

Criminal Justice: The Effects of the Theories of Prosecution on Private Prosecution in Nigeria

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Abstract

Private prosecution in Nigeria offers a critical mechanism for seeking justice in instances where the state fails to act. However, the effectiveness of this practice is deeply intertwined with the theories of prosecution that guide legal practitioners and influence judicial outcomes. The primary objectives of this study are to evaluate the effectiveness of the "Servant of the Law" and "Who and What" theories in guiding private prosecutions in Nigeria and to identify the challenges and opportunities for improving the fairness and impartiality of this legal mechanism. While the "Servant of the Law" theory provides a crucial ethical framework for prosecutors, its effectiveness might be undermined by the realities of power dynamics in Nigeria, as described by the "Who and What" theory. The influence of social and political status often skews the outcomes of private prosecutions, leading to unequal access to justice and potential misuse of the legal process. This study examines the effectiveness of some theories of prosecution, specifically, the "Servant of the Law" theory and the "Who and What" theory within the context of private prosecution in Nigeria. The study employs a qualitative research methodology by adopting a doctrinal analysis. It examines the application of the "Servant of the Law" theory, alongside the "Who and What" theory, drawing on legal texts to assess how these theories, when applied in Nigerian private prosecutions, would impact on justice delivery. The study finds that despite the legal framework supporting private prosecution in Nigeria, there are significant concerns about the potential for bias, inequality, and the misuse of the legal process. The "Servant of the Law" theory advocates for impartiality, yet its application in private prosecutions may be challenged by the realities of social and political influence, as highlighted by the "Who and What" theory. These issues raise questions about the ability of private prosecution to deliver fair and just outcomes in the Nigerian legal system. These findings suggest a significant gap between the theoretical ideals of prosecution and the practical realities in Nigeria's justice system. The study concludes that while the theories of prosecution provide important guiding principles, their effectiveness in private prosecutions in Nigeria is limited by systemic issues such as inequality and bias. The study recommends strengthening judicial oversight, improving access to legal resources for all citizens, and ensuring that legal practitioners adhere strictly to the ethical standards embodied in the "Servant of the Law" theory, to enhance the fairness and effectiveness of private prosecution. These would ensure that private prosecution remains a viable and just component of Nigeria's criminal justice system.

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

1.0. Introduction

The criminal prosecution process can be long and intricate and usually involves a whole lot of persons starting from the police or any other law enforcement agency, the prosecutors whether public or private, judges, the defendant and his counsel.¹ Criminal prosecution is not limited to just a body but it cuts across all the criminal justice system with the aim of promoting speedy, fair, and just administration of criminal justice. The diversity of each legal system cum jurisdiction brings about the peculiarity in the ways and institution of their criminal justice system. Criminal prosecution may either be public or private. Before a criminal trial can commence, the prosecutor has to make a prosecutorial decision as to whether a suspect should be charged for a criminal act or not and whether a criminal prosecution should be continued or discontinued.² Hence, the theories of prosecution are necessary to understand the concept of prosecution. They identify the responsibilities of a prosecutor, the aim of prosecution and what the private prosecutor is to consider before proffering a charge for a criminal act. The issue of who controls and makes sentencing decisions is also considered. However, there is neither a well recognised nor universally recognised theories about prosecution available in both legal and criminological texts. Meanwhile, various scholars have highlighted their perspectives and propounded different theories of prosecution. Some theories focused on the work of the individual line prosecutors from a sociological view with emphasis on the subjective judgments of prosecutors. Some others concentrated on the institutional settings, court communities and the other criminal justice agencies. This is to be able to highlight the significance of institutional requirements and challenges faced by the prosecutors. The theories also considered the relationship between the prosecutors and other players within the criminal justice system. The propounded theories of prosecution are justice theory, Servant of the Law Theory, the Who and What Theory, sociological theory, criminological theory, economic theory, self-interest theory and fiduciary theory. The Servant of the Law Theory and the Who and What theories of prosecution are discussed for the purpose of this paper.

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¹ CDPP, 'Steps in Prosecution'

<<https://www.cdpp.gov.au/prosecution-process/steps-prosecution>> accessed 7 January 2025.

