

## Power to Decide, Not Power to Rule: Prosecutorial Discretion and Constitutional Restraint in Uganda

Timothy Amerit

Makerere University, Uganda

✉ **Corresponding Author:** Timothy Amerit, **E-mail:** [timothyamerit@gmail.com](mailto:timothyamerit@gmail.com)

### ARTICLE INFORMATION

**Submitted:** July 14, 2026

**Accepted:** August 29, 2026

**Published:** September 23, 2026

**Volume:** 2

**Issue:** 1

### KEYWORDS

Prosecutorial discretion; Director of Public Prosecutions; judicial review; reasons; equality; private prosecution

### ABSTRACT

Article 120 of Uganda's Constitution entrusts the Director of Public Prosecutions with wide powers because criminal justice cannot be administered by formula. That institutional freedom is indispensable, but it is not dominion. Article 120(6) protects the prosecutor from external direction; article 120(5) governs the quality of the decision made once that protection has done its work. Public interest, the administration of justice and the need to prevent abuse of legal process are therefore not ceremonial considerations. Read with articles 20, 21, 28, 42 and 50, they require a decision that can be justified by reference to evidence, lawful purpose, even-handedness and fair procedure.<sup>1</sup> The 2023 *Decision to Charge Guidelines* are a serious institutional advance. They adopt a realistic-prospect test, separate evidential sufficiency from public interest, require written reasons and insist on continuing review. Yet the Guidelines also contain their own accountability deficit: compliance is mandatory inside the Office of the Director of Public Prosecutions, but the instrument disclaims third-party rights and withholds written reviews from those most affected by them. The result is an uncomfortable constitutional arrangement in which the state records why coercive power moved but ordinarily denies the affected person access to the explanation.<sup>2</sup> This research study argues for a more exacting, but properly restrained, law of prosecutorial accountability. *Bakaleeke*, *Rutayisire*, *Wanyoto* and *Begira Avito* are not treated as passing illustrations. Each is examined for its premise, method, constitutional consequence and practical effect. Their combined lesson is that Ugandan courts recognise review in principle, but have not yet resolved how a claimant can prove irrationality, improper purpose or failure to consider relevant matter when the decisive record remains with the DPP. Comparative authority is used to address that difficulty without inviting courts to retry criminal cases before trial. The proposed model is structured discretion: clear criteria, contemporaneous reasons, independent reconsideration, controlled access to the record, remedies fitted to the defect and institutional measures that value decisional integrity rather than raw throughput. Independence survives intact. What disappears is the assumption that independence supplies its own justification.

### 1. Introduction: the power before the trial

The expression 'prosecutorial discretion' is often made to carry more weight than it can bear. It correctly signals that a prosecutor must choose: which facts warrant further inquiry, whether available evidence crosses the charging threshold, which offence fairly reflects the conduct, whether prosecution serves the public interest and whether a case should continue when its foundation changes. It does not answer the harder question, which is what makes any one of those choices lawful. Breadth of choice and legality of choice are different inquiries. When the distinction is neglected, a constitutional protection against political command quietly becomes an argument against legal accountability.<sup>3</sup>

That slippage is particularly serious in criminal justice. A charge is not a neutral invitation to a court to look at evidence. It changes the accused person's position before any evidence is tested: arrest may follow, liberty may depend on bail, employment and reputation may be damaged, and the cost of defending the case begins at once. Victims and witnesses are also drawn into a

<sup>1</sup> Constitution of the Republic of Uganda 1995 (as amended) arts 20, 21, 28, 42, 50 and 120(3), (5)–(6); *Bakaleeke v Attorney General* (Miscellaneous Cause No 212 of 2018) [2019] UGHCCD 4 (27 February 2019).

<sup>2</sup> Office of the Director of Public Prosecutions, *The Decision to Charge Guidelines* (2023) paras 1.1.6–1.2.1, 1.6.1, 2.1.6 and 2.10.1. The tension is internal to the instrument: it promises transparency and requires reasons, makes compliance disciplinary, but disclaims third-party rights and places written reviews behind a categorical confidentiality rule.

<sup>3</sup> Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1969) 4–6; Angela J Davis, *Arbitrary Justice: The Power of the American Prosecutor* (OUP 2007) 5–15; Stephanos Bibas, 'The Need for Prosecutorial Discretion' (2010) 19 *Temple Political and Civil Rights Law Review* 369, 369–73.

process whose pace and direction they do not control. A refusal to prosecute, or a late discontinuance, works in the opposite direction but is no less consequential. It may close the only realistic route to adjudication, waste years of cooperation, or leave a serious allegation suspended between public suspicion and legal silence.<sup>4</sup>

None of this means that every mistaken charge is unconstitutional or that every disappointed complainant is entitled to a prosecution. Prosecutors evaluate incomplete human accounts. Honest judgments will differ, witnesses will withdraw and evidence that appeared reliable may collapse. A sound doctrine must leave room for that professional judgment. The constitutional objection begins elsewhere: where the decision has no rational evidential footing, pursues an alien purpose, ignores a material defence, treats comparable cases unevenly, departs from settled criteria without explanation, or continues after its lawful basis has gone. At that point, deference to judgment has become deference to the absence of judgment.

The argument developed here is that article 120 already contains the resources for a more coherent distinction. Clause (6) answers the institutional question: no person or authority may direct or control the DPP in the exercise of the constitutional functions. Clause (5) answers the decisional question: those functions must be exercised with regard to public interest, the administration of justice and the need to prevent abuse of legal process. Those provisions are complementary. The first protects the location of judgment; the second disciplines its exercise. Articles 20, 21, 28, 42 and 50 then connect that discipline to rights, fair administration and an effective remedy.<sup>5</sup>

The 2023 Guidelines make this inquiry timely. Uganda no longer lacks a national account of how a prosecutor ought to approach charge. The more pressing issue is whether the standards proclaimed in that document can be tested when they matter. The Guidelines require written decisions and detailed records, yet tell a person questioning a charge to consult the Guidelines rather than the reasons in the file. A code that is mandatory for the decision-maker but unavailable to the person affected is not worthless. It improves training, consistency and supervision. It is nevertheless incomplete as a constitutional safeguard because it regulates conduct without fully exposing power to correction.<sup>6</sup>

