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Attorney General's Intervention in Private Prosecutions in Tonga: Analysing *Attorney General v Lavulavu* [2019] TOSC 35; AM 11 of 2019 (9 July 2019)

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Abstract

A general rule in criminal law is that once an offence has been committed, it is the duty of public prosecutors to prosecute the suspect and the right to institute a private prosecution is the exception. In Tonga, this right is provided for in section 197 of the Criminal Offences Act which states that "[a]ll prosecutions under this Act may be brought by the Attorney General or the person aggrieved." Clause 31A(1)(b) of the Constitution of Tonga provides that the Attorney General shall "be in charge of all criminal proceedings on behalf of the Crown." Unlike the relevant constitutional provisions in other common-law countries such as Vanuatu, Samoa, Uganda, Kenya, Botswana, Nigeria, Eswatini and Gambia which expressly provide that the Director of Public Prosecutions or Attorney General can take over private prosecutions, Clause 31A(1)(b) does not expressly state that. In Attorney General v Lavulavu the Supreme Court of Tonga held that Clause 31A(1)(b), if read in tandem with the common-law powers of the Attorney General, empowers the Attorney General to take over and discontinue a private prosecution. Private prosecution is an under-researched area in Tonga. The purpose of this article is to analyse this judgment and highlight ways in which it is likely to minimise the abuse of the right to institute a private prosecution in Tonga.

Keywords: Tonga; private prosecutions; Attorney-General; intervention

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1 INTRODUCTION

It is a general rule in common-law countries' criminal law that once an offence has been committed, the public prosecutor must prosecute the suspect. The right to institute a private prosecution is the exception in many of these countries. Courts in countries such as Uganda,[1] Solomon Islands[2] and Kenya[3] have held that a criminal offence is committed against the state as opposed to the victim himself or herself. The right to institute a private prosecution is recognised in many least developed common-law countries (which follow English common-law) such as Kenya,[4] Zimbabwe,[5] Uganda,[6] South Africa,[7] Samoa,[8] Fiji,[9] Vanuatu,[10] Papua New Guinea,[11] Cooks Islands,[12] and Tonga. In these countries the right is of English common-law origin. It is beyond the scope of this article to discuss the history of the right to institute a private prosecution in England as this history has been discussed in detail by other scholars[13] and English courts.[14] The Supreme Court of the United Kingdom explained the rationale behind the right to institute a private prosecution.[15]

1 In *Uganda v Ssonko* (Criminal Revision Appl. No. 12 OF 2019) [2019] UGHCCRD 42 (2 October 2019), the Ugandan High Court held that: "Under Criminal Law, the crime is considered to be an offence against society as a whole that is why it is the state that starts the criminal prosecution and controls prosecutions generally even where there is private prosecution. If the state finds merit in the case, it may take over or discontinue the proceedings."

2 *Regina v Tutala* [2004] SBHC 37; HC-CRC 022 of 2002 (5 May 2004) 2, the High Court held that "all crimes are committed against the Queen, the State or Government if you like to call it that for simplicity's sake because the Police being the law enforcement agent and other agencies of the government are the prosecutors of all offenders against the law though there is room for private prosecution in a limited way."

3 In *Joshua Mutambuki & 557 Others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 6 Others* [2018] eKLR para 58, the High Court of Kenya held that "State officers and public servants are accountable and indeed liable for their individual commissions and omission. Where a criminal offence is reported to any government agency responsible for prosecuting such crimes but fails to take appropriate action, the victim has numerous options including making an application before the court to institute private prosecution where the offender is identified."

4 See generally, *Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene & 7 Others* [2016] eKLR.

5 See generally, *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).

6 See generally, *Uganda v Kayihura & Ors* (Revision Cause No. 34 OF 2016) [2016] UGHCCRD 75 (17 August 2016); *Uganda v Ssonko* (Criminal Revision Appl. No. 12 OF 2019) [2019] UGHCCRD 42 (2 October 2019).

7 See generally, *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC).

8 *Teo v Attorney-General* [2001] WSSC 25 (4 September 2001). In *Churchward v Curtiss* [1931] WSLawRp 2; [1930-1949] WSLR 23 (24 August 1931), the accused was convicted for shooting the prosecutor's dog dead.

9 *Director of Public Prosecutions v Matatulu* [1999] FJCA 15.

10 *Aru v Salmon* [1998] VUSC 56; Criminal Case No 013 of 1998 (18 September 1998) (the Court held that a private prosecutor does not have to be impartial in a case he is prosecuting. However, a law prosecuting on behalf of the private prosecutor has to be impartial).

11 *Togan v Man* [2000] PGDC 35; DC270 (7 November 2000).

12 In *Moore v Lyon* [2010] CKHC 25; CR 961 of 2010 (10 December 2010) para 34, the High Court of Cooks Islands held that "[p]rivate prosecutions are rare but not unknown. They are likely to be brought where there is a concern that the Crown is improperly refusing to act."

13 Brown, Turne and Weisser, *The Oxford Handbook of Criminal Process* (2018) 249; Chiao, *Criminal Law in the Age of the Administrative State* (2019) 14–15; Smith, 'The Myth of Private Prosecutions in England: 1750 – 1850' in Dubber and Farmer, *Modern Histories of Crime and Punishment* (2007) 151.