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

2.0. The Servant of the Law Theory

According to Bellin, a former prosecutor and a professor of Law,³ there is no normative Theory on prosecution; instead, he propounded the Servant of the Law theory which the court has used to describe the prosecutor as the servant of the law.⁴ He described the theory as more of a ‘domestic theory’ that aims to transform the American prosecutorial behaviour. The idea, according to Bellin, focuses on potential advantages for the American criminal justice system in which the primary purpose of prosecutors shifts from being an advocate for justice to being a servant of the law.⁵ This theory is expected to outline how the prosecutor is to serve in the interest of the law in regard to certain situations. Even though serving the law is clearer than seeking justice, yet, it could be an arduous task because high expectation is placed on the prosecutor to serve the purpose of the law.⁶ Notwithstanding that it is expected that a prosecutor seeks justice, such prosecutor including a private prosecutor is to serve in the best interest of the law.

The law dictates what constitutes crime and punishes same. It also lays down the procedure which criminal proceedings/trials must follow particularly placing on the prosecution the burden of proof beyond reasonable doubt.⁷ The court has held in a number of cases that the proof beyond a reasonable doubt is a constitutional necessity.⁸ Some of the other rights the law provides for the defendant include right to a counsel,⁹ right to fair hearing,¹⁰ and right to an interpreter.¹¹ When a prosecutor embraces all the available provisions of law and the rights

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

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

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

⁶ Laura Appleman, ‘Local Democracy, Community Adjudication and Criminal Justice’ (2017) 111 NWULR 1413.

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

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

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

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

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

available to a defendant, he would not be insistent on getting a defendant convicted at all cost. Such prosecutor would see the law as being served and it would not matter whether he losses or not. That is, whether the defendant was convicted, acquitted or the case dismissed for want of sufficient evidence or unlawful arrest or interrogation, as long as law has been served, he is deemed to have done his job and would be satisfied with it.¹²

The servant of the law prosecutor would place a priority on constitutional provisions on the rights of a defendant¹³ He would decline and restrain from any situation or procedure that would breach the rights that the defendant is entitled to such as right to bail.¹⁴ A private prosecutor would have to imbibe these characteristics. Private prosecutors should not seek conviction at all cost even in the name of justice. The statutory rights of the defendants have to be considered and it should not matter whether the defendant gets acquitted or is convicted.

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

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

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

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

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

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

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

2.1. Accessing Evidentiary Sufficiency- In every criminal prosecution, making a decision to charge the suspect is always the first prosecutorial decision to be made.¹⁷ Here, the prosecutor has to decide whether to accept the case brought by the police and a decision also has to be made as to whether the suspect is to be charged, where he is to be charged and what he should be charged for. Hence, the prosecutor must be able to show that crime has been committed and the act was carried out by the defendant especially in the instance where the private prosecution can institute a criminal charge without the approval of the Attorney General.¹⁸ It would be legally difficult for the prosecution to maintain a charge where there is no probable cause to show and believe that the defendant committed the crime.¹⁹ A private prosecutor's approach to charging criminal acts against a suspect must be one that is 'readily provable'. That the prosecution is carried out by the private prosecutor should not warrant indiscriminate and unnecessary charges on his part.

Accessing evidential sufficiency is not just descriptive or definitive, it extends to whether the defendant will get convicted based on the admissible evidence. The servant of the law prosecutor would not charge for a criminal act based on instinct or intuitive feeling of guilt or justice, or just for the purpose of public safety or the desire to please the interest of the public.²⁰

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

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

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

²⁰ Model Rules of professional Responsibility [2020], r 3.8.

Instead, the focus would be on outcomes that would promote the applicable laws. Once the prosecution is satisfied that a crime has been committed by the defendant, and has sufficient evidence to prove its case against the suspect, the next step is choosing the charge that the defendant will be prosecuted for.²¹ The Servant of the Law Theory when imbibed by private prosecution, would enable the prosecutor to have power to dismiss the case totally or where he decides to charge the defendant, it would not be an indiscriminate charge.²² Such private prosecutor would be expected to file only charges that are consistent with the interest of justice and which serve the purpose of the law. As a servant of the law, the private prosecutor has to be certain that the admissible evidence will sustain the charge against the defendant beyond a reasonable doubt. The servant of the law prosecutor must be wary of making discretionary decisions that lack legal direction and provisions. This, according to Bellin, is best achieved by applying a prosecutorial discretion referred to as ‘rule of lenity’²³ which introduces the issue of prosecutorial nullification.²⁴