That incompleteness can be seen in the cases. In *Bakaleeke v Attorney General*, the High Court accepted that prosecutorial power is reviewable and must be exercised fairly and honestly, but refused to examine evidential sufficiency and placed the burden of proving public-law error on an applicant who did not have the prosecution's decisional record. *Rutayisire v Uganda Revenue Authority* shows that a court can intervene without trying the criminal case when there is no rational bridge between the investigated facts, the legal elements and the persons selected for charge. *Wanyoto v Sgt Ouma* reveals something more troubling: investigative abuse can infect the prosecution that adopts it, while procedural divisions among police, prosecutor and Attorney General can leave responsibility difficult to locate. *SP Begira Avito v Attorney General* restates judicial restraint, but also sharpens the question that *Bakaleeke* left unanswered. If review is available only after a claimant proves what the state alone has recorded, how real is the remedy?<sup>7</sup>

This research study does not answer that question by asking judges to become prosecutors. It advances a narrower proposition. A reviewing court should examine whether the constitutionally assigned decision-maker addressed the right legal test on a rational evidential foundation, for a proper purpose and through a fair process. Where the defect is curable, reconsideration by a different prosecutor will ordinarily respect article 120 better than a judicial direction to prosecute or not to prosecute. Where continuation itself is abusive, stronger relief may be necessary. The line is not between review and independence. It is between supervision of legal boundaries and substitution of prosecutorial judgment.

The discussion proceeds accordingly. Section 2 explains the method and the standard of evaluation. Section 3 reads article 120 within the Constitution as a whole. Sections 4 to 6 examine charge, takeover, discontinuance and disclosure as connected points in one decisional course. Section 7 gives sustained attention to the principal Ugandan cases and develops a record-sensitive approach to judicial review. Sections 8 and 9 place doctrine alongside institutional capacity and comparative experience. Section 10 proposes reforms that can operate together in practice. The conclusion returns to a simple constitutional idea: the DPP must remain free to decide, but the decision must remain one that law can recognise as reasoned public power.

## **2. Method and measure of lawful discretion**

The research is doctrinal, comparative and data-informed. Its primary materials are the Constitution, criminal procedure legislation, the 2023 Guidelines, Ugandan judgments and official audit and performance material. Comparative cases are not presented as answers imported from elsewhere. They are used to isolate recurrent design problems: how to preserve independence while requiring reasons; how to disclose enough of a record for review without endangering witnesses; how to

---

<sup>4</sup> *The Decision to Charge Guidelines* (n 3) paras 2.1.2–2.1.5; Stephanos Bibas, 'Prosecutorial Regulation versus Prosecutorial Accountability' (2009) 157 *University of Pennsylvania Law Review* 959, 978–92.

<sup>5</sup> Constitution of the Republic of Uganda 1995 (as amended) arts 20, 21, 28, 42, 50 and 120(3), (5)–(6).

<sup>6</sup> *The Decision to Charge Guidelines* (n 3) paras 1.1.5–1.2.1, 1.6.1, 2.1.6 and 2.10.1.

<sup>7</sup> *Bakaleeke* (n 2); *Rutayisire and another v Uganda Revenue Authority* (Miscellaneous Cause No 236 of 2020) [2021] UGHCCD 10 (19 March 2021); *Wanyoto v Sgt Ouma and another* (Civil Appeal No 91 of 2021) [2022] UGCA 185 (8 July 2022); *SP Begira Avito v Attorney General* (Miscellaneous Cause No 23 of 2024) [2026] UGHCCD 236 (22 July 2026).

distinguish legal scrutiny from evidential substitution; and how to fashion relief without putting a court in charge of prosecution policy.<sup>8</sup>

That restraint matters. Prosecutorial institutions differ in constitutional position, appointment, resources, police relations and the place given to private prosecution. A rule developed for England and Wales, Canada, Kenya, Mauritius, Fiji or South Africa cannot simply be lifted out of its setting and renamed Ugandan law. Comparative value lies in function, not resemblance. *R (Purdy) v Director of Public Prosecutions*, for example, is useful because it shows why a public policy must be clear enough to guide those whose conduct it governs. It does not settle the content of article 120. *Democratic Alliance v Acting National Director of Public Prosecutions* is useful because it explains why a court needs the record of the impugned decision. It does not determine which Ugandan documents are privileged. The constitutional work remains local.<sup>9</sup>

Official figures require similar care. Counts of files received, sanctioned or prosecuted reveal workload and institutional reach. They do not, without more, reveal whether the right person was charged, whether an exculpatory account was tested, whether like files received like treatment or whether a withdrawal corrected an earlier error. The analysis therefore uses reported numbers as evidence of operational conditions, not as a surrogate for justice. Where the Auditor General identifies incomplete case data, underused information systems or weak verification, that limitation is part of the constitutional analysis rather than an inconvenience to be hidden.<sup>10</sup>

Lawful discretion is assessed against six connected questions. Did the decision-maker possess and properly exercise the power? Was the conclusion anchored in admissible, reliable and sufficiently complete evidence? Was public interest weighed as a distinct question rather than assumed from evidential sufficiency? Were relevant persons and considerations treated impartially? Do contemporaneous reasons show how the conclusion was reached? Was there a practical route to correction? These are not six boxes to be ticked. They form a chain. A clear rule cannot help if no reasons disclose its application; reasons cannot be tested if the record is withheld; review cannot correct what it is not permitted to see; data cannot expose inconsistency if the underlying decisions are not recorded.<sup>11</sup>

The chosen measure is therefore justificatory rather than outcome-centred. A conviction does not retrospectively make every earlier prosecutorial act lawful, just as an acquittal does not by itself prove that the charge was abusive. The question is whether the decision was one a constitutionally independent prosecutor could lawfully make on the information then available, applying the standards that governed at that time. This temporal discipline protects prosecutors from hindsight while preventing later events from washing away an unlawful beginning.

### 3. Article 120 read as a constitutional whole

#### 3.1 Independence identifies the decision-maker; it does not immunise the decision

Article 120(3) gives the DPP power to direct police investigations, institute criminal proceedings, take over proceedings begun by another person or authority and discontinue proceedings before judgment. Article 120(6) then provides that, in performing those functions, the DPP is not subject to the direction or control of any person or authority. The protection is deliberately strong. A prosecution service exposed to ministerial instruction, private pressure or police command cannot apply criminal law evenly.<sup>12</sup>

The wording does not, however, remove prosecutorial action from the rest of the Constitution. Article 2 declares constitutional supremacy. Article 20 binds all organs and agencies of government to respect, uphold and promote rights. Article 42 guarantees just and fair treatment in decisions made by administrative bodies, while article 50 provides access to a competent court where a right is infringed or threatened. The DPP is independent within that order, not independent of it.

