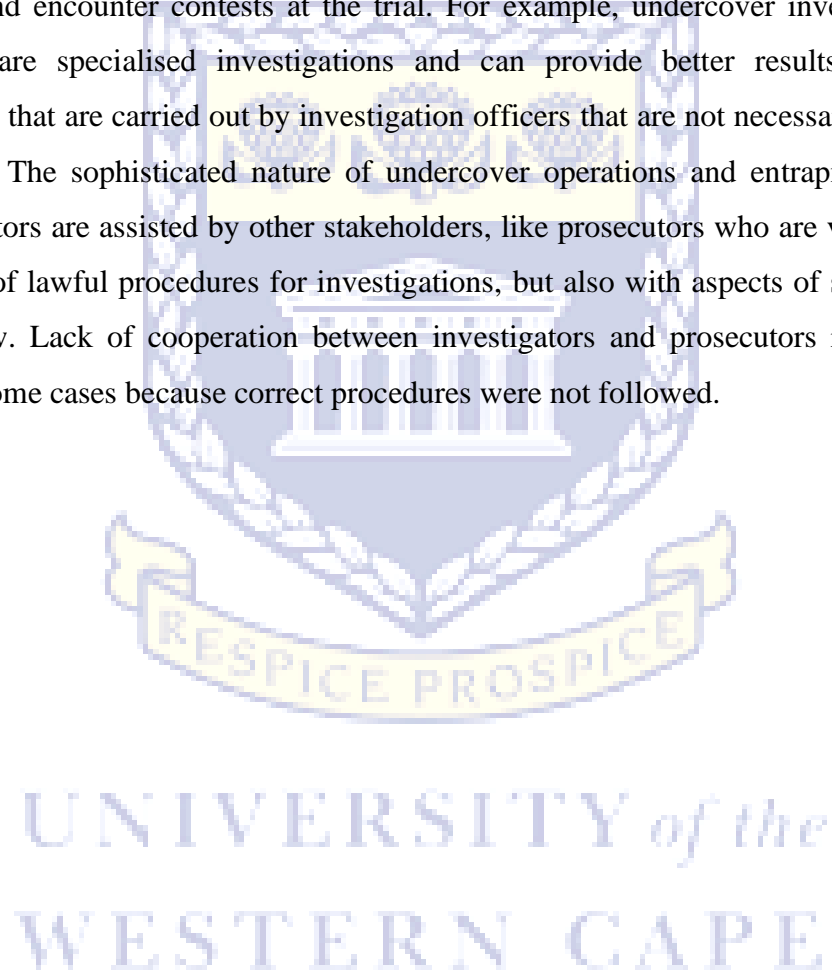
³⁴⁶ Owasanoje (2012) at 194.

³⁴⁷ *Mwambwa v Minister of Safety & Security*, Case No. I 105/2014, at para 87.5.3 and 211.

³⁴⁸ *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa*, (SA-2017/7) [2019] NASC 2 (28 February 2019, at 85.

enables them to understand legal requirements that make their investigations compliant to the law. Some of these investigators are also qualified to prosecute offences, after obtaining authorisation from the Prosecutor-General. Meanwhile, the Namibian Police's investigators are not at the same level of training as discussed below (see Chapter Five) and would largely need guidance from prosecutors, especially when investigating serious crimes, to ensure that they provide admissible evidence to the prosecution.

Investigations that are carried without inter-agency cooperation are symbolised by unlawful procedures and encounter contests at the trial. For example, undercover investigations and entrapments are specialised investigations and can provide better results than normal investigations that are carried out by investigation officers that are not necessarily specialised investigators. The sophisticated nature of undercover operations and entrapments requires that investigators are assisted by other stakeholders, like prosecutors who are vested not only with aspects of lawful procedures for investigations, but also with aspects of similar facts in evidential law. Lack of cooperation between investigators and prosecutors resulted in the state losing some cases because correct procedures were not followed.



CHAPTER FIVE FINDINGS ON THE TRENDS OF RELATIONSHIP BETWEEN INVESTIGATORS AND PROSECUTORS

5.1 Introduction

The structures of investigation and prosecution agencies discussed in chapter four interact at different levels on matters related to criminal investigation and prosecution. This chapter discusses the nature of these interactions, the underlying factors that shape them and the implications of these on the criminal justice process. The chapter is based on the empirical research and an evaluation of the empirical data will be made to determine instances in which investigators work closely with prosecutors vis-à-vis when investigators work on their own. The chapter also presents the questions posed to interviewees and their responses. An assessment of inter-agency cooperation is made following the responses by interviewees and in some instances, comparisons with the jurisdictions discussed in Chapter Three are made.

5.2 Distinctiveness of agencies

The two structures, investigation and prosecution agencies, are separate entities with different structures and they do not have overlapping administrative functions. Police investigators have their own budget appropriated under the Budget Vote of the Ministry of Home Affairs, Immigration, Safety and Security, while ACC investigators have their budget appropriated under the vote of the ACC. Meanwhile, the budget of the prosecution agency is provided for under the Ministry of Justice. The respective budgets are administered by different accounting officers, called Executive Directors, whose accounting functions are regulated by the *State Finance Act*.³⁴⁹

The two structures have different trainings too. There is no joint training, even on legislations like the *Prevention of Organised Crime Act* (POCA),³⁵⁰ which is central to serious investigation and is a tool of trade for both police and ACC investigators. A senior prosecutor feels that it does not help to only train prosecutors, while investigators are left out. The two institutions will work together in cases falling under this legislation and both their officials

³⁴⁹ No. 31 of 1991.

³⁵⁰ No. 29 of 2004.

need to have a better understanding of the applicable law and procedures. This is particularly necessary because both the police and prosecutors have personnel specialising in specific units. Joint trainings of these officials will improve the coordination of their activities.³⁵¹

5.3 Absence of regulatory framework

There is no legal framework providing guidelines for the cooperation between investigators and prosecutors in Namibia, except two documents, a Memorandum of Understanding signed between the Namibian Prosecutor-General and Inspector-General of the Namibian Police in the early 1990s,³⁵² and the Prosecutors Guideline issued by the Prosecutor-General in 2008. The Memorandum stipulates that when there is a new case, a docket should be delivered to the prosecutor, not later than 16:00 on the day before the court date. If it is an old case, the docket should be delivered to the prosecutor two days before the court date. This Memorandum is generally treated like a gentleman agreement that it is no longer being adhered to, because it is not enforceable by the court. Non-compliance with the Memorandum by either prosecutors or investigators does not result in their punishment. It is stated above that the Prosecutors' Guidelines were issued, which stipulate how prosecutors should work, *albeit* not how the investigation and prosecution agencies should cooperate. Prosecutors use these guidelines in cases of forfeiture and preservation and being adhered to. Accordingly, these types of cases are disposed of fast compared to other cases, because police investigators and prosecutors work closely on cases.³⁵³

Police investigators involved in commercial crime are housed in the offices of the Prosecutor-General where they work closely with prosecutors on investigations.³⁵⁴ This is only for offences falling under the *Prevention of Organised Crime Act*.³⁵⁵ There is, however, no legislation or regulations governing this cooperation and as a result, there is no consistency in the model and formula of cooperation adopted by officials for the two agencies.

³⁵¹ G-OSH (2019).

³⁵² The memorandum is a document for internal use and not for public citing.

³⁵³ A-SCPG (2019).

³⁵⁴ A-SCPG (2019).

³⁵⁵ No. 29 of 2004.

Each agency (investigators and prosecutors) uses its own legislation to see how this can guide in the relationship with another agency. For example, prosecutors will consider provision in the *Criminal Procedure Act*,³⁵⁶ for conditions under which bail can be refused, which include instances when the Court establishes that an accused will interfere with investigation. In this case, a prosecutor who is responsible for opposing bail application before the court will be consulting with the investigator to establish whether the investigator sees any risk of interference with investigation, if bail is granted to the accused and can further demonstrate this during examination-in-chief as it happened in *Onesmus Valombola v The State*.³⁵⁷

In the absence of a legislative framework in Namibia, prosecutors sometimes rely on the guidance from their long-time serving colleagues on how to work closely with investigators.³⁵⁸ Working on the basis of experience is not always necessarily ideal, because there is no guarantee for consistency. When one asks three long-time serving colleagues, one may as well get three different answers. But when there is a written guideline, then all prosecutors would follow the provisions therein.

When there is no legislative framework between investigators and prosecutors, their cooperation is left at the discretion of the two officers. For example, in the American criminal justice system, the police and prosecutors are involved in the pleas bargaining. As the legislature has not provided a legal framework on cooperation between investigators and prosecutors on plea bargaining, these officers are given a free way to adopt any cooperation mechanism that they deem appropriate.³⁵⁹

Investigators in Namibia use their discretion to investigate matters on the basis of preliminary information presented. In this respect, they could be guided by the prosecutors in the investigation process, yet they retain independence in the investigation. This is a general trend in common law countries, which enjoys discretionary power to initiate investigations. In some common law countries, there is no hierarchical supervisory relations between prosecutors and investigators. Investigators in these countries have a wider discretion of what

³⁵⁶ No. 51 of 1977a, s 61.

³⁵⁷ *Onesmus Valombola v The State*, Case No.: CA 80/2008, at para 18. In this case, during the examination-in-chief the prosecutor tried to demonstrate that the accused will interfere with witnesses. However, his reasons were not convincing and the court did not decide in favour of the state.

³⁵⁸ B-WLC P (2019).

³⁵⁹ Abel (2017) at 1732.

cases to investigate, and similarly, prosecutors exercise their discretion on what cases to prosecute.³⁶⁰

This is unlike the system in Cameroon, where the prosecution controls the investigation and investigators have limited powers and freedom to initiate and carry out investigations while under such direct control.³⁶¹ This again is undesirable as it does not ensure the independence of the investigation agency, discussed below (see Chapter Seven).

5.4 Communication between agencies

Communication between investigation and prosecution agencies differs from one region to another. When asked about the nature of communication between investigators and prosecutors, a senior investigator³⁶² from Windhoek, Khomas Region, stated:

There is no legal framework regulating formal structured cooperation between investigators and prosecutors. However, the unit commanders for investigators and prosecutors in each region holds monthly meetings in their respective region where they discuss, among others, matters related to coordination and cooperation among their personnel.

In addition to mandatory meetings, unit commanders further appreciate the importance of collaboration in investigations that they do not always wait for the monthly meetings. They also meet on *ad hoc* basis, as investigators come to prosecutors regularly to discuss the investigation diary and other aspects related to their investigations. However, this study submits that having monthly meetings as a practice rather than as a rule is not advisable. When different officials take over, they can decide at whim to discontinue the monthly meetings. Currently, monthly meetings between the two agencies at the level of supervisors are maintained without fail because they are key performance indicators in the performance agreements of the control prosecutors. But key performance indicators change from time to time and, arguably, when they no longer include monthly meetings there is no guarantee that these meetings will be retained.

The type of cooperation in Khomas is strategic cooperation, but its shortcoming is lack of discussions on legislative and policy framework, because these are not in place. It would

³⁶⁰ Waters (2008) at 68.

³⁶¹ Eban (2008) at 136.

³⁶² A-WPOL (2019).

have been ideal for senior agency members to review the state of cooperation practice and suggest a legislative framework that will guide exchange programmes between agencies. These meetings further exclude another important agency, the ACC. It is necessary to include the ACC because there are many cases brought before the Court against the ACC regarding defects in their investigation procedures and methods, the examples being *New Force Logistics CC v The Anti-Corruption Commission*³⁶³ and *Simataa v Magistrate of Windhoek and Others*.³⁶⁴ Inter-agency meetings between the ACC and prosecutors only takes place between the Prosecutor-General and the Director of ACC, when there is a matter that either party wants to discuss with the other, like when a case has been withdrawn and the Director-General of the ACC wants to draw the attention of the Prosecutor-General on matters that the prosecution may not have properly considered. These meetings are not regularised, but are held on an *ad hoc* basis. There are no minutes taken to be shared with junior officers from the two agencies.

Another shortcoming is that there is no operational cooperation. A junior prosecutor stated that the inclusion of junior investigators and prosecutors from monthly meetings was necessary, because these are persons that are involved in actual investigations and prosecutions groundwork. This study concurs and submits that as foot soldiers of the two agencies, having formalised structured engagements would have placed them in a better position to coordinate their activities and enhance the efficiency of their work. Formalised interaction between these officers will create a platform of addressing weakness in investigations, the role of prosecutors in guiding investigators and effective investigation of offences.³⁶⁵

There is a similar trend in the interactions between police investigators and prosecutors in the lower courts at Oshakati that only Control Prosecutors and Heads of Units from the Police meet. There was, however, a time in the recent years, when the Oshakati District Magistrate's Court had no unit head and this had an effect that collaboration between prosecutors and investigators was non-existent. There was no junior prosecutor taking initiatives to reach out to investigators, presumably because they feared that they would be acting beyond

³⁶³ *New Force Logistics CC v The Anti-Corruption Commission* (HC-MD-CIV-MOT-GEN-2018/00018) NAHCMD 28.

³⁶⁴ *Simataa v Magistrate of Windhoek and Others* (A75/2010) [2012] NAHC 201.

³⁶⁵ M-WLC (2019).

mandate.³⁶⁶ If an operational level cooperation had been institutionalised, junior officers from the agency could have maintained cooperation between the two institutions and meet constantly to engage on matters requiring discussion among agency members.

Cooperation at the senior level among police and prosecutors symbolises a communication model collaboration, in which no agency encroaches upon the arena of another. It further symbolises an equality formula of cooperation based on the principle of complementarity because agency members discuss more cooperation method, than becoming involved in operational cooperation in investigation. It could have been possible that a different approach may have manifested itself if there were collaborations on actual investigations.

There is a different practice regarding inter-agency cooperation at the Oshakati High Court. In an interview with a senior prosecutor,³⁶⁷ related that:

Prosecutors are required to meet stakeholders monthly, and the meetings are not limited to senior prosecutors and investigators. Minutes of these meetings are shared with colleagues, Further, prosecutors and investigators meet on a need basis.

Given the differences in practices in Khomas and Oshana Regions, various challenges emanate from the absence of a written policy framework on inter-agency cooperation. For example, *ad hocism* in inter-agency cooperation is observed, creating inconsistency in the legal system. When investigators employ techniques, they should ascertain the legality of such techniques. This will require inputs from prosecutors, who are able to scrutinise practices against legislation and the Constitution. Accordingly, it is necessary to adopt a communicative cooperation model in which investigators will benefit from advices of prosecutors on whether the techniques that they employ are lawful.

The inclusion of junior officers from the two agencies encourages operational level communication and fosters communication methods that promote cooperation among them when they carry out investigations. If junior investigators experience problems with the investigations that they carry out when they present them to prosecutors, they will be able to raise these concerns at their meetings and be advised regarding the stage at which they should involve prosecutors in their investigations. Even when prosecutors are not forthcoming to

³⁶⁶ E-OLC (2019).

³⁶⁷ G-OSH (2019).

provide them with guidance, investigators can use the monthly meetings platform to rectify the matter. Similarly, when investigators are not listening to advice or not willing to approach persecutors for advice, this could be raised at the monthly meetings platform.

The sharing of monthly meeting minutes or resolutions among colleagues in Oshakati is a good practice, so that prosecutors and investigators who did not have an opportunity to attend meetings will be kept informed, unlike in Windhoek where minutes of the monthly meetings between senior prosecutors and investigators are only sent to the Prosecutor-General for her information. This limited sharing of information keeps junior officers from the investigation and prosecution agency in the dark regarding discussions between their superiors.³⁶⁸ There is a need to share these minutes or at least resolutions with junior investigators and prosecutors to ensure that all officers are appraised on inter-related matters pertaining to their work, particularly when resolutions are taken at these meetings and their implementation impacts on all members of the agencies.

Under the current framework of unregulated relationship between investigators and prosecutors, police officers are not under any obligation to inform prosecutors that they will arrest suspects, or they will be investigating an offence. A senior prosecutor³⁶⁹ asserted that:

Prosecutors only see the docket when an investigation has been completed. Because of this state of relations, in some cases, prosecutors learned cases through media reports, and only then that they would contact the police to enquire whether there were dockets for them to consider whether *prima facie* evidence for prosecution has been established.

This study submits that the practice where prosecutors see the docket only after completion indicates that investigators and prosecutors do not collaborate on investigations. It is in instances like this that the police arrests persons unlawfully. This is largely because in terms of the law, the police acts on the basis of reasonable suspicions.³⁷⁰ This can be a contestable issue, because the reasonable suspicion should be based on reasonable grounds and the holder of suspicion should be able to set out the grounds or facts where the suspicion is based.³⁷¹ Meanwhile, prosecutors act when there is *prima facie* evidence. Approaching the prosecution before launching investigations would save unnecessary waste of time and resources and embarrassment in the court.

³⁶⁸ A-WPOL (2019).

³⁶⁹ A-SCPG (2019).

³⁷⁰ *Criminal Procedure Act*, No 51 of 1977a, ss 40 (1) (b).

³⁷¹ *S v Gotlieb* (CRIMINAL-2018/41) [2018] NAHCNLD 90 (21 September 2018), at para 8.

While the police will feel duty bound to carry out an investigation when the prosecution makes enquiries following reports, it is not necessarily that the prosecution would instruct the police to launch an investigation. Accordingly, even after enquiries, the police is not compelled to investigate the matter or report to the prosecution why it has not investigated the matter after it has been notified by the prosecution. This is unlike in other jurisdictions. For example, in South Africa, the police can be directed by the prosecution to commence a specific investigation, as discussed below.³⁷²

Generally, it has been observed that cooperation exists between prosecutors and investigators in more serious offences, like murder, robbery and gender-based violence offences that are prosecuted in the High Court, compared to minor cases. Meanwhile, prosecutors and investigators in the lower courts have a low level of cooperation.³⁷³ An example of cooperation between prosecutors and investigators in serious offences is the investigation in the murder of Magdaleena Stoffels. Though at the initial stage of arrest and preliminary investigation investigators acted without collaboration with prosecutors, resulting in a wrongful arrest, later the Prosecutor-General stated that her office would provide guidance to police officers involved in the investigation. This is because of the nature of the complexity of the case.³⁷⁴ Trends of this correspond to the coordination model propounded by Liddle and Gelsthorpe³⁷⁵ in which resources of the police and prosecutors are combined to carry out investigation and realise the principle of establishing material truth about an offence.

In other common law systems, investigators work with prosecutors on some types of crimes, but in general investigations are carried out independently from the prosecution until the matter is brought to court for trial.³⁷⁶ For example, in South Africa, too, the common law system is adopted, and the prosecution authority exercises some supervisory coordination to investigation agencies in some specific investigations. The *National Prosecuting Authority Act*³⁷⁷ provides that the Director of the National Prosecuting Authority offices at the seat of a High Court can issue written directives or provide guidelines to the Provincial Commissioner

³⁷² *National Prosecuting Authority Act*, No. 32 of 1998, s 24 (4) (c); Mwalili [s.a.] at 229.

³⁷³ G-OSH (2019).

³⁷⁴ Menges (2011).

³⁷⁵ Canton (2016) at pp 80 – 90.

³⁷⁶ United Nations Office on Drugs and Crime (2006) at 1.

³⁷⁷ No. 32 of 1998, s 24 (1) (c) and 24 (4) (c).

or police officers involved in the investigation for offenses in the area of jurisdiction falling under the Director. The Act then provides for the Director's powers to "supervise, direct and coordinate specific investigations",³⁷⁸ which means that a prosecutor-dominated cooperation approach is adopted, employing a directive cooperation model introduced by this study (see Chapter One, section 1.5.8). Prosecutors are not performing the functions of investigators, but they keep a watchful eye and command investigators what to do. There is no similar provision in the Namibian system, which still uses the *Criminal Procedure Act*.³⁷⁹ The inclusion of inter-agency cooperation formula in the legislation gives it prominence and relevance in law, because if investigators are not cooperative with prosecutors and disregard their direction, they will be acting contrary to law and could be held to account. This is designed to ensure that there is uniformity in the trends of investigations and these trends conform to lawful procedures, particularly for specific cases which are directly supervised by prosecutors.

When Namibian prosecutors do request further investigations to be provided for by investigators and call the latter to be taken through, it is left to investigators to go and continue with investigations as guided, but they do not work under continuous supervision and direction of the prosecutors in their further investigations. Actually, their relationship is just that of communication model, in terms of Liddle and Gelsthorpe's typology of inter-agency cooperation.³⁸⁰ This is unlike in the UK, for example, as discussed above (see section 3.2.1) where prosecutors are availed to police stations to provide early advice to investigators. In this case, prosecutors become involved at the early stage of charging the suspects. The prosecutors have also a hotline, where the police can call 24 hours to seek immediate advice on matters that they are investigating.³⁸¹

Challenges in communication have also been observed in India. Randhawa and Sigh³⁸² state that there are instances of challenges on investigators-prosecutors' coordination, as the police do not carry out the registration of cases and collection of evidence prudently, given the fact that they do so without coordinating with the prosecutors. Further, sometimes investigators

³⁷⁸ *National Prosecuting Authority Act*, No. 32 of 1998, s 24 (1) (c).

³⁷⁹ No 51 of 1977.

³⁸⁰ Canton (2016) at pp 80 – 90.

³⁸¹ Waters (200) at 69.

³⁸² Randhawa and Sigh (2016) at 6.

do not appraise prosecutors on material facts required for the case. There is further an element of negligence in their withholding of valuable information to prosecutors which are vital for prosecuting the case in court.

It should be noted that while a prosecutor can direct an investigator to provide further information, a prosecutor cannot direct the investigation institution to substitute an investigator due to incompetence in providing quality evidence in a given case. This could mean that the docket could be going back and forth between the investigator and prosecutor, thereby delaying the trial. This could be solved if a prosecutor was actively involved in the investigation process, or alternatively if a prosecutor could request that a different investigator be assigned to a docket.

5.5 Attitude of investigators and prosecutors

Lack of cooperation between investigators and prosecutors could result from different perspectives. When the two institutions have different views on the act of offence, it will not be easy to coordinate their activities and, therefore, one cannot talk about cooperation of the two institutions. Their understanding of offences is shaped by their respective different trainings and experiences. Each will try to pull in the direction as his view point dictates. For example, investigators may be inclined to call suspects' close associate as a witness in court, while prosecutors may regard such witnesses' evidence to be poor and would rather request investigators to seek additional information in order to prosecute the matter successfully. What could be viewed as a strong witness for the case by the investigator would be viewed by the prosecutor as a weak witness.³⁸³

The relationship between the two may differ based on the personalities of prosecutors or investigators. A high-ranking investigator³⁸⁴ stated that some prosecutors have attitudes towards prosecutors. His views were corroborated by investigators who complained that:

Prosecutors instruct investigators like parents instructing their children and paint a picture of investigators not performing their tasks. Prosecutors underestimate investigators because of their level of education, forgetting that some investigators have long-time experiences.³⁸⁵

³⁸³ Buchanan (1989) at 1.

³⁸⁴ O-ACC (2019).

³⁸⁵ I-WPOL (2019).

This study submits that the above signifies a typical personality-based type of interactions between officials from the two agencies, but the recommended course is that interactions should follow systems and processes. Admittedly, it is conceivable that because prosecutors have a high level of education, a law degree, compared to investigators who have diplomas in Police Science, some prosecutors do not like to be advised by investigators and they look down upon them. There are bound to be problems in interactions between two agencies, when there is a vacuum of legislation and policy. But when there is a written policy framework of cooperation in place, personality-based collaboration could be avoided, because each officer (investigator and prosecutor) is obliged to adhere to policies and regulations.

Some prosecutors do not like to provide support to investigators. For example, in an interview, an investigator stated that when there is a need to locate and bring witnesses to court, prosecutors tell investigators that it is not their problem, investigators should see how they will secure the presence of witnesses.³⁸⁶ This type of attitude comes, arguably, from the fact that there is no compelling policy and regulatory framework that oblige a prosecutor to provide the assistance requested by an investigator.