The servant of the law approach's main drawback is that it opposes prosecutorial nullification. Whereas, where it is right and necessary, justice embraces nullification.²⁵ To the servant of the law prosecutor, the constitution takes priority over any criminal legislation in a situation where the charge against the defendant is a threat to the defendant’s constitutional rights.²⁶ The Servant of the Law Theory would ensure that a private prosecutor carefully takes necessary measures to prevent the collapse of the legal system. The Servant of the Law Theory opines that it would be almost impossible for a prosecutor committed to ‘serving the law’ to bend or break the law by over-charging, he would not engage in stringent plea bargains, will not keep anything from the defendant all that will help his case, he will not bring up unfounded cases and would avoid making misleading closing arguments.²⁷ A private prosecutor at every time is to be mindful of this as the theory encourages cooperation with the defense counsel. It will

²¹ Jeffery Bellin, ‘Theories of Prosecution’ (2020) 108 CLR 1203.

²² *ibid.*

²³ Rules of lenity depicts the default to the less severe option when the legislature tries to dictate a standardless choice.

²⁴ Roger Fairfax Jr, ‘Prosecutorial Nullification’ (2011) 52 BCL.R 1243; Kernel Murray, ‘Populist Prosecutorial Nullification’ (2021) 96 NYU LR 173.

²⁵ *ibid.*

²⁶ Jeffery Bellin, *Commentary: Waiting for the Justice* (Slate 2018)

²⁷ Jeffery Bellin, ‘The Power of Prosecutors’ (2019) 9 NYULR 1.

encourage open file discovery, transparent plea-bargain and proper charging practices. It will also focus on other players²⁸ to promote the enactment and applicability of relevant laws and legal changes as it relates to private prosecution.

2.2. Effects of Servant of the Law Theory on Private Prosecution in Nigeria

The theories of prosecution paves way for a smooth criminal prosecution be it public or private. In all jurisdictions, the prosecutor is a center base to the functions and objectives of the criminal process.²⁹ Therefore, in carrying out his responsibilities, the private prosecutor must act fairly without any fear or favour, impartially and objectively.³⁰ The private prosecutor has to consider the opinions and concerns of the victims when their personal interests are affected. They should also ensure that the victims are informed of their rights and updated on developments in the criminal proceedings.³¹ The way by which evidence is gotten and the way by which statements made by the defendant is gotten are important under the law, and where there is any contravention, such evidence and statement should not be tendered.³² Necessary information about the case must not be kept away from the other parties by the prosecutor except in instances where such information will affect the fairness and justice of the criminal proceedings.³³ As provided in section 6 of the Administration of Criminal Justice Act (ACJA), facts that are material to the defense but which the prosecution does not intend to use should be disclosed to the defense counsel to help ensure that the rule of law is respected and an innocent person is not convicted.³⁴ As soon as it is discovered that the investigation conducted contravenes the law, the private prosecutor should drop the criminal proceedings. This will reflect the true position of the Servant of the Law Theory in a private prosecution.

In the Nigerian justice system, the Servant of the Law Theory would require that all legal practitioners, including those involved in private prosecutions, act as neutral agents of justice.

²⁸ These includes the Police, Judges, Law-makers and everyone involved in the criminal justice system

²⁹ UNODC, 'Public Prosecutors as the "Gate Keepers" of Criminal Justice' <<https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/2--general-issues--public-prosecutors-as-the-gate-keepers-of-criminal-justice.html>> accessed 15 December 2024.

³⁰ *ibid.*

³¹ Satyajit Boolel, 'Challenges in Crime in the 21st Century' <<https://dpp.govmu.org/Documents/Publications%20and%20Communique/hopac.pdf?csf=1&e=VbeSTk>> accessed 10 January 2023.

³² *ibid* standard item 4.

³³ High Court Federal Capital Territory Civil Practice Directions 2017, order 5.

³⁴ Administration of Criminal Justice Act 2015, s 6.

Their primary duty is to the law itself, rather than to any party involved in the prosecution. This theory emphasizes the importance of objectivity, fairness, and the pursuit of justice over personal gain or vindictiveness. Some of the effects of this theory therefore discussed hereto under.