Comparative common-law authority assists because the same false equation has appeared elsewhere. In *Mohit v Director of Public Prosecutions of Mauritius*, the Privy Council rejected the view that constitutional independence displaced judicial review. In *Matalulu v Director of Public Prosecutions*, the Supreme Court of Fiji identified confined grounds on which a prosecutorial decision may be reviewed, including excess of power, improper purpose, bad faith, obedience to an unauthorised direction, fettering by inflexible policy and manifest unreasonableness. *Sharma v Brown-Antoine* endorsed a similarly cautious jurisdiction.

<sup>8</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 101–04.

<sup>9</sup> Esin Örcü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205, 208–11; Laurène Soubise, 'Prosecutorial Discretion and Accountability: A Comparative Study of France and England and Wales' (PhD thesis, University of Warwick and Université Lumière Lyon 2, 2015) 269–73.

<sup>10</sup> Office of the Auditor General, *Report of the Auditor General on the Office of the Director of Public Prosecution for the Audit Year Ended December 2025* (December 2025) 2–4, 23–25 <https://www.oag.go.ug/storage/reports/ILO CG DPT 2024 25 1775572785.pdf> accessed 8 September 2026.

<sup>11</sup> Jerry L Mashaw, *Due Process in the Administrative State* (Yale University Press 1985) 158–62; Marc L Miller and Ronald F Wright, 'The Black Box' (2008) 94 *Iowa Law Review* 125, 127–40.

<sup>12</sup> Constitution of the Republic of Uganda 1995 (as amended) art 120(3), (6); *The Decision to Charge Guidelines* (n 3) paras 1.3.1–1.4.4.

These cases do not license routine challenges to charge. Their deeper point is that independence concerns influence over the result; judicial review concerns the legal conditions under which the authorised official reached it.<sup>13</sup>

That distinction carries a practical consequence. The intensity of review should respond to the quality of the decision, not simply to the status of the office. A court should be slow to disturb a careful, contemporaneous evaluation that addresses the governing test and discloses a rational evidential foundation. The same court should not become more deferential because no reasons were recorded. Opacity is not expertise. If institutional silence itself enlarges the margin of discretion, the weakest process receives the strongest protection.

### **3.2 Independence from police requires independent thought**

Article 120(3)(a) empowers the DPP to direct the police to investigate criminal information and report expeditiously. The 2023 Guidelines add, in plain terms, that prosecutors are independent from police and other investigators and must consider circumstances that favour as well as those that disadvantage the accused.<sup>14</sup>

This separation is easily stated and harder to practise. Most prosecution files arrive through investigators who have already selected witnesses, framed the narrative and formed a view of guilt. A prosecutor working under pressure may test whether the police case can be presented, rather than whether the state has fairly investigated the competing explanation. Those are not the same task. The first asks whether the file contains enough inculpatory material. The second asks whether reasonable lines of inquiry that point away from guilt have been pursued, whether contradictions alter reliability, and whether an apparently criminal dispute is being used to gain leverage in a civil or commercial contest.

The power to direct investigation is therefore accompanied by responsibility. It should be used to repair imbalance, preserve vulnerable evidence and test the state's own hypothesis before charge. A minute that merely asks the police to obtain another statement supporting the existing theory does not demonstrate prosecutorial independence. Nor does the prosecutor become independent by signing a charge sheet drafted from an investigator's conclusions. Independence is shown in the quality of the challenge brought to the file.

### **3.3 Article 120(5) states three cumulative disciplines**

Article 120(5) requires the DPP to have regard to public interest, the interest of the administration of justice and the need to prevent abuse of legal process. The three considerations overlap, but they are not synonyms. Each performs work that would be lost if 'public interest' became a general label for whatever decision the prosecutor preferred.<sup>15</sup>

Public interest asks whether deploying criminal law serves a legitimate public end in the circumstances of the particular case. Serious harm, culpability and protection of vulnerable persons plainly matter. So do the age and circumstances of the suspect, state-caused delay, available non-criminal responses and the likely proportionality of prosecution. Public opinion may inform the social setting, but it cannot dictate the answer. A prosecution calculated to satisfy political appetite, punish an unpopular person or avoid criticism is not converted into a public-interest prosecution by the volume of support it attracts.

The administration of justice is broader than the likelihood of conviction. It reaches the selection of charges, candour with the court, disclosure, witness treatment, reasonable expedition and willingness to revise a position when its foundation changes. A prosecutor may have enough evidence to secure a conviction and still act against the administration of justice by suppressing material, inflating charges for bargaining leverage or insisting on a case that has become procedurally unfair. The constitutional phrase keeps the prosecutor's responsibility fixed on the integrity of adjudication rather than the institutional credit of winning.

The prevention of abuse is also prospective. It does not begin only after a court declares the proceedings oppressive. It requires attention to how criminal process is being used: whether an investigator is converting arrest and charge into pressure over property; whether repeated adjournments preserve a charge while the state searches for the evidence that should have preceded it; whether takeover of a private prosecution will be followed by an unexplained withdrawal; or whether revival of a closed matter defeats a legitimate assurance without new evidence. The obligation is to avoid creating the abuse as well as to stop it once visible.

These considerations are cumulative. Evidential sufficiency cannot excuse improper purpose. Political sensitivity cannot cure missing proof. Administrative convenience cannot turn disproportionate prosecution into justice. The decision record need not read like a judgment, but it must make clear that the relevant constitutional tensions were actually confronted. A formula stating

---

<sup>13</sup> *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 [17]; *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 (Supreme Court of Fiji) 735–36; *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780 [14]. These decisions use a demanding threshold because prosecution requires evaluative judgment. Their demand for restraint is not a rule that a prosecutor may define the limits of constitutional power conclusively.

<sup>14</sup> Constitution of the Republic of Uganda 1995 (as amended) art 120(3)(a); *The Decision to Charge Guidelines* (n 3) paras 1.4.1, 1.4.4 and 2.3.9.

<sup>15</sup> Constitution of the Republic of Uganda 1995 (as amended) art 120(5); Daniel DD Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124, 130–37.

'public interest considered' says no more than a charge sheet stamped 'evidence considered'. It records a conclusion and conceals the reasoning.