Similarly, some investigators, too, do have attitudes towards prosecutors. Because there is no similar legislation in Namibia, like the one in South Africa, providing power to prosecutors to direct investigators, when prosecutors make requests for further investigations, investigators feel that they are being instructed. Accordingly, they would have some resentments, because they feel that their chain of command is their supervisors from whom only they should receive instructions.³⁸⁷ An attitude problem can only derail the criminal justice process. With prosecutors holding investigators in a low esteem and perceiving them to be ineffective, the police, too, retaliates with antagonism against prosecutors. This is particularly the case with experienced police officers who may regard newly recruited prosecutors as lacking police skills required in investigations. In a cooperation model advocated by Liddle and Gelsthorpe,³⁸⁸ this trend of investigators' and prosecutors' ill-feelings towards one another

³⁸⁶ J-WPOL (2019).

³⁸⁷ P-ACC (2019).

³⁸⁸ Canton (2016) at pp 80 – 90.

will be addressed because the model prescribes that one agency ought to allow another agency to take the lead.

The relationship between investigators and prosecutors change with the transfer of prosecutors. In an interview with a prosecutor,³⁸⁹ it was revealed that:

Prosecutors who receive dockets and decide on prosecution are not the ones who prosecute the matter in court and already there are no prosecutors who were involved in investigations. But during trial, a relationship is built between investigators and prosecutors. At times investigators are transferred from one duty station to another during the middle of the trial. Prosecutors do not have control over this.

The above reveals that individuals, rather than institutions and instruments, play a role in inter-agency cooperation.

If there was inter-agency cooperation between investigation and prosecution, especially at operational level, the predicament created when it comes to the transfer of police officers from one duty station to another could be addressed. Prosecutors could for example advise the investigation agency to provide an investigator who will work together with a prosecutor and a transferring colleague for some weeks or months before the transfer takes place. Or, alternatively, prosecution will be able to advise the investigation institution that a particular officer should be available immediately when required, in order to prevent the delay in a trial and the transfer could be held in abeyance. As investigators, police officers are key witnesses in the prosecution. When a police officer is transferred, the connection between the two officials is hindered and needs to be rebuilt with a new investigator coming on board.³⁹⁰

Various investigators and prosecutors narrate different experiences of the relationship between the two officials, further illustrating that the characters of individuals matter in the relationship between investigators and prosecutors. For example, one investigator³⁹¹ stated that:

There are times when there is no prior consultation between prosecutors and investigators, prior to the accused's appearance in court. Meanwhile the same prosecutors will hold discussions with counsels before hearing from investigators.

Another investigator³⁹² commented:

³⁸⁹ P-ACC (2019).

³⁹⁰ Mbote and Akech (2011) at 123.

³⁹¹ F-ACC (2019).

³⁹² N-ACC (2019).

Some prosecutors call investigators and go through with them in the docket and guide investigators how to prepare witnesses for a trial.³⁹³

The two investigators cited above are from one working place. Accordingly, with regard to the research question on the stage of investigation when investigators and prosecutors interact, the findings are that this happens at different stages, depending on the personalities involved in the investigation and prosecution processes. The different experience that they have is attributable to the characters of prosecutors, which determine inter-agency cooperation, in the absence of a policy framework. This is different from Tanzania, where prosecutors and investigators work closely on cases. In that country, before the Director of Public Prosecutions decides on prosecuting a matter, he or she would first request to see the file, and when required he or she would even provide guidance to investigation agencies on the evidence to be presented before the Court.³⁹⁴

Consultation with the defence counsel by the prosecution while leaving out investigators, stated in the quotation above, only serves to advantage the defence in the trial to the disadvantage of the state, because the defence will be prepared about evidences and arguments that they need to advance at the trial. Meanwhile, investigators will not have been properly guided about the evidence that the state will advance at the trial. Since prosecutors communicate with counsel, they should communicate with investigators too, in order to compare and contrast whether there are confessions made by the accused, which are relevant for use by the prosecution when they argue for conviction of an accused before the court. They should further scrutinise the credibility of the witness statements.³⁹⁵ It is important that there should be no contradictions in the witness statement. The court takes into consideration facts like the material identicalness, consistency and corroborative evidence presented by witnesses.³⁹⁶

Meanwhile, for the specialised investigations, the Specialised Investigation Division of the Police endeavour to work closely with the office of the Prosecutor-General at the commencement of the investigation process, largely because in 2008 the Prosecutor-General issued guidelines which guides the police and prosecutors in special investigations. This

³⁹³ P-ACC (2019).

³⁹⁴ Tibasana (2001) at 171.

³⁹⁵ Walsh and Jones (2008) at 2 – 3.

³⁹⁶ *Sankwasa v State*, Case No. 70/2012, at para 11.

attests the importance of having a general policy framework of cooperation for the entire investigation and prosecution fraternity, in order to avoid the character and personalities of individuals to determine inter-agency cooperation.³⁹⁷

5.6 The differences in the capacity of the two agencies' officials

In 2005, the Prosecutor-General informed the Parliamentary Standing Committee on Constitutional and Legal Affairs that the Namibian Police does not have sufficient skills to carry out proper investigations and this resulted in the backlogs of cases at the courts.³⁹⁸ She revealed that at independence the Police lost experienced detectives who left for the private sector that was highly competitive to the public service. The Inspector-General of Police, Lieutenant-General Sebastian Ndeitunga, confirmed that police investigators were not sufficiently trained to carry out investigations.³⁹⁹ This warrants cooperation with prosecutors, who are better skilled to deal with intricacies of investigations and the gathering of evidence.

The capacity and skills of police officers have an impact on inter-agency cooperation, because there are times when there is communication breakdown between officials from the two agencies. Apart from attitudes, there are also misunderstandings arising from differences in the level of training. Since prosecutors are more skilled, they have an advanced level of language compared to investigators. As a result, when prosecutors write down instructions to investigators, they use legal vocabulary and the standard of the language in general that investigators do not always understand. Some investigators would want to hide their academic shortcomings and will not come forth to concede that they do not understand legal jargons and seek further clarity from prosecutors. This results in the investigator missing out on the salient guiding points that the prosecutor had provided.⁴⁰⁰ This communication model of inter-agency cooperation has not been effective, insofar as the level of education of the investigation officer is highly limited. An investigator⁴⁰¹ surmised that:

I don't know what the curriculum is for investigators...basic understanding of the law and evidence and the way they handle it, I can give instructions and we understand each other and then when they collect evidence for me, the way evidence is collected, sometimes they will interfere with the scene or not follow procedures how evidence is collected. When it reaches me, I cannot use such evidence.

³⁹⁷ United Nations Office on Drugs and Crime (2016) at 212.

³⁹⁸ Dentlinger (2005).

³⁹⁹ Dentlinger (2005).

⁴⁰⁰ C-WLC (2019).

⁴⁰¹ C-WLC (2019).

Investigators need to understand the basic understanding of law in their training, to appreciate the law of evidence and the related provisions in the *Criminal Procedure Act*. This is because, even when there is inter-agency cooperation where they are given clear instructions by prosecutors, without an appreciation of law, investigators still carry out their investigations without complying with the provisions of law. The discrepancy in education compels inter-agency cooperation to adopt a directive cooperation model, in which prosecutors should supervise the investigation process, rather than allowing investigators to carry out their investigation independently. But if investigators have undergone elementary training in the law of evidence, the two agencies could then maintain their interaction at the communication model and still be effective.

But if inter-agency cooperation is to be effective, officials should be provided with adequate facilities. For example, they should be provided with communication tools to be able to reach out and be reachable. Currently, only senior prosecutors and investigators are provided with official mobile phones and junior prosecutors feel it is unfair to use their own air-time communicating with other agency officials, whereas senior officials are equipped by the government. For investigations to be successful, it is necessary that officials involved are enthusiastic about their work. Enthusiasm will depend on, among others, the provision of adequate facilities to officials to perform their work without hindrances. Commenting on poor investigations in Cameroon, Fonachu⁴⁰² states that lack of resources in terms of equipment available to prosecutors and limitations in access to telephone communications have impacted negatively on timely interventions by investigators. Similarly, if Namibian investigators and prosecutors without official mobile phones have to wait to communicate when they are in their offices, it would hamper timely intervention in the investigation of offences.

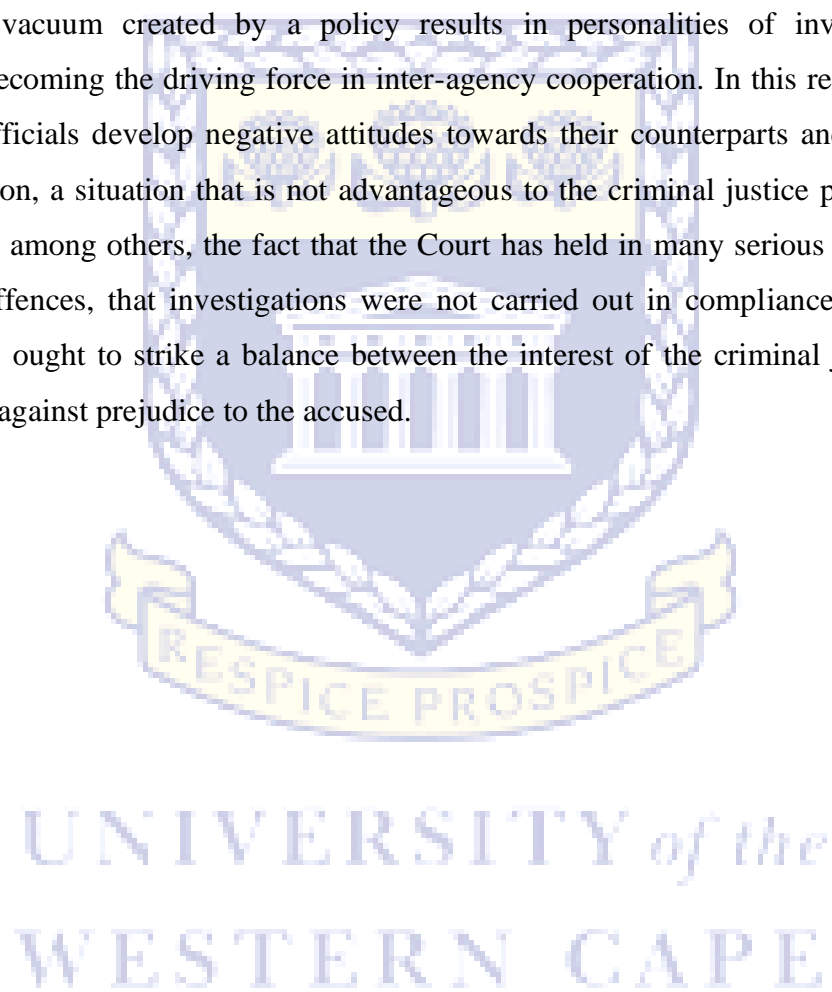
5.7 Conclusion

The structure of the investigation and prosecution agencies have corresponding similarities, ideal to facilitate inter-agency cooperation, but this opportunity is not optimally explored in

⁴⁰² Fonachu H. I., [S.a.], The criminal justice system in Cameroon: problems faced with regard to corruption and suggested solutions, in *UNAFEI Resource Material Series* No. 76, pp 145 – 152.

the Namibian criminal justice system. Namibian investigators' and prosecutors' cooperation remains largely dependent on the will of the officers. It should be acknowledged that for the crimes under the *Prevention of Organised Crime Act*,⁴⁰³ investigators and prosecutors maintain cooperation, despite the absence of a policy framework. Similarly, the degree of cooperation between prosecutors and investigators in Oshana Region is higher than that for the officers in Windhoek. In Oshana region, the cooperation cascades to the level of junior officers.

Further, the vacuum created by a policy results in personalities of investigators and prosecutors becoming the driving force in inter-agency cooperation. In this respect, either of the agency officials develop negative attitudes towards their counterparts and this brings a parallel reaction, a situation that is not advantageous to the criminal justice process. This is illustrated by, among others, the fact that the Court has held in many serious criminal trials, like sexual offences, that investigations were not carried out in compliance with the law. Investigations ought to strike a balance between the interest of the criminal justice process and guarding against prejudice to the accused.



⁴⁰³ *Prevention of Organised Crime Act*, No. 29 of 2004.

CHAPTER SIX THE SIGNIFICANCE OF PROSECUTOR-INVESTIGATOR RELATIONSHIP

6.1 Introduction

Inter-agency cooperation between prosecutors and investigators is fundamental to a successful prosecution of a matter before the court. This arrangement produces the collection of relevant evidence, so that there is no prejudice to suspects and that the accused should go through a fair trial. Similarly, sufficient evidence needs to be collected so that guilty persons do not end up being acquitted because of technicalities. The fairness of a trial is, therefore, important to both the accused and the state. Accordingly, the interest of justice is served without compromising the integrity and veracity of the criminal justice process. Arrangements to the contrary stand to defeat the end of justice.

In Chapter Three, discussions of various jurisdictions reveal that in some jurisdictions, prosecutors have supervisory coordinating roles in their relationship with investigators. Waters⁴⁰⁴ re-iterates this, referring to the jurisdictions in Chile, Germany, Hungary and France. In a supervisory relationship, the relationship between prosecutors and investigators is hierarchical, with prosecutors serving as superiors to investigators, giving them directives over crime scene investigations and collection of information which investigators have to comply with. In addition, they provide professional support to investigators, advising them on the evidence that will be valid before the court.⁴⁰⁵

This chapter discusses the significance of the cooperation between investigators and prosecutors in the investigation of crimes. The substance of the chapter is derived from data collection among investigators and prosecutors; hence it will include their responses that will be analysed to provide the underlying essence that makes inter-agency cooperation imperative to the criminal justice process. The chapter also looks at the shortcomings of lack of cooperation and coordination between investigators and prosecutors and the impact that it has on the legal system. The chapter further discusses the advantages of cooperation between officials of the two agencies. It therefore endeavours to respond to the main research

⁴⁰⁴ Waters (2008) at 68.

⁴⁰⁵ Mahmutović and Huskanović (2017) at 68.

question: What is the relevance of coordination between investigators and prosecutors in the prosecution process? The discussion will include examples and cases from the jurisdictions discussed in Chapter Three.

6.2 The essence of cooperation between investigators and prosecutors

The importance of the relationship between prosecutors and investigators should not be understated, especially because in some jurisdictions, investigators may initiate investigative contacts with the represented accused in instances where prosecutors are not allowed. Without coordination, this poses challenges to prosecutors to supervise investigations by these investigators. Mason⁴⁰⁶ quotes Lininger stating that in most cases, the police would need assistance of prosecutors in efficiently performing their duties and for this reason, cooperation between the two agencies will be of essence.

Cooperation includes provision of professional support to investigators by interpreting to them the criminal justice regulations and aspects of procedural and substantive criminal law. Further, in this instance, prosecutors sensitise investigators on the protection of human rights of persons under police investigations. They also guide investigators in the collection of legally valid information, ensuring that pertinent information that is necessary in the prosecution of a crime is included in the docket.⁴⁰⁷

6.2.1 The necessity to produce relevant evidence

In order to be effective in exploring all avenues that lead to the gathering of pertinent evidence required in the conviction of an accused, there should be a close working relationship and consultation between the investigation and prosecution teams. Crime investigators in particular will be required to provide accurate and comprehensive synopsis of the crime committed, which is best presented when prosecutors have provided the necessary guidance, based on one of the formulas of cooperation and on one of the models of inter-agency cooperation discussed in Chapter Three.⁴⁰⁸

⁴⁰⁶ Mason (2008) at 749, 776.

⁴⁰⁷ Mahmutović and Huskanović (2017: 69).

⁴⁰⁸ *Constitution of the Republic of Namibia*, 1990, article 12.

Brown⁴⁰⁹ stated that police collaboration with prosecutors assists in determining which charges are appropriate and, therefore, which evidence is admissible before the court. This is particularly necessary because what investigators do is gathering information. Not all information gathered is evidence and it is only evidence that is required by the prosecution. It is, thus, imperative that the prosecution guides investigators in taking out relevant evidence from the information gathered, which will then be presented at the trial. It is argued that prosecutors are in a better position to know what evidence is relevant for the trial, hence their participation in the investigation guides investigators to provide sufficient information that will suppress frivolous challenges put up by the defence counsel.⁴¹⁰ This stems from the differences in the level of training between investigators and prosecutors. The content of the training does not deal with in-depth aspects of the law of evidence, as it is the case with prosecutors who study the Law of Evidence module at the university.⁴¹¹

Given the background in their training discussed below, prosecutors are more skilled and informed in legal procedures than investigators and the latter, therefore, have some challenges in compiling the required data to successfully prosecute the matter. Coordination between investigators and prosecutors is, therefore, necessitated by the fact that legally trained personnel and investigation officers without a background of comprehensive legal training come from different backgrounds and they have, therefore, different approaches to cases. While legally trained prosecutors do focus on information required to convict an accused, like burden of proof and *mens rea*, amongst others, investigators focus on the characteristics of the offender and the need for prosecution to ensure compliance with the law.⁴¹²

Meanwhile, although Namibian investigators, too, have limited legal training, cooperation between investigators and prosecutors is largely in the form of meetings, based on investigator-dominated cooperation approach for less serious offences and on prosecutor-dominated approach for serious offences that involve asset forfeiture. For example, investigators for sexual assault offences in Windhoek meet with prosecutors three to four meetings in a year, where investigators and prosecutors present their problems. This

⁴⁰⁹ Brown (2015) at 60.

⁴¹⁰ Brown (2015) at 93.

⁴¹¹ K-WPOL (2019).

⁴¹² Garoupa *et al.* (2011) at 238, 239.

illustrates a communication model of inter-agency cooperation, as this form of cooperation does not include operational activities of joint investigations by investigators and prosecutors or prosecutor-guided investigations. In serious offences where guidance is provided to investigators by prosecutors, coordination is based on the cooperation and coordination models.⁴¹³

The essence of inter-agency cooperation stems from various perspectives that investigators and prosecutors would have on an investigation being carried out. Given the background and level of training, the two agencies' officials have different outlooks to the investigation process. With cooperation among them, prosecutors come to appreciate aspects of investigation that afford them a better understanding to argue legal principles during the trial. To compare with other jurisdictions, for example, Assistant US Attorney William Browder observed that during investigation which involves search and seizure, investigators are under time pressure to make decisions with limited information, an aspect that should be addressed within the framework of good faith with exception to the search warrant rule.⁴¹⁴ This exercise requires cooperation with prosecutors, adopting a cooperation and coordination mode, because they are better knowledgeable to postulate questions that the Court will ask investigators involved in the search and seizure operation.

Inter-agency cooperation is justifiable by law, insofar as it serves the common purpose of furthering the interests of justice and establishing the real truth about offences committed. There are times when investigators are driven by personal interests, especially in cases where rewards are offered. In this respect, Justice Dumbutshena cautioned in the case of *S v Nangombe*⁴¹⁵ that investigators in cases of this nature can come up with evidence that outweigh their regard for the truth, driven by motives to earn monetary rewards. It is, thus, necessary for these investigators to work closely with prosecutors, who will prevail upon them to abide by the principle of objective truth in the course of investigation. It is through this exercise that the two agencies work towards uncovering offences in an efficient way, within the framework provided by law, applying correct methods. Coordination starts at pre-trial investigations stage and serves the purpose of guiding investigators to carry out a

⁴¹³ A-SCPG (2019); K-WPOL (2019).

⁴¹⁴ Buchanan (1989) at 2.

⁴¹⁵ *S v Nangombe* (SA 2/93) [1994] NASC 3.

legitimate gathering of evidential material.⁴¹⁶

Mahmutović and Huskanović⁴¹⁷ assert that when working on their own, investigators are bound to make errors with regard to minute taking, evidence gathering and, therefore, sometimes they end up reporting on activities that will not constitute crimes in terms of law. This weakness would be overcome, when prosecutors will provide support by advising investigators on lawfully gathered valid evidence. Inter-agency coordination should run from the initial phase of filing charges against the suspect up until the completion of a trial.

Unguided investigations recklessly leave out vital information and consequently lead to miscarriage of justice. In the Schiedam Park murder case in The Netherlands, investigators were focusing on one suspect, while ignoring other possible evidence. This resulted in the conviction of an innocent person. It is arguable that if investigators had been comparing notes with prosecutors from the initial stage of investigation, they would have considered the latter's inputs in the investigation and justice would have been effectively served.⁴¹⁸

In the international legal system, too, lack of inter-agency coordination has seen irrelevant evidence brought before the court. Brammertz⁴¹⁹ states that lack of coordination between investigators resulted in evidence gathered by investigators being not ready for trial. Investigators merely gathered evidence that was unorganised. While investigators focused on what happened, prosecutors required evidence on who was responsible. Accordingly, there was no adequate evidence at trial on key issues and no substantiated linkage of the specific accused to the crimes committed. Further, investigators focused on essential offence for which the accused was charged, but fell short of pointing out contextual elements. For example, in charges of crime against humanity, investigators focused on the fact that there were attacks, but the prosecution of this crime additionally required proof that there was prevalent systematic attack, for which the accused was criminally liable. A bulk of information was collected, which did not specify which evidence was relevant for which elements of crimes committed. The learned prosecutor maintained that only when there was coordination between investigators and prosecutors that this problem could have been

⁴¹⁶ Navickienė (2010) at 345 – 346. *corpor*

⁴¹⁷ Mahmutović and Huskanović (2017) at 70; Varshney (2007) at 285.

⁴¹⁸ Salet (2017) at 128 – 129.

⁴¹⁹ Brammertz (2016).

avoided as evidence could have been properly analysed.⁴²⁰ His views are supported by a senior investigator in the Namibian criminal justice process, who avers that investigators and prosecutors working in isolation attach different importance and interpretation to the evidence collected, which is detrimental to the successful prosecution of crimes at the trial.⁴²¹

6.2.2 Capacity building and knowledge transfer

Inter-agency cooperation is essential for knowledge transfer. Since investigators in Namibia have not received comprehensive training in legal procedures, unlike prosecutors, working with prosecutors over a long period and sometimes having joint operations could result in investigators gaining knowledge over legal procedural matters. This is necessary for carrying out a law-compliant investigation.⁴²² This is unlike in Japan, where the Japanese investigators undergo national examinations. They also attend the same training with private lawyers and officials of the judiciary at the Legal Training and Research Institute (LTRI) of the Supreme Court.⁴²³ Training sessions are conducted by long-time serving prosecutors as an ongoing exercise, in order to impart knowledge and expertise to new prosecutors. Accordingly, Japanese investigators do not require knowledge transfer from prosecutors.⁴²⁴ As stated above, the respective trainings for Namibian police investigators and prosecutors are separate from each other and capacity building and knowledge transfer is, thus, imperative.

Knowledge transfer is a two-way traffic, with some prosecutors also learning from investigators. For example, the capacity of prosecutors at the US prosecution agency is built over the time. Since public prosecution is less competitive to the private law firms, it does not attract graduates from best law schools. The Chief Prosecutors at counties are responsible for the appointments of new recruits. As the training at law schools is merely theoretical, prosecutors receive on-the-job training when they enter the prosecution services. Prosecution agencies also arrange in-service-training sessions for their prosecutors.⁴²⁵ Given the operational cooperation between the two agencies, it is arguable that prosecutors learn from their relations with investigations the fundamentals of investigations and prosecutions.

⁴²⁰ Brammertz (2016).

⁴²¹ F-WPOL (2019).

⁴²² A-WPOL (2019).

⁴²³ Weber (2009) at 139.

⁴²⁴ Weber (2009) at 139, 143).

⁴²⁵ Castberg [s.a.] at 137.