Promotion of Fairness and Objectivity: The Servant of the Law Theory underlines the need for fairness and impartiality in prosecutions, whether public or private. In private prosecutions, there is a risk that personal biases or vendettas could drive the pursuit of criminal charges. The theory mandates that legal practitioners involved in private prosecutions must prioritize justice over personal interests, ensuring that prosecutions are based on sound legal grounds rather than personal grievances. This helps mitigate the risk of malicious or frivolous prosecutions and promotes fairness in the criminal justice process.

Ensuring Accountability and Ethical Standards: By positioning the prosecutor as a servant of the law, this theory imposes a duty on legal practitioners to uphold high ethical standards. In the context of private prosecution in Nigeria, this means that lawyers must be vigilant in ensuring that their actions do not compromise the integrity of the legal process. They must avoid conflicts of interest and ensure that their conduct does not bring the administration of justice into disrepute. This adherence to ethical standards helps maintain public confidence in the legal system, even when prosecutions are initiated by private individuals rather than the state.

Balancing Public and Private Interests: The Servant of the Law Theory requires prosecutors to balance public interest with the rights of individuals involved in criminal proceedings. In private prosecutions, there is a potential tension between the private interests of the complainant and the broader public interest in the fair administration of justice. The theory mandates that legal practitioners must not allow private interests to overshadow the need for justice. This balance is crucial in ensuring that private prosecutions do not become tools for personal vendettas or harassment but rather serve the public interest by addressing genuine grievances where the state has failed to act.

Judicial Oversight and Control: The Nigerian judiciary is expected to play a critical role in ensuring that the principles of the theory are upheld in private prosecutions. Courts have the authority to scrutinize private prosecutions to ensure they are not malicious or frivolous and to dismiss cases that do not meet the required legal standards. This judicial oversight acts as a safeguard, ensuring that private prosecutions align with the broader objectives of justice and

fairness. The courts should also ensure that private prosecutors adhere to ethical standards and that their actions do not undermine public confidence in the legal system.

Impact on the Rule of Law: The application of the theory in private prosecutions will strengthen the rule of law in Nigeria. By emphasizing the impartial application of legal principles and the need for justice to be served without bias, the theory will reinforce the idea that the law is above personal interests. This will help to maintain the integrity of the legal system and ensures that all individuals, regardless of their status or influence, are subject to the same legal standards.

Challenges in Implementing the Servant of the Law Theory in Nigeria

Even though the theory promotes impartiality and fairness, its application in private prosecutions can be challenging in Nigeria.

Lack of Resources: The criminal justice system in Nigeria is underfunded. Prosecutors often lack adequate tools, investigative support, and infrastructure. This undermines the impartial and fair execution of duties required by the servant of the law theory.

Legal Expertise: Many prosecutors lack continuous legal training. Without current knowledge of evolving legal standards and due process norms, fair and impartial prosecution becomes difficult.

Corruption: Corruption distorts the prosecutorial process. Bribes, political influence, and selective prosecution compromise the ideal of serving the law rather than private interests or state power. Also, the influence of powerful individuals or entities can skew the prosecution process, making it difficult to adhere strictly to the principles of the theory. In some cases, private prosecutors may lack the objectivity required by the theory, leading to biased or unjust prosecutions. These issues obstruct the theory's demand that prosecutors act as neutral ministers of justice rather than instruments of control or vendetta.

3.0. The ‘What and Who’ Theory of Prosecution

Ronald Wright³⁵, a renowned criminal justice scholar and former attorney with the US Department of Justice, and Rodney Engen³⁶, in analysing their views on the theories of

³⁵ He is a professor of law and his area of concentration is on the work of criminal prosecutors.

³⁶ Engen is an associate professor at the University of Arkansas with area of interest in criminology, criminal justice and sentencing.

prosecution, highlighted two (2) comprehensive inquiries to describe their idea of theories of prosecution.³⁷ These are the ‘What’ and the ‘Who’ Theories of prosecution.