14 For example, in *Gouriet v Union of Post Office Workers* (1978) 3 All ER 70.

15 For example, in *Gujra, R (on the application of) v Crown Prosecution Service* [2013] 1 All ER 612 para 68, the Court held that "[t]here is no doubt that the right to bring private prosecutions is still firmly part of English law, and that the right can fairly be seen as a valuable protection against an oversight (or worse) on the part of the public prosecution authorities." The Court held further that "Private prosecution is, and I think always has been, a safeguard against the feelings of injustice that can arise when, in the eyes of the public, public authorities do not pursue criminal investigations and proceedings in a manner which leads to culprits being brought before a criminal court. The impunity which offenders appear to enjoy can be socially detrimental. This is … particularly so in those cases where a victim actually knows that the offence has been committed but finds that a [public] prosecutor does not think on a balance of likelihood that his evidence, if given orally in court, will be accepted. The feeling of injustice will be particularly acute, if … the [public] prosecutor's decision was a fine one, and the alleged victims or another prosecutor might equally reasonably have concluded that the case was one in which the evidential test was satisfied." Para 116. See also *Financial Times Ltd. & amp; Ors v Interbrew SA* [2002] EWCA Civ 274 para 22.

In Tonga, which is also a least developed common-law country, this right is provided for in section 197 of the Criminal Offences Act[16] which states that "[a]ll prosecutions under this Act may be brought by the Attorney General or the person aggrieved." If an offence is committed against a person and the Attorney General decides not to prosecute the suspects, the aggrieved person may institute a private prosecution. As the Supreme Court of Tonga held in *Pohiva v Tu'ivakano*,[17] "[t]here is no power to compel the Attorney General to undertake a prosecution against his will."[18] Unlike in the constitutions of other common-law countries such as Uganda,[19] St. Vincent and the Grenadines,[20] Lesotho,[21] Tuvalu,[22] Antigua and Barbuda,[23] Belize,[24] Grenada,[25] Bahamas,[26] Solomon Islands,[27] Guyana,[28] Seychelles,[29] St. Lucia,[30] Barbados,[31] Jamaica,[32] Kiribati,[33] and Dominica,[34] where the relevant provisions expressly empower the Director of Public Prosecutions or the Attorney General to intervene in private prosecutions, the Constitution of Tonga does not expressly deal with this issue. Clause 31A(1)(b) of the Constitution of Tonga provides that the Attorney General shall "be in charge of all criminal proceedings on behalf of the Crown." In *Attorney General v Lavulavu*[35] the Supreme Court of Tonga held that Clause 31A(1)(b), if read in tandem with the common-law powers of the Attorney General, empowers the Attorney General to take over and discontinue a private prosecution. The purpose of this article is to analyse this judgment and highlight ways in which it is likely to minimise the abuse of the right to institute a private prosecution and also strengthen the accused's right to a fair trial in private prosecutions. Private prosecution is an under-researched area of law in Tonga, and this will be the first publication to comprehensively discuss the issue of private prosecutions in this jurisdiction. To put the discussion in context, it is important to discuss the question of *locus standi* to institute a private prosecution in Tonga before dealing with the case of *Attorney General v Lavulavu*.[36]

2 *LOCUS STANDI* TO INSTITUTE A PRIVATE PROSECUTION IN TONGA

One of the most important issues to be discussed in the context of private prosecutions is the issue of *locus standi* to institute such prosecutions. As mentioned above, section 197 of the Criminal Offences Act[37] provides that "[a]ll prosecutions under this Act may be brought by the Attorney General or the person aggrieved." This means that there are two types of prosecutions under section 197 of the Criminal Offences Act: public prosecutions, instituted by the Attorney General; and private prosecutions, instituted by "the person aggrieved."[38] The

16 Criminal Offences Act, Chapter 10.09.
17 *Pohiva v Tu'ivakano* [2014] TOSC 1; AM20.2013 (17 January 2014).
18 *Pohiva v Tu'ivakano* para 27.
19 Article 120(3) of the Constitution of Uganda (1995) provides that the functions of the DPP include: "(c) to take over and continue any criminal proceedings instituted by any other person or authority; (d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court."
20 Section 64(4) of the Constitution of St Vincent and the Grenadines (1979).
21 Section 99(4) of the Constitution of Lesotho (2011). Although these powers may also be exercised by the Attorney General.
22 Section 79(10) of the Constitution of Tuvalu (2010).
23 Section 88(2) of the Constitution of Antigua and Barbuda (1981).
24 Section 50(4) of the Constitution (2011).
25 Section 71(4) of the Constitution of Grenada (1992).
26 Article 78(3) of the Constitution of Bahamas (1973).
27 Section 91 (6) of the Constitution of Solomon Islands (1978).
28 Section 187(3) of the Constitution of Guyana (2016).
29 Article 76 (6) of the Constitution of Seychelles.
30 Section 73(4) of the Constitution of St Lucia (1978).
31 Section 79(4) of the Constitution of Barbados (2007).
32 Section 94(5) of the Constitution of Jamaica (1962).
33 Section 42(7) of the Constitution of Kiribati (2013).
34 Section 72(4) of the Constitution of Dominica (2014).
35 *Attorney General v Lavulavu* [2019] TOSC 35; AM 11 of 2019 (9 July 2019).
36 *Attorney General v Lavulavu*.
37 Criminal Offences Act, Chapter 10.09
38 In *Public Prosecutor v Kivia* [1988] PGNC 48; [1988-89] PNGLR 256; N686 (22 December 1988), the National Court of Papua New Guinea held that a public prosecutor cannot rely on a legislative provision governing private prosecutions to institute a public prosecution.