The essence of inter-agency coordination is to ensure that proper advice is given to investigators. Accordingly, consideration should be given to the nature of the case that is being investigated and the experience of a prosecutor. It is not helpful to ask inexperienced prosecutors to provide guidance to investigators in highly sophisticated matters. In Canada, 15-year-old Rehtaeh Parson had sexual activities with two boys and one boy took a video while she was having sex with another and vomiting at a window. An investigator consulted with a junior Crown counsel, who consulted a senior counsel and advised that suspects could not be prosecuted for child pornography offences. These prosecutors were not experts in child pornography laws. When the matter was reviewed by the Internet Child Exploitation Unit (ICE), an analysis-driven evaluation was made, applying the law to the facts and the Unit advised that child pornography should have been laid at the conclusion of an investigation. The police laid charges and the two accused in the matter were convicted.⁴²⁶

6.2.3 The evolution of sophisticated methods of committing offences and transnational crimes

Tibasana⁴²⁷ underscores that crime has evolved over the years from petty to more sophisticated crimes requiring sophisticated investigations too. Criminals have learned counter-investigation methods to escape investigations into their offences. Investigations nowadays thus, require specialised skills and erudite understanding of evidential law. These skills are not common among investigative officers, but are found in the legal fraternity. Therefore, the prosecution is better equipped to advise investigators when carrying out investigation, to avoid case dismissals on the basis of technicalities rather than the substance of law. Inter-agency cooperation is required because prosecutors need to screen the quality of evidence collected, otherwise the charges are set to fail from the beginning.⁴²⁸ This is corroborated by Richman⁴²⁹ who asserts that in the US, cases of grand juries, electronic surveillance, search warrants require adequate attention from prosecutors; they cannot be left to investigators alone.

⁴²⁶ Segal (2015) at iv.

⁴²⁷ Tibasana (2001) at 167.

⁴²⁸ Tibasana (2001), at 167; V-WC (2020).

⁴²⁹ Richman (2016) at p 1.

As crime methods improve, police investigations too are required to improve to catch up with the evolution of crime and technology.⁴³⁰ Some crime investigations require blood analyses using DNA tests. The Police Executive Research Forum,⁴³¹ too, supports the contention that DNA tests are particularly effective for investigations related to sexual assaults. A senior prosecutor,⁴³² however, complained that DNA samples take longer, sometimes up to three years and this causes delays in the investigation and prosecution of cases. The police should address this issue as the National Forensic Science Institute of Namibia (NFSI) is part of the police establishment.

Other investigations like homicide require specialised investigation, while some investigations require computer analyses. In order to keep up with the pace of technology development, it is necessary that police investigators cooperate with other stakeholders who have the necessary skills, including prosecutors, in order to carry out their investigation effectively. Inter-agency cooperation eases the collection of evidence for sophisticated investigations, especially when increasing digital crimes make it difficult for investigators to carry out investigations in compliance with the law. For example, in Singapore, cooperation between prosecutors and investigators has been effective to produce evidence, where prosecutors became involved at the early stage of investigation. When that country was hit by cyberattacks, owners of hacked websites found an Internet forum where the hacker was boasting to bringing down their websites, with screenshots about the attacker hacking the server also on the forum. Technology investigators from the police and prosecution used this information to search on the Internet, resulting in them finding various pseudonyms used by the hacker, after which the obtained information led to identifying the hacker and he was arrested in Malaysia. He was charged with over 160 charges and pleaded guilty to 40 charges. He was then sentenced to four years and eight-month imprisonment.⁴³³

Nair⁴³⁴ maintains that even when cyber offenders try to cover their tracks on the Internet, the involvement of prosecutors in investigations and collaborations with investigators thereof is capable of unlocking barriers to investigations and the offenders' anonymity, because they

⁴³⁰ Weisburd and Neyroud (2011) at 6.

⁴³¹ Police Executive Research Forum (2012) at vi.

⁴³² G-OSH (2019).

⁴³³ Nair (2017)

⁴³⁴ Nair (2017).

will discover interfaces between the offender's pseudonyms on the Internet and their identity in the real world. The collaboration of agencies in these investigations produces results on time. For example, the investigation in the above-mentioned cyberattacks of 2014 in Singapore was completed in less than two weeks.

In 2018, the US embassy organised the Southern Africa Regional Cyber Investigations and Electronic Evidence Workshop in Windhoek, which was attended by investigators and prosecutors from Namibia, Botswana, Malawi, Mozambique, Seychelles, Swaziland, and Zambia. The joint tutoring of investigators and prosecutors speaks to the importance of inter-agency collaboration to overcome sophisticated investigations of cyber-crimes. Addressing workshop participants, US Ambassador to Namibia, Lisa Johnson, stated:

Technology can be used in almost any crime, from homicide to fraud, often leaving behind a digital trail of evidence. Unfortunately, electronic evidence is fragile and can perish, even unintentionally ... Electronic evidence can be lost at the touch of a single key, or even just by turning off a computer or cell phone. Therefore, effective tools and techniques for capturing electronic evidence are vital to law enforcement in the 21st century.⁴³⁵

Given the increasing relevance of technology in the evidence required in the investigation of criminal offences, Namibia should invest in joint-advanced training for investigators and prosecutors in order to effectively investigate and prosecute offences committed using cyber-technology.

The Namibian police as an investigation agency face challenges of skills to deal with the evolution of sophisticated methods of offence and transnational crimes. As stated above (see Chapter One), junior officers like Sergeants and Warrant Officers have not received sufficient training in crime investigation.⁴³⁶ Meanwhile, the requirements for criminal prosecutors until 2012 were a three-year Bachelor degree in law, Baccalaureus Juris (B Juris) offered by the University of Namibia, or an equivalent qualification. From 2013, the requirements for criminal prosecutors were changed to LLB degree graduates. The requirements for prosecutors involved in civil matters, like the Asset Recovery Unit, are an LLB degree plus admission as a Legal Practitioner of the High Court.⁴³⁷ Prosecutors are, arguably, in a better position to understand transnational crime investigations, given their training.

⁴³⁵ Johnson (2018).

⁴³⁶ K-WPOL (2019)

⁴³⁷ A-SCPG (2019).

It has been observed in the UK that when police investigators carry out investigations without collaborating with the Crown Prosecution Services (CPS), their investigations become riddled with mistakes fatal to their case, especially when sophisticated techniques are involved. This results in legal challenges culminating into lengthy trials. In order to overcome these shortcomings, the Metropolitan Police Services reaches out to the CPS for cooperation in sophisticated investigations, in order to ensure that their investigations produce admissible evidence and successful prosecution thereof.⁴³⁸

Cooperation between investigators and prosecutors is required, especially on matters involving transnational crimes. This is because such crimes involve international protocols, which investigators need to follow. Blackwood⁴³⁹ states that international investigations require a dedicated team in order to ensure the realisation of effective investigation. Cooperation is further required in cases where primary witnesses' testimony can easily be compromised.

6.2.4 To safeguard the criminal justice process from manipulated, hearsay and selective evidence

The essence of inter-agency cooperation is also to guard against exploitative manoeuvring of evidence by investigators or selective evidence as discussed above in the investigation for Justice Teek's rape case (see Chapter Two, section 2.7). Investigators' unchecked evidence could result in innocent persons being convicted. It would be unfortunate when one is sentenced to life imprisonment without an option of parole, only to establish years later that they were wrongfully convicted when, for example, witnesses were subjected to coercive interrogation.⁴⁴⁰

⁴³⁸ Asia Development Bank-Organisation for Economic Cooperation and Development (2003) at 17.

⁴³⁹ Blackwood (2014) at p 7.

⁴⁴⁰ The Namibian Supreme Court changed this in 2018, following a decision in the case of *Zedekias Gaingob and 3 Others v S* (SA-2008/7) [2018] NASC 4. The Court held that lengthy imprisonment without parole consideration denies offenders hope for release during their lifetime and are, therefore, alien to a civilised legal system. Justice Smuts maintained that these sentences are cruel, degrading, inhuman and incompatible with the right to human dignity provided for article 8 of the Namibian Constitution. Accordingly, he set aside the decision of a court a quo to sentence the accused to life imprisonment that would make them eligible for parole after 25 years.

People are convicted and sentenced wrongly. Sometimes when an appeal is made and a sentence is reversed, a relief to the accused would be late, as the accused may have passed on.⁴⁴¹ In instances where investigations are monitored and guided by the prosecutions, this trend of manipulation of evidence will, arguably, be curbed from investigations. This is because prosecutors have ethical obligations imposed by the *American Bar Association (ABA)'s Model Rule of Professional Conduct* to disclose to the defence all evidence known to prosecutors that may disprove the guilt of the accused or mitigate the offence.⁴⁴² In Namibia, there is no model rule, but in the case of *State v Teek*,⁴⁴³ the Court has emphasised this principle.

The Namibian Police have been warned against presenting manipulated evidence, particularly in cases of entrapment that involve monetary rewards. Justice Dumbutshena cautioned against this trend in the case of *S v Nangombe*⁴⁴⁴ when he said:

Courts of law must guard against the abuse of the legal system because justice begins at the time a suspect is questioned by the police. If at that stage falsehoods are brought to Court by over-enthusiastic police or state witnesses, courts may unknowingly accept false evidence and convict innocent men and women.

The quotation above signifies the relevance of filtering and ascertain hearsay evidence. This manipulated evidence is generated by investigators working on their own. Manipulated evidence is characterised by what Justice Levy termed in the case of *S v Fillemon Shitungeni*⁴⁴⁵ an immoral system that potentially makes or may make liars and perjurers out of innocent and good officers and criminals out of good or weak officers by offering them extra money than what they could earn in a life-time.

⁴⁴¹ While there have not been instances of persons who served long term sentences and released later upon new evidence in the Namibian legal system, there has been a number of wrongful convictions and sentences. For example, in the case of *Pieter Petrus Visagie v Government of the Republic of Namibia and Others* (SA-2017/34) [2018] NASC 411 (03 December 2018), the Namibian High Court held that the trial in the magistrate court was conducted in a manner reflecting 'disgrace' and a 'failure of justice'. The Court set aside the conviction and sentence of over three years' imprisonment. In the case of *Leonard v S* (HC-NLD-CRI-APP-CAL-2018/00045) [2018] NAHCNLD 106 (11 October 2018), the Court set aside the conviction of an accused for the contempt of court and six-months imprisonment, which was imposed after he failed to appear in Court, because it was established that the accused failed to appear in Court because he was in police custody and the police failed to take him to the Court due to unavailability of transport. Arguably, severe wrongful convictions and sentences are also possible.

⁴⁴² *In re Sodersten*, 53Cal.Rptr.3d572,576(Ct.App.2007), case No. F047425; American Bar Association (1983); Kozinski (2015), at xi.

⁴⁴³ *State v Teek*, Case No.: SA 12/2017, at para 83.

⁴⁴⁴ *S v Nangombe* (SA 2/93) [1994] NASC 3.

⁴⁴⁵ *S v Fillemon Shitungeni* Case No. 25/93.

In the rape case of *S v Ochurub*,⁴⁴⁶ investigators relied on hearsay evidence. Justice Damaseb asserted that investigators were wrong to advance hearsay evidence, which the Magistrate court erroneously admitted. A police investigator, by the name Hafeni, in opposing the bail application alleged that the accused was interfering with an investigation. Acting without prosecutors' guidance, a police investigator reported that when the accused was arrested, the complainant's mother was asked by the accused's sister and his lawyer for her daughter to withdraw the case. The learned judge affirmed that:

The complainant's mother was never called to verify the allegation of interference and Hafeni's testimony is therefore hearsay. I am unable to find on the record any evidence that the appellant interfered with the witnesses or that he would interfere with the police investigation. The magistrate's finding that the accused interfered with the complaint and that he might interfere with the police investigations was therefore unsound because it was not supported by the evidence.⁴⁴⁷

If the investigator in the case had collaborated with prosecutors in the investigation, he would have been appropriately advised on gathering credible evidence that was admissible, than presenting hearsay evidence that was not admissible before the Court, because it did not meet the exception to the hearsay evidence as explained by the Court in the *Criminal Procedure Act*.⁴⁴⁸

6.2.5 To avoid misleading the prosecution

When there is lack of inter-agency cooperation, investigators can mislead prosecutors, by instigating prosecution of an offence on the basis of irregularly obtained evidence. This is illustrated by the case of *Minister of Safety and Security v Tyokwana*.⁴⁴⁹ In this appeal case, the respondent who was a prisoner serving sentence was assigned, as part of community service, to wash the car of a policeman. The policeman alleged that the respondent stole his firearm and arrested him. The matter was investigated by a Warrant Officer. The respondent was assaulted to agree to allegations levelled against him. The Court held that both the arresting and investigating officers failed to inform the prosecution the truth about the facts

⁴⁴⁶ *S v Ochurub*, Case No: CA 46/2008) [2008] NAHC 22.

⁴⁴⁷ *S v Ochurub*, Case No: CA 46/2008) [2008] NAHC 22, at para 3t.

⁴⁴⁸ No. 51 of 1977a, section 216 states that hearsay evidence is inadmissible except where it is provided for in the Act. Section 216A provides for admissibility of evidence provided by children under 14 years. Some years later the Court also explained the exception in *Aupindi vs Shilemba* Case No. SA 7/2016, at para 39.

⁴⁴⁹ *Minister of Safety and Security v Tyokwana* 2015 1 SACR 597 (SCA).

of the offence. Had the prosecutor been appraised with correct information, he would have declined to prosecute the matter. Justice Fourie asserted that:

It has often been stressed by our courts, that the duty of a policeman who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.⁴⁵⁰

The learned judge maintained that the arresting and investigating officers instigated prosecution, misleading the prosecutor with distorted truth and failing dismally to disclose to him fair and honest statements. He confirmed the judgement in a court, which held that there was malicious prosecution, because it was based on statements that were forced out of the accused and accordingly dismissed the appeal. It is arguable that under the framework for inter-agency cooperation, when a prosecutor keeps an eye to investigators during the process of investigation of an offence, a scenario like this one would have been avoided as prosecutors assisting investigators would have advised against statements obtained from the accused and under duress.

6.2.6 To expedite the criminal justice process

Inter-agency cooperation is necessary because prosecutors are required to bring matters before trial within the shortest possible time, but they do not have control over the process of investigation. Having a coordinated approach will enable prosecutors to assist in fast-tracking investigations and bring the matter to trial within a reasonable time. In the meantime, suspects are arrested by the police without seeking guidance from prosecutors and when they take long to bring matters before trial, prosecutors are forced to make temporary withdrawals of cases, in terms of section 6A of the *Criminal Procedures Act*.⁴⁵¹ A senior prosecutor stated that:

Most cases especially commercial crime cases take long to investigate. Accused persons are arrested early in the investigative stage of the case, when there is no sufficient evidence that can prove all elements of the offence, for a prosecutor to be ready to bring the matter for trial...The challenge in commercial cases arises when an accused is arrested too early and when there is no sufficient evidence. That will give an opportunity to a suspect to hide part of the evidence and it will be difficult for an investigating officer to find that evidence.⁴⁵²

This means that after a court appearance, an accused will be released on bail and since he knows that he is a suspect who will possibly be re-arrested in the future, he will have ample

⁴⁵⁰ *Minister of Safety and Security v Tyokwana*, 2015 1 SACR 597 (SCA), at para 40.

⁴⁵¹ No 51 of 1977a.

⁴⁵² H-OSH (2019).

time to destroy incriminating evidence. These challenges could be avoided if investigators and prosecutors are coordinating their activities from the initial phase of the reporting of an offence. Prosecutors will advise investigators not to effect arrest, if they foresee that investigation will take some time, or their involvement in the investigation will expedite the investigation and there will be no need for temporary withdrawal of the case.

6.2.7 To overcome challenges posed by lack of resources within investigation agencies

Investigations are hampered by lack of adequate resources and the distance between the victims and police stations. Due to the fact that some victims stay far from police stations, it takes time to go and report cases. On the part of the police, lack of resources results in inadequate response to crime acts from the distant areas once they are reported and it creates an obstacle to crime investigations. It further contributes to challenges of crime prevention, because when criminals know that there is weakness in investigations and that they can get away with offences, it encourages them to perpetually commit offences.⁴⁵³ The issue of inadequate transport resources in the Namibian Police has been a problem for many years and its impact on investigations is significant, particularly in instances where evidence from a crime scene can be lost with time lapses.⁴⁵⁴ It is for this reason then that inter-agency cooperation model is relevant, when the two agencies can share costs.

6.3 Conclusion

Inter-agency collaboration between investigators and prosecutors is imperative, because it is fundamental to an efficient and effective criminal justice process. Inter-agency cooperation provides an enabling environment to actors in the criminal justice process to collaborate on aspects of establishing facts for an offence with a view to bring qualitative evidence at the trial that does not unfairly advantage one party (the state or accused) to the prejudice of another. Prosecutor-guided investigations produce credible evidence which will be admissible in court. It is also expeditious, as the prosecutor will be involved right during investigations and not to wait to guide and correct investigators after the docket has been submitted to the prosecution agency.

⁴⁵³ Daniel (2011) at 480; Mbote and Akech (2011) at 121; Ashimala (2014) at 70 – 73.

⁴⁵⁴ D-IPOL (2019).

Investigators' skills and capacity are challenged by evolving crime complications amidst which they should adhere to the provision of law, particularly the rights of suspects. Inter-agency collaboration is, therefore, mutually beneficial to officials from both agencies in terms of learning from each other and enhancing their capacity in carrying out duties that are furthering productivity in the criminal justice system. Without collaboration, the system will be loaded with shortcomings that include investigators working outside the ambit of law, resulting in the prosecution losing cases at trials. Further, cases will be unnecessarily delayed and the quality of investigation will be inferior. In some instances, investigators and persecutors would end up taking conflicting positions.



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CHAPTER SEVEN

INTER-AGENCY COOPERATION AND THE QUESTION OF INDEPENDENCE OF THE PROSECUTION AND THE DOCTRINE OF SEPARATION OF POWERS

7.1 Introduction

A proposition anchored in the doctrine of separation of powers supposes that investigation and prosecution should be carried out separately, without integrating their operations.⁴⁵⁵ This is meant to ensure that the process is not influenced by other persons from other branches of government and other departments or government agencies whose function is not investigation or prosecution.

It follows that inter-agency cooperation between prosecutors and investigators should be carried out with due consideration to the fact that the two agencies should maintain the separation of powers and that the prosecution should act independently. In *Makapa v Minister of Safety and Security*,⁴⁵⁶ it was held that prosecutors should carry out their functions independently from any influence by other officials. Further, the Namibian Prosecutor-General falls under the judiciary, whereas the Inspector-General, Director-General of the ACC and their staff fall under the executive. In maintaining cooperation between these officials and their institutions, they should be cognisant of the doctrine of separation of powers, so that no agency usurps the power of the other.

This chapter discusses the cooperation between investigators and prosecutors within the context of the independence of the prosecution, constabulary independence and the doctrine of separation of powers. The chapter discusses the separation of powers within the Namibian context, assessing whether it complies with international standards and how prosecutors can be held accountable. It then proceeds to explain how the independence of the agencies can be guaranteed in inter-agency cooperation. The chapter also addresses the following research question: How can prosecutor-investigator interactions be realised within the framework of separation of powers? With relevant examples from some jurisdictions, the chapter discusses how the cooperation between the two agencies can be maintained without interfering with the

⁴⁵⁵ Garoupa et al., (2011) at 229.

⁴⁵⁶ *Makapa v Minister of Safety and Security* (I 57/2014) [2017] NAHCMD 130 (05 May 2017).

independence of the investigation agency and without infringing on the independence of the prosecution.

7.2 The doctrine of separation of powers

The doctrine of separation of powers was developed by a French philosopher, Montesquieu, referring to the division of labour and distinctness of power relations and responsibilities between the three branches of government, namely the legislative, executive and judiciary. The power relation between these branches is based on the principles of checks and balances. The formulation and enactment of prosecutorial legislation is the domain of the executive and the legislature. However, in the execution prosecutorial duties, the Prosecutor-General, who is a judiciary functionary, exercises his or her power independently.⁴⁵⁷

The doctrine of separation of powers in Namibia has been explained by the Court. In the case of *Itula and Others v Minister of Urban and Rural Development and Others*,⁴⁵⁸ the Supreme Court stated that in terms of the principle of separation of powers, the legislative authority is vested in Parliament, which may delegate subordinate legislative power to the executive in terms of making regulations. The separation of powers between the branches of government also means that even when there is inter-agency cooperation between investigators and prosecutors, a functionary of one branch of government will not be held liable for the conduct of the functionary of another branch. This was held in the judgement of *Pieter Petrus Visagie v Government of the Republic of Namibia and Others*,⁴⁵⁹ where the Supreme Court stated that separation of powers puts the judiciary and executive in separate spaces, that the state will not be liable for the actions of the judiciary. It is, therefore, arguable that in Namibia the executive, including investigators, is not liable for the conduct of the Prosecutor-General who is accountable to the Judicial Service Commission, unlike for the conducts of investigators who fall under the executive.

⁴⁵⁷ Hamilton (2011) at p 13.

⁴⁵⁸ *Itula and Others v Minister of Urban and Rural Development and Others* (1 of 2019) [2020] NASC 6 (05 February 2020).

⁴⁵⁹ *Pieter Petrus Visagie v Government of the Republic of Namibia and Others* (SA-2017/34) [2018] NASC 411 (03 December 2018).

In the case of *Matengu v Ministry of Safety and Security and Others*,⁴⁶⁰ the Court held that the doctrine of separation of powers in the Namibian context should be considered with the provisions of the Namibian Constitution which established three branches of government, namely the executive, legislature and judiciary, with the respective authorities vested in each branch. The Court should guard against one branch interfering with the duties of another branch.

In the case of *Kambazembi Guest Farm cc t/a Waterberg Wilderness v Ministry of Lands and Resettlements*,⁴⁶¹ the Supreme Court explained that the separation of powers doctrine supposes that legislative power is vested in the legislature and not the executive. But it further held that no separation of powers is absolute that while the legislature sets legislation principles, the particularisation of subordinate legislation, like regulations and their administration and implementation are left to experts.

Schönteich⁴⁶² states that in South Africa, there is a clear distinction of power between prosecutors and the police. While the two institutions are completely separate and independent from each other, it is equally acknowledged that they mutually rely on each other to effectively fight crime. The rationale is that even if an offence has been thoroughly investigated, it remains subject to fail if prosecution is flawed. Similarly, if there has not been thorough investigation of an offence by the police, prosecution will not be in a position to prove its case beyond reasonable doubt. Therefore, while the South African criminal justice system adopts the doctrine of separation of powers, it also maintains inter-agency cooperation between investigators and prosecutors.

In Namibia, there is a clear demarcation of what investigators should do and what prosecutors should do. The task of an investigator is to place before the Prosecutor-General available evidence, upon which the Prosecutor-General will independently decide on whether or not the matter should be prosecuted. Once the docket has been handed to a prosecutor, the matter falls under the control of a prosecutor, who would request investigators to provide further

⁴⁶⁰ *Matengu v Ministry of Safety and Security and Others* (HC-MD-CIV-MOT-GEN-2017/10) [2017] NAHCMD 127 (27 April 2017), at para 7 and 11.

⁴⁶¹ *Kambazembi Guest Farm cc t/a Waterberg Wilderness v Ministry of Lands and Resettlements* (SA 74/2016) [2018] NASC 399 (27 July 2018), at para 39, 45 - 46.

⁴⁶² Schönsteich (1999) at p 1.

information, if necessary.⁴⁶³ This is similar to other jurisdictions, like in the US, where prosecutors as important court actors have the ultimate discretion whether or not to charge the accused with a crime. If the prosecution decides not to file a charge, there will be no case prosecuted in the court and there is nothing that investigators can do.⁴⁶⁴

It is unlikely that prosecutors will bring before trial cases which they know are riddled with evidential challenges that are an impediment to a successful prosecution of the case, because they know that it will be a futile exercise. In such instances, they will use their discretion and decline prosecution. This discretion symbolises the principle of expediency or advisability that is applied by Cameroonian prosecutors, who decide on the prosecution depending on the sufficiency of incriminating evidence.⁴⁶⁵

A separation of powers exists between the Prosecutor-General, the functions of this office and the investigation agencies, with the former falling under the judiciary, while the latter falls under the executive. The principle for the independence of the Prosecutor-General was laid in the case of *Ex Parte: Attorney-General*⁴⁶⁶ discussed below.