### **3.4 Rights give content to restraint**

Article 21 matters because discretion distributes the severity and mercy of the criminal law. Discrimination may be express, but it may also appear as unexplained difference in charging, diversion, plea position or discontinuance across otherwise comparable cases. The evidential difficulty is obvious: the affected person rarely possesses the comparator data held across the prosecution service. The United States Supreme Court's decision in *United States v Armstrong* illustrates the danger. By demanding a demanding initial showing of selective prosecution before discovery, the doctrine placed access to proof behind proof of the very pattern the claimant needed the state to disclose. Uganda should not reproduce that circle under article 21.<sup>16</sup>

Article 28 protects the fairness of the hearing, but its significance is not postponed until testimony begins. A charge without a rational evidential basis, concealment of material needed to answer it, or delay used as an investigative holding device can compromise the conditions of a fair hearing before trial. Article 42 adds a distinct concern with how public authority treats the person affected. Its application need not turn every prosecutorial choice into an administrative appeal. It requires, at minimum, that lawful power be exercised fairly, for proper purpose and on relevant material. Article 50 ensures that those requirements are not merely aspirational.

Reasons connect these provisions. They make the prosecutor pause before acting, preserve what was known at the time, enable a supervisor to identify error, help an affected person understand the decision and permit a court to distinguish lawful judgment from assertion. Administrative-law scholarship has long treated reasons as a discipline on discretion, while prosecutorial scholarship has shown how decisions hidden in a 'black box' resist both equality analysis and institutional learning.<sup>17</sup> The constitutional demand should remain proportionate. A routine, straightforward charge may justify a short record. A reversal in a serious case, a decision to take over a private prosecution, or a discontinuance after years of litigation requires more. Consequence, novelty and departure should determine depth.

The point is not that reasons guarantee a sound decision. A polished explanation can rationalise error, and a hurried prosecutor may reach a lawful result in sparse terms. Yet the absence of reasons removes the most practical means of testing whether the judgment was independent, evidence-led and constitutionally attentive. Article 120 protects room for choice; it does not protect a choice from having an intelligible legal basis.

## **4. The 2023 Guidelines: a strong charging code with a weak constitutional doorway**

### **4.1 The evidential test must do more than rename suspicion**

The *Decision to Charge Guidelines* begin from the right premise. Prosecutors are gatekeepers, not a forwarding office between police and court. The document acknowledges that a poorly charged case may place a person on remand, restrict bail, damage family and employment, and burden an already strained court system. It therefore requires an objective and independent analysis of every file and written reasons for charge or no charge.<sup>18</sup>

The prescribed standard is a realistic prospect of conviction against each suspect on each charge. The question is whether an objective, impartial and reasonable court, properly directed, is more likely than not to convict. That threshold is deliberately lower than proof beyond reasonable doubt. It is nevertheless more demanding than a reasonable suspicion, and it belongs to the prosecutor rather than the investigator. The Guidelines support that distinction by requiring attention to relevance, admissibility, reliability, credibility, availability and any defence raised. Reasonable lines of inquiry include those pointing away from guilt.<sup>19</sup>

The strength of this scheme lies in its insistence on disaggregation. Evidence does not become sufficient because the file is thick or the allegation grave. Each element, suspect and charge must be tested. A confession may be central but vulnerable to exclusion; an identification witness may be sincere but unreliable; a document may be probative but lack an admissible foundation; a complainant may be credible on the central event yet mistaken about the identity of a secondary participant. An independent prosecutor must ask how the evidence will operate in court, not merely whether it can be summarised in language that resembles an offence.

That distinction is easy to lose where a file has travelled through an investigative hierarchy. Repetition can give an allegation the appearance of corroboration even when several statements derive from one source. A police recommendation may also frame

<sup>16</sup> Constitution of the Republic of Uganda 1995 (as amended) art 21; *United States v Armstrong* 517 US 456, 463–71 (1996); Angela J Davis, 'Prosecution and Race: The Power and Privilege of Prosecutorial Discretion' (1998) 67 *Fordham Law Review* 13, 35–41. *Armstrong* is used as a warning, not as a proposed Ugandan test: its comparator requirement shows how an exacting disclosure threshold can make proof of selective prosecution practically circular.

<sup>17</sup> Mashaw (n 12) 158–62; Miller and Wright (n 12) 127–40; Davis, *Arbitrary Justice* (n 4) 180–88.

<sup>18</sup> *The Decision to Charge Guidelines* (n 3) paras 1.1.6, 2.1.2–2.1.6.

<sup>19</sup> *ibid* paras 2.2.1, 2.3.1–2.3.9 and 2.11.1–2.11.7. Paragraph 2.2.1 defines a realistic prospect as a conclusion that an objective, impartial and reasonable court is more likely than not to convict; it expressly distinguishes that test from proof beyond reasonable doubt.

the disputed question too narrowly, particularly in land, commercial or employment conflicts where a complainant seeks criminal process alongside civil advantage. The Guidelines expressly require the suspect's explanation to be assessed. The sound approach is neither to accept the explanation at face value nor to dismiss it as 'a matter for the defence'. It must be tested against objective facts before the state commits itself to charge.

The constitutional event is therefore the application of the test, not its appearance in a public document. 'Realistic prospect of conviction' can discipline judgment only if the file shows which evidence established each element, which apparent weaknesses were material, what further investigation was directed and why the final balance crossed the threshold. Without that trace, the phrase can become a certificate attached after the choice has already been made.

#### **4.2 The threshold test cannot make detention an investigative method**

The Guidelines permit a charge before the full evidential test is met in 'rare and unique' circumstances. The offence must be very serious; there must be some evidence, reasonable grounds to believe the suspect committed it, an identifiable and non-speculative prospect of further evidence within a reasonable time, substantial grounds to object to bail, and a public interest in immediate charge. Supervisory consultation is required. The file must describe the outstanding evidence and anticipated timetable, and the first review must occur within fourteen days.<sup>20</sup>

Properly confined, that exception recognises a hard reality. Evidence in a murder, terrorism, election-violence or sexual-offence inquiry may still be emerging while delay creates a real risk to witnesses or public safety. The exception allows an urgent decision without pretending that the ordinary test has been met. Its candour is preferable to lowering the ordinary threshold invisibly.

The danger lies in the way its requirements can reinforce one another. If substantial grounds to oppose bail become part of the reason to charge, the state's desire to secure custody may precede the evidential justification for invoking criminal process. Once the person is detained and a court file exists, institutional momentum favours another adjournment rather than admission that the anticipated evidence has not arrived. What began as a carefully delimited exception then permits arrest-led investigation: charge now, complete the case later, and make the accused bear the delay.