Criminal Offences Act does not define "the person aggrieved." However, case law from the Supreme Court of Tonga shows that private prosecutions have been instituted by victims of crimes such as assault,[39] embezzlement,[40] theft of work documents,[41] theft of household items,[42] criminal defamation,[43] receiving property by false pretences,[44] and damage to property.[45] Therefore, for a person to institute a private prosecution, he/she has to be a victim of crime.[46] In other words, an aggrieved person in the context of section 197 of the Criminal Offences Act means a victim of crime. Where there is an argument that the person who instituted a private prosecution does not have *locus standi* to institute a private prosecution, the Supreme Court will have to resolve that issue before it will deal with the merits of the case.[47] Although the Criminal Offences Act provides that only an aggrieved person can institute a private prosecution and case law shows that victims of crime have instituted private prosecutions, since the words "aggrieved person" are not defined in the Criminal Offences Act, the Supreme Court has had to interpret what these words mean and to potentially expand the ambit of the meaning of the words "aggrieved person." In *Pohiva v Tu'ivakano*[48] the appellant, a famous politician in Tonga, instituted a private prosecution against several high profile politicians and a government company for allegedly stealing and misusing public funds (a loan that the government had obtained from the Chinese government). The respondents were discharged by the magistrate on the ground that the accused had not adduced sufficient evidence to prove that the alleged perpetrators had committed the offences in question.[49] One of the arguments that were raised by the respondents' lawyer before the Supreme Court was that the applicant was not an aggrieved person within the meaning of section 197 of the Criminal Offences Act.[50] In dismissing this argument, the Supreme Court held that "a prominent member of Parliament wishing to bring a matter of obvious public concern to this Court should properly be regarded as such a person."[51] This means that for a person to have *locus standi* to institute a private prosecution, he or she does not have to be a victim of crime in the narrow definition of the term. A person can institute a private prosecution if the subject matter of such a prosecution is "of obvious public concern." This opens up the possibility for some people to institute private prosecutions in the public interest and for offences that affect the general public such as corruption.

39 *Pohiva v Lasike* [1997] TOLawRp 43; [1997] Tonga LR 247 (1 August 1997) (assault); *Flemming v Manu* [1997] TOLawRp 30; [1997] Tonga LR 196 (17 June 1997) (assault); *Taufa v Ma'u* [1994] TOLawRp 19; [1994] Tonga LR 97 (5 September 1994) (assault).

40 *Pikula v Fukofuka* [2015] TOSC 3; AM 18 of 2014 (4 February 2015).

41 *Attorney General v Lavulavu*.

42 *Paletu'a v Toki* [2020] TOSC 93; AM 25 of 2020 (3 November 2020) (however, the appellant was acquitted on appeal).

43 *Langi v Televave* [2006] TOSC 27; AM 007 2005 (14 July 2006).

44 *Dataline System v Vea* [2012] TOSC 50; AM 2 of 2012 (27 April 2012).

45 *Rex v Malele* [2013] TOSC 3; CR09.12 (30 January 2013).

46 The position is the same in the Cook Islands, in *Pera v Tangiiti* [2010] CKHC 5; CRC 115-116 of 2010 (10 September 2010) para 5, the High Court of the Cook Islands held that "a citizen's right to issue private information and conduct private prosecutions against those whom they allege to have committed criminal offending is an ancient right which, though infrequently exercised, remains in full force and effect."

47 *Rex v Malele* [2013] TOSC 3; CR09.12 (30 January 2013) (the Court had to determine whether a person who inherited a house from his mother could institute a private prosecution against those who had damaged it).

48 *Pohiva v Tu'ivakano* [2014] TOSC 1; AM20.2013 (17 January 2014).

49 *Pohiva v Tu'ivakano* paras 7–8.

50 *Pohiva v Tu'ivakano* para 31.

51 *Pohiva v Tu'ivakano* para 31.

Section 197 of the Criminal Offences Act is also silent on whether the "aggrieved person" includes juristic (legal) persons. In some common-law countries such as South Africa, courts have held that a juristic person does not have a right to institute a private prosecution unless legislation expressly empowers it to do so.[52] A similar approach has been followed in some instances in Fiji.[53] Although section 197 of the Criminal Offences Act is silent on the issue of juristic persons' right to institute private prosecutions, case law from the Supreme Court of Tonga shows that juristic persons have instituted private prosecutions. For example, there are cases in which companies have instituted private prosecutions for offences such as receiving money[54] or property[55] by false pretences. In countries such as Vanuatu[56] juristic persons do not need specific legislation to institute private prosecutions.

Another issue relates to the offences for which a private prosecution may be instituted. As mentioned above, section 197 of the Criminal Offences Act provides that "[a]ll prosecutions under this Act may be brought by the Attorney General or the person aggrieved." A literal interpretation of section 197 leads to the conclusion that an aggrieved person can only institute a private prosecution if the offence committed against him or her is provided for under the Criminal Offences Act. Put differently, a person does not have a right to institute a private prosecution for offences that are not provided for under the Criminal Offences Act. However, in practice, this is not the case. This is so because case law from Tonga shows that private prosecutions have not only been instituted for offences under the Criminal Offences Act[57] but as well as for offences under other pieces of legislation other than the Criminal Offences Act. These have included private prosecutions for offences under the Order in Public Places Act.[58]

3 MEASURES IN PLACE TO PREVENT OR STOP THE ABUSE OF THE RIGHT TO INSTITUTE PRIVATE PROSECUTIONS

The right to institute a private prosecution may be abused. This fact has been recognised by the Supreme Court of Tonga. In *Attorney General v Lavulavu*,[59] the Supreme Court held that:

> Whilst the right to bring a private prosecution has a long history in Tonga, there is a need for safeguards in the prosecution system when the right is abused. Problems associated with private prosecutions include that a private prosecutor is not bound by the Crown Law Prosecution Code, it is unlikely there will be a separation between the investigation and prosecution functions (which is vital to the integrity of the prosecution system), there may be inadequate disclosure to accused persons and, some prosecutions may be pursued for vengeful or vexatious reasons.[60]

There are different measures taken in Tonga to minimise or stop the abuse of the right to institute a private prosecution. These include the fact that before a summons is issued against

52 See generally, *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC). In Papua New Guinea, legislation allows the bank to, amongst other things, institute prosecutions. Although the bank is a public entity, these prosecutions are referred to as private prosecutions and the DPP's consent is needed before a bank can institute a prosecution. *Bank of Papua New Guinea v Mai* [2007] PGSC 19; SC862 (4 May 2007). See also *Ruh v Kerker* [2020] PGNC 353; N8571 (8 October 2020) para 6. However, in *Kamit v Aus-PNG Research & Resources Impex Ltd* [2007] PGNC 4; N3112 (2 February 2007), the Court held that a bank is a public body and therefore cannot institute a private prosecution. In the Cook Islands, the High Court held that as long as legislation does not prohibit a person from instituting a private prosecution, he/she has *locus standi* to institute such a prosecution, see *Moore v Lyon* [2010] CKHC 25; CR 961 of 2010 (10 December 2010).