On whether there is exception to the doctrine of separation of powers the Supreme Court further stated that the doctrine of separation of powers is inviolable, as there is no exception to it, not even when the act of legislature is endeavouring to achieve a legitimate regulatory measure, like regulating a public right.⁴⁶⁷ Further, the Court maintained that a breach of the separation of powers doctrine negates the principle of equality, as one branch would be arrogating the power of another.⁴⁶⁸

7.3 Independence of the prosecutors in Namibia

Independence of the prosecution refers to both institutional autonomy and functional independence. Institutional autonomy refers to the independence of the prosecution or

⁴⁶³ *Makapa v Minister of Safety and Security*, at para 79.1.4.

⁴⁶⁴ Meeker (2018) at pp 39 – 40.

⁴⁶⁵ Eban (2008) at 139.

⁴⁶⁶ *Ex Parte Attorney. General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* 1998 NR 282 (SC) (1).

⁴⁶⁷ *State of Tamil Nadu v State of Kerala and Another* [2014] INSC 405 (7 May 2014), at para 146.

⁴⁶⁸ *State of Tamil Nadu v State of Kerala and Another* [2014] INSC 405 (7 May 2014), at para 121.

investigation agencies as institutions, rather than to the independence of individual prosecutors or investigators. It is different from the general prosecutorial independence or constabulary independence discussed in the next sections below. On the independence of the prosecution in relation to investigation, a formal separation is characterised by a clearly identifiable separate functions of the two agencies and the discretionary powers accorded to them. When prosecutors are free to institute prosecution without interference from the members of the executive and the police, it symbolises the separation of powers.

In the case of *Mahupelo v Ministry of Safety and Security*,⁴⁶⁹ it was underscored that the exclusive power to prosecute, withdraw charges and stop prosecution that has been granted to the Prosecutor-General by law illustrates that the Prosecutor-General is completely independent. This demonstrates institutional autonomy that there is no other office, be it the legislative, or executive, including investigators, who can give instructions to the Prosecutor-General. This is in line with a long-held inference in law that the functions of legislating, investigation and determination of liability should be undertaken by different institutions.⁴⁷⁰ Under these arrangements, the requirements for the autonomy of an institution will be met, as there is no external influence in taking a decision, but only the consideration of legal principles and ethical duty that the prosecutor owes to the criminal justice process.

Roach⁴⁷¹ asserts that, generally, there is no guarantee that political authorities would not abuse the power that they have over appointments of senior police commanders. It is, therefore, further contended by this study that investigation agencies should enjoy institutional autonomy, whether from political influence or from the prosecution. Appointments of investigators should not be influenced by political functionaries or prosecutors for the purpose of gaining control over foreseeable and unforeseeable investigations.

Institutional autonomy of the investigation agency, too, should be respected, not only by the political authority in the executive, but also by the prosecution. Roach⁴⁷² cited the Royal Commission on the prosecution of Donald Marshall Jr. when it declared that police has an

⁴⁶⁹ *Mahupelo v Ministry of Safety and Security* Case No. I 56/2014.

⁴⁷⁰ Garoupa, et al. (2011) at p. 229.

⁴⁷¹ Roach (2011: 136).

⁴⁷² Roach (2011) at p 124.

inherent constabulary independence in determining an investigation. In this regard / he propounds that police investigators should be able to lay charges, even when the Attorney-General will possibly refuse to prosecute the case. This follows that in collaboration with investigators during investigations, prosecutors should focus on the elements of admissibility of the investigation and its outcome, but they should not direct investigators about the staying of an investigation or termination.

Functional independence of prosecutors is illustrated by the ability of the prosecution to carry out their professional duties without being subjected to interference from other branches of government. Similarly, they should not be unnecessarily exposed to unjustifiable civil or penal liabilities, which means that liability should only be considered when there has been an intentional unlawful commission or omission that has no mitigating factors.⁴⁷³ For functional independence to be strictly enforced, it should be included in legislation that no individual instruction should be given to prosecutors, including by the police or members of other investigation agencies. Unless such instruction is to serve the interest of the criminal justice process and provided that it is one in public, transparently, in accordance with the laid procedures.⁴⁷⁴ The position of Namibia on functional independence is laid in the case of *Ex Parte: Attorney-General*⁴⁷⁵ discussed below.

In the case of *Ex Parte: Attorney-General*,⁴⁷⁶ the Attorney-General of Namibia approached the Supreme Court to determine whether the Attorney-General in exercising final authority over the office of the Prosecutor-General, as provided for in article 87 of the Namibian Constitution has the power over the following:

- to instruct the Prosecutor-General to institute a prosecution, to decline to prosecute, or to terminate a pending prosecution in any matter;
- to instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution; and
- to require that the Prosecutor-General keeps the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.

⁴⁷³ Guamieri and Piana (2016)

⁴⁷⁴ United Nations Office on Drugs and Crime (2020)

⁴⁷⁵ *Ex Parte Attorney. General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* 1998 NR 282 (SC) (1).

⁴⁷⁶ *Ex Parte Attorney. General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* 1998 NR 282 (SC) (1).

The independence of the prosecution outlined in the judgement is based on the old tradition in the English legal system, which is based on the ‘Shawcross doctrine’,⁴⁷⁷ named after Lord Shawcross, UK Attorney-General. In terms of the doctrine, the consultation of the Attorney-General with Cabinet colleagues is not mandatory, but rather an entitlement which the Attorney-General enjoys. In the same vein, the Namibian Prosecutor-General’s consultation with the Attorney-General is, arguably, not mandatory. Further, the doctrine supposes that Cabinet members can only advise the Attorney-General, but cannot give directions and the Attorney-General bears the ultimate responsibility of a decision that he or she takes. Similarly, in Namibia, even when the Prosecutor-General consults with the Attorney-General, the latter cannot give directions. The Prosecutor-General solely bears the responsibility of deciding on whether an offence is prosecutable, irrespective of what the investigation agency may feel about the matter.

In the case of *Ex Parte: Attorney-General*,⁴⁷⁸ Justice Leon asserted that the function of the Prosecutor-General is quasi-judicial. When a political appointee is allowed to interfere with the Prosecutor-General on what prosecutions should be initiated, it defeats the protection of fundamental human rights and freedom. The learned judge maintained that the office of the Prosecutor-General should remain truly independent. He held that the Attorney-General cannot instruct the Prosecutor-General to institute a prosecution, to decline to prosecute, or to terminate a pending prosecution in any matter and further, he cannot instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution.⁴⁷⁹

It follows logic from the above-mentioned judgement that investigators, too, are not allowed to instruct or direct the prosecution to initiate prosecution. The two agencies can cooperate in the investigation, but when the investigation is complete, it is left to the prosecution to use its discretion, and hence the independence of agencies and separation of powers is maintained. The Namibian Court underscores that in discharging the discretion whether or not to prosecute, there is ethical duty on the part of the prosecutor not to act arbitrary, but with due

⁴⁷⁷ Rosenberg (2009).

⁴⁷⁸ *Ex Parte Attorney. General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* 1998 NR 282 (SC) (1).

⁴⁷⁹ *Ex Parte Attorney. General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* 1998 NR 282 (SC) (1), at 291 B.

consideration to the principle and values of fairness, professionalism and justice.⁴⁸⁰ It should further be noted that even when investigators ask for the staying the prosecution, the decision rests with the Prosecutor-General who takes the decision independently and the police cannot interfere with or influence the decision of the Prosecutor-General.⁴⁸¹

Further, prosecutorial independence in the *Ex Parte: Attorney-General*,⁴⁸² clearly leaves out the executive from the judicial domain, unlike the legal systems where prosecutors are directly commanded by the executive to initiate or terminate prosecution, like in Cameroon, where prosecutors cannot pursue initiatives independently without authorisation from the Minister.⁴⁸³ It follows that when prosecutors pursue inter-agency cooperation between prosecutors and investigators, they will be subject to authorisation by the Minister.

Functional independence is also stated in the case of *Mahupelo v Minister of Safety and Security*⁴⁸⁴ when the Court averred that a prosecutor is fully independent and should be free from outside influence. They should be at ease to fully consider whether or not to prosecute, because their decisions to prosecute, even if the accused is later acquitted, can have far-reaching implications, including loss of reputation, interruption of personal relations, apprehension, and trauma that results from being prosecuted. The Court further maintained that the independence of the prosecution is crucial for establishing confidence of the public in the justice system and that the Prosecutor-General should decide on whether or not to prosecute an offence, independently from anyone's influence.⁴⁸⁵

The independence of prosecutors was further elaborated by Namibia's Ombudsman, Advocate John Walters, who also acted as Namibia's Prosecutor-General for two years, from December 2002 to December 2004, in the case of *Makapa v Minister of Safety and Security*.⁴⁸⁶ The Ombudsman argued that a prosecutor should act independently without fear, favour or prejudice. As a person enjoying independence, a prosecutor should take control of the docket and when there are discrepancies in the information available in the docket, a

⁴⁸⁰ *Makapa Minister of Safety and Security*, case No. I 57/2014.

⁴⁸¹ ASCPG (2019).

⁴⁸² *Ex Parte Attorney. General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* 1998 NR 282 (SC) (1).

⁴⁸³ Enonchong (2012), at p. 330.

⁴⁸⁴ *Mahupelo v Minister of Safety and Security*, Case No. I 56/2014.

⁴⁸⁵ *Mahupelo v Minister of Safety and Security*, Case No. I 56/2014, at para 120, 132 and 132.

⁴⁸⁶ *Makapa v Minister of Safety and Security* (I 57/2014) [2017] NAHCMD 130 (05 May 2017).

prosecutor should demand evidence and failure to produce this means that a matter should be withdrawn.⁴⁸⁷ The Court held that in carrying out their duties, prosecutors should be seen to be independent from the police.⁴⁸⁸

Institutional autonomy of the prosecution agency and the framework of inter-agency cooperation can further be defined in terms of the concepts of *ex ante* and *ex post* controls.⁴⁸⁹ In the context of the Namibian establishment, *ex ante* control would be referring to when members of the executive, including the police or other investigation agencies' top echelon, seek to control the process of appointing a Prosecutor-General in order to gain some leverage in prosecutorial discretion. It further refers to the lower level of prosecution, when investigators seek to influence the promotion and transfer of prosecutors in order to control inter-agency collaboration in the investigation of offences. This is against the principle of institutional autonomy of the prosecution and the doctrine of separation of powers.

Ex post control applied to the Namibian context would be referring to when after appointing the Prosecutor-General, members of the executive, including investigators, would want to maintain influence over the office-holder when there are disagreements over decisions to prosecute. It further includes when investigators working together with prosecutors on an investigation want to have control over the decision to prosecute.⁴⁹⁰ The police, as an investigating agency and therefore a different institution, is strictly only required to place evidence before the Prosecutor-General, which investigation may have been carried out under prosecutorial guidance. Under the framework of inter-agency cooperation, just as the prosecutor maintained the autonomy of the investigation agency by only guiding and not imposing aspects of investigation on investigators, so is the autonomy of prosecutorial institution observed by the police by not putting any pressure on prosecutors to initiate prosecutions.

Where the police have prosecutorial powers, there could be interference with the independence of the prosecution. This is because such police officers are under the

⁴⁸⁷ *Makapa v Minister of Safety and Security* (I 57/2014) [2017] NAHCMD 130, at paras 79.3, 79.13 – 79.14.

⁴⁸⁸ *Makapa v Minister of Safety and Security* (I 57/2014) [2017] NAHCMD 130, at para 211.3.

⁴⁸⁹ Brinks and Blass (2017), at pp 306 – 307.

⁴⁹⁰ Brinks and Blass (2017), at pp 306 – 307.

hierarchical command of senior police officers who are not prosecutors. The senior police officers can instruct their subordinates involved in prosecutions to initiate or terminate prosecution. Activities of prosecutors in this regard do not reflect the separation of powers principle. The separation of powers is further evidently absent in the police prosecutions and hence countries are discontinuing this practice.⁴⁹¹

7.4 Independence of the prosecution and accountability

The location of the prosecution services in either executive or judiciary branch of government has an impact on both the independence of the prosecution agency and the cooperation with the investigation agency. Voigts and Wulf⁴⁹² state that when the prosecution falls under the executive, it is ideal for implementing law enforcement policies, but it equally exposes the prosecution to undue influence by the executive. Meanwhile, they also state that having a prosecution falling under the judiciary guarantees political independence, but it presents the problem of holding prosecutors accountable for their actions. To ensure that there is no absolute independence that could be abused, there must be some checks and balances to hold prosecutors accountable.

While defence counsel are subject to the regulations of the Law Society in their conduct, the same is not applicable to prosecutors, as not all prosecutors are members of the Law Society. Only Prosecutors who are Legal Practitioners of the High Court are members of the Law Society. But even then the action that the Law Society can take against them is of less impact, as it relates to withdrawing their practice licence. They can still continue to serve in the prosecution without the licence. There must be a structure that can regulate and review their actions.⁴⁹³

Independence of the prosecution is strengthened by the opportunity principle, as opposed to the principle of legality. The principle of legality is generally applied in civil law countries and places a mandatory obligation on a prosecutor to prosecute a criminal offence when there is sufficient evidence of an offence committed. Meanwhile, the opportunity principle, which is applied in all common law countries, including Namibia, supposes that a prosecutor has

⁴⁹¹ United Nations (2014), at 1 (e).

⁴⁹² Voigts and Wulf (2017), at p 4.

⁴⁹³ Weber (2009), at 127 states that in Japan, the Prosecutor Review Commission is able to review the acts of prosecutors and this is an ideal model that Namibia could adopt.

discretion whether or not to institute criminal proceedings and, when criminal proceedings have been initiated, to decide whether to withdraw specific charges or the entire proceedings.⁴⁹⁴

In the case of *Mahupelo v Ministry of Safety and Security*,⁴⁹⁵ Justice Christiaan underscored that prosecution discretion should be taken objectively. He asserted that discretion is not a mere decision that a prosecutor makes, but the use of the power that is vested in the office of the Prosecutor-General. It is this power that is protected from influence by institutions or factors that impair the principle of independence of the prosecution. Even if there was inter-agency collaboration in the investigation of an offence, once the evidence is placed before the Prosecutor-General, investigators no longer have a role in determining the prosecution. It should also be noted that while investigators have no role in determining whether the offence should be prosecuted, prosecutors are precluded from instituting a prosecution when they know that the matter is not prosecutable. If a prosecutor proceeds to prosecute when he or she is aware of this fact, he or she is liable for malicious prosecution, for which actions are instituted against the government.⁴⁹⁶

When investigators are able to compel prosecutors to reverse their decision not to prosecute, it creates a subordinate relationship. If there are grounds to believe that prosecutors could fail in their ethical duties stated above, as set in the case of *Makapa Minister of Safety and Security*,⁴⁹⁷ the study submits that in the absence of any policy or law that addresses an issue of declining to prosecute, the remedy is to have a review commission recommended by Schönsteich.⁴⁹⁸ He advocates that a review commission should only have the authority to receive presentations from the prosecutors regarding reasons for declining to prosecute and should be able to provide non-binding advices to the prosecution to reverse its decisions. Even if the police is part of such a commission, the cooperative communication approach between the commission and prosecution only creates cooperative accountability of the prosecution to the Commission and the separation of powers and independence of prosecution would still remain in place.

⁴⁹⁴ United Nations (2014).

⁴⁹⁵ *Mahupelo v Ministry of Safety and Security* Case No. 56/2014.

⁴⁹⁶ *Makapa v Minister of Safety and Security* (I 57/2014) [2017] NAHCMD 130 (05 May 2017), at para 146; *Minister of Safety and Security & Others v Mahupelo* 2019 (2) NR 308 (SC).

⁴⁹⁷ *Makapa Minister of Safety and Security*, (I 57/2014) [2017] NAHCMD 130 (05 May 2017).

⁴⁹⁸ Schönsteich (2014), at p 17.

Although prosecutors are independent, they are accountable to law and will be held liable by affected parties when they transgress the law. In *Makapa v Minister of Safety and Security*⁴⁹⁹ it was stated that when a prosecutor is conscious of the wrongfulness of the prosecution, but nevertheless continued, the accused person will be entitled to remedy in terms of delictual claim. In the case of *Mahupelo v Ministry of Safety and Security*,⁵⁰⁰ it was held that a prosecutor will be liable when prosecution was conducted without a reasonable and probable cause. This means that there should be an actual belief on the part of the prosecutor and that such belief should be reasonable.

As an appointed judicial official who is accountable only to the Constitution and laws of the Republic, the Prosecutor-General is not influenced by public opinion or that of investigators. He or she has a duty to ensure fairness in line with obligation to prosecute subject to the Constitution and the law as held by the Supreme Court in *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa*.⁵⁰¹ Similarly, independence of the prosecution does not imply that prosecutors will pursue the interest of investigators, as Namibia is governed by the rule of law.⁵⁰² Thus in *Minister of Safety and Security and Others v Makapa*⁵⁰³ the Supreme Court held that the Prosecutor-General was under duty not to act arbitrarily, but objectively and protect public interests.

7.5 Does the separation of powers and independence of the prosecution comply with international standards?

In the case of *Matengu v Ministry of Safety and Security and Others*,⁵⁰⁴ the High Court maintained that there is no universal standard of the separation of powers. Different models are adopted by countries to ensure adherence to the principle of separation of powers. Prosecutorial independence refers to both institutional and individual independence, meaning that as individuals, prosecutors should be free from interference from outsiders, including

⁴⁹⁹ *Makapa v Minister of Safety and Security* (I 57/2014) [2017] NAHCMD 130 (05 May 2017), at para 161.

⁵⁰⁰ *Mahupelo v Ministry of Safety and Security* Case No. 56/2014., at 11

⁵⁰¹ *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa*, (SA-2017/7) [2019] NASC 2 (28 February 2019, at 32.

⁵⁰² *Constitution of the Republic of Namibia*, article 1.

⁵⁰³ *Minister of Safety and Security and Others v Makapa* Case No.: SA 35/2017, at 65.

⁵⁰⁴ *Matengu v Ministry of Safety and Security and Others* [2017] NAHCMD 12, at para 8.

investigators. The United Nations Office on Drugs and Crime⁵⁰⁵ states that to demonstrate independence, prosecutors should be able to decide rationally, *i.e.*, making sense and logic as far as the law, facts and evidence are concerned. Independence also requires that a prosecutor should be impartial, acting only in furthering the interests of the law.

A senior prosecutor⁵⁰⁶ propounded that in order to maintain the independence of the two agencies and ensure that the criminal justice process is carried out fairly and in a transparent manner, it is advisable that a prosecutor who guides an investigator in the investigation of an offence should not be the same who will prosecute the matter at the trial. This is because having him as both the person who was involved in the investigation and at the same time the prosecutor of the offence will compromise the criminal justice process. Further, this is because the purpose of coordination is not to provide the prosecutor with information at an early stage of investigation in order to internalise it for the purpose of prosecution, but it is to ensure that correct and lawful procedures have been followed at the investigation stage, all key witnesses have been interviewed in compliance with law and the evidence produced does merit that the suspect should be brought before trial.

South Africa adopted the National Crime Prevention Strategy (NCPS), where prosecutorial guidance is highlighted as essential for sufficient investigations of cases.⁵⁰⁷ This collaboration between the police and prosecutors is made within the ambit of recognising the independence of the police and the prosecution agencies. This does not make the police subservient to the prosecution, but the prosecution merely guides the investigation process. While the Director of Public Prosecution can direct the police to carry out an investigation, prosecutors do not take over investigations from the police. The only time prosecutors were carrying out investigation is when they were carrying out their investigation – and not usurping the power of police investigators – when they had the Directorate of Special Operations, called the Scorpion, that investigated and carried out functions pertaining to investigations.⁵⁰⁸

⁵⁰⁵ United Nations Office on Drugs and Crime (2014), at p 10.

⁵⁰⁶ V-WHK (2019).

⁵⁰⁷ Departments of Correctional Services, Defence, Intelligence, Justice, Safety & Security and Welfare South Africa), 1996, *National Crime Prevention Strategy*, Summary, p. 11, available online at <https://www.gov.za/documents/national-crime-prevention-strategy>, accessed on 13 September 2021.

⁵⁰⁸ Keuthen (2007) at 12. From 2008, the Scorpions had since merged with the South African Police. Prosecutors now directs and supervises investigations in terms of the *National Prosecuting Authority*

Prosecutorial independence in South Africa is also provided for in section 32 (1) (b) of the *National Prosecution Authority Act*.⁵⁰⁹ The independence of the prosecution is further confirmed in the South African case law. In the case of *Minister of Justice and Constitutional Development v Moleko*,⁵¹⁰ the Supreme Court held that the Minister of Justice was not vicariously liable for the conduct of the National Prosecution Authority because this agency was accountable to Parliament. In the case of *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others*,⁵¹¹ the Constitutional Court stated that prosecutorial independence is provided for in the national legislation, granting prosecutors the power to act without fear, favour or prejudice. The Court maintained that any action by the executive or any legislation that seeks to threaten prosecutorial independence will be subject to control by the Court.⁵¹² In the case of *Freedom Under Law v National Director of Public Prosecutions and Others*,⁵¹³ the High Court held that prosecutorial independence is guaranteed by the Constitution and prosecutors enjoy wide discretionary power to prosecute, decline prosecution or discontinuing criminal proceedings that even the Courts are cautious about and refrain from interfering with this power, except in instances when discretion is exercised improperly, manifesting illegal or irrational decision.

In a typical relationship reflecting the separation of powers between investigators and prosecutors, in the US, prosecutors do not have the power to compel the police to carry out investigations and bring a case to the prosecution for further processing. Similarly, the police cannot compel prosecutors to prosecute an offence. This differs from the French system where the *procureur* have power over police investigations of offences and the Chinese legal system in which prosecutors have a supervisory function over the police.⁵¹⁴

Act, No. 32 of 1998 – see Chapter four, section 4.8.3).

⁵⁰⁹ No 32 of 1998. Section 32 (1) (b) states that “Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions”.

⁵¹⁰ *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at para 18.

⁵¹¹ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC), at para 18-19.

⁵¹² Meaning that the Court will rule against that action, when the matter is brought before it.

⁵¹³ *Freedom Under Law v National Director of Public Prosecutions and Others* (26912/12) [2013] ZAGPPHC 270 (23 September 2013), at para 121, 122 and 124.

⁵¹⁴ Richman (2016) at p 1.

Even in an inquisitorial legal system like France, the separation of powers between investigators and prosecutors is observed, because in practice and as framed by investigation regulations, the police dominate the investigation process. The police carry out 95 percent of investigations under the *commission rogatoire* without prosecutors becoming involved. Further, the police can carry out investigations at their own initiative and only need to inform prosecutors about those who have been detained in order to ensure that proper procedures of investigations have been followed and to direct the enquiry process, as required. Prosecutorial supervision of police investigation can be made telephonically and direct supervision is regarded as inappropriate and is further not required by law.⁵¹⁵

The prosecutor-guided investigations under the French legal system's realisation of the separation of powers between the two agencies is further illustrated in cases that change from police enquiry to *instructions*, which is a judicial investigation.⁵¹⁶ The fact that the police can initiate investigations, their enquiry largely shape the investigation of the case, before the opening of *information* stage, that this stage rather comes as a necessary formality. Judicial investigation comes in largely to verify the evidence that was gathered by the police.

The synchronisation of the police and prosecutors' duties in the investigation at the pre-trial stage is meant for the prosecutor to closely monitor the investigation process. The framework is that investigators are leading investigations with the assistance of the police, while maintaining a substantial degree of autonomy. The purpose of this relationship is to ensure that all the necessary information necessary for the administration of justice have been collected.⁵¹⁷ The mandatory report of the arrests made by the police to prosecutors is to ensure checks and balances. This being the case, the notion of separation of powers is not thrown away and it remains relevant in this synchronisation of duties.