The ‘What’ Theory focuses on what the main objectives of the prosecutor entails and the factors the prosecution has to consider when charging for a criminal act or when negotiating a plea bargain.³⁸ It concerns the end result expected by the prosecution in the course of prosecuting a criminal act. One of the reasons for prosecuting a criminal act is to minimize or control crimes and this could be by maximizing the sanction attached to the crime.³⁹ The prosecutor may create a set of capital offences and try to maximize the convictions for such capital offences.⁴⁰ The law already provides what constitutes capital offences alongside sanctions attached to them. The private prosecutor may in this circumstance, consider the gravity of the crime committed to determine the type of crime that the defendant will be charged with, be it a simple offence or a capital offence. The theory provides that the prosecutor may increase the number of convictions while paying little attention to the sentence attached to the conviction.⁴¹ Here, seeking to increase the number of convictions would depict seeking conviction at all cost.

The ‘What’ Theory according to Wright and Engen, highlights crime control issues that influence the decisions arrived at by judges and prosecutors.⁴² The charge against the defendant will vary based on the type and gravity of the crime committed.⁴³ The prosecutor considers more than the seriousness of the crime and the available evidence when subjective judgment

³⁷ Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 Marquette Law Review 1.

³⁸ Jeffery Bellin, ‘Theories of Prosecution’ (2020) 108 CLR 1203; Alexander Heinze, ‘Prosecutors and Trials’ in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021) 117.

³⁹ Oluyemisi Bamgbose and Sonia Akinbiyi, *Criminal Law in Nigeria* (Evan Brothers 2015).

⁴⁰ Stefano Ruggeri, ‘Public Prosecutors in Criminal Investigations: A Comparative Law Study’ in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021) 3.

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

⁴² *ibid.*

⁴³ Chelsea Thomas, ‘Legal and Ethical Principles for the 21st Century Prosecutor’

<https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2190&context=student_scholarship>

accessed 19 October 2022; Jan-Williem Van Prooijen, ‘Motives for Punishment’

<<https://doi.org/10.1093/oso/9780190609979.003.0002>> accessed 12 December 2024.

about the defendant's culpability and dangerousness are made.⁴⁴ The seriousness of the crime and the criminal history of the defendant play a major role when making a judgment.⁴⁵ However, this should not be a decision to be made by the private prosecutor, rather the judge who is also a part of the criminal justice system should be left to make the decision based on the fact before the court and all relevant evidence tendered by the prosecution.

The 'Who' Theory addresses the issue of who controls charging and who makes sentencing decisions. It regards the prosecutor as being a part of a complicated institutional and organizational system where outside forces, organizational imperatives, and personal interests are all taken into consideration to reach a prosecutorial decision.⁴⁶ Here, the prosecutor seeks individual objectives instead of seeking to control crime.⁴⁷ There are other persons involved and who also have one impact or the other on the work of the prosecutor. The prosecutor has to perform his work in line with the judges and defense counsel, he also has to consider the comments from the community and also perform within the available resources and boundaries set by the law makers.⁴⁸ So aside the individual motives and objectives of the prosecutor, the theory raises a question of 'who decides on criminal prosecution?'⁴⁹ Is it the prosecutor or the prosecuting institution as a body or some of the other parties involved in the criminal justice system? One of the commonest influence on the prosecutor's work comes from within the office of the prosecutor where he is given instruction and directives from the head of the organisation who is the chief prosecutor and in some states referred to as the Director of Public Prosecutions (DPP).⁵⁰ The chief prosecutor determines the way by which the middle management of the

⁴⁴ Austin Sarat, 'Beyond Discretion: Prosecution, the Logic of Sovereignty and the Limits of Law' (2008) 33 *Law and Sociology Inquiry* 387.

⁴⁵ Nora Demleitner, 'Prosecutors and Sentencing' in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021).

⁴⁶ Ronald Wright and Rodney Engen, 'Change Movement and Theories of Prosecutors' (2007) 91 *Marquette Law Review* 1.

⁴⁷ Jacqueline Hodgson, 'Prosecution in Adversarial and Inquisitorial Procedures: The Weakening of Professional Autonomy' in David Nelken and Claire Hamilton (eds), *Research Handbook in Comparative Criminal Justice* (Elgar 2022).

⁴⁸ Askarali Haydarov, 'Attorney Investigation in the United State' (2022) 6 *Tematics Journal of Law* 47.

⁴⁹ Ronald Wright and Rodney Engen, 'Change Movement and Theories of Prosecutors' (2007) 91 *Marquette Law Review* 1.