53 For example, section 14(3)(h) of the Civil Aviation Authority of the Fiji Islands Act [Cap 174A] provides that one of the functions of the Civil Aviation Authority is to prosecute "any offence committed under the provisions of this Act and its Regulations, other than an offence under Part II of the Civil Aviation (Security) Act 1994." See also section 17C of the Act. In *Joyce v Civil Aviation Authority of Fiji* [2019] FJCA 234; ABU0130.2018 (5 November 2019), the appellant was prosecuted by the Civil Aviation Authority for flying an aircraft without a licence.

54 *Funaki Enterprises v Kakala* [2010] TOLawRp 30; [2010] Tonga LR 197 (2 November 2010).

55 *Dataline System v Vea* [2012] TOSC 50; AM 2 of 2012 (27 April 2012).

56 See for example, *Etmat Bay Estate Ltd v Magna Ltd* [2014] VUSC 79 (Supreme Court of Vanuatu); *Lauto v Public Prosecutor* [2003] VUSC 75; Criminal Case 010 of 2003 (21 April 2003) (the appellant was prosecuted by BP).

57 *Pohiva v Lasike* [1997] TOLawRp 43; [1997] Tonga LR 247 (1 August 1997) (assault); *Flemming v Manu* [1997] TOLawRp 30; [1997] Tonga LR 196 (17 June 1997) (assault); *Taufa v Ma'u* [1994] TOLawRp 19; [1994] Tonga LR 97 (5 September 1994) (assault); *Pikula v Fukofuka* [2015] TOSC 3; AM 18 of 2014 (4 February 2015) (embezzlement).

58 *Manupele v Tukutau* [1999] TOSC 5; CR APP 053 1999 (8 February 1999).

59 *Attorney General v Lavulavu* [2019] TOSC 35; AM 11 of 2019 (9 July 2019).

60 *Attorney General v Lavulavu* para 38.

an accused, the magistrate must hold an inquiry and be satisfied that the private prosecutor has a *prima facie* case against the accused[61] and the court's power to reimburse the accused, should the private prosecution be unsuccessful, the expenses incurred in defending himself.[62] Another measure has been discussed above – that only victims of crime can institute private prosecutions. Furthermore, the Attorney General's power to intervene in private prosecutions, which is the main focus of this article, is also one of the measures in place to prevent the abuse of private prosecutions. Unlike in some common-law countries such as Namibia,[63] Eswatini,[64] South Africa,[65] Zimbabwe,[66] and Botswana,[67] where a private prosecution can only be instituted once the Director of Public Prosecutions (DPP) has declined to prosecute, in Tonga the Attorney General's refusal to prosecute is not a prerequisite for a person to institute a private prosecution.[68] In light of the fact that there is no such control at the initial stage of a private prosecution, the Attorney General will intervene in a private prosecution once it has been instituted.[69] He/she has to invoke Clause 31A(1) of the Constitution which is to the effect that:

> (1) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall appoint an Attorney General, who shall: (a) be the principal legal advisor to Cabinet and Government; (b) be in charge of all criminal proceedings on behalf of the Crown; and (c) perform any other functions and duties required under law.

Clause 31A(1) should be distinguished from the relevant provisions of the Constitutions of some of the common-law countries mentioned above which expressly provide that the DPP or Attorney General is empowered to take over and continue with or discontinue private prosecutions. The Supreme Court of Tonga has grappled with the issue of whether Clause 31A(1)(b) of the Constitution empowers the Attorney General to take over private prosecutions. In *Pohiva v Tu'ivakano*[70] the Supreme Court observed that in England and Wales, the Attorney General is empowered to take over a private prosecution where, for example, a private prosecutor has abused the process.[71] However, the Court added that:

> As presently defined by Clause 31 A, the Attorney General's duties in this area seem to me to be somewhat unclear. Does the Clause mean that the Attorney General is in charge of all criminal proceedings, including private prosecutions, on behalf of the Crown, or does it mean that he is only in charge of criminal proceedings actually commenced by the Crown? If the latter, then there has been a constitutional departure from the position [that the Attorney General controls both public and private prosecutions]. Given the very wide ambit of section 197 [of the Criminal Offences Act] I am of the opinion that all prosecutions, whether private or not, should be within the purview of the Attorney General in order to avoid prosecutions being commenced which clearly do not conform with the Crown's prosecution policy or which, for other good reason, are not in the public interest.[72]

In this case, the Court takes issue with Clause 31A(1)(b). However, it concludes that although it is vague on the issue of whether the Attorney General has the power to take over private prosecutions, the Attorney General has such powers. A year after this judgment, the Supreme Court held that the Attorney General should exercise his discretion under Clause 31A(1)(b) and take over a private prosecution for an offence that had been committed outside the