The manner in which appointments of prosecutors are made determines the degree of prosecutorial independence. It is contended that when prosecutors are appointed by the executive or legislature, the degree of independence is not as high as when they are appointed by the judiciary, except when appointment by the legislature is made in a presidential

⁵¹⁵ Hodgson (2005), at pp 245-246; Hodgson (2009) at 340, 341.

⁵¹⁶ Tomlison (1983) at 147

⁵¹⁷ Smedovska and Falletti (2008), at pp 201 – 202.

system.⁵¹⁸ In the Namibian case, the Judicial Service Commission recommends the appointment of the Prosecutor-General, but the President, who is a member of the executive makes the appointment. There are no procedures in place regarding when a President rejects a recommendation by the Judicial Service Commission, although in practice this scenario has not been experienced since Namibia's independence. The Namibian prosecutors' appointment and promotions are made like that of any other civil servants.

The Constitutional Court in South Africa has held that the appointment of the Director of National Prosecution, who is an equivalent of Namibia's Prosecutor-General, does not mean that there is no separation of powers.⁵¹⁹ What is important is that as decided in the case of *Ex Parte: Attorney-General*,⁵²⁰ there is a separation of powers between the Office of the Prosecutor-General and the executive. This separation of powers remains prevalent in the relationship between the Prosecutor-General's office and the investigation agency, as the prosecution agency is not compelled by investigators to carry out prosecutions.

In France, prosecutors are appointed by the Executive in consultation with the Superior Council of Magistracy (SCM). In India, appointments of prosecutors reflect the separation of powers and substantial degree of independence. The degree of independence arising from the separation of powers for Indian prosecution fraternity, as discussed in *Rekha Murarka v The State of West Bengal and Another*,⁵²¹ is guaranteed from the manner in which prosecutors, and not only the Director of Public Prosecutions, are appointed, for both the Central Government and State Government. Public prosecutors for the High Court are appointed by the executive branch of the Government in consultation with the High Court, while for the District Court, they are appointed by the respective State Governments from a list of names prepared by a District Magistrate in consultation with Session Judges.⁵²² This presents an opportunity for a high degree of prosecutorial independence, because the executive has no unlimited power in the appointment of public prosecutors, unlike in Namibia where the judiciary's involvement is only limited to the appointment of the Prosecutor-General, while

⁵¹⁸ Van Aaken et al. (2004), at pp 258, 278.

⁵¹⁹ *Ex Parte: Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), at para. 146

⁵²⁰ *Ex Parte Attorney. General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* 1998 NR 282 (SC) (1).

⁵²¹ *Rekha Murarka v The State of West Bengal and Another*, No. 1727 of 2019, para 8.

⁵²² *Code of Criminal Procedure*, 1973, s 25A.

the appointment of rest of the public prosecutors, including the Deputy Prosecutor-General is entirely in the hands of the executive.

Professional independence is also important in the separation of powers framework. The appointment and promotions of prosecutors should be free from interference by members of the executive and legislature.⁵²³ The current practice where prosecutors' appointments and promotions are directly under the executive does not reflect in full the separation of powers doctrine and for the same reasons that the Magistrates were taken from the Public Service with the enactment of the *Magistrates Act*.⁵²⁴ In the case of *Mahupelo v Minister of Safety and Security*⁵²⁵, the High Court averred that prosecutors deal with voluminous legal and administrative aspects of their work which are complex and unusual and further play a crucial role of ensuring the due process and rule of law in the criminal justice system. These are important judicial functions that justify that the powers for appointments, promotions, transfers or dismissals of, or disciplinary steps against prosecutors are taken away from the Public Service Commission. This study contends that to ensure that there are checks and balances in the process, appointments and promotions of prosecutors should be done in consultation with a quasi-judicial body, like the Magistrates Commission.

The separation of powers does not mean that there should be no cooperation between the two agencies, since both serve the interest of the administration of justice. However, cooperation should not only take place when prosecution is subordinated to the police control and administration, as suggested by a retired Indian police officer⁵²⁶ who advocated for a scenario which existed in India prior to promulgation of the *Code of Criminal Procedure* in 1973. Cooperation should take place under the current separation of powers relationship between the police and prosecutors, in which the police could still request prosecutors to provide guidance in investigation. Accordingly, the communicative cooperation model will ensure that collaboration between the two agencies would maintain their respective independence.

⁵²³ Alemika (1999).

⁵²⁴ No. 2 of 2003. Section 3 of the Act states that the objectives of establishing a Magistrate Commission is "to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, magistrates take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and correctly". This principle is, arguably, relevant to furthering the interest of prosecutorial independence.

⁵²⁵ *Mahupelo v Minister of Safety and Security*, Case No. I 56/2014, at para 134.

⁵²⁶ Gupta (2016), at p 75. Prior to 1973, prosecution was under the control of police. It became independent following the enactment of the *Code of Criminal Procedure (India)*, 1973 (see Chapter three, section 3.2.3).

It has been stated above that the Namibian Supreme Court has held that the executive cannot instruct the Prosecutor-General to commence or initiate prosecution. It is also equally important to look at whether the prosecution agency can instruct the investigation agency to initiate, stop or stay an investigation of an offence. On this question, a senior prosecutor⁵²⁷ stated that:

It is recognised that the prosecution and the police are two separate agencies...A prosecutor cannot compel an investigator to initiate or stop an investigation...a prosecutor can only decline to prosecute after being presented with an investigation report.

This means that the investigation function is recognised by law as a domain of the police and investigators from other investigation agencies.⁵²⁸ The prosecution agency is not mandated by law to initiate or stop investigations.

In *Rekha Murarka v The State of West Bengal and Another*,⁵²⁹ the Indian Supreme Court held that the Public Prosecutor occupies a position of great importance that has a crucial role in the administration of justice and is, thus, an independent officer who should act fairly to both the accused and the investigation agency. He or she is not a servant of the investigation agency or the government, even if he or she is appointed by the government. In this judgement the Court made it clear that the prosecution agency and police departments should be completely separated, with the prosecution machinery placed under the control of the Director of Prosecution. There should be no subordinate relationship between prosecutors and the police as that will erode the principle of separation of powers and independence of the prosecution. Prosecutors do not owe responsibility to the police, but they owe their duty to the criminal justice process, through the Court.

In the case of *Hitendra Vishnu Thakur vs State of Maharashtra*,⁵³⁰ the Indian Supreme Court stated that when an investigation agency has not completed an investigation on time, checks and balances demand that it should be subjected to the scrutiny by the prosecution agency regarding the delay. Before any extension is granted to investigate, an investigator should satisfy a prosecutor about the progress of the investigation. The Court emphasised that a prosecutor is not part of the investigation agency, but is an independent authority and when a

⁵²⁷ A-SCPG (2019).

⁵²⁸ *Police Act*, No. 19 of 1990, at s 13 (c), *Anti-Corruption Act*, No. 8 of 2003, at s 3.

⁵²⁹ *Rekha Murarka v The State of West Bengal and Another*, No. 1727 of 2019, para 8.

⁵³⁰ *Hitendra Vishnu Thakur vs State of Maharashtra* 1994 AIR 2623, 1994 SCC (4) 602.

request comes from an investigation agency to extend the time for an investigation, a prosecutor applies his or mind to such a request independently. He or she is not bound to agree to the request by an investigator, especially if there has been a deliberate delay that could have been avoided.

Abel⁵³¹ states that the separation of powers protects the overreaching of the state on prosecutors and leaves prosecutors with independent authority over its portfolio. The objectivity principle, when adopted by the prosecution and investigation teams, prevents any interference with the independence of the judiciary. Impartiality and objectivity are better realised in adversary legal systems, because of the separation of powers between agencies, with the prosecution leading. In France, within the auspices of the separation of powers doctrine, prosecutors have discretion on which judicial police unit to work with on an investigation. It provides an opportunity to select the unit that is competent in the type of investigation to be carried out.⁵³²

In Namibia, there are challenges with regard to administrative autonomy, with respect to the budget. The Prosecutor-General, like the counterparts from some jurisdictions, including South Africa, is financially dependent on a budget sub-vote under the Ministry of Justice, which is controlled by the Executive Director, who is the accounting officer of the Ministry.⁵³³ All activities and functions of the office of the Prosecutor-General, including those that are related to communicative cooperation with investigation agencies are at the mercy of the accounting officer and the Prosecutor-General has no control over the budget. The executive head of the Ministry, who is the Minister and the Executive Director may have their own budget priorities other than activities of the office of the Prosecutor-General. As for investigative agencies, like the police and ACC, they control their budgets hence they have no challenges for administrative autonomy, and as long as Parliament has appropriated sufficient funds for their activities, they will be able to function. This is also the case with some prosecution agencies, like in Brazil, as it will be discussed below.

⁵³¹ Abel (2017) at 1736.

⁵³² Smedovska and Falletti, 2008, at p 202.

⁵³³ *State Finance Act*, No 31 of 1991, s 18.

In Brazil, administrative autonomy of prosecutors is enshrined in the Constitution, which provides that prosecutors should prepare and control the budget.⁵³⁴ The United Nations Office on Drugs and Crime⁵³⁵ states that budgeting allocation should reflect the independence of the prosecution. This means that the prosecution agency should be in a position to control its budget and determine the priorities on the use of the funds. When there are joint operations between the prosecution and investigation agencies as part of their cooperation. The prosecution agency should have access to the funds without being subjected to bureaucratic inconveniences. Further, a prosecution agency should be provided with sufficient human and capital resources, so that it should not be dependent on an investigation agency.

7.6 Guaranteeing separation of powers and prosecutorial independence under inter-agency cooperation

Does the practice of placing of the police investigators for serious offences in the office of the Prosecutor-General, as it happens in Namibia, or placing prosecutors at police stations, as it happens in the UK, for example, compromise the independence of either agency or separation of powers thereof? This study contends that this practice does not compromise the separation of powers or independence of either agency. For the police, their independence remains because it is still the agency that carries out investigations and prosecutors only provide guidance. The provision of guidance in investigation is a universal legal principle. The United Nations *Guidelines on the Role of Prosecutors*,⁵³⁶ provides that prosecutors shall perform a vigorous role in criminal investigation, including supervision of investigation as permissible by the laws, or consistent within local practices of their respective countries.

In Brazil, too, separation of powers is possible amidst inter-agency cooperation, because the Federal Public Prosecutor's Office and the Federal Police collaborate in carrying out investigations. This does not compromise the independence of the prosecution, which is guaranteed a high degree of autonomy by the Constitution.⁵³⁷ The police and prosecutors had three separate teams collaborating in the investigation of the *Lava Jato* case, which revealed

⁵³⁴ *Constitution of the Federative Republic of Brazil*, 2010, 3rd ed., art 128.

⁵³⁵ United Nations Office on Drugs and Crime (2014), at p 16.

⁵³⁶ United Nations (1990), at para 11.

⁵³⁷ *Constitution of the Federative Republic of Brazil*, 2010, 3rd ed., art 129 – 130.

the money laundering schemes involving bribes to public officials to secure contracts with Petrobas oil company. Prosecutors are empowered to exercise some control over police activities which include investigations. They can also request investigation procedures adopted by the police in investigations. All these are done within the framework of separation of powers, as control does not entail interfering with the independence of the police.⁵³⁸

Prosecutors should act cautiously to ensure that inter-agency cooperation does not compromise their independence. Compromising the independence of the prosecution through inter-agency cooperation was discussed in the case of *Dix v Canada*.⁵³⁹ In this case, at the request of the police, a prosecutor was availed to assist with an investigation. The prosecutor carried out interviews with witnesses early and frequently visited the police station. The accused later instituted a civil suit and the Court held that the prosecutor was heavily involved in the case, crossing the line of borders between investigation and prosecution. The learned judge averred that:

[T]here is a functional, legal, and ethical division between the police and prosecutors. The police conduct the investigation. Prosecutors conduct the in-court prosecution... Overall, I am satisfied that Arnold Piragoff's involvement in the investigation stepped over the legal, functional, and ethical division which should exist between the respective functions of the police and prosecutors and that his involvement was greater than it needed to be and greater than it was desirable to be.⁵⁴⁰

The Court further cautioned that prosecutors who intrinsically become involved in investigations risk becoming less objective when they have to assess whether the case is prosecutable. The judge maintained that the prosecutor lost objectivity and further misled the Court in the bail hearing.⁵⁴¹

Inter-agency cooperation within the context of the separation of powers doctrine is that each agency should maintain distinctiveness in terms of the power to exercise its mandate and functions, without undue influence by another agency. This does not mean that the two agencies cannot collaborate in executing their duties. This could be realised under the equal control cooperation formula, because each agency remains in charge of the scope of its work, free from hindrance by another agency. This approach conforms to the gist of the doctrine of

⁵³⁸ Aras (2018), at p 88; Carson and Prado (2014), at p 29; *Constitution of the Federal Republic of Brazil*, 2010, article 129 (VIII).

⁵³⁹ *Dix v Canada* 2002 ABQB 580.

⁵⁴⁰ *Dix v Canada* 2002 ABQB 580, paras 290 and 294.

⁵⁴¹ *Dix v Canada* 2002 ABQB 580, paras 290 and 528.

separation of powers, which asserts that the branches of government enjoy equal and well-defined powers and independence.⁵⁴²

It does not mean, however, that under a prosecutor's guidance the separation of powers doctrine is eroded. The roles of investigators and prosecutors can be kept separate, while maintaining mutual cooperation between the two agencies.⁵⁴³ This means that in carrying out investigations, the two agencies can maintain collaboration, but this does not mean that their roles are integrated. Each agency still remains with its distinctive role. The distinctiveness is necessary so that the role of each agency in a criminal justice process is able to be evaluated and each agency will be held accountable for any defect in the performance of its duties. It is also for this reason that the role of prosecutors should be limited to providing guidance because if they become involved in the actual investigation, there will be no proper checks and balances. Prosecutors do not give directions on an investigation process in a vacuum or for frivolous reasons. They operate within the framework of law and procedures. Their involvement in the process is to ensure compliance with the law and not to usurp the power, functions and independence of investigators. They are an important intermediary between investigators and the courts.⁵⁴⁴

Prosecutorial independence is enhanced by the principle of legality, which ensures that all known cases with evidence are prosecuted. This prevents the impact of any interference that external stakeholders may attempt to do.⁵⁴⁵ The principle of legality ensures that state organs do not extend their powers beyond the parameters of law, because it supposes that when there is an unlawful conduct, it should be corrected. This was stated in the case of *Namibia Airports Company Ltd v China State Engineering Construction Corporation*.⁵⁴⁶ One of the control mechanisms to realise this principle is when the power of investigators is monitored and, therefore, when necessary guided by prosecutors through inter-agency cooperation models.⁵⁴⁷

⁵⁴² Sultana (2012) at p 55.

⁵⁴³ Krone (1999).

⁵⁴⁴ Voigt and Wulf (2017), at p 5.

⁵⁴⁵ Kjelby (2015: 76).

⁵⁴⁶ *Namibia Airports Company Ltd v China State Engineering Construction Corporation* (HC-MD-CIV-MOT-REV-2017/444) [2019] NAHCMD 171 (07 June 2019), at para 33.

⁵⁴⁷ Mguni and Muller (2009) at p 113.

It was stated earlier that while the Prosecutor-General and the functions of her office are part of the judiciary, prosecutors are part of the executive, appointed on the recommendations of the Public Service Commission. This is unlike in countries like France where prosecutors and not only the head of the prosecution services are members of the judiciary. This gives prosecutors independence, which will not be compromised by investigators, who are members of the executive, in the course of their cooperation. In Brazil, although the Prosecution Services is part of the executive, reforms have been made creating an independent prosecutions service.⁵⁴⁸ In Namibia, though in practice the Prosecutor-General and prosecutors are independent, it was not without some working relationship challenges, which resulted in the Attorney-General filing an *Ex Parte* application discussed above.

What are the implications of locating the Namibian Prosecutor-General prosecution agency in the judiciary, but prosecutors in the executive branch of government on the principle of separation of powers? A senior prosecutor⁵⁴⁹ stated that prosecution and investigation agencies should remain independent of each other, despite belonging to the same branch. Prosecution-guided investigations are only meant to enhance investigation and produce credible evidence and are not meant to subordinate one agency to the other. These words are echoed by Brown.⁵⁵⁰ Under the communicative approach of collaboration, the term ‘advising’ leaves investigators with a choice whether or not to adopt the advice from prosecutors.

Another senior investigator⁵⁵¹ maintained that cooperation between investigators and prosecutors will not compromise the doctrine of separation of powers or independence of the prosecution, because the framework of cooperation, the police or other investigation agency officials will still be in charge of investigation, whilst prosecutors will be in charge of taking decisions on prosecution. No agency’s official will arrogate the powers and responsibilities that are within the domain of another agency’s official. Having officials from the two agencies working together on an investigation does not mean that there is no demarcation of the boundaries of the functions of the two agencies. Each agency remains subject to a law from where it derives its mandate, even if people see the relationship to appear seamless. As

⁵⁴⁸ Mguni and Muller (2009), at p 10, 12.

⁵⁴⁹ S-WHC (2020).

⁵⁵⁰ See Brown (2015) at 60.

⁵⁵¹ A-WPOL (2019).

a matter of fact, in *State of Tamil Nadu v State of Kerala and Another*,⁵⁵² the Court maintained that even when there is seemingly a thin line between the executive, legislature and judiciary, the doctrine of separation of powers is still valid.

Both the prosecution and investigation agencies serve one purpose, namely furthering the interests of justice.⁵⁵³ Both agencies pursue criminal charges in order to contribute to the maintenance of public order and safety. In Namibia, investigation and prosecution agencies pursue investigations and charges for the ultimate adjudication by a competent adjudicating authority, namely magistrates and judges. Therefore, they are bound to cooperate for the purpose of attaining the maintenance of law and order than for the purpose of defeating the end of justice or compromising the independence of either agency.

The theory of separation of powers should take into account the reality of intertwined roles of investigators and prosecutors. Thus, in Australia the Department of Public Prosecution (DPP) is amenable to consultation in prosecuting crimes. It is stated that:

Reports into the relationship between police and independent prosecutors have stressed repeatedly the need for communication and consultation between the two. In this way there is a moderation of the independence of each.⁵⁵⁴

It should be noted that a communication between the two agencies is not a hierarchical communication, in which one agency is commanded by another. It is a two-way traffic, horizontal communication in which deference is maintained between agencies.

In addition to the above, it is acknowledged that prosecutors should act fairly and objectively, and that they should not be drawn into the investigative process of the case. However, independence should not imply a complete barrier between investigators and prosecutors, where they only meet when there is a delivery of a brief of evidence. Coordination of investigations between the two agencies should not be taken off the table. Qosaj-Mustafa propounds that to ensure efficiency in the administration of justice, independence and impartiality should be maintained, while a professional coordination is maintained between investigators and prosecutors.⁵⁵⁵

⁵⁵² *State of Tamil Nadu v State of Kerala and Another* [2014] INSC 405 (7 May 2014), at para 104.

⁵⁵³ Waters (2008) at p 29.

⁵⁵⁴ Krone (1999) at 18.

⁵⁵⁵ Qosaj-Mustafa (2014) at p 11.

Reviewing prosecutors do not reinvestigate crimes, but they depend on the primary reports of evidences gathered by investigation officers and improve on them. The process is based on the investigator-dominated approach to investigations and on the communication model. On the basis of this information, a decision to prosecute a crime is taken. Since police reports are generally watered down by inadmissible evidence, given the level of their skills, if investigation reports are to be reconceptualised by an officer who is proficient in legal matters, persuasive arguments for prosecution could be established.⁵⁵⁶

A senior prosecutor⁵⁵⁷ was asked whether the collaboration between prosecutors and investigators does not compromise the independence of agencies, to which she replied that:

Prosecutors only guide investigators but investigators are not bound to follow instructions of prosecutors. And there is nothing in law that a prosecutor can do to compel an investigator to follow his instructions, in the event that an investigator chose not to cooperate.

The afore-mentioned prosecutor maintained that it is imperative to have prosecutor-guided investigations, for the purpose of ensuring that investigators are not working in isolation to the detriment of the prosecution of an offence. Prosecutors can always assist in guiding investigation, as long as they do not assume the primary function of investigating an offence. They should leave this to investigators in order to maintain the independence of the investigation agency.

Another senior prosecutor⁵⁵⁸ asserted that the legal system recognises that prosecution and investigation agencies are two separate agencies independent from each other and the current practice of guidance does not compromise the doctrine of separation of powers, because an investigator is not compelled to follow the guidelines provided by a prosecutor. She maintained that:

The basis of cooperation is designed by the law, starting with the Constitution which establishes the office of the Prosecutor-General and assigning the prosecution exclusively to the Prosecutor-General and the same constitution established the Police Force and mandated Parliament to enact a law, the Police Act, No. 19 of 1990, which vests the power of investigating offences in the Police. Cooperation is based on the recognition of the separation of powers between the Prosecutor-General and the Police. They have different roles. The two can't operate in isolation, because each agency has expertise but they have different roles, which cannot be performed independent of each other.⁵⁵⁹

⁵⁵⁶ Nelson (2013) at pp 7 – 8.

⁵⁵⁷ H-OSH (2019).

⁵⁵⁸ H- OSH (2019).

⁵⁵⁹ H- OSH (2019).

Cooperation is framed in such a manner that no agency is subordinated to another and the ultimate decision on what to do with the investigation and prosecution rests with investigators and prosecutors, respectively.

There are no cases decided yet by the Namibian courts on independence of the prosecution in respect of inter-agency cooperation. A guiding framework can be found from the Indian jurisdiction. In the case of *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others*,⁵⁶⁰ the Court maintained that a prosecutor is not part of the investigation agency, but an independent authority, who can disagree with investigators. He or she can point out that investigation has not been carried in a proper manner. To safeguard against such defective investigations, it is important that prosecutors' guidance is sought, not to take over the investigation, but to guide on the process to be followed. Against this background, it should be understood that cooperation between investigators and prosecutors do not compromise the separation of powers doctrine. It is rather coordination which Varshney⁵⁶¹ contends is necessary for the success of the police investigation, which is viable only when there is cooperation between the two agencies from the time of laying charges until the end of a trial in the court.

It is further in line with the doctrine of separation of powers for prosecutors, or the Prosecutor-General who is a member of the judiciary, to guide investigators. This is because the doctrine of separation of powers does not exclude the concept of checks and balances, as stated in the case of *Matengu v Ministry of Safety and Security and Others*.⁵⁶² This means that one branch of government to check on another branch. As equal entities, there are rights, obligations and responsibilities on each branch to check what another branch is doing. This is to ensure that there are no arbitrary decisions made by one branch. Accordingly, when there is inter-agency cooperation, there will be no arbitrary procedures made in investigation processes.⁵⁶³ In view of the importance of the checks and balances, The practice in Namibia of housing investigators for serious crime to operate from the prosecution agency offices is supported by this study as it ensures prosecutorial independence, unlike when prosecutors are

⁵⁶⁰ *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others* (1994) 4 SCC 602

⁵⁶¹ Varshney (2006) at 284.

⁵⁶² *Matengu v Ministry of Safety and Security and Others* [2017] NAHCMD 12, at para 8.

⁵⁶³ Sultana (2012) at p 56.

taken to operate from investigation agency offices, a situation which Voigts and Wulf⁵⁶⁴ said makes them susceptible to undue influence.

Investigators' collaboration with prosecutors is provided for in the law. For example, the *Anti-Corruption Act*⁵⁶⁵ provided for investigators to "consult, co-operate and exchange information with appropriate bodies". This means that in the course of their investigations, ACC investigators can cooperate with the prosecution. For police investigators it has already been stated above (see Chapter Six) that cooperation with the prosecution is triggered by the need to ensure that lawful procedures have been followed in investigations. A question now arises regarding where the cooperation scheme leaves the separation of powers doctrine.