The Guidelines attempt to prevent that result. Further evidence must be identifiable; the reason it is missing and the time needed to obtain it must be recorded; continuing objection to bail must itself be reviewed; and absent evidence should prompt review for withdrawal without delay.<sup>21</sup> Those protections need a firmer operational edge. The fourteen-day review should state whether each promised item arrived and how it altered the case. A supervisor should give fresh written authority for any extension. Where the missing material no longer has a realistic prospect of emerging, withdrawal should be the default. A threshold charge is lawful because of a time-bound evidential trajectory, not because the original allegation remains serious.

This is where article 120(5) changes the analysis. The administration of justice is not served by preserving a charge that exists mainly to preserve detention. Prevention of abuse requires the prosecutor to account for the liberty cost created by an incomplete state investigation. Public interest may justify urgency, but urgency cannot become a permanent substitute for proof.

#### **4.3 Public interest must sometimes change the answer**

Once the evidential test is passed, the Guidelines require a distinct public-interest assessment. Seriousness, culpability, harm, age and maturity, the circumstances of the victim, impact on the community, proportionality and alternatives to prosecution are among the listed considerations. Their weight varies, and one factor may outweigh several pointing the other way.<sup>22</sup>

The word 'distinct' is important. If every case that passes the evidential test is said to pass the public-interest test for the same reason, the second stage adds ceremony rather than judgment. The public interest earns its constitutional place when it can change an outcome that evidence alone would permit. A technically provable but minor offence may call for diversion; a child may require a response centred on rehabilitation; grave state-caused delay may make a marginal prosecution unjust; a vulnerable victim may need prosecution despite difficulty, or may face further harm from a course whose likely penal consequence is slight. The decision should identify the factors pulling in both directions and say why one side prevails.

That practice protects more than the individual file. Unexplained severity is readily criticised as persecution, but unexplained leniency can distribute privilege just as effectively. A system cannot assess whether comparable suspects received comparable treatment if its reasons record only the factor that supports the chosen result. The counter-consideration matters because it shows what was rejected and provides a basis for internal comparison.

Laurène Soubise's comparative work offers a useful warning. Central charging standards may reduce uncontrolled variation, yet forms and managerial routines can compress genuine evaluation into a box marked 'public interest'.<sup>23</sup> The answer is not to

---

<sup>20</sup> *ibid* paras 2.4.1–2.6.2. The exception applies only in rare and unique circumstances and requires all five conditions in paras 2.4.3–2.4.9, as well as the file contents prescribed by para 2.5.2.

<sup>21</sup> *ibid* paras 2.4.5–2.6.2. The further evidence must be identifiable rather than speculative, and failure of that evidence to arrive or meet the required standard calls for review with a view to withdrawal without delay.

<sup>22</sup> *ibid* paras 2.3.10–2.3.24; Constitution of the Republic of Uganda 1995 (as amended) art 120(5); Children Act, Cap 59, s 3 and sch 1.

abandon a common standard. It is to require a short narrative proportionate to the case: what makes prosecution publicly valuable, what counts against it, and why the balance is not adequately served by another response. A sentence written for that file is more informative than a page of standard wording.

#### **4.4 Charge selection and plea bargaining reveal whether the test is genuine**

The Guidelines forbid proceeding with unnecessary counts or a more serious charge merely to induce a plea to fewer or lesser offences. They also require the charge to reflect the seriousness and extent of the offending while permitting a lesser charge where it adequately captures the conduct and sentencing powers.<sup>24</sup> This is not a peripheral drafting instruction. Charge selection sets the ceiling of exposure, shapes bail, fixes the bargaining range and tells the public what the state says occurred.

Plea bargaining can conserve scarce trial time and secure a proportionate resolution. Its legitimacy, however, depends upon a meaningful option to contest the case. An accused person confronting an inflated count, incomplete disclosure or prolonged remand may accept a lesser plea for reasons that say little about factual guilt. Scholarship on plea systems has repeatedly shown that broad prosecutorial charging power can determine outcomes long before judicial scrutiny of evidence.<sup>25</sup> The ethical difficulty is clearest where the anticipated bargain begins to justify the original charge. The sequence must run the other way: a charge must be independently supportable; only then may a plea resolve it.

Audit should therefore examine the movement between initial charge, accepted plea, proved factual basis and sentence. A large difference does not automatically establish overcharging. Evidence changes, witnesses become unavailable and responsible prosecutors narrow cases. But a repeated pattern in one offence category or office should trigger qualitative file review. Otherwise, institutional statistics may reward the very inflation the Guidelines prohibit by counting ambitious charges as productivity and later bargains as success.

#### **4.5 A rule binding only inside the institution remains incomplete**

The Guidelines say that all prosecutors have a duty to comply and may face internal discipline for failure. They also state that the document creates no rights or obligations for any third party, including defence counsel. In the same instrument, all charge and no-charge decisions and their reasons must be written and recorded.<sup>26</sup>

The tension cannot be resolved by calling the Guidelines 'soft law'. The DPP may lawfully issue internal standards without turning every breach into a free-standing cause of action. Some departures will be immaterial; some will reflect unusual facts; some provisions are plainly managerial rather than constitutional. It would be unsound to quash a prosecution because a form contained a harmless clerical omission.

It is equally unsound to say that a published rule is irrelevant whenever the person governed by the resulting decision invokes it. A material departure may show that relevant evidence was ignored, the wrong threshold was used, a policy was applied inflexibly or like cases were treated differently. The legal complaint then arises under articles 21, 42, 50 and 120(5), not merely from breach of an office manual. The Guidelines supply evidence of what the DPP regards as fair, independent and professionally competent decision-making. An unexplained departure from that account should require an explanation, not automatic invalidity.<sup>27</sup>

Two United Kingdom decisions help draw the distinction. *R (Lumba) v Secretary of State for the Home Department* concerned unpublished detention policies and confirms that a public authority must ordinarily follow its published policy or justify departure. *R (Purdy) v Director of Public Prosecutions* required a clearer prosecution policy because persons facing profound choices needed to understand how a broad discretion would be exercised. Neither case converts policy into a rigid code or transfers the decision to a court. Both recognise that official criteria matter to legality because they make power predictable enough to be evaluated.<sup>28</sup>

The Ugandan difficulty goes beyond the disclaimer. Written reviews 'must never' be given to unauthorised persons, and queries about a decision to charge are answered by reference to the Guidelines. Reasons for a decision not to prosecute may be given by an approved letter, but the person charged receives the general rule rather than the file-specific application.<sup>29</sup> That is a

<sup>23</sup> Soubise (n 10) 138–49, 160–63. The study is valuable here for its account of how central criteria can improve consistency while standard forms and performance pressures reduce fact-sensitive judgment to administrative completion.