61 *Pohiva v Tu'ivakano* [2014] TOSC 1; AM20.2013 (17 January 2014).
62 *Pohiva v Mafi* [2014] TOSC 28; CV 75 of 2014 (17 October 2014), para 4; *Latu v Magistrates Court of Tonga* [2020] TOSC 81; AM 21 of 2020 (13 October 2020) paras 34 and 45.
63 Section 7(2)(b) of the Criminal Procedure Act.
64 Section 13 of the Criminal Procedure and Evidence Act.
65 Section 7(2)(b) of the Criminal Procedure Act.
66 Section 16 of the Criminal Procedure and Evidence Act.
67 Section 18 of the Criminal Procedure and Evidence Act.
68 However, in practice some private prosecutions were instituted after the DPP had declined to prosecute. See for example, *Rex v Malele* [2013] TOSC 3; CR09.12 (30 January 2013).
69 In Vanuatu, the Supreme Court held that although legislation does not provide that a private prosecution can only be instituted once the DPP has declined to prosecute, it should be interpreted broadly as imposing that requirement in order to prevent the abuse of the right to institute private prosecutions. See *Fordham v Colmar* [2017] VUSC 101; Criminal Case 1541 of 2017 (11 August 2017). The Supreme Court of Papua New Guinea also came to a similar conclusion, see *Bank of Papua New Guinea v Mai* [2007] PGSC 19; SC862 (4 May 2007) para 22.
70 *Pohiva v Tu'ivakano* [2014] TOSC 1; AM20.2013 (17 January 2014).
71 *Pohiva v Tu'ivakano* para 34.
72 *Pohiva v Tu'ivakano* para 36.

territorial jurisdiction of Tonga.[73] Close to four years after this holding, the Supreme Court was confronted, this time directly, with the question of whether the Attorney General could rely on Clause 31A(1)(b) to take over a private prosecution and discontinue it. Because of the important issues that this case raises, it will be discussed at length here.

4 THE FACTS AND HOLDING IN *ATTORNEY GENERAL v LAVULAVU*

In *Attorney General v Lavulavu*,[74] the respondent instituted private prosecutions against some people before the magistrate court for allegedly stealing work documents.[75] When the committal proceedings begun,[76] the Attorney General invoked Clause 31A(1)(b) of the Constitution and "applied to intervene and take over the prosecutions and to terminate them."[77] In his application to take over the private prosecution, the Attorney General "provided detailed reasons. These included that there was insufficient evidence to support the prosecutions, there was no public interest in the pursuit of the prosecutions, the prosecutions were an abuse of the Court's processes and, the interests of justice required them to be terminated."[78] The respondent opposed the Attorney General's application.[79] The magistrate dismissed the Attorney General's application to take over the private prosecution on the basis that the "Attorney General has no right to intervene to conduct the prosecutions without Mr Lavulavu's [the respondent] consent."[80] The Attorney General appealed against this decision to the Supreme Court. The Attorney General argued "that her right to intervene and discontinue a prosecution (including a private prosecution) was recognised by the common law and is now contained in the powers conferred upon her Office by cl. 31A of the Constitution."[81] She added that "a citizen's right to bring a private prosecution under s. 197 of the Criminal Offences Act is not absolute and is subject to the powers of the Attorney General; the existence and exercise of which are necessary in the public interest."[82] She added that the Attorney General's supervisory powers over private prosecutors will ensure that the right to institute private prosecutions is not abused.[83] The respondent argued that Clause 31A(1)(b) of the Constitution and section 197 of the Criminal Offences Act do not mention that the Attorney General can intervene in private prosecutions and that the right to institute a private prosecution under section 197 of the Criminal Offences Act "takes precedence over any powers the Attorney General may have had to intervene in a private prosecution under the common law."[84] In resolving the issue before it, the Court referred to numerous decisions from British courts to the effect that at common law the Attorney General has the power to take over private prosecutions and discontinue the same.[85] The Court held that the plain interpretation of Clause 31A(1)(b) shows that the Attorney General controls both public and private prosecutions and that this interpretation is in line with the common law.[86] The Court held that there is a need for the Attorney General to have control over private prosecutions in order to prevent people from abusing their right to institute private prosecutions.[87] Against that background, the Court held that:

> [T]he position in Tonga is that under cl. 31A of the Constitution the Attorney General's powers include the right, in exercise of her discretion, to intervene in, stay or discontinue private prosecutions and that such power may be exercised without the consent of the private prosecutor.[88]

The Court referred to jurisprudence from the common-law countries of Australia, New Zealand, Samoa, Canada and Fiji and observed that in all these countries, the Attorney General's power

73 *Pikula v Fukofuka* [2015] TOSC 3; AM 18 of 2014 (4 February 2015) paras 32–33.
74 *Attorney General v Lavulavu* [2019] TOSC 35; AM 11 of 2019 (9 July 2019).
75 *Attorney General v Lavulavu* para 4.
76 Part III of the Magistrates' Court Act governs the committal of the accused to the Supreme Court for trial.
77 *Attorney General v Lavulavu* para 5.
78 *Attorney General v Lavulavu* para 6.
79 *Attorney General v Lavulavu* para 7.
80 *Ibid*, para 8.
81 *Ibid*, para 14.
82 *Ibid*, para 15.
83 *Ibid*, para 16.
84 *Ibid*, para 20.
85 *Ibid*, paras 23 – 28.
86 *Ibid*, paras 29 – 33.
87 *Attorney General v Lavulavu* para 38.
88 *Attorney General v Lavulavu* para 44.

to take over a private prosecution was subject to judicial review.[89] Against that background, the Court concluded that "[a] private prosecutor aggrieved by a decision of the Attorney General to intervene would, in my view, be entitled to seek a judicial review of that decision in this Court."[90] It is to the analysis of this judgment that we turn below.

5 ANALYSING THE SUPREME COURT'S DECISION IN *ATTORNEY GENERAL v LAVULAVU*

Although Clause 31A(1)(b) of the Constitution is silent on the measures in place to prevent or minimise the abuse of private prosecutions, the court's interpretation of this provision is meant to ensure that private prosecutors do not abuse their right to institute private prosecutions. There are a few observations to make about this judgment. First, although the Attorney General has the power to intervene in private prosecutions, the strong decision-making criteria and the court's ability to review his/her decisions are safeguards to prevent or minimise the risk of abusing this power. Before he/she takes over a private prosecution, he has to give reasons for doing so and if these are not convincing, a court may set aside the decision. This is the case notwithstanding the fact that Clause 31A(2) guarantees the Attorney General's independence. This clause is to the effect that "[t]he Attorney General shall, unless otherwise provided by law, have complete discretion to exercise his legal powers and duties, independently without any interference whatsoever from any person or authority." The Court's decision means that although the Attorney General is independent in exercising his functions, he is not beyond judicial scrutiny.