As the Police and the ACC belong to the executive branch of the government, it means that the Inspector-General of the Police and the Prosecutor-General, respectively, belong to the executive and judiciary. Police independence within the concept of the doctrine of separation of powers refer to political interference in the work for the police, which has ultimate impact on the rule of law. The concept is not applied to judicial direction or guidance of the police in the execution of their duties that include investigation of offences. Therefore, when prosecutors provide guidance to investigators in the course of investigations of offences, this does not compromise the independence of police investigations.⁵⁶⁶

The guidance by prosecutors is premised on the fact that prosecutors perform quasi-judicial functions. It should be noted that in the British legal system where fully-fledged prosecution agencies did not exist, it was felt that police officers do not have the necessary capacity and skills to carry out quasi-judicial functions and therefore solicitors received instructions from the police to prosecute offences. Later a fully-fledged prosecution authority was established. Given this background, it follows logic that prosecutors become involved in the investigations, given their knowledge of judicial procedures. This does not compromise the independence of investigators and a separation of powers between the two agencies still remains.⁵⁶⁷

⁵⁶⁴ Voigts and Wulf (2017) at p 4.

⁵⁶⁵ *Anti-Corruption Act*, No. 8 of 2003, s 3 (c).

⁵⁶⁶ Stenning (2011).

⁵⁶⁷ Jackson (2004), at p 112.

Within the sphere of the separation of power doctrine and the principle of checks and balances, the investigation agency still remains accountable to the prosecution agency regarding their conduct during the arrest. The interrogation of suspects and other stages of investigations are subject to law and since it is prosecutors who will place evidence before the court, they are entitled to be guaranteed that the evidence that they will be placed before court during trial was properly obtained. Prosecutors can be better assured of this fact when they have followed the investigation process, including becoming involved in guiding investigators how to carry out investigation. Under this framework, separation of powers between the two agencies still exists.

The independence of investigators depends on the level of guidance and the volume thereof. For example, in a prosecutor-dominated approach, investigators do not work independently. In the Namibian legal system which adopts a communicative cooperation approach, although prosecutors guide investigators in serious offences, the fact that investigators are at liberty to follow or ignore prosecutorial guidance signifies their independence that inter-agency collaboration is facilitated in a manner that conceivably ensures the separation of powers and independence of the investigation agency.

Prosecutors are gatekeepers for the adjudication process and they need to determine whether the case is prosecutable. Therefore, their involvement in the investigation is only to determine whether the evidence gathered is sufficient and whether it was in line with statutory requirements. They can ascertain this after an investigation has been completed, or during the period when investigators are gathering evidence. Prosecutors can even become involved prior to the commencement of an investigation. Investigators internalise the guidance provided by prosecutors and in the course of prosecutors' involvement, they would have regard to the independence of the investigation agency.⁵⁶⁸

The independence of the investigation agency should not be overemphasised at the cost of a failure to generate criminal charges because if investigation officers are not guided, they can err in the investigation process and even mislead prosecutors. Further, it should be noted that there is a legal duty on the part of investigators to provide information to prosecutors and any

⁵⁶⁸ Richman (2019).

facts known to them.⁵⁶⁹ When investigators fail to do this, it is a fatal omission that makes them liable. Inter-agency cooperation will ensure that no vital information is withheld and investigators will act within the expectations of the legal duty that they owe to the legal system.

On the question whether prosecutors' guidelines compromise the independence of the investigation agency, a senior prosecutor explained that there has been debate whether prosecutors' involvement in investigations amounts to instructing investigators what to do. He stated that:

The Police's stance is that if a prosecutor put a request in the investigation diary, that becomes an instruction, but we still feel as prosecutors that it is a guideline. I cannot ask a police officer who didn't adhere to instructions to be disciplined.⁵⁷⁰

When a unit commander in the police endorses the request of the prosecutor, it becomes an official instruction from a supervisor to the police officer who would carry out the investigation. This is the only time when an investigator can be disciplined if he or she has not followed the instruction from his or her superior. The afore-said senior prosecutor maintained that prosecutors respect the separation of powers between the two agencies and know the limit of their power. For this reason, the relationship is respectful and efforts are made not to interfere with each other's powers and functions.

Independence is determined by factors like the nature of directive and instructions, degree of control and influence by another agency, the frequency of such influence and whether an agency is bound by the directives.⁵⁷¹ Although the French system adopts a dominant cooperation model, in practice the police carry out criminal investigations and the *procureur* only oversee the investigation. This judicial supervision of prosecutors over police investigation does not translate into direction and command, but is symbolised by a relationship of trust between the two agencies.⁵⁷² Accordingly, independence of the investigation agency is sufficiently guaranteed. Hodgson and Soubise states that:

[S]upervision did not consist in monitoring checks, which could be resented by police officers, or even presence during the *garde à vue*. Instead, oversight of the police is concerned to demonstrate compliance with the form, rather than the process of the investigation, and is essentially distant and based on a relationship of trust, due to the dependence of *procureurs* on the police for gathering evidence, as well as resource and time constraints.

⁵⁶⁹ *Carmichelle v Minister of Safety and Security*, 2001 (4) SA 938 (CC).

⁵⁷⁰ B-WLC (2019).

⁵⁷¹ Voigts and Wulf (2017),

⁵⁷² Hodgson and Soubise (2017).

The fact that prosecutors do not sit in police interviews of suspects and do not go to police stations to check on the *garde à vue* shows that the police's independence is observed in the French legal system. The prosecution agency understands that the degree of control should be kept minimal in order to satisfy the requirements of the separation of powers doctrine.

A senior investigator⁵⁷³ stressed that the doctrine of separation of powers would not be complied with, when there is interference into the activities of one branch by another branch of the government. But with inter-agency cooperation, the key word is collaboration. When two agencies are collaborating, the relationship is complementarity of duties and not interference. He maintained that both parties represent the state and are working towards one goal, *i.e.*, the interests of the administration of justice.

Inter-agency cooperation between investigators and prosecutors also work well in favour of promoting the doctrine of separation of powers or constabulary independence. This is particularly when members of the executive are interfering with the investigation by the police or other investigation agencies. In Brazil, for example, President Paul Bolsonaro tried to interfere with police investigations, prompting the Supreme Court to order an investigation in the claims.⁵⁷⁴ Prosecutors are better placed to advise the police in the investigation of such claims as they know the ambit of law that they can determine unlawful interference with investigations by the executive.

Prosecutors working with the police, like the ones working on serious crimes in Namibia are not compromised in respect of their independence. Prosecutors who are compromised are those who work from offices physically placed in military bases, because they are seen as part of those military establishments. The report *on the Situation of Human Rights in Mexico*, by the Inter-American Commission of Human Rights states that:

The Commission believes that this situation seriously compromises the objectivity and independence of the prosecutor. At a minimum, under these circumstances, members of the Army have greater access to the prosecutor than do other individuals, including other State authorities and private individuals.

It is surmised in the report that it is difficult for people who want to access those prosecutors because it is another hassle to gain access to military installations. Further, while prosecutors

⁵⁷³ F-WPOL (2019).

⁵⁷⁴ Lima (2020).

working in these environments do not hierarchically fall under the command of military commanders, in practice they receive orders from them in carrying out their duties. This practice is not applicable to prosecutors working in the environment of police investigators.

7.7 Conclusion

There is a need for different branches of government to maintain their distinctiveness in working together with other branches. In their collaboration, no branch should be subordinate to another as this does not reflect the elements of the doctrine of separation of powers. An investigation agency should independently decide on when and whether to initiate an investigation for an offence. During the process of investigation, it can seek guidance from prosecution agency without becoming subservient. The purpose is for the prosecution to provide opinion on the lawfulness of the conduct of investigators in the process of investigation and the admissibility of the evidence emanating from the investigation report. Similarly, when it comes to prosecution, investigators should not seek to influence the prosecution regarding the prosecution of the offence. The prosecution should independently decide whether an offence should be prosecuted and during the process of prosecution, whether proceedings should be stayed or stopped completely. This illustrates that each agency is taking decisions without any influence or interference from outside.

Different jurisdictions have their respective forms of prosecutorial independence and separation of powers and hence no universal model. These forms have a bearing of the cooperation formula that have been adopted. Namibia maintains a separation of powers and prosecutorial independence based on the principle of non-interference into the power and functions of another branch as decided by the Namibian Courts. Some of these characteristics are similar to other jurisdictions, particularly from the adversary legal system.

Inter-agency collaboration can be maintained between prosecutors and investigators without impacting negatively on the independence of either agency or the doctrine of separation of powers, particularly in the communicative cooperation model and equality formula that has been adopted in the Namibia legal system. But even in prosecutor-dominated cooperation formula that is prevalent in inquisitorial legal systems, the separation of powers can still be maintained in inter-agency collaboration, when in practice prosecutors refrain from directing investigators as if they are in a hierarchical relationship. The essence of the collaboration is to

ensure that there are checks and balances as complete autonomy and independence could be subjected to abuse. It further means that no branch of executive should endeavour to influence decisions made by another branch through the appointments, promotions and transfers of officials. To ensure this, the appointment of officials with quasi-judicial functions, like prosecutors, should, arguably be made in consultation with and / or the recommendation of quasi-judicial authorities. Similarly, judicial functionaries should have no influence in the appointments, promotions and transfers of investigators whose functions fall under the executive branch of government.



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CHAPTER EIGHT

SUGGESTED FRAMEWORK AND FORMULA OF COOPERATION BETWEEN PROSECUTORS AND INVESTIGATORS IN NAMIBIA

8.1 Introduction

In order to have a consistent approach to inter-agency cooperation between prosecutors and investigators in the Namibian legal system, it is imperative to design a framework and formula of cooperation that will enhance efficiency in the criminal justice process. Instruments of cooperation like legislation and policy guidelines, including manuals of operations, should be put in place. Inter-agency cooperation should focus on serious crime, as this is where police and other investigators have shortcomings and require guidance from prosecutors. Investigations of minor offences can be left to the police, so that the prosecution should not be turned into an investigation agency because that is not their primary function. Their core-function is to prosecute and cannot, therefore, be involved in guiding investigators in all offences. As stated above (see Chapter Two), inter-agency cooperation in serious crime is also a practice in other jurisdictions, like Brazil, Cameroon, India and the UK, among others.

Having a documented inter-agency cooperation framework fosters the principle of adhering to the rule of law. This principle safeguards against persecution of suspects through investigations and prosecution thereof. It serves as a legal instrument to constrain the abuse of power by agencies' officials.⁵⁷⁵ With instruments of cooperation in place, when officials from one agency are working outside the framework of the rule of law, others will be able to correct them.

When there is a written framework of cooperation that guides the two agencies, it prevents the atmosphere of unconstructive competition. When investigators and prosecutors work together at the initial phase of investigation, a spirit of collegiality prevails and all will accept their responsibility for what comes out of the investigation. A senior prosecutor stated that investigators and prosecutors act as if they are in competition to control the process, with investigators maintaining that they are the owners of the dockets, while prosecutors maintain

⁵⁷⁵ Kjelby (2015) at p. 62.

that they are the ones that prosecute the offence at the trial and, therefore, they matter more than investigators.⁵⁷⁶

This chapter discusses the instruments of cooperation that are necessary to be introduced in the Namibian criminal justice process, citing examples from jurisdictions with both inquisitorial and adversarial legal systems. The chapter will look at the principles and formulas applicable to these instruments and recommend a suitable hybrid model for Namibia. The chapter answers the research question: “What can be done to ensure investigator-prosecutor interactions at every stage of the investigation?” Like in the previous chapters, cases from the jurisdictions discussed in Chapter Three will be cited, as there are no applicable cases from the Namibian courts.

8.2 Instruments of cooperation

It is important to have instruments of inter-agency cooperation documented, like the regulations, policies or manuals of operations that specify how investigations are to be carried out. The Police Executive Research Forum⁵⁷⁷ maintains that effective investigations require written policies that guide investigators regarding their duties and responsibilities. This promotes certainty and consistency in the practice of the criminal justice process.

Crime scene and evidence collection require standard protocols that are documented so that the necessary investigation procedures can be fully explored. The absence of definite legal framework creates a dilemma for joint investigation teams comprising investigators and prosecutors, particularly in respect of common standards and the nature of the supervision of investigations.⁵⁷⁸ It further puts into question the legality of inter-agency cooperation when there is no legal framework providing for that. It then follows that the absence of a legal framework may result in one agency encroaching upon the domain of another, or failing to act under the impression that it has no role to play in a particular stage of the criminal justice process.

⁵⁷⁶ F-WPOL (2019).

⁵⁷⁷ Police Executive Research Forum (2018) at 19.

⁵⁷⁸ Dandurand (2005), at 11.

Instruments of cooperation should be developed with inputs from both investigators and prosecutors. Not only because both officials will be affected by the framework, but also because these personnel know the gaps that need to be filled in inter-agency cooperation and will, therefore, assist in ensuring that instruments of cooperation that will be formulated will benefit a new direction in the criminal justice process.

8.2.1 Legislation

Legislation is an important instrument to guide cooperation between investigators and prosecutors. The current Namibian statutes, namely the Constitution, *the Anti-Corruption Act*,⁵⁷⁹ *Police Act*⁵⁸⁰ or *Criminal Procedures Act*.⁵⁸¹ do not considerably address inter-agency cooperation between investigators and prosecutors. The *Police Act*⁵⁸² just provides the power to the Police to carry out criminal investigations without providing for a framework how this task should be performed. The Namibian Constitution merely provides that the Prosecutor-General is vested with the power to prosecute, a function which he or she can delegate to other officials like prosecutors in both the High Court and lower courts. These court officials are, however, not obliged by legislation to provide guidance to investigators in the investigation of offences. The *Criminal Procedures Act*⁵⁸³ provides for the power of the Prosecutor-General to initiate prosecutions in the name of the state without any reference to the role of prosecutors in investigations. This state of affairs leaves a vacuum in inter-agency cooperation among investigating and prosecution agencies.

In other jurisdictions, like The Netherlands, there is a *Wet bijzondere opsporingsbevoegdheden* (BOB – *Special Powers of Investigation Act*), which was passed in 2000, which provides for prosecutors' involvement in the investigation of complex crimes in which prosecutors decide on the methods to be employed,⁵⁸⁴ signifying a prosecutor-dominated approach to investigations. It has been stated above (see Chapter One) that the Namibian legal system adopts the Roman-Dutch law and it is, thus, arguably essential to take example from the Dutch legal system regarding inter-agency cooperation between

⁵⁷⁹ No. 8 of 2004.

⁵⁸⁰ No. 19 of 1990.

⁵⁸¹ No 51 of 1977a.

⁵⁸² No. 19 of 1990.

⁵⁸³ No 51 Of 1977.

⁵⁸⁴ Van de Bunt and Van Gelder (2012) at 135.

prosecutors and investigators in the investigation of offences. Having legislation as an authority creates stability in interactions among stakeholders in the criminal justice process. Meanwhile, when there is lack of formal authority for prosecutors to direct investigators to investigate an offence which they will bring forth for prosecution and lack of formal authority for investigators to suggest that prosecutors proceed with prosecuting an offence, it signifies some fragmentation in the criminal justice process.⁵⁸⁵

The South African jurisdiction has the *National Prosecution Authority Act*,⁵⁸⁶ in addition to the above-stated *Criminal Procedures Act*,⁵⁸⁷ as an instrument that lays ground for inter-agency cooperation between investigators and prosecutors in organised crimes.⁵⁸⁸ This Act provides for the establishment of a Directorate of Investigations and the staff (prosecutors) of this Directorate could be requested to initiate an investigation. Further, the Act provides that the Director of an Investigation Directorate may provide directives and/or guidelines to, or seek assistance from the Provincial Commissioner of Police in respect of an investigation of an offence. When so requested, the Provincial Commissioner is under obligation to comply with the request and failure to comply will, therefore, be an unlawful omission. The South African Constitutional Court summed up the Investigation Directorate in the case of *Shaik and Others v S*⁵⁸⁹ as an entity with limited investigative power and functioning capacity to give precedence to investigation of serious and organised offences, for the purpose of ensuring effective prosecution of such offences. The Court surmised that the operation of the Investigative Directorate put into effect inter-agency cooperation in investigations in the South African criminal justice process. From the judgement it could be construed that the principle underlying inter-agency cooperation envisaged by the South African legislation is objectivity and material truth, because prosecutors endeavour not to favour or prejudice any party in the criminal justice process.

The essence of having a legal framework providing for the role of prosecutors in providing guidance to investigators was stated by the Indian Chief Justice Sinha in the case of *Jayadeva Prasad v Union of India (Uoi) and Another*.⁵⁹⁰ The learned Justice stated that there was a

⁵⁸⁵ Richman (2019) at 3.

⁵⁸⁶ No 32 of 1998.

⁵⁸⁷ No 51 of 1977b.

⁵⁸⁸ No 51 of 1977b.

⁵⁸⁹ *Shaik and Others v S* 2008 (2) SA 208 (CC).

⁵⁹⁰ *Jayadeva Prasad vs Union of India (Uoi) and Another*, W.P.(C) 4235/1996, at para 9.

need for an amendment to the legal framework to ensure that there was coordination between prosecution and investigation institutions. This followed a recommendation by the independent Review Committee, which recommended, among others, that the functions of prosecutors should include providing advice to investigators on all aspects related to criminal offences during the course of investigation and trial. This signifies a cooperation model as prosecutors provide advice to investigators to address issues of mutual concern in criminal justice, but each agency maintains its separate identity.

It should be noted that lack of a legislative framework can result in the validity of information obtained from inter-agency cooperation being challenged. This is illustrated by a decision by the Supreme Court in India in the case of *R. Sarala vs T.S. Velu and Others*,⁵⁹¹ decided two years earlier than the afore-mentioned *Prasad Case*. In the *Sarala Case*,⁵⁹² Justice Thomas declared that the *Code of Criminal Procedure* was the source of investigation and prosecution authority and in accordance with it, the role of a prosecutor was inside the court, whereas that of an investigator was outside the court. He maintained that to involve prosecutors in the investigations of offences was injudicious and investigators should, therefore, not be compelled to seek advice from prosecutors in the course of their investigation exercises. A jurisdiction in which inter-agency cooperation depends on goodwill of the two agencies, rather than on a legal framework, like the Namibian one, runs the risk of being slapped with a judgement similar to that of the *Sarala Case*.⁵⁹³

It should be stressed that even if cooperation is specified in a constitution, it should further be elaborated in legislation, regulations or manual of operations. In Chapter Three, it is stated that the Brazilian Constitution provides for inter-agency cooperation in terms of supplementary laws, yet the supplementary laws do not specify instances when and how should prosecutors exercise control across activities of the Police. It is, thus, recommended that when Namibia formulates a statute or regulations, aspects of inter-agency cooperation should be specifically spelt out.

⁵⁹¹ *R. Sarala vs T.S. Velu and Others*, No. 2711 of 1999.

⁵⁹² *R. Sarala vs T.S. Velu and Others*, No. 2711 of 1999.

⁵⁹³ *R. Sarala vs T.S. Velu and Others*, No. 2711 of 1999.

The Brazilian Constitution further empowers the prosecution agency to request investigation procedures and the setting up of a police investigation, stating the legal position of its acts.⁵⁹⁴ This provision is clearer than the afore-said provision of external control over activities of the police and it symbolises a communicative cooperation model, in which the prosecution requests and does not command or control the investigation agency. It is meant to enforce the principle of legality, for it is arguable that overseeing procedures adopted in investigation helps to safeguard suspects against the abuse of power by investigation agencies.

Against the above-mentioned, in order to improve efficiency and effectiveness in the investigation of offences, this study, thus, recommends that Namibia formulate a law to bring inter-agency cooperation between Namibian investigators and prosecutors under a legal framework. It is necessary to look at the review of existing legislation, in which a cooperation framework could be provided in the law. For example, legislation should be enacted providing that prosecutors should render assistance to investigators when required to do so, as it is provided in the South African *National Prosecution Authority Act*.⁵⁹⁵ The recommended Namibian legislation should further oblige prosecutors to provide directives on investigative procedures in a specified category of serious crimes. Such provisions will guard against selective inter-agency cooperation, where the police would choose which investigations they can seek advice from prosecutors. Further, it will compel prosecutors to provide the necessary advice to investigators rather than being left to do so at their will and convenience. Further, it could also be provided in the legislation governing the police that in the investigation of offences for serious offences, the police should endeavour to consult with the prosecution for guidance and necessary advice, as provided on the regulations and guidelines on investigations. The guidelines will then provide in detail the nature and degree of cooperation as discussed below.

An improvement could also be made to the *Anti-Corruption Act*.⁵⁹⁶ The Act provides for the Director-General to appoint a person with special expertise for specific investigations, subject to approval by the Prime Minister. A provision could be added that the Director-General could approach the Prosecutor-General's office to avail prosecutors for guidance in the investigation of serious corruption crimes. This is imperative when one looks at the case like

⁵⁹⁴ Constitution of the Federative Republic of Brazil (2010), article VIII.

⁵⁹⁵ No. 32 of 1998.

⁵⁹⁶ No. 8 of 2003.

the corruption case involving politicians and businesspersons known as “*the Fishrot Case*”. The suspects in the case are being charged for bribes paid to them between 2012 and 2018 for an Icelandic company Samheji to secure fishing quotas in Namibia. The charges further include fraud, corruptly using office for gratification, money laundering and conspiracy to commit corruption involving siphoning N\$ 75.6 million from the National Fishing Corporation of Namibia (Fishcor).⁵⁹⁷ The Namibian Prosecutor-General⁵⁹⁸ stated that her office had already liaised with the Icelandic authority in terms of the *Namibian International Cooperation in Criminal Matters Act*,⁵⁹⁹ which provides for assistance in investigation in trans-boundary offences. Against this background, it is important that prosecutors and investigators collaborate in the investigation process and it should be made a statutory provision, rather than a goodwill exercise on the part of the agencies’ officials.

8.2.2 Regulations and policies

A lack of policy guidelines does not augur well for inter-agency cooperation between investigators and prosecutors. Policy documents and regulations providing for the cooperation framework should be formulated by the Ministries responsible for justice and police, in consultation with other investigations agencies, like the Anti-Corruption Commission.⁶⁰⁰

The policy guidelines should provide the nature and type of offences in which inter-agency cooperation is required, as it is in the UK legal system in respect of the *Guidance on Investigating and Prosecuting Rape* (see Chapter Three). This is particularly necessary for some investigation techniques, like search and arrest warrants, so that investigators do not end up acting on invalid search or arrest warrants (see Chapter Four). In Texas, US, it is a practice that the police do not make an arrest without a warrant before engaging a prosecutor.⁶⁰¹ This is not a practice in Namibia, as Namibia only follows what is provided in

⁵⁹⁷ At the time of writing (September 2021) the amount is equivalent to US\$ 5.3 million.

⁵⁹⁸ *The Namibian*, 14 December 2019, at p 1.

⁵⁹⁹ *Namibian International Cooperation in Criminal Matters Act*, No. 9 of 2000; *The Namibian*, 14 December 2019, p 1.

⁶⁰⁰ Mapaire et al. (2014) at 50 – 51.

⁶⁰¹ Richman (2016) at p 3. This is just a practice, but it is not required by law. Articles 14.01 and 14.02 of the *Texas Code of Criminal Procedure* only states that a peace officer may arrest any person without warrants if offense is committed in his or her presence or within his or her view; if the offense is one classed as a felony or as an offense against the public peace; or when a felony or breach of the peace

the *Criminal Procedure Act*⁶⁰² regarding instances when the police can make an arrest without a warrant. Adopting inter-agency practice in Texas, when necessary, is a trend that could be explored if it is workable to avoid unnecessary procedural flaws.

The policy governing inter-agency cooperation should further provide for sanctions for non-adherence to the guidelines. It does not help to have a policy in place, which officials implement or disregard at their own conveniences. The policy framework should further provide for all investigators of serious crimes, not only from the police who are involved in commercial and financial crimes as it is currently the practice, but from other investigation agencies to be housed in the prosecution agency for easy coordination of cooperation in the process of investigation and that this coordination be maintained from the time of filing charges against the suspect until the completion of the trial in the court, as is the case in the Indian criminal justice system.⁶⁰³ A coordination model in terms of Liddle and Gelsthorpe's models should be adopted, where the separate identities of investigations will be maintained, though they are combining resources with prosecutors, in order to comply with the doctrine of separation of powers.