<sup>24</sup> *The Decision to Charge Guidelines* (n 3) paras 3.1.1–3.1.5; Judicature (Plea Bargain) Rules 2016, SI 43 of 2016.

<sup>25</sup> Richard L Lippke, *The Ethics of Plea Bargaining* (OUP 2011) 21–38, 109–22; Bibas, 'Prosecutorial Regulation' (n 5) 978–1005.

<sup>26</sup> *The Decision to Charge Guidelines* (n 3) paras 1.1.5–1.2.1, 1.6.1 and 2.1.6.

<sup>27</sup> Constitution of the Republic of Uganda 1995 (as amended) arts 42, 50 and 120(5); *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 [26], [35]–[36]; *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 [40]–[56]. The comparative cases support a modest proposition: a public authority should apply an announced policy consistently or give a lawful reason for material departure. They do not make every internal instruction independently justiciable.

<sup>28</sup> *Purdy* (n 28) [54]–[56]; *Lumba* (n 28) [26], [35]–[36]. In *Purdy*, clarification made prosecutorial choice more predictable without giving the claimant a right to a particular prosecution decision. That distinction is central to the reform advanced here.

<sup>29</sup> *The Decision to Charge Guidelines* (n 3) paras 2.10.1 and 2.11.5–2.11.7; compare *Soon Yeon Kong Kim and another v Attorney General* (Constitutional Reference No 6 of 2007) [2008] UGCC 2 (6 March 2008).

peculiar form of accountability. The affected person is told the test, the prosecutor records the reasoning, and the institutional boundary prevents the two from meeting.

There are sound reasons for confidentiality. Witness safety, live investigative methods, third-party privacy, informants, legal advice and national security cannot be ignored. But those interests attach to particular information; they do not prove that the whole decisional record is privileged. A defensible regime would provide an intelligible gist, redact the protected passage with a stated category of justification and permit confidential judicial inspection where the claim to secrecy is disputed. Confidentiality should protect a demonstrated risk. It should not be permitted to stand in for the legal merits of the decision.

## **5. Takeover and discontinuance: control cannot erase the private prosecution**

### **5.1 The constitutional text must be kept exact**

Article 120(3)(c) empowers the DPP to take over and continue proceedings instituted by another person or authority. Article 120(3)(d) permits discontinuance before judgment, but contains an express safeguard: proceedings commenced by another person or authority may not be discontinued without the consent of the court. Article 120(4) concerns delegation. It permits the DPP to delegate functions to an authorised officer, except the power to discontinue proceedings commenced by someone else.<sup>30</sup>

That arrangement is carefully constructed. Takeover may occur without judicial consent because the Constitution gives the DPP national responsibility for public prosecution. Once takeover has occurred, however, termination is neither an ordinary delegated act nor a matter for the prosecution alone. The DPP must make the decision personally, and the court must consent. Reading the provisions otherwise would allow clause (3)(c) to destroy the protection written into clause (3)(d): take over first, treat the case as an ordinary public prosecution, then withdraw without the safeguard that the Constitution expressly reserved.

The point is more than textual tidiness. A private prosecution exists because a person alleges that the ordinary enforcement machinery did not act. The allegation may be misguided, vexatious or evidentially weak, which is why central control is necessary. It may also expose official reluctance, conflict or neglect. The constitutional design allows the DPP to bring professional judgment to that case while ensuring that the decision to extinguish it is visible to a court. The private prosecutor has no veto, but neither does takeover make that person's initiative constitutionally irrelevant.

### **5.2 Kayihura: a defensible takeover rule with an unfinished safeguard**

In *Uganda v Inspector General of Police, General Kale Kayihura and seven others*, private lawyers commenced proceedings against senior police officers arising from alleged violence against opposition supporters. The DPP intervened. The High Court held that article 120(3)(c) gives an automatic power to take over and continue a private prosecution; no formal application, consent of the private prosecutor or prior leave of court was required. The court added an important caution: the DPP should not take over merely to withdraw, but should prosecute the matter fully.<sup>31</sup>

The holding starts from a sound constitutional premise. National prosecutorial responsibility would be seriously weakened if every private prosecutor could decide whether the DPP may assume conduct. A requirement of consent would rewrite clause (3)(c). The court was also right not to treat takeover as inherently hostile to the private case. It may bring investigative capacity, disclosure discipline and experienced advocacy that the proceeding otherwise lacks.

The method is less complete at the point where takeover changes into discontinuance. The exhortation that the DPP should prosecute fully expresses the proper concern, but exhortation cannot replace the express machinery of clause (3)(d) and the non-delegation rule in clause (4). Evidence may lawfully deteriorate after takeover. Continuing every case to judgment would itself offend article 120(5). The safeguard is therefore not a presumption that withdrawal is forbidden. It is a requirement that the DPP personally explain why continuation is no longer justified and persuade the court to consent.

Court consent must be substantive. A court need not decide whether it would have prosecuted, but it should know the evidential assessment, the public-interest reasons, any new material since takeover and any allegation that the process is being used for an improper end. The private prosecutor should have an opportunity to address the request, subject to protective limits on disclosure. Consent given on a bare *nolle prosequi* would reduce a constitutional check to registry work.

---

<sup>30</sup> Constitution of the Republic of Uganda 1995 (as amended) art 120(3)(c)–(d), (4). The location of the safeguard matters. Court consent is required by the proviso to art 120(3)(d), not by art 120(4). Clause (4) instead permits delegation but withholds from a delegate the power to discontinue proceedings begun by another person or authority. Read together, the provisions require both a personal decision by the DPP and court consent.

<sup>31</sup> *Uganda v Inspector General of Police, General Kale Kayihura and seven others* (Criminal Revision Cause No 34 of 2016) [2016] UGHCCRD 75 (17 August 2016). The Court held that takeover under art 120(3)(c) does not depend on a formal application or the private prosecutor's consent, while cautioning against takeover used merely as a route to withdrawal.