Second, and related to the above, are the circumstances in which the court can review the Attorney General's decision. In South Africa, for example, the Supreme Court of Appeal held that a court can review and set aside the DPP's decision if it is illegal, irrational or unreasonable.[91] In some common-law countries such as Vanuatu,[92] Kenya,[93] Eswatini,[94] Uganda,[95] and Nigeria,[96] legislation or the Constitutions provide for the factors that the DPP has to consider in exercising his powers and courts have held that such factors shall be considered in deciding whether to review the DPP's decision to take over private prosecutions. For example, Article 120(3) of the Constitution of Uganda provides that the functions of the DPP include:

> (c) to take over and continue any criminal proceedings instituted by any other person or authority; (d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.

Article 120(5) provides that "[i]n exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process." In *Were Naphtal v Attorney General*[97] the petitioner argued before the Constitutional Court that the DPP's decision to take over and discontinue the private prosecution he had instituted against some Executives and Directors of MTN, a multinational telephone company, for tax evasion was contrary to Article 120(3). This was so because evidence before court showed that the decision to discontinue the private prosecution had been reached by the DPP based on a memorandum of understanding between two private companies (MTN and another company) and the DPP.[98] In finding that the DPP's decision to discontinue the private prosecution was contrary to Article 120(3), Justice

89 *Attorney General v Lavulavu* para 42.
90 *Attorney General v Lavulavu* para 43.
91 *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA).
92 Section 8 of the Public Prosecutor's Act [CAP. 293]. See *Jessop v Public Prosecutor* [2010] VUSC 134 (Civil Case 114 of 2009) (2 July 2010).
93 Article 157 (11) of the Constitution of Kenya (2010). See *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & Another* [2018] eKLR.
94 Section 162(6) of the Constitution.
95 Article 120(3) of the Constitution (1995).
96 Section 211(3) of the Constitution of Nigeria. See *Ndi Okereke Onyuike v. The People of Lagos State & Ors* (2013) LPELR-24809(CA).
97 *Were Naphtal v Attorney General* (Constitutional Petition No. 11 of 2013) (9 February 2021).
98 *Were Naphtal v Attorney General* 10–13.

Kakuru referred to Article 120(3)(c) of the Constitution and held that

> 'Take over and continue' in my view means the Director of Public Prosecutions when he/she decides to take over any criminal proceedings not instituted by her /him must continue which the prosecution of the case until its logical conclusion. This clause excludes the situation whereby the Director of Public Prosecutions may 'take over and discontinue' the prosecution of such case.[99]

He referred to Article 120(3)(d) and held that:

> Under the above clause the Director of Public Prosecutions may discontinue criminal proceedings instituted by any other person or authority with the consent of Court. In my understanding clause 120(3) (d) relates to situation where Director of Public Prosecutions decided to discontinue proceedings only. In other words, Director of Public Prosecutions may simply discontinue proceedings if that decision is a public interest, interest of administration of justice or in order to prevent abuse of process…[T]he Director of Public Prosecutions cannot take over [p]rivately instituted proceedings for the purpose of 'continuing prosecution' under Article 120(3) (c) then immediately discontinue the same under Article 120(3)(d). But he/she can however either, takeover and continue up to the end of the trial under Article 120(3) (c) or simply terminate with the consent of the Court under Article 120(3)(d) but cannot do both with the same proceedings.[100]

Against that background, he concluded that the DPP's decision to discontinue the private prosecution was contrary to Article 120(3) and therefore reviewable under Article 120(5). He added that:

> The office of the Director of Public Prosecutions is not independent of the executive. It is firmly embedded in the executive branch of Government, the wording of Article 120 of the Constitution notwithstanding. However, the Constitution shields the Director of Public Prosecutions from undue influence from the other members of the executive while making decisions. The decision he/she makes are subject to review by Courts of law just like any other decisions taken by the Executive or Parliament. They must comply with all Rules of natural justice. They must be reasonable objective, justifiable and free from bias. Most importantly the Director of Public Prosecutions' decisions must not be arbitrary. He/she must be able to justify them before a Court of law in judicial review proceedings.[101]

In the above reasoning, Justice Kakuru stipulates the grounds upon which the DPP's decision can be reviewed. Some of these grounds are not expressly mentioned in Article 120(5) of the Constitution. However, as illustrated below, in some common-law countries such as Fiji, Mauritius and Malawi there is no such legislation and courts have held that although the Attorneys General or Directors of Public Prosecution decisions' can be reviewed, this has to be done in exceptional circumstances. While dealing with a case from Mauritius, the Privy Council adopted the following grounds, which were laid down by the Court of Appeal of Fiji, on which a court may review the Attorney General's decision:

> 1. In excess of the DPP's constitutional or statutory grants of power— such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)). 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review. 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe. 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved. 5. Where the DPP has fettered his or her discretion by a rigid policy — eg one that precludes prosecution of a specific class of offences. There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of

99 *Were Naphtal v Attorney General* 16
100 *Were Naphtal v Attorney General* 16–17.
101 *Were Naphtal v Attorney General* 9.

situations in which such decisions would be reviewable for want of natural justice.[102]

Since the Privy Council has laid down the above criteria to guide courts in Fiji and Mauritius[103] when deciding whether to review the decisions of the Directors of Public Prosecution, it is not far-fetched to argue that the Supreme Court of Tonga is also very likely to adopt the same or similar criteria should it be presented with a case in which it would have to review the manner in which the Attorney General has exercised his powers. This is so because of the fact that the Supreme Court of Tonga has already cited with approval judgments from courts in other countries which have set similar criteria as the Privy Council in this regard.[104] The Court could also find comfort in the fact that this reasoning has been followed in other common-law countries such as Malawi[105] and Samoa.[106] Third, the Supreme Court held that in taking over a private prosecution, the Attorney General does not need the consent of the private prosecutor. This should be distinguished from the position in some common-law countries such as Kenya[107] and the Gambia[108] in which the private prosecutor's consent is needed before the DPP can take over a private prosecution.