It could be made mandatory in the policy guidelines that when a serious offence is reported to the Police or Anti-Corruption Commission, they should inform prosecutors within a period of 48 hours, for example. Following this, prosecutors will, within 48 hours provide guidance for an investigation. This type of inter-agency cooperation will partly adopt the one from the French legal system, the difference being that in the French system it is applicable to all reported offences and not only to serious crimes (see Chapter Three). The mandatory

has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.

⁶⁰² No. 51 of 1977, s 40 (1), In terms of this section, a peace officer may without warrant arrest any person who, *inter alia*, commits or, attempts to commit any offence in his presence; or suspected suspects of having committed an offence referred to in Schedule 1 (listed in section 4.2 of this study); who has escaped or who attempts to escape from lawful custody; who has in his possession any implement of housebreaking and who is unable to satisfactorily account for such possession; who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, including livestock and whom the peace officer reasonably suspects of having committed an offence with respect to such thing; who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence; who is reasonable suspected of being a prohibited immigrant; and whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside Namibia, which if committed in Namibia, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody Namibia.

⁶⁰³ Varshney (2006) at p. 284).

reporting of serious offences to prosecutors should *ipso facto* have consequences that formal charges should be laid when prosecutors are satisfied, in order to avoid wasting time of the criminal justice process. This is a practice in the Canadian jurisdiction in Quebec, New Brunswick and British Columbia. In these districts, the police should await approval for the Attorney-General's consent before charges are laid. Without the consent of the Attorney-General, no charges can be laid. In approving the charges, the Attorney-General takes into consideration whether prospects of conviction at the trial exist.⁶⁰⁴ When there is disagreement between the police and Crown Attorneys on whether or not to lay charges, the matter is referred to higher officials who will make a decision. The formula of cooperation between prosecutors and investigators in the mainland is an operational cooperation signifying a dominant prosecution, as the laying of the charges at the discretion of the prosecution and the police's power is fettered. It further signifies a directive cooperation model, in which investigators concede to prosecutors to take a lead, determining whether charges should be laid.

Meanwhile in mainland Canada, the regulations provide that when a prosecutor feels that it is not in public interests to proceed with prosecution, he or she should first discuss the matter with an investigator before a public announcement is made.⁶⁰⁵ This signifies an equal approach to investigation where consideration is made that as primary custodians of investigations, investigators should have an input in the decision not to prosecute an offence. Consultation with investigators also helps to avoid arbitrary decisions by prosecutors. This trend is recommended for the Namibian inter-agency cooperation regulatory framework with some modification, adopting a communicative cooperation model.

There should be sound reasons, specified in the regulations, for prosecutors to disapprove the laying of charges. The reasons may be the absence of prima facie evidence and the absence of a suspect in Namibia. Also, it may not be in the public interest to prosecute while there are proceedings on the matter in another state, or before an international tribunal. But even when both investigators and prosecutors agree to decline laying charges and launching an investigation and the complaint is not satisfied, provision should be made that the complainant can approach the court to compel investigators to carry out an investigation,

⁶⁰⁴ Crown Attorney's Office (2009) at 7-6, 7-8.

⁶⁰⁵ Crown Attorney's Office (2009) at 5-10.

after proving to the court that the decision was arbitrary and it imposes a severe procedural burden on the party.⁶⁰⁶

Prosecutors should closely monitor the investigation diary and guide investigators, and not only wait to point out at the defects in investigation for the purpose of declining prosecution. This is in line with Justice Sathasivam's ruling in the case of *Shidharha Vashisht alias Manu Sharma vs State (NCT of Delhi)*⁶⁰⁷ when he said:

The purpose and the object seem to be quite clear that there should be fairness in investigation, transparency and a record should be maintained to ensure a proper investigation.

This arguably means that the record is kept to enable the ongoing investigation's compliance with law and not to wait until the investigation is complete and thrash it for non-compliance with the law.

There is no time frame set for investigations in Namibia. Investigation agencies can complete their investigations at their own convenience. In *Tjizu v S*,⁶⁰⁸ the High Court held that the period for completing an investigation falls within the discretion of the Court. The Court has, however, not specified a specific duration. Regulations and policy framework should provide for a time frame for investigations, as it is the case in inquisitorial systems, like the Brazilian legal system where investigations are expected to be completed within a period of three months in some instances and only extended when the Court grants permission.⁶⁰⁹ In the Russian jurisdiction the *Criminal Procedure Code*⁶¹⁰ provides that the time frame for completing an investigation is two months, after which an investigator can request extension.⁶¹¹ Providing a time frame in the regulations in the Namibian legal system will

⁶⁰⁶ Human Rights Watch (2014) at 4; Beck (2006) at 156 – 157, 181.

⁶⁰⁷ No. 179 of 2007, para 85.

⁶⁰⁸ *Tjizu v S* (CA 01/2017) [2017] NAHCMD 131 (08 May 2017), at para 28.

⁶⁰⁹ Mendonça (2014) at 65.

⁶¹⁰ No. 174-FZ of 2001.

⁶¹¹ *Criminal Procedure Code*, No. 174-FZ of 2001, art 162. Article 162 states:

- “The preliminary investigation on a criminal case shall be completed within two months from the day of institution of the criminal case.
- Into the term of the preliminary investigation shall be included the period of time from the day of institution of the criminal case until the day of forwarding it to the public prosecutor with the conclusion of guilt or with the resolution on handing over the criminal case to the court for examining the question about the application of forcible measures of the medical character, or until the day of adopting the resolution on the termination of the proceedings on the criminal case.
- Into the term of the preliminary investigation shall not be included the time for appealing by an investigator against the prosecutor's decision where it is provided for by Item 2 of Part One of Article

encourage efficiency in the criminal justice process and guard against the delay of justice. Both prosecutors involved in guiding investigations and investigators will be compelled to complete their tasks within a defined reasonable time.

Whether prosecutors are involved in guiding an investigation or not, if investigations are taking long, prosecutors should be able to point this out without fear or favour. Currently, this does happen, as stated by an investigator⁶¹² that she was taken on by a prosecutor in the court for the postponement of a trial. This study submits that when an accused is in custody or bail, the period of investigation should not just be left at the discretion of the court as stated in *Tjizu v S*,⁶¹³ but there should be a time frame set in binding, legislation, regulations or policies for consistency. Exception should, however, be applicable to cases where there is no prejudice to the suspect, *i.e.* unknown or not arrested.

There should be regulations governing investigations of crime committed by police officers. Although there is the Compliance and Discipline Unit which carries out investigations for offences committed by police officers (see Chapter Four), their investigations could be compromised when offences are committed by members of the Unit. Generally, there is

221 of this Code, as well as the time, during which the preliminary investigation was suspended on the grounds envisaged by the present Code.

- The term of the preliminary investigation stipulated by Part One of this article may be extended up to three months by the chief of the corresponding investigatory body.
- The term of the preliminary investigation on a criminal case, the inquisition of which is particularly complicated, may be extended by the chief of the investigatory agency for a constituent entity of the Russian Federation and by another chief of an investigatory body equated therewith, as well as by deputies thereof, by up to twelve months. A further extension of the term of the preliminary investigation may be effected only in exceptional cases by the Chairman of the Investigation Committee of the Russian Federation, by the chief of the investigatory agency of the appropriate federal executive body (under the federal executive body) or by deputies thereof.
- If a prosecutor returns a criminal case to an investigator in compliance with Part 1.1 of Article 211, Part One of Article 214 and Item 2 of Part One of Article 221 of this Code, the term for execution of the prosecutor's instructions shall be established by the chief of the investigatory agency that has taken over the criminal case and may not exceed one month as of the date of receiving this criminal case by the investigator. If a suspended or terminated criminal case is resumed or a criminal case is returned for additional investigation, the term of the additional investigation shall be fixed by the chief of the investigatory agency that has taken over the case and may not exceed one month as from the day when the criminal case comes to the investigator. The term of the preliminary investigation shall be further extended on general grounds in accordance with the order established by Parts Four, Five and Seven of this Article.
- If it is necessary to extend the term of the preliminary investigation, the investigator shall pass the corresponding resolution and shall submit it to the chief of an investigatory agency not later than five days prior to an expiry of the term of the preliminary investigation.”

The Code does not differentiate where the accused is in detention or not. It only obliges the investigator to notify the accused and his counsel, the victim or his representative about the extension.

⁶¹² K-WPOL (2019).

⁶¹³ *Tjizu v S* (CA 01/2017) [2017] NAHCMD 131 (08 May 2017), at para 28.

concern about impartiality when police officers investigate their colleagues. In the US, investigations of police officers by their colleagues have resulted in police officers who have committed offences escaping prosecution, as officers involved in investigations try to cover up for their law-breaking colleagues.⁶¹⁴ While there are no similar incidences reported in Namibia to date, this study avers that it is necessary to have appropriate regulations in place, in the event of any compromise in the justice criminal process involving investigations of police officers in the future.

It should be provided in the policy framework that investigators should undergo training regularly, because new crime techniques evolve from time to time. Joint trainings should also be provided in the policy, as advocated by the Asia-Pacific-Economic-Cooperation⁶¹⁵ that investigators' training should be aligned to specialist prosecutors. Joint training will strengthen cooperation between officials from the two agencies as in the course of investigation they will, arguably, be able to speak the same language and have a better common understanding of issues. Training should include areas like elements of criminal offence, admissible evidence, interrogation techniques, law on search and seizure, and preparing court papers, among others. The joint training should further cover judicial rulings on investigations, since the principle of *stare decisis* is applicable to the Namibian legal system, so that both investigators and prosecutors will appreciate procedures and processes that can invalidate investigations.⁶¹⁶

8.2.3 Manual of Operations

A Manual of Operations helps to maintain standardised investigation procedures that will guide investigators and prosecutors in their cooperation efforts and establish best practices that promote efficiency.⁶¹⁷ The Manual of Operations should define the roles of investigators and prosecutors in the investigation process, bearing in mind that investigation is the primary role of investigators, but prosecutors' involvement is pertinent to ensure compliance with the

⁶¹⁴ Krone (1999) at 5; Panwala A. S., 2003, Failure of local and federal prosecutors to curb police brutality, in *Fordham Urban Law Journal*, Vol. 30 (2), pp 639 – 662, at 648.

⁶¹⁵ Asia-Pacific-Economic-Cooperation (2014) at p 7. It has been observed in the US that the background differences in training have a negative impact on collaboration between prosecutors and investigators Castberg [s.a.] at 140.

⁶¹⁶ Police Executive Research Forum (2018) at 33; Richman (2019) at 9.

⁶¹⁷ Ladapo (2011) at 89.

law and hence it is to guide and lead investigators towards a successful investigation. In this respect, as it is practised in the US jurisdiction, prosecutors should not patronise investigators about what to say, but rather how they are expected to present their findings, including advising them on possible questions that would arise from their investigation during cross examination at the trial.⁶¹⁸

To further guarantee that prosecutors remain independent, the manual of operations should specify that prosecutors should guard against frequent consultation on a case. When a prosecutor becomes frequently involved in the investigation of a case, an investigator stands to benefit as there will be consistent guidance in the investigation process, but in a way, the prosecutor's independence will be compromised as in the process the prosecution agency becomes too much involved and by the time the matter is prosecuted, the prosecution agency would not be in a position to point out the loopholes in the investigation process in which it was heavily involved.⁶¹⁹

The role of prosecutors could further be elaborated in the Manual of Operations to include the practice in the South African jurisdiction of overseeing the search and seizure operations to determine their lawfulness, assisting investigators to identify materials that should be seized, and to question persons believed to possess information and materials related to an investigation to provide such information and/or materials. Accordingly, the Manual of Operations should underscore that the role of prosecutors in the course of an investigation will not be to carry out investigations, but to advise on the methods and procedures of investigation, provide guidance on aspects of law, ensuring that sufficient evidence is gathered and that this is done in compliance with statutory requirements. Prosecutors should monitor investigation quality and explain the evidential standards to investigators, including investigation strategies and facts that need clarification.⁶²⁰

The Manual of Operations should include steps and procedures to be followed by investigators, since the laying of the charges, and when to consult prosecutors, like prior to or

⁶¹⁸ Richman (2019) at 8

⁶¹⁹ Waldock (2015).

⁶²⁰ Castberg [s.a.] at 140; Van de Bunt and Van Gelder (2012) at 135; Richman (2019) at 8; *Shaik and Others v the State* 2008 (2) SA 208 (CC), at para 51 – 52; Consultative Council of European Prosecutors (2015).

after interrogation of suspects and witnesses. These are guidelines that detail activities to be followed and what investigators should refrain from doing, like consulting prosecutors when witness statements in specified serious offences are recorded as these have pertinent impact on a case at a later stage.

Further, the manual should also stipulate when investigators can proceed with investigations without guidance from prosecutors. It should be noted that that the purpose of investigation is not to create dependency of investigators on prosecutors, but rather the efficiency of the criminal justice process, hence when investigators can competently carry out their investigations, prosecutors can maintain their supervision at minimal level. Investigators should, however, keep prosecutors informed about the progress made in an investigation of an offence, so that when there are contradictions to lawful procedures, prosecutors can advise investigators at the earliest opportunity before they have taken wrongful steps far. This approach of keeping prosecutors abreast of the developments is supported by the Consultative Council of European Prosecutors⁶²¹ too.

The Manual of Operations guiding investigators and prosecutors in inter-agency cooperation should provide for the meetings between investigators and prosecutors, including the frequency, level and scope. The high-level meetings (senior management of investigation and prosecution agencies) should discuss offences that should receive priority in investigations and monitor the implementation of prosecution and investigation policies, as it is the practice with the Board of Prosecutors-General in the Dutch legal system.⁶²² This is to avoid different practices in the same jurisdiction, like in Namibia in respect of meetings between prosecutors and investigators from the police and the Anti-Corruption Commission in Khomas and Oshakati regions (see Chapter Four).

The Manual of Operations could be specific to particular crimes or it could be general to crime investigations. For example, the UK has the *Murder Investigation Manual*,⁶²³ *Crown Office and Procurator Fiscal Service Guidance for the Investigation and Prosecution of*

⁶²¹ Consultative Council of European Prosecutors (2015) at para 17.

⁶²² Van de Bunt and Van Gelder (2012) at 121 – 122.

⁶²³ National Centre for Policing Excellence (2006),

Serious Crime,⁶²⁴ *Crime Investigation Standard Operating Procedure (SOP) for Scotland*,⁶²⁵ and the *Disclosure Manual*,⁶²⁶ among others.

The Manual of Operations should provide for an investigator of a serious offence to map out with a prosecutor prior to the commencement of an investigation, steps and techniques that will be adopted, basic items to be factored in, the financial and human resources that will be required, types of expertise (internal and / or external) that should be used by the investigative team, the scope of inter-agency cooperation that will be required, information exchange between agencies and possible joint travel. Ideally, there should be an investigation plan with a legal guidance. The plan should outline the phases of investigation and an estimate of resources that will be spent, including the timeline.⁶²⁷ Investigators and prosecutors should further work closely, discussing ongoing investigations. This practice has proven to be effective in the US jurisdiction, following the integration of the Bureau of Intergovernmental Drug Enforcement (BIDE) in Maine state.

The Manual of Operations should have a sample of an investigation diary that makes provision for investigation activities to be recorded in a chronological order, the nature of investigation, date, time and where investigators note inputs and /or guidance by prosecutors and the results that the investigation produced. This is for senior investigation and prosecutorial officers to note the effectiveness of inter-agency cooperation. When an investigation involves more than one investigation agency, it should be spelt out in the Manual of Operations that these investigators should be coordinated jointly by a prosecutor, who will ensure appropriate inter-agency cooperation.⁶²⁸

The Manual of Operations should provide how prosecutors' guidance will be employed in matters related to disclosure. In the UK, for example, it is stated in the *Disclosure Manual*⁶²⁹ that prosecutors should be engaged in the disclosure process at an early stage. This will ensure that investigators disclose to the defence team the necessary information, as leaving

⁶²⁴ Scotland Prosecution Service [S.a.].

⁶²⁵ Scotland Prosecution Service (2018).

⁶²⁶ Crown Prosecution Service (2018).

⁶²⁷ Asia-Pacific-Economic-Cooperation (2014) at p 6; International Criminal Tribunal for the former Yugoslavia Republic, 2009, at 13.

⁶²⁸ Consultative Council of European Prosecutors (2015) at para 26.

⁶²⁹ Crown Prosecution Services (2018).

out pertinent disclosure will defeat their case at the trial. It also further ensures that that disclosure obligations are met, including retaining and recording relevant material that is reviewed and declared to the prosecutor. Similarly, the Manual of Operations should provide that before presenting serious offences investigations for trial, investigators should request prosecutors to run through the investigation diary. This practice is adopted in the Canadian system and provided in their *Guide Book of Policies and Procedures for the conduct of criminal prosecutions in Prince Edward Island*.⁶³⁰

The Manual of Operations should provide for the correlation of specialised units of the Police with that of the prosecution agency mentioned below (see section 8.4). Corresponding investigators should then liaise with corresponding prosecutors for guidance, as advocated by Braga et al.⁶³¹ that investigators have duties to liaise with prosecutors prior to and during the trial. The Manual of Operation should further provide for the level of police officers to carry out specific serious offences, as it is the case with the *Crime Investigation Standard Operating Procedure (SOP) for Scotland*, which for example, provides that Specialist Investigation Officers for serious crimes should hold a rank of Detective Inspector and above.⁶³² The Manual of Operations should provide that head of inter-agency investigation teams should possess strong leadership skills, an excellent criminal investigation supervisory background, skills to manage and supervise personnel, and strong qualities of teamwork.

8.3 Cooperation formula and principles

An equal relationship approach symbolises a separate lines of accountability for each agency. Such a horizontal relationship that is characterised by the absence of hierarchical power is in tandem with the principle of separation of powers.⁶³³ The communicative cooperation model is recommended. In this respect, while there is cooperation between investigators and prosecutors, they remain separate entities, that investigators are hierarchically subordinate only to their supervisors, ensuring that the doctrine of separation of powers is maintained between the two institutions. The decision on the officers to be deployed to investigations

⁶³⁰ Crown Attorney's Office (2009) at 7–2, 7–3.

⁶³¹ Braga et al. (2011) at p 3.

⁶³² Police of Scotland (2018).

⁶³³ Richman (2019) at 1.

rests with the investigation agency, but prosecutors can advise on the number of officers and skills required.⁶³⁴

There should be a provision that should a prosecutor observe that a particular investigator cannot competently carry out an investigation, such prosecutor can advise the investigation agency about the need for a replacement of the investigator in question. Further, provision should be made that in the course of their collaboration on investigations, prosecutors can give directions about investigations, but investigators should have an option whether to seek further clearance from their supervisors or proceed with investigation as advised by prosecutors. If investigators' supervisors concur with the recommendations by the prosecutors, then investigators should uphold the advice. When investigators' supervisors have strong reservations, the matter should be referred to the head of an investigation agency who should take a decision following consultation with the Attorney-General, whose opinion is binding, as it is a practice in the Indian criminal justice system.⁶³⁵ To ensure that investigations are not delayed, there should be a time frame put to the consultation process. For example, a supervisor should revert to a subordinate investigator within 48 hours, while the head of an agency should take a decision within 72 hours. This is to ensure that the principle of efficiency is upheld in inter-agency cooperation. The due process of effective and smooth functioning of a criminal justice is symbolised by investigators and prosecutors performing their duties expeditiously.⁶³⁶

It is argued that when prosecutors dominate the investigation process, it breaks the balance of power between prosecutors and the defence counsel, because the former has added advantages of more power, when they have been inquisitors during the investigation process. Elementary justice requires that there is balance between the accuser and the accused. This will not be attained when a prosecutor dominates the process as the investigator, the director of investigators in their investigation exercise and the later the prosecutor in the matter.⁶³⁷ Accordingly, the best is to leave this task to investigators, with prosecutors only guiding on procedural standards and monitoring the process. Further, as stated above (see Chapter

⁶³⁴ Montana (2009).

⁶³⁵ *Jayadeva Prasad vs Union of India (Uoi) and Another*, W.P.(C) 4235/1996, at para 10.

⁶³⁶ Consultative Council of European Prosecutors (2015) at para 21.

⁶³⁷ Pyo (2007), at 192.

Seven), a prosecutor who prosecutes the offence should not have been involved in the investigation of the same offence.

The approach of an equal approach is recommended for Namibia. An example is the approach adopted by the ICC, with the police carrying out investigations in teams with prosecutors attached to each investigation team as advisors.⁶³⁸ Police commanding investigation teams have substantial experience in crime investigations. During trials, senior attorneys are brought in to direct investigations which would be necessary to support ongoing trials. During the trial, investigation teams and prosecutors work very closely as an inseparable team. This is because investigations do not cease with the beginning of trial, as new evidence may arise during trial. The fact that prosecutors serve as advisors to investigation teams signifies that their role is not to dominate the criminal investigation process, but to serve as complementary partners to investigators.

The purpose of inter-agency cooperation should be to support the investigation; hence the equality approach is recommended. For example, in the UK, for a critical investigation a Gold Support Group is formed comprising investigators, prosecutors and other key stakeholders. The Group holds meetings to develop a strategy and identify potential risks in the investigation and mitigation thereof. The Group further assesses the resources required and it oversees and advises the investigation. Only when it is necessary that the Group directs the investigation, which still does not result in the prosecutor dominated approach as direction is done in the meetings and in addition, the senior investigator still has access to specialist investigation support from his peers within the police establishment.⁶³⁹

It is not advisable to adopt the prosecutor-dominated approach as found in the Cameroonian legal system, particularly the SSC investigations where prosecutors control investigation and give orders to police officers. Such type of an approach has the potentiality of resulting in a semi-combined operation by the two agencies and this type of seemingly seamless functioning of the two agencies is not compatible with the underlying principles of the

⁶³⁸ International Criminal Court, 2005, *Report of the Prosecutor of the International Criminal Court to the Security Council, pursuant to Resolution 1953 of 2005*; International Criminal Court, 2005, *Regulations of the Office of the Prosecutor General*, Regulation 32.

⁶³⁹ National Centre for Policing Excellence (2006), at 78 - 79.

doctrine of separation of powers. Taking a cue from the French legal system, Tomlison⁶⁴⁰ surmises that the dominant approach either by investigators or prosecutors is not advisable, as there is need to maintain checks and balances between the two agencies. Having one agency dominating the process excessively causes suspects or the criminal justice system to suffer injustice. When investigation officers have disproportionate dominant power over investigations, without collaboration or lax collaboration with prosecutors, they ignore elementary individual liberties and the state is put in an unfairly advantageous position over suspects.

Similarly, it is submitted that the investigator-dominated approach runs the risk of non-compliance with lawful procedures in the course of an investigation. When investigators can decide of investigation methods and steps without considering the input by a prosecutor, it defeats the principle of checks and balances and it leaves room for manipulated investigations. Accordingly, there should be monitoring by prosecutors as officials from an equal agency in the criminal justice process, whose inputs should be taken into consideration.

8.4 Corresponding structure

In order to have effective inter-agency cooperation, the structure of investigation and prosecution agencies should correspond to one another. Currently, the following structure exists in Khomas and Oshana regions:

The police have a Directorate of Criminal Investigations, divided into the following Divisions: Specialised Investigation Division, High Profile Investigation Division, Commercial Crime Investigation Unit, the National Central Bureau Interpol, and the Regional Crime Investigation Division. The Directorate is headed by the Commissioner, while the Divisions are headed by Deputy Commissioners. The Deputy Commissioners are assisted by both commissioned and non-commissioned officers, like Chief Inspectors, Inspectors, Warrant Officers and Sergeants who are involved in the actual data collection for investigation.⁶⁴¹

⁶⁴⁰ Tomlison (1983) at 164, 195.