⁵⁰ For example, in Nigeria, the Director Public Prosecutions heads the Department of Public Prosecutions and he is the Chief Prosecutor of the State. He has the final say on any legal advice forwarded to the Ministry of Justice by the Police.

office interprets and follows his prosecutorial decisions and leaving no chance to the prosecutor under him to make the final prosecutorial decision.⁵¹

The outcome of prosecutorial decisions made by organizational imperatives may be driven by certain contemplations instead of considering what is apt or proper in a given case. For example, cases that might have been won may have been rejected; others may be reduced to a lesser charge just because the office is more interested in a particular case or because the office has allocated more resources to some other cases.⁵² Prosecutorial decisions made by the office of the DPP are what guide the initiation of private prosecution in jurisdictions where the approval of the Attorney General or DPP is needed before a crime can be prosecuted. Where there is no need for such approval, the prosecutorial decision will be left in the care of the private person or the private legal practitioner to determine whether or not a charge should be initiated against the defendant. In the 'Who' Theory, the prosecution of crime is not limited to just the prosecutorial body to decide on, it involves interactions and discussions with other government institutions.⁵³ This may be the interplay between the prosecutors and the police, or between prosecutors and defense counsel or prosecutors and the courts. The prosecution is a part of the 'working group' in the court and he is expected to have a cordial relationship with other components of the 'working group'.⁵⁴ This would make it almost impossible for the prosecutor to depart from what is expected of him to make a charge and process cases and norms that have been developed by the working group to ensure a sustainable and decent working condition and the ease off handling cases smoothly within a busy system.⁵⁵ This process has been described as the 'inter-organizational exchange' wherein the institution accommodates the needs of one another.⁵⁶ A private person or private legal practitioner should be ready to be involved in this

⁵¹ Stephen Singer, 'Elections, Powers, and Local Control: Reining in Chief Prosecutors and Sheriffs' (2015) 15 UMLJ 319.

⁵² *ibid.*

⁵³ Jeffery Bellin, 'Theories of Prosecution' (2020) 108 CLR 1220, 1223.

⁵⁴ Ronald Wright, 'Community Prosecution and Building Trust Across a racial Divide' in Ronald Wright, Kay Levine and Russell Gold (eds), *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford University Press 2021) 413.

⁵⁵ Peter Nardulli, Roy Flemming and James Eisenstein 'Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process' (1985) 76 Journal Criminal Law and Criminology 1103.

⁵⁶ Se Won Park, 'Every Reasonable Chance Plus two: How the Red Hook Community Justice Center Bridges the Gap Between the Community and the Justice System' (2022) 23 Cardozo Journal Conflict Resolution 575; Ronald Wright and Rodney Engen, 'Change Movement and Theories of Prosecutors' (2007) 91 Marquette Law Review 1.

process. In some circumstances, the interaction between prosecutors and other governmental bodies results in the development of formal guidelines that prosecutors must abide by. Some of these institutions are in control of the funds allocated to the prosecutor, some determine the standard of the evidence in the case file or the seriousness of the punishment that is passed.⁵⁷ This type of relationship according to Wright denotes the magnitude at which agencies are arranged and the extent to which decisions at certain stages have influence on the results of the next stage.⁵⁸

The theory also includes the relationship between the prosecutor and the community which is referred to as ‘community prosecution’.⁵⁹ One of the aims of prosecution includes the safety of the community and public order. The prosecution interacts and relies on the community by holding meetings and taking surveys to decide which cases to prosecute first. The prosecution looks beyond the convictions it has bagged and engages in a victim and community-centered stance on the work that is needed to be done.⁶⁰ Crime prosecution is not just the focus of the work but crime prevention which is meant to promote the feeling of security and wellbeing in the neighborhood.⁶¹ Additionally, community prosecution strengthens and promotes connections between the prosecutor and other governmental organizations. The chief prosecutor coordinates and engages the police, social service agencies and any other group that can contribute to a healthier community.⁶² In a way, the community cannot be ignored as it is an important player in prosecutorial decisions and choices.⁶³ It would only be right for a private person or private legal practitioner to reflect both the ‘What’ Theory and the ‘Who’ Theory of prosecution. The ‘Who’ Theory of prosecution where not properly adhered to, will lead to an unfavorable assessment of charge and a preference for less quality provisions in the criminal code as the players involved in the prosecutorial decisions would be too many. Every player

⁵⁷ Ronald Wright, ‘Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation’ (2005) 105 Columbia Law Review 1010.