Another issue that the court pointed out relates to the private prosecutor's duty of disclosure when, as mentioned above, it held that a private prosecution may be abused because "there may be inadequate disclosure to accused persons." A prosecutor's duty to disclose case materials to the accused has been recognised widely as an integral aspect to the accused's right to a fair trial and in particular the right to defend himself. The Human Rights Committee, the enforcement body of the International Covenant on Civil and Political Rights, has observed that the accused's right to access adequate facilities to prepare for his defence which is protected under Article 14(3)(b) of the International Covenant on Civil and Political Rights "must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory."[109] The European Union Parliament has also recognised this right.[110] Countries have taken two approaches to give effect to this duty. In some countries such as Samoa,[111]

102 *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194, para 17. See also para 21.
103 *Mohit Jeewan v Director of Public Prosecutions* para 17. See also para 21.
104 *Attorney General v Lavulavu* para 42.
105 *S & Anor Ex Parte: Trapence & Anor* (Constitutional Case No. 1 of 2017) [2018] MWHC 799 (20 June 2018).
106 *Teo v Attorney-General* [2001] WSCA 7 (23 November 2001) (Court of Appeal of Samoa); *Saufau v Siaosi II* [2019] WSSC 89 (9 August 2019) (Supreme Court of Samoa).
107 Article 157(6) of the Constitution of Kenya
108 Section 85 of the Constitution of the Gambia.
109 General Comment No. 32 (On Article 14: Right to equality before courts and tribunals and to a fair trial) CCPR/C/GC/32, (21 August 2007) para 33. Footnote omitted.
110 Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, 1–10 provides that: "(1). Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. (2). Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence. (3). Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered. (4). By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review. (5). Access, as referred to in this Article, shall be provided free of charge."
111 Section 46 of the Samoa Criminal Procedure Act 2016 provides that: "(1) The prosecutor must, within a reasonable time before the trial, disclose: (a) to the Court and the defendant, copies of all statements made by witnesses proposed to be called, and by the defendant whether given orally or in writing; and (b) to the defendant, a list of any defendant's previous convictions that are known to the prosecutor (2) A statement that is in a language that the defendant does not understand must be translated into a language that the defendant understands."

the United Kingdom,[112] Australia,[113] and New Zealand,[114] legislation has been passed which obligates a prosecutor to disclose case materials to the accused. In other countries such as South Africa, Namibia, Singapore, Uganda, and Tonga, there is no legislation imposing a duty on prosecutors to disclose case materials to the accused. As a result, courts have held, based on the fact that the accused has a right to defend himself and to prepare for his defence, that prosecutors have a duty to disclose case materials to the accused.[115] In Tonga, because of the fact that "[t]here are no statutory provisions or rules of the Supreme Court dealing with the situation [of disclosure in criminal matters] in the Kingdom [of Tonga]",[116] this issue is governed by common law, and public prosecutors "appear to have an appropriate awareness of the common law rules relating to disclosure of material by the prosecution to the defence."[117] The Supreme Court of Tonga held that the prosecutor's duty to disclose the case materials to the defence is meant to prevent him/her from ambushing the accused.[118] The disclosure has to take place before or during the trial. For example, in *R v Fungavaka*,[119] the accused in a murder case asked the court to order the police to disclose to him the witness statements they had collected during the investigation. Because the accused had not yet appeared before court to enter a plea, the court's first duty was to decide whether the police could be classified as prosecutors. The Court answered this question in the affirmative when it held that prosecutors include "all of such bodies as the police, Crown Solicitors and counsel and forensic experts (say scientists, psychiatrists, doctors as examples) who are engaged to advise the police, prepare reports and give evidence."[120] The Court held that a prosecutor has a duty to disclose to the accused, before or during his trial, "all relevant evidence of help" to him or her.[121] Failure by the prosecution to disclose the relevant case details to the defence, for example, the identity of potentially helpful witnesses or statements, could render the accused's trial unfair.[122] In practice, public prosecutors disclose to the defence all the materials they will rely on in the case.[123] However, disclosure will be denied if, for example, the prosecution is not in possession of the materials being sought by the accused,[124] to protect the identity of a police informer,[125] the accused is the source of the document in the hands of the prosecution,[126] or where failure to disclose such material or witness to the accused will not prejudice him.[127] In all cases in