Jamil Mujuzi has argued that the constitutional protection of private prosecution needs strengthening in light of *Kayihura*.<sup>32</sup> The case certainly reveals vulnerability, but the existing text has more force than a purely formal reading allows. Personal decision by the DPP, reasoned application under clause (3)(d) and genuine judicial assessment can protect against erasure without giving a private litigant control over public prosecution. Legislative amendment may clarify procedure; it should not obscure safeguards already present in the Constitution.

### 5.3 Reversal over time requires an account of what changed

The Basajjabalaba proceedings demonstrate why temporal reasoning matters. The proposed prosecution generated years of constitutional litigation, culminating in the Supreme Court's 2021 decision in *Hassan Basajjabalaba and another v Attorney General*. In October 2022, the DPP entered a *nolle prosequi*, the accused were discharged, and public reporting attributed the decision to incomplete investigations while leaving open the possibility of a later prosecution.<sup>33</sup>

This research study does not infer corruption or illegality from discontinuance. A responsible prosecutor must withdraw when evidence no longer meets the standard, however prominent the case or costly its history. The problem lies in the unexplained chronology. If the file was previously sufficient to charge and defend through prolonged litigation, what deficiency later became decisive? Was evidence lost, reassessed or ruled unavailable? Did the legal theory change? Which further investigation remained incomplete, and why had that investigation not preceded the original charge?

Those questions do not presume the accused guilty. On the contrary, a clear explanation protects the presumption of innocence by replacing rumour with an institutional account. It also protects the DPP. Silence in a politically salient case forces public discussion into two equally crude positions: withdrawal proves favouritism, or constitutional independence makes inquiry improper. Reasons allow a third and more lawful possibility, that the decision can be scrutinised without the court of public opinion trying the allegation.

The Guidelines already contemplate reversal when new evidence appears or an earlier decision is found to be wrong. A serious case should therefore have a decision history identifying the earlier conclusion, the new or re-evaluated material, the officer authorising change and the consequence for possible revival. That record is particularly important where discharge is not an acquittal. Without a disciplined timetable, the possibility of reinstatement can hang over an accused person indefinitely while the complainant receives no clear finality.

### 5.4 Case ownership prevents responsibility from dissolving

A national service cannot guarantee that one prosecutor will handle a matter from file receipt to judgment. Transfer, leave, promotion and specialisation make handover inevitable. Yet serious cases often pass through so many hands that each officer sees only a moment: one sanctions the charge, another prepares committal papers, another appears at trial and a supervisor later withdraws. Every isolated step may seem defensible while the course as a whole has no owner.

The practical answer is not rigid personal continuity. It is accountable case ownership. One designated prosecutor or team should maintain the decision history, ensure that promised investigation is pursued, record why positions change and make certain that disclosure and review survive handover. A withdrawal memorandum should engage with the reasons for charge rather than begin as though the earlier decision never existed. Institutional memory is not administrative ornament. It prevents a prosecution from becoming less answerable each time the file changes hands.<sup>34</sup>

## 6. Disclosure: the test of whether continuing review is real

The Constitutional Court's decision in *Soon Yeon Kong Kim and another v Attorney General* placed pre-trial disclosure within the guarantee of a fair hearing. Witness statements and exhibits were prima facie disclosable, although protection could be justified for witnesses, informants, state secrets or the circumstances of a genuinely simple case. The prosecution had to identify the need for restriction, and the court retained authority to determine whether that restriction was justified.<sup>35</sup>

The case is important for more than the quantity of material an accused receives. Its method separates a legitimate interest in secrecy from the claim that the prosecution may define the interest conclusively. That allocation is constitutionally sound. The prosecutor knows the operational risk and should explain it; the court has no institutional stake in the result and decides whether

<sup>32</sup> Jamil D Mujuzi, 'Strengthening the Right to Institute a Private Prosecution in Uganda by Amending Article 120(3) of the Constitution: A Comment on *Uganda v Inspector General of Police, General Kale Kayihura and 7 Others*' (2017) 25 *African Journal of International and Comparative Law* 590, 596–605.

<sup>33</sup> *Hassan Basajjabalaba and another v Attorney General* (Constitutional Appeal No 1 of 2018) [2021] UGSC 64 (19 November 2021); 'DPP Withdraws Shs142 Billion Case against Basajjabalaba' *Daily Monitor* (Kampala, 7 October 2022); 'DPP Explains Withdrawal of Basajjabalaba Charges' *The Independent* (Kampala, 9 October 2022). The media reports are used only for the public fact and stated explanation of withdrawal, not as proof of an improper motive.

<sup>34</sup> *The Decision to Charge Guidelines* (n 3) paras 1.6.1, 2.6.1–2.9.1; Soubise (n 10) 145–49, 222–23.

<sup>35</sup> *Soon Yeon Kong Kim* (n 30); Constitution of the Republic of Uganda 1995 (as amended) arts 28 and 44(c). The decision recognises a prima facie disclosure obligation while permitting justified restriction; its enduring importance is that the court, rather than the prosecution alone, assesses the claimed limit.

the proposed limit remains compatible with a fair hearing. The same method can govern access to a prosecution decision record. A witness address may require protection. The evidential test applied, the material factors considered and the existence of a departure from policy usually do not.

Disclosure also tests prosecutorial independence from the investigation. Material pointing away from guilt is not 'defence evidence' merely because it weakens the state case. It is part of the prosecution's own assessment. A prosecutor who waits for the accused to discover an inconsistency has treated continuing review as a search for confirmation, not a continuing judgment about whether the case should exist. International prosecutorial standards and the Guidelines both reject that narrow adversarial posture.<sup>36</sup>

There is a necessary qualification. Open-ended disclosure may endanger a witness, expose a covert method, compromise a related inquiry or violate third-party privacy. The solution is not a choice between total secrecy and an unredacted file. It lies in staged disclosure, summaries, redaction, protective conditions and, where needed, inspection by the court alone. *Soon Yeon* is persuasive precisely because it leaves room for those protections without permitting the prosecutor to be final judge of a limitation claimed in the prosecution's own interest.

The duty continues after plea. Witness selection, concessions, amendment of counts, acceptance of a plea, response to an admissibility ruling and the decision to appeal can each correct or compound the original judgment. The Guidelines require constant review and identify three consecutive prosecution adjournments, new evidence, witness unavailability and disclosure as triggers.<sup>37</sup> A real review should leave a dated record of what changed and why continuation remains justified. Otherwise, 'continuous' describes duration rather than thought.

That point leads directly to judicial review. Once reasons and disclosure are understood as parts of lawful prosecutorial practice, the central question is no longer whether the DPP's decisions are reviewable in the abstract. It is whether review can function when the claimant sees neither the reasoning nor the record needed to test it.