⁵⁸ *ibid.*

⁵⁹ Ronald Wright and Rodney Engen, ‘Change Movement and Theories of Prosecutors’ (2007) 91 Marquette Law Review 1.

⁶⁰ Se Won Park, ‘Every Reasonable Chance Plus two: How the Red Hook Community Justice Center Bridges the Gap between the Community and The Justice System’ (2022) 23 Cardozo Journal Conflict Resolution 575.

⁶¹ *ibid.*

⁶² Joshua Kelifeld, Stephanos Bibas and Richard Bireschbach, ‘By the People: Restoring Democracy in Criminal Justice’ <[file:///C:/Users/hp/Downloads/SSRN-id4107451%20\(1\).pdf](file:///C:/Users/hp/Downloads/SSRN-id4107451%20(1).pdf)> accessed 20 August 2024.

⁶³ Josh Bowers, ‘Grassroots Plea Bargaining’ (2007) 91 MLR 85.

would want to have a say. However, the main objectives of prosecution will determine the need for a quality criminal code where it is necessary and how the prosecutors will pursue the objectives is also of importance. Where prosecutorial decisions embrace inequality in the application of the law, justice will be compromised.

4.0 Challenges in Implementing the Who and What Theory on Private Prosecution in Nigeria

The "Who and What" Theory in the context of legal practice, emphasizes the importance of the identity of the parties involved (the "who") and the nature of the case (the "what") in shaping the dynamics and outcomes of criminal proceedings. This theory will be relevant in jurisdictions like Nigeria, where the interplay between powerful individuals, societal status, and legal institutions can significantly influence the administration of justice. In the realm of private prosecution, this theory has profound implications, as it touches upon issues of access to justice, equality before the law, and the potential for misuse of the criminal justice system. The effectiveness and fairness of private prosecution can be influenced by the identities of the parties involved (who is prosecuting and who is being prosecuted) and the nature of the crime (what is being prosecuted).

Influence of Social and Political Status: One of the primary effects of 0 on private prosecution in Nigeria is the potential for the influence of social and political status on legal outcomes. In cases where the prosecutor or the defendant is a person of significant social or political standing, there can be considerable pressure on the criminal justice process. For instance, a private prosecution initiated by a powerful individual against a less influential person may be pursued more aggressively, with greater resources at their disposal thereby potentially leading to an imbalance in the administration of justice. Conversely, if the defendant is a powerful figure, the prosecution may face obstacles such as intimidation, undue delays, or even interference with the criminal justice process. This can result in unequal treatment before the law, where the identity of the parties involved overshadows the legal merits of the case.

Access to Justice and Inequality: The theory also highlights issues of access to justice, particularly in a system where wealth and influence can affect legal outcomes. Private prosecution requires resources such as financial, legal expertise, and time that may not be readily available to all individuals. As a result, wealthier individuals or entities are more likely to successfully initiate and sustain private prosecutions, while poorer individuals may be unable

to seek justice through this mechanism. This creates a disparity in access to justice, where the "who" in terms of financial capability plays a critical role in determining whether justice is served. Furthermore, the nature of the case ("what") can influence whether a private prosecution is pursued or not. High-profile cases involving significant public interest may attract more attention and resources, while less prominent cases may be overlooked or under-prosecuted, leading to selective justice.

Potential for Abuse of Legal Process: The theory raises concerns about the potential for abuse of the private prosecution process. Individuals with power or influence might use private prosecution as a tool for personal vendettas or to settle scores, rather than to seek genuine justice. In such cases, the identity of the parties involved (who) and the nature of the case (what) can be manipulated to serve personal interests rather than uphold the rule of law. For example, a wealthy individual might initiate private prosecution against a rival or a critic, not necessarily because a crime has been committed, but to harass or intimidate the defendant. This misuse of the legal process undermines the integrity of the justice system and can lead to a lack of public confidence in the fairness of legal proceedings.