112 See Sections 3–11 of the Criminal Procedure and Investigations Act 1996.
113 Sections 35–49 of the Criminal Procedure Act 2009 (NO. 7 OF 2009).
114 Sections 12–19 of the Criminal Disclosure Act 2008.
115 *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593; 1996 (1) SA 725 (Constitutional Court of South Africa); *S v Kandovazu* (SA 4/96) [1998] NASC 2 (10 February 1998) (Supreme Court of Namibia); *Public Prosecutor v Li Weiming and Others* [2014] SGCA 7 (23 January 2014) (Supreme Court of Singapore); *Uganda (DPP) v Mpanga & 6 Ors* (Session Case No. HCT-00-SC 0014/2014) [2014] UGHCCRD 33 (20 JUNE 2014); *Ddumba Muwawu v Uganda* (HCT-00-CR-SC-169 OF 2012) [2013] UGHCCRD 12 (28 MARCH 2013).
116 *Vete v R* [2002] TOLawRp 49; [2002] Tonga LR 308 (22 November 2002) 2.
117 *Vete v R* 3.
118 *Rex v Maue* [2004] TOSC 53; CR 016 2004 (20 December 2004).
119 *R v Fungavaka* [1997] Tonga LR 230.
120 *R v Fungavaka* 232.
121 *R v Fungavaka* 236.
122 *R v Fungavai* [2007] TOLawRp 28; [2007] Tonga LR 163 (14 August 2007) para 36.
123 *R v Dalgety* [2010] TOLawRp 29; [2010] Tonga LR 186 (1 November 2010).
124 *R v Sosefo* [2008] TOLawRp 22; [2008] Tonga LR 108 (1 May 2008) (in this case the photographs were not available).
125 In *R v Puloka* [2019] TOSC 44; CR 50 of 2019 (29 August 2019) para 5, the Court held that "[w]here there is a risk that disclosure of information may compromise the identity of an informant, then the officer and Court should take particular care to ensure that any copy of a supporting affidavit that is provided to the defence should be redacted. There is a responsibility resting on the Officer in charge to ensure that his informant is not compromised and is protected so he should be vigilant and take appropriate steps to ensure that this kind of information is not released to the defence by a Court without appropriate redaction. This may mean he has to consult prosecuting authorities for guidance before an affidavit is released to the defence that is supportive of the grant of a warrant."
126 *R v Fainga'anuku* [1989] TOSC 1; CR 38-67 1988 (10 April 1989) (in this case the letter in question implicating the accused in the commission of the offence had been written by the accused to the police officer).
127 *Rex v Maue* [2004] TOSC 53; CR 016 2004 (20 December 2004) (in this case the accused was being prosecuted for housebreaking. The victims (both husband and wife) were available as witnesses at the preliminary inquiry but only the husband was interviewed as a potential witness for the prosecution. Later on, the prosecution called the wife as a witness and the accused challenged this on the ground that the prosecution had not disclosed to him that the wife would be a witness. The Court dismissed the objection on the ground that the husband and wife's version was the same and therefore the prosecution's failure to disclose her as a potential witness to the defence did not violate the accused's right to a fair trial).

which courts in Tonga have dealt with the prosecutor's duty of disclosure, the prosecutors were public prosecutors. However, for the first time in the case of *Attorney General v Lavulavu*[128] the Court pointed out the fact that as is the case with public prosecutors, private prosecutors also have a duty to disclose case materials to the defence. This is meant, as in the case of public prosecutions, to ensure that the accused is given adequate time and facilities to prepare for his defence. This approach by the Supreme Court of Tonga is not different from that adopted by courts in Samoa which have held that a private prosecutor has a duty to disclose case materials to the accused.[129] However, "the duty of disclosure on the Police as the law enforcement arm of the State is even more onerous given the facilities and resources the Police are able to call upon."[130] The Supreme Court of Samoa held that failure of the private prosecutor to make all copies of the trial documents available to the accused in time will violate the accused's right to a fair trial (the right to adequate time to prepare for his defence) and may lead to the dismissal of the prosecution's case unless the court is convinced that there is another way in which that violation can be remedied, for example, through adjourning the case to enable the accused to read the documents submitted to him or her late.[131] Unlike the courts in Tonga and Samoa, the High Court of Cyprus held that, on the basis of Article 7 of Directive 2012/13/EU, a private prosecutor does not have a duty to disclose case materials to the defence.[132] In light of the fact that disclosure is meant to protect the accused's right to a fair trial, the approach adopted by courts in Tonga and Samoa is closer to achieving that objective than that adopted by the Cyprus High Court.

6 CONCLUSION

In *Attorney General v Lavulavu*[133] the Supreme Court of Tonga held that Clause 31A(1)(b) of the Constitution empowers the Attorney General to take over a private prosecution. This is the case although this provision does not expressly provide for this. In this article, the author has illustrated how the right to institute a private prosecution may be strengthened in Tonga. The author has also discussed ways in which the DPP may be prevented from abusing his/her powers to intervene in private prosecutions. It has also been illustrated that the Constitution of Tonga does not expressly provide for powers of the DPP to intervene in private prosecutions. There may be a need for Clause 31A(1) to be amended to expressly empower the Attorney General to intervene in private prosecutions. This would be in line with the approach taken in some common-law countries. Apart from expressly empowering the Attorney General to take over a private prosecution, the amendment could also expressly provide for the factors which the Attorney General may consider in taking over a private prosecution. For example, in Papua New Guinea, the Prosecution Policy expressly provides for the circumstances in which the public prosecutor can intervene in private prosecutions.[134] The Amendment could also require the Attorney General to provide reasons to the court why he/she intends to take over a private prosecution. Without providing such reasons, it may be impossible for the court to establish whether the Attorney General has valid reasons for taking over a private prosecution.

128 *Attorney General v Lavulavu*.
129 *Sione v Ponifasio* [2017] WSDC 30 (31 August 2017).
130 *Police v Solomona* [2004] WSDC 4 (18 October 2004) (District Court of Samoa).
131 *Toailoa Law Office v Duffy* [2005] WSSC 7 (17 May 2005) (Supreme Court of Samoa). See also *Toailoa Law Office v Duffy* [2005] WSDC 3 (25 January 2005) (District Court of Samoa).
132 *Reference to the Application of Ostia Developers Ltd et al.*, Political Request No. 171/2019 (9 October 2019).
133 *Attorney General v Lavulavu*.
134 Papua New Guinea, Prosecution Policy (2006) para 18.2 provides that: "The Public Prosecutor takes the view that his powers under the Constitution and the Public Prosecutor (Office and Functions) Act enable him to intervene in private prosecution where it is in the public interest to do so, either to proceed with the prosecution or discontinue it (except where to do so would be an abuse of process)."