⁶⁴¹ Nakuta and Cloete (2011) at 9 – 10; Namibian Police (2019).

The Regional Crime Investigation for the Khomas Region has the following sub-divisions, headed by Chief Inspectors:

- (i) Drug Law Enforcement Unit,
- (ii) Protected Resources Unit,
- (iii) Women and Child Protection Unit,
- (iv) Serious Crime Unit,
- (v) Scenes of Crime Unit,
- (vi) Stock Theft Unit,
- (vii) Motor Vehicle Theft Unit,
- (viii) Second Hand Goods Unit,
- (ix) Tourist Protection Unit,

The investigation structure in the Oshana region is headed by the Deputy Commissioner Investigations who serves as a Regional Crime Coordinator. The Deputy Commissioner reports to the Commissioner who is the Regional Commander of Police. Under the Deputy Commissioner are ten Unit Commanders of Specialised Units, namely:

- (i) Drug and Law Enforcement Unit,
- (ii) Protected Resources Unit,
- (iii) Gender-based Violence Unit,
- (iv) Community Crime Unit,
- (v) Serious Crime Unit,
- (vi) Scene of Crime Unit,
- (vii) Anti-Stock Theft Unit,
- (viii) Anti-Motor Vehicle Theft Unit,
- (ix) Second Hand Goods Unit, and
- (x) Tourism Protection Unit

Unit Commanders hold the rank of Chief Inspector in the police. In addition, there are two Chief Inspectors of the rank of staff officer to the Regional Crime Coordinator. Further, there are three Station Commanders at Oshakati, Ongwediva and Ondangwa police stations of the rank of Inspector who, too, report to the Regional Crime Coordinator. These officers head investigations for lesser offences like house breaking, common assault, assault with grievous bodily harm, theft of goods or money with the value of not more than N\$ 50 000-00 – (the exchange rate between US\$ and Namibia \$ at the time of writing, September 2021, is about

US\$1 = N\$ 14.5). These offences are prosecuted at the Oshakati District Magistrate's Court as it will be discussed below. For lesser offences, daily crime reports are about 20 at Ondangwa and Oshakati, while at Ongwediva they are around 10.⁶⁴²

At the Windhoek High Court, the Prosecutor-General is deputised by Deputy-Prosecutors General who are heading the following Units:

- (i) Commercial Crime Unit, dealing with financial transactions;
- (ii) The Sexual Offences Unit, whose head is at the Main Division of the High Court;
- (iii) Serious Crime Unit, dealing with murder and robbery;
- (iv) Assets Forfeiture Unit, dealings with preservation of property, seizure, confiscation and money laundering; and
- (v) Wildlife and Environmental Crime Unit.

The structure of the Oshakati Division of the High Court prosecution comprises three Deputy Prosecutor-Generals, each covering two Regional Magistrate's Courts, namely in Kunene and Omusati regions, Ohangwena and Oshikoto regions, Oshana region and part of Rundu.⁶⁴³ One of the Deputy Prosecutors-General serves as the overall head of the prosecution at the Oshakati Division of the High Court, holding the position of the Chief Prosecutor. Under the Deputy Prosecutors-General is one Chief Legal Officer (Control Prosecution Officer), and under this officer there are three Senior Legal Officers. These prosecution officers are divided among the following specialised units:

- (i) Commercial Crime Unit, dealing with financial transactions;
- (ii) The Sexual Offences Unit, whose head is at the Main Division of the High Court;
- (iii) Serious Crime Unit, dealing with murder and robbery;
- (iv) Assets Forfeiture Unit, dealings with preservation of property, seizure, confiscation and money laundering; and
- (v) Wildlife and Environmental Crime Unit.

There is no Corruption Unit at Oshakati, which means that all prosecutions on corruption that come to the High Court are referred to the Windhoek Division of the High Court. The prosecution for the Lower Court in Oshakati Regional Magistrate's Court is headed by the

⁶⁴² D-IPOL (2019).

⁶⁴³ G-OSH (2019).

Control Prosecution Officer, who reports to the Deputy Prosecutor-General at the Oshakati Division of the High Court.

The structures of investigators and prosecutors do not correspond to each other. This is largely because there is no standing regulated structure of inter-agency cooperation. This study submits that investigators' units within the Police should be clustered and be linked to those of the Prosecutors as follows: the Police's Drugs and Law Enforcement, Protected Resources and Second Hand Goods Units should be linked to the prosecutors' Commercial Crime Units for the purpose of inter-agency cooperation; Women and Child Protection / Gender-Based Violence Units of the Police should be linked to the Sexual Offences Units of the Prosecution; Community Crime, Serious Crime, Stock Theft and Motor-Vehicle Theft Units of the Police should be linked to the Serious Crime Units of the Prosecution. Investigation Units of the ACC should be linked to the prosecution's Asset Recovery / Asset Forfeiture and Corruption Units. Tourism Protection Unit of the Police should be linked to the Wildlife Unit of the Prosecution. Scene of Crime Unit in the Police should be linked to a corresponding Unit in the Prosecution, depending on the type of crime. Linking police units to corresponding prosecution units for the purpose of inter-agency cooperation will enable clear-cut cooperation at operational level among officials of the two agencies. It further facilitates smooth implementation of the federation and merger cooperation models when circumstances demand that they should be adopted.

This study submits that in order to enhance inter-agency collaboration, the departments and units in the investigation and prosecution agencies should correspond. This will make it convenient for an officer from one agency to know which counterpart he should approach, given the similarity of structures and level of officials in the two agencies. A hybrid formula is recommended, namely that an equality approach and communicative cooperation model are recommended for minor offences, while serious offences should be approached from a prosecutor-dominated perspective, featuring a directive cooperation and federation models advocated in Liddle and Gelsthorpe's typology. Accordingly, the practice in Namibia of housing investigators for serious crime to operate from the prosecution agency offices is supported by this study as it ensures prosecutorial independence, unlike when prosecutors are

taken to operate from investigation agency offices, a situation which Voigts and Wulf⁶⁴⁴ said makes them susceptible to undue influence.

8.5 Inclusion of sexual offences in constant inter-agency cooperation coordination framework

It was stated above (see Chapter Five, section 5.3) that police investigators work closely with prosecutors in commercial crimes under the *Prevention of Organised Crime Act*.⁶⁴⁵ It should be noted that sexual offences have a number of challenges to investigate, including the time factor that they require constant coordination. In an interview with a senior prosecutor,⁶⁴⁶ she stated that:

Sometimes investigations take long, without an involvement of prosecutors. By the time when the docket will be brought to the prosecution, a period of eight months had passed. The prosecutor will then notice that the crime scene was not visited and site plan was not taken. It will be impossible to do anything about these shortcomings after eight months of the commissioning of an offence.

It is for that reason that sexual offences require early involvement of investigators, so that they can apply at the earliest opportunity their adjudicative capacity as an investigative tool.⁶⁴⁷ If there was inter-agency cooperation, where investigators will immediately seek inputs from prosecutors in their investigations, prosecutors will immediately point out to the need to visit the crime scene and the state will not be confronted with the problem of insufficient evidence at the trial. Mbote and Akech,⁶⁴⁸ too, argue that some offences, like sexual offences require immediate medical examinations. When these are not obtained immediately, while a victim's body could be examined, it will adversely affect the required sufficient evidence to secure conviction. When there is a low rate for conviction, the public will lose confidence in the criminal justice process.

An example illustrating the need for constant coordination of investigation in sexual offences was the wrongful arrest that happened in the arrest of Junias Phillipus in July 2010, after he was found near the crime scene where a school girl, Magdaleena Stoffels, was brutally murdered after having been raped. The only consideration by the police, acting without

⁶⁴⁴ Voigts and Wulf (2017) at p 4.

⁶⁴⁵ No 29 of 2004.

⁶⁴⁶ A-SCPG (2019).

⁶⁴⁷ Richman (2016) at p 4.

⁶⁴⁸ Mbote and Akech (2011) at 121.

guidance from prosecutors was that the suspect was in the vicinity of the scene, at the time of discovering the offence. Semen was found on the body of the deceased. The Namibian *Criminal Procedure Act*⁶⁴⁹ provides for investigation by way of ascertaining bodily features. This includes blood samples and deoxyribonucleic acid (DNA) tests. The DNA sample is believed to be effective in providing correct results to investigations related to rape. After a first court appearance prosecution directed further investigation and a DNA test was carried, with the results of the tests not matching with the suspect's DNA samples. This resulted in charges being withdrawn against Junias, followed by Junias suing the state for wrongful arrest.⁶⁵⁰ Litigation for wrongful arrest was however dismissed because of prescription and the plaintiff only succeeded in the claim for malicious prosecution.⁶⁵¹

In sexual offences, investigators are confronted by ambiguity. Generally, they look at whether there was consent between the complainant and the offender when investigating a charge of sexual assault. But prosecutors will enrich an investigation by looking at whether or not consent was withdrawn at some stage. The assault will not be looked at sexual activity as a single act, because consent can be withdrawn and become invalid during one single sexual engagement.⁶⁵²

8.6 Conclusion

Inter-agency cooperation formula in which the prosecution agency is involved from the beginning of a criminal justice process will increase compliance with the law in the investigation process, and ensure that the process of investigation is fair. Further, it expedites the criminal justice process because investigations are availed reasonably sufficient and skilful human resources, forming a formidable and effective team that does not dwell on pointing fingers towards one another. Thus, it is imperative to have in place a regulatory framework binding to investigators and prosecutors, providing the essentials, structures and methods of collaboration.

⁶⁴⁹ No. 51 of 1977a, s 37.

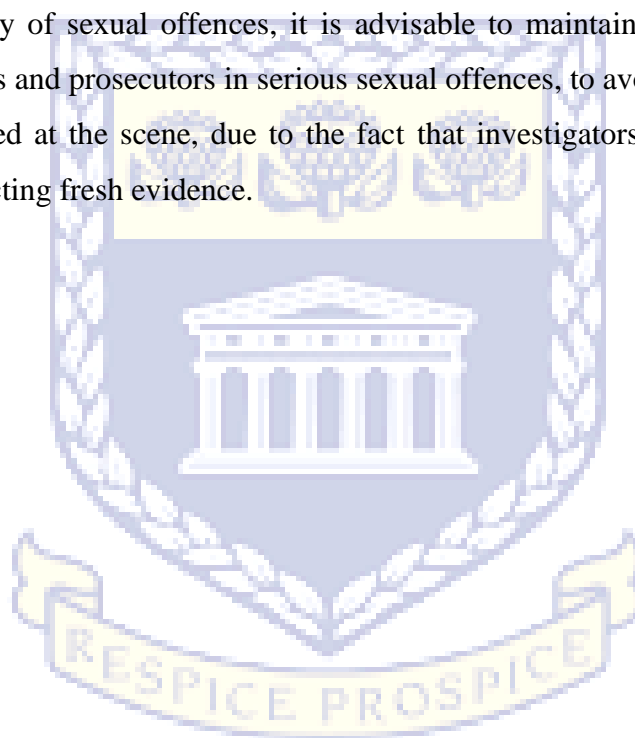
⁶⁵⁰ Menges (2011).

⁶⁵¹ *Fillipus v Government of the Republic of Namibia*, (I 1598-2013) [2016] NAHCMD 238 (18 August 2016).

⁶⁵² Segal (2015) at 33 and 85.

The regulatory framework is particularly essential for consistency in the criminal justice process. Statutes and policies adopted by the government, and in particular the manuals of operation, should provide detailed framework of cooperation stating the role of prosecutors in investigations, the type of offences where prosecutorial guidance in investigations will be required and the stages of investigation at which inter-agency cooperation should be adopted. The regulatory framework will further stipulate the level of coordination and the frequency of engagement between the two agencies.

Given the complexity of sexual offences, it is advisable to maintain constant coordination between investigators and prosecutors in serious sexual offences, to avoid errors like essential evidence not collected at the scene, due to the fact that investigators do not appreciate the significance of collecting fresh evidence.



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CHAPTER NINE CONCLUSION AND RECOMENDATIONS

9.1 Introduction

This study investigated aspects of inter-agency cooperation between investigators and prosecutors in Namibia listed below to answer the research questions.

- Trends in the Namibian criminal justice system, in respect of cooperation between investigators and prosecutors, *i.e.*, how common is it in Namibia for prosecutors to assist investigators and lessons that could be learned from other jurisdictions.
- The significance of coordination between investigators and prosecutors in the prosecution process and what can be done to ensure prosecutor/investigator interactions at every stage of the investigation.
- How inter-agency cooperation can be realised within the framework of separation of powers.

The study makes an epistemological contribution to the field of criminal justice process by positing that inter-agency cooperation between investigators and prosecutors carried out in a complementary structure is appropriate. It further makes an ontological contribution by arguing that the manner in which individuals in investigation and prosecution agencies engage should be positively set towards the process, law and regulations.

New knowledge created include the identification of two more cooperation formulas, in addition to the ones identified by Loraine R. Gelsthorpe. The formulas are the directive cooperation model, in which one agency dominates the collaboration and communicative cooperation model, and the communicative cooperation model, in which agencies maintain equality in their relationship.

9.2 Trends of inter-agency cooperation in the Namibian criminal justice system

In response to the research question regarding the trends in the Namibian criminal justice system, in respect of cooperation between investigators and prosecutors and how common is it in Namibia for prosecutors to assist the investigators, the study's findings are that there is no regulatory framework for inter-agency cooperation in Namibia. This has resulted in inconsistent practices of inter-agency cooperation in the Namibian jurisdiction. An example is the monthly meetings between prosecutors and investigators in the Khomas region which include only senior officers, while similar meetings in the Oshana Region include junior officers. Formal inter-agency collaboration in Namibia takes place between police investigators and prosecutors, but not between prosecutors and ACC investigators. For serious crimes, collaboration at an operation level is maintained between prosecutors and investigators, along the coordination model of inter-agency cooperation. A survey of some jurisdictions around the world reveals that there are some jurisdictions without regulatory framework, like Namibia, whereas some have regulatory frameworks which bring consistency in inter-agency cooperation.

9.3 The significance of inter-agency cooperation in Namibia

On the research question of what is the significance of coordination between investigators and prosecutors in the prosecution process, the findings of the study are that the significance of inter-agency collaboration is, *inter alia*, to guard against contradictions between investigators and prosecutors and to avoid incongruities in the activities of agencies at the trials. Inter-agency cooperation serves the purpose of procedural gathering of information and guards against coercing suspects and extracting information from them in a manner contrary to the due process of law. In the process of inter-agency cooperation, prosecutors will guide investigators to avoid irregularities such as wrongful arrests, illegally or irregularly obtained evidence, which may be inadmissible in court. Lack of appraisal during investigation results in prosecution failing and crime perpetrators being acquitted as a result of technical aspects of the case, when investigations are riddled with erroneous facts and information.

Further, guided investigations by prosecutors assist to unlock ambiguities in cases like assault by threat. This offence poses a challenge to investigators when compiling reports, as they do not include all the necessary elements of the offence. But with guidance from prosecutors,

investigators are able to specify the elements and a docket will be trial-ready. At the trial, a prosecutor will not struggle to present evidence, because it has been included in the file with a high degree of professionalism from the prosecutor-guided investigation.

Further, inter-agency cooperation in serious crime serves the purpose of focusing on the essential offence for which the accused was charged. Evidence gathered by investigators should be ready for trial, specifying the elements of crimes committed. Inter-agency cooperation also guards against investigators and prosecutors attaching different importance and interpretation to the evidence collected, when working in isolation as this is detrimental to the successful prosecution of crimes at the trial. The study avers that inter-agency coordination is necessary to realise the balance between promoting the interest of justice and guarding against prejudice to the accused.

The findings of the study are that inter-agency collaboration and cooperation enables the efficient and effective management of the criminal justice process. The lack thereof leads to delays in finalising investigations and trials partly because of lack of sufficient knowledge on criminal justice on the part of investigators. Lack of proper investigation of cases compromises the quality of evidence for the purpose of prosecution. It further leads to unnecessary postponements of cases. Accordingly, prosecutors advise investigators during an early stage of investigation, so that the process of investigation can be compliant with the law. For the advice rendered at the early stage of investigation, prosecutors adopt the cooperation and coordination models, utilising their resources and joining investigations by advising investigators on the methods to be followed and the evidence that they should focus on.

Inter-agency cooperation fosters efficiency in the criminal justice process, ensuring speedy trials in order to comply with the principles of fair, just and reasonable criminal justice procedures. When lack of coordination spells lengthy trials thereof, it produces undesirable results, like it prejudices innocent accused persons because of the anxiety that they have to endure, their stigmatisation by the society and bearing economic impairment. Even for the accused that is eventually convicted, lengthy trial creates doubts in their minds about the credibility of the criminal justice process and leaves the accused, their friends and family members unconvinced about the guilty verdict.

Namibia exists in the international legal system and she can improve her legal system by adopting some aspects of inter-agency cooperation that are workable in other jurisdictions, both from the common law and civil law systems. A hybrid of a communicative cooperation and coordination models is recommended for Namibia, because it is workable for independence of the prosecution and investigation agencies. This is particularly important because the Namibian Constitution has adopted the principle of separation of powers between the three branches of government, namely the executive, legislature and judiciary.

9.4 Proposals regarding the interactions between investigators and prosecutors during the investigation of offences

With regard to the research question on what can be done to ensure prosecutor/investigator interaction at every stage of the investigation, the study advances a proposition that inter-agency cooperation policies and regulations should clearly state the nature and purpose of cooperation between agencies. For example, that prosecutors should guide investigators at any stage from the beginning until the completion of an investigation, to guard against poorly carried out and unlawful investigations in order to avoid unnecessary dismissals of state cases and acquittals of supposedly guilty accused.

Investigators pass on the docket to prosecutors after a suspect has been charged. For investigations in lower courts, a prosecutor reads the docket and provides advice on additional information required through the investigation diary. The findings of the study reveal that an investigator collects the file and when he returns it, sometimes it is very late, *i.e.*, when the matter is to be heard by the court. In such instance, a prosecutor would have no sufficient time to read the docket. For offences tried in the Regional Courts and High Court, the docket remains with the prosecutor and investigators will access the docket three days prior to the trial. In this instance, prosecutors thoroughly read the docket at every stage of prosecution. For investigations falling under the *Prevention of Organised Crime Act*,⁶⁵³ where investigators are continuously guided by prosecutors, prosecutors read the docket during the investigation stage through to the trial stage.

⁶⁵³ No 29 of 2004.

9.5 Realising inter-agency cooperation within the framework of separation of powers

In response to the research question how can inter-agency cooperation be realised within the framework of separation of powers, the study's findings are that the Namibian courts have held that the Prosecutor-General falls under the judiciary and prosecutors should carry their work independently from interference by the executive, in accordance with the principles of the doctrine of separation of powers. The courts held that the doctrine of separation of powers calls for the distinctiveness of the branches of government, that one branch will not be liable for the acts of the other.

The findings of the study are that, although investigation and prosecution agencies are two distinct and separate institutions. their collaboration is imperative because each agency relies on the other in the fight against crime. Investigators may carry out an investigation perfectly, but this should be complemented by a flawless prosecution. Communication between agents within the framework of the communicative cooperation model would prevent this undesirable anomaly. Similarly, a prosecution will succeed only if there is sufficient evidence that will enable prosecutors to prove offences beyond reasonable doubt. Inter-agency cooperation within the ambit of the communicative cooperation model is appropriate and meets the aspirations of the doctrine of separation of powers envisaged by the Namibian Constitution and case law. In this regard, prosecutors merely advise, but do not impose on investigators what should be done in the investigation process.

9.6 Recommendations

This study recommends that, like in the UK and Indian jurisdictions, inter-agency cooperation in Namibia should be formalised by way of enacting a legislation and accompanying regulations, policies and manual of operations. These instruments should specify the respective nature, level and form of cooperation that should be adopted and instances in which these should be applied. Inter-agency cooperation should be applied only to serious offences, to advance the principle of efficiency in the criminal justice process while on other offences, it should be adopted on a need basis to avoid having prosecutors being pre-occupied with guiding investigators all the time, as they have their prosecutorial functions as the core business to attend to.

This study introduces a new model of cooperation to the field of criminal justice process, the communicative cooperation model, as the appropriate model under which inter-agency cooperation should take place. This model ensures the principles of neutrality and efficiency in the criminal justice process. The study further recommends for an operational cooperation characterised by regular meetings between corresponding units of investigation and prosecution agencies.

This study further recommends that in order to maintain separation of powers within inter-agency cooperation scheme, policy documents should provide that investigators should not be empowered to decide on who are the prosecutors that should handle the case that they are investigating. This is because inter-agency collaboration should be based on positions rather than on personalities, *i.e.*, it requires any investigator and prosecutor to collaborate on an investigation than specific individuals from investigation and prosecution agencies. Further, such a practice will interfere with independence of the prosecution. Similarly, prosecutors should not be in a position to call for the removal of investigators and specify who should replace them. Such a practice will interfere with constabulary independence. If in the course of collaboration either agency member identifies weaknesses in an official of another agency, they can report to the supervisors and it should be left to each agency to deal with addressing the weakness by its official. Inter-agency cooperation within the framework of separation of powers advances the principle of complementarity.

Further, it should be noted in the regulatory framework that inter-agency collaboration within the framework of separation of powers does not mean that prosecutors should become biased in favour of investigators and against suspects, as their primary concern should only be the administration of justice. This is in line with the principle of objectivity and material truth as found in other jurisdictions. Moreover, inter-agency cooperation takes place as a necessity to comply the principle of complementarity (see Chapter Two).

The study recommends amendments in the current legislation to adopt some trends in the Tanzanian legal system that the Prosecutor-General can order for an investigation of an offence that has come to his or her attention. In this case, the Prosecutor-General should, if necessary, allocate a prosecutor who will provide guidance to investigators. It could be

included in the Manual of Operations that investigations which have been ordered by the Prosecutor-General should be guided under the coordination model.

The study further recommends that there is a need to effect amendments to the current legislation to provide for mandatory prosecution in serious crimes when investigation has provided prima facie evidence. Alternatively, an amended legislation should provide for a Prosecutorial Review Commission, which can review decisions by the Prosecutor-General declining to prosecute. This is to ensure that the prosecution agency acts with a sense of accountability.

To ensure that there is both public confidence in the investigation and that there is no any iota of conflict of interests, Namibia should adopt prosecutorial investigation solely in cases involving police officers. Investigating prosecutors are not members of the Police and will carry out their investigation functions with a high degree of independence. The recommended prosecutorial investigations should advisably adopt the inquisitorial system's prosecutorial investigations, which are led by prosecutors as discussed in Chapter Two of this study. This is particularly important if the Brazilian model is adopted, in which prosecutors cannot be changed from investigations by their superiors, unlike police investigators.

9.7 Areas for further research

The study recommends that further research should focus on: (i) Inter-agency coordination between Namibian investigators and prosecutors on cyber-crime as the evolution of information technology has resulted in crimes committed online and this arena has not been academically explored; (ii) Comparisons between prosecutorial investigations and police investigations and the workability of the former in the common law system. This is to determine whether it will be practical to adopt a hybrid of the investigation process in the Namibian criminal justice process.

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ANNEX A
STRUCTURED INTERVIEW

1. From your experience, what are the challenges of co-operation between investigators and prosecutors in the Namibian criminal justice system?
2. What is the significance of co-operation between investigators and prosecutors in enhancing efficiency in the Namibian criminal justice system?
3. What is the foundation of co-operation between investigators and prosecutors in enhancing efficiency in the Namibian criminal justice system, in the absence of a legislative framework?
4. What is the level of coordination (if any) in the investigators-prosecutor relationship in Namibia?
5. How does the practice of co-operation between prosecutors and investigators reconcile with the doctrine of separation of powers?
6. What are the advantages and disadvantages of lack of collaboration between investigators and prosecutors?
7. Is there any other issue concerning investigator-prosecutor co-operation upon which you wish to comment?



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