Judicial Bias and Perception: The theory also has implications for judicial impartiality. Judges, consciously or unconsciously, may be influenced by the identities of the parties involved or the perceived importance of a case. In a highly politicized environment like Nigeria, where the judiciary is sometimes perceived as being influenced by external factors, this can lead to biased rulings that favor the more powerful party than the less. Moreover, the public perception of justice can be affected by the "Who and What" dynamics. If the public believes that the justice system favors the wealthy or the powerful, or that certain cases are prioritized over others based on their societal implications, this can erode trust in the rule of law and the judicial system.

Impact on the Rule of Law: The overall impact of the "Who and What" Theory on private prosecution in Nigeria is significant in terms of its effect on the rule of law. The principle of equality before the law is a cornerstone of the rule of law, but when legal outcomes are influenced by the identities of the parties involved or the nature of the case, this principle is compromised. The theory can lead to a situation where the rule of law is applied inconsistently therefore undermining the foundations of a fair and just criminal justice system.

5.0 Conclusion and Recommendations

The Servant of the Law Theory is relevant as it depicts and promotes the stands expected of a private prosecutor as the theory outlines how the private prosecutor is to serve in the interest of the law irrespective of the situation, he finds himself. The theory has significant effects on private prosecution in Nigeria by promoting fairness, objectivity, and the rule of law. While there are challenges in its application, particularly in ensuring that private prosecutors adhere to the high standards required by the theory, the principles it espouses are crucial for maintaining the integrity of the legal system. Judicial oversight and the ethical obligations imposed on legal practitioners help mitigate the risks associated with private prosecution by ensuring that it serves the public interest and upholds the principles of justice. In a legal system where the state may not always be able or willing to prosecute crimes, the Servant of the Law Theory provides a necessary framework for ensuring that private prosecutions contribute to the fair and just administration of the law in Nigeria

As the private prosecutor is seeking justice, he should also focus on serving the purpose of the law which includes fairness and excludes seeking justice at all cost. The Servant of the Law Theory portrays that priority be placed on constitutional provisions regarding the rights of a defendant. Operating under the Servant of the Law Theory would make the private prosecutor to refrain from engaging in situations that would berate and tamper with the rights of the defendant. Servant of the law theory promotes that private prosecutors should not make conviction at all cost a do or die affair in the name of justice. Thus, the rights of the defendants should be put into consideration not withstanding whether such defendants get acquitted or not. Furthermore, according to the Servant of the Law Theory, it is the private prosecutor's duties to take into account the opinions and concerns of crime victims when those interests are at stake. He also has a responsibility to keep victims informed of their rights and updated on any developments in the criminal case.

The "Who and What" Theory highlights the challenges of private prosecution in Nigeria, particularly in a context where social, political, and economic factors can heavily influence legal outcomes. The theory underscores the potential for unequal access to justice, the risk of abuse of the legal process, and the possibility of judicial bias. These issues pose significant challenges to the fair and impartial administration of justice in Nigeria. To mitigate the negative effects of the theory on private prosecution, there is a need for robust legal frameworks that ensure the impartiality of the judiciary, protect against the misuse of private prosecution, and

promote equal access to justice. Strengthening the rule of law in Nigeria requires addressing the underlying social and political dynamics that allow the identities of parties and the nature of cases to unduly influence legal outcomes. Only by doing so can the integrity of the legal system be preserved, ensuring that justice is truly blind and that all individuals, regardless of their status or the nature of their case, are treated equally before the law.

Furthermore, engaging the lower cadres to make simple charges for a crime may empower them and make them feel relevant and useful as opposed to the chief prosecutor and those at the higher cadre who have risen above the level of charging simple offence by themselves. Most importantly, transparency should be a virtue to be upheld at any point in time when a charge is being made. The public should be able to identify the party responsible for the decision of the prosecutor as this would help them to be able to change leadership or prevail on leadership to make or revise policies or even spending priorities where necessary. The public might not be comfortable with the prosecutorial decision arrived at and transparency makes it possible for the public to know the right institution or body to channel its grievances to. Where the prosecution of a criminal act is handled privately, the public would be aware and they would be able to direct their grievances to the right channel. This would also promote transparency in private prosecution. Overall, to uphold justice in accordance with the servant of the law principle, a private person or private legal practitioner must be properly directed on what the defendant should be charged with and who should bring the case. The trial of the defendant should not be a do or die issue. The defendants have rights and the rights are to be upheld by the servant of the law private prosecutors.