## **7. Judicial review: legality is recognised, but proof remains rationed**

Ugandan law no longer supports a categorical claim that prosecutorial decisions are beyond review. The harder problem is doctrinal operation. Courts repeatedly state grounds such as illegality, irrationality, procedural impropriety, bad faith and improper purpose. Yet those grounds concern the route by which a decision was reached, and that route is commonly recorded only inside the prosecution file. A claimant can describe external facts, but cannot ordinarily know which evidence the prosecutor treated as decisive, whether an exculpatory account was addressed, who authorised a reversal or whether the public-interest test was applied at all. Review is promised at the level of doctrine and restricted at the level of proof.

### **7.1 *Bakaleeke*: a reviewable power protected by an inaccessible merits boundary**

In *Bakaleeke v Attorney General*, Assistant Commissioner of Police Siraji Bakaleeke challenged charges of abuse of office, conspiracy and kidnapping arising from events involving two Korean nationals. He alleged that the Criminal Investigations Directorate had dictated the charge, that investigation was incomplete and that the file disclosed no sufficient evidence against him. The Attorney General and DPP filed no affidavit in answer. The application therefore put two distinct questions before the High Court: whether the charging power was legally reviewable, and how far a civil court could examine the evidential foundation without usurping the criminal trial.<sup>38</sup>

On the first question, *Musa Ssekaana J* was clear. The power to prosecute, including the power to discontinue, was administrative or quasi-judicial and had to be exercised fairly, honestly and within legal limits. Drawing on *Matalulu* and *Sharma*, the Court accepted that constitutional independence did not protect excess of power, bad faith, improper purpose, unauthorised direction, policy fettering or manifest unreasonableness. That premise is constitutionally persuasive. It gives article 120(6) its proper object, freedom from control, while leaving articles 42 and 50 able to police legality.<sup>39</sup>

The judgment's method then became markedly more restrained. The Court declined to assess the sufficiency or propriety of the evidence because the criminal court could determine admissibility, credibility and guilt. The applicant had not established

---

<sup>36</sup> *The Decision to Charge Guidelines* (n 3) paras 1.4.4, 2.3.9, 2.8.2 and 2.11.2; United Nations, *Guidelines on the Role of Prosecutors* (1990) paras 12–14; International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (23 April 1999) paras 1 and 3–4.

<sup>37</sup> *The Decision to Charge Guidelines* (n 3) paras 2.6.1–2.9.1 and 3.1.4–3.1.5.

<sup>38</sup> *Bakaleeke* (n 2). The application concerned charges of abuse of office, conspiracy to defraud, kidnapping with intent to confine and related allegations arising from the treatment of Korean nationals. The applicant contended, among other matters, that investigators had dictated the charge and that the file was incomplete; the respondents did not file an affidavit in answer.

<sup>39</sup> *ibid*; *Matalulu* (n 14) 735–36; *Sharma* (n 14) [14].

illegality, irrationality or procedural impropriety, and the availability of trial and appeal weighed against collateral intervention. The application was dismissed.<sup>40</sup>

There is good reason for that restraint. A judicial review court has affidavits, not a criminal trial. It should not decide whether a witness is truthful, resolve contested defences or announce whether guilt is more likely than not. Premature merits litigation can delay the prosecution and invite every accused person to seek a second forum. *Bakaleeke* was right to protect the trial court's function.

The difficulty is that the judgment placed too much material on the trial side of the boundary. Whether evidence proves guilt is a merits question. Whether the decision-maker addressed the correct legal elements, possessed some rational material linking this accused person to them, considered an obvious exculpatory account and acted independently of an investigator's command is a public-law question. A court can examine that minimum rational bridge without deciding which witness should ultimately be believed. Indeed, the judgment itself referred to an earlier case in which certiorari issued because shareholders had been charged for a company's alleged conduct without a lawful basis for personal liability. That example cannot be reconciled with a boundary that sends every question touching evidence to trial.<sup>41</sup>

The unopposed nature of the application makes the problem sharper. Failure to file an affidavit did not entitle the applicant to automatic relief; public-law illegality still had to be proved. But the answer should not have been to infer a lawful decisional process from silence. Once a claimant identifies a credible gap between the elements and the alleged conduct, or adduces facts suggesting investigator control, the DPP should produce the contemporaneous review sufficient to show that the constitutional judgment was in fact made. Protected details may be redacted. What matters is that the evidential burden moves to the party who alone can explain the decision.

The constitutional consequence of *Bakaleeke* is therefore mixed. It opened the door to review while leaving the key to the prosecution. Its practical effect is to make acquittal the ordinary answer even where the complaint is that the accused should never have been exposed to trial. That answer is adequate for a mistaken but rational judgment about guilt. It is not adequate for a charge made on no rational foundation or for an improper purpose, because in such a case the process is part of the injury.

## **7.2 *Rutayisire*: review of the rational bridge is not a trial before trial**

*Rutayisire and another v Uganda Revenue Authority* demonstrates that the distinction can be drawn more carefully. The High Court quashed criminal process directed at individuals in respect of company-related conduct where investigation had not established a rational legal and factual basis connecting those persons to the alleged offence.<sup>42</sup> The Court did not have to decide whether a prosecution witness would eventually be believed. It examined the antecedent question whether the state had a reasoned basis for selecting these persons for criminal liability.

That approach supplies the limiting principle missing from a broad reading of *Bakaleeke*. Review does not ask whether the prosecution case is strong enough to convict. It asks whether the charging conclusion is legally intelligible on the material the prosecutor was entitled to use. The offence must be identified, its elements understood, and some admissible or potentially admissible evidence must connect each accused person to those elements. Where personal liability is said to arise from corporate conduct, status as shareholder, director or officer cannot silently substitute for the statutory basis of attribution.

The practical difference is substantial. If a court waits for trial where that connective reasoning is absent, eventual acquittal proves only that the state failed at the last stage. It does not repair remand, expense, stigma or leverage produced along the way. Nor does early review disrespect the trial court. A trial court remains responsible for proof beyond reasonable doubt. Judicial review prevents the state from demanding that trial where the prosecutor never crossed the prior, and different, legal threshold for charge.

The two judgments can therefore be aligned. *Bakaleeke* should govern genuine disputes about weight, credibility and competing inferences on a properly assembled record. *Rutayisire* should govern the absence of a rational bridge, use of the wrong legal test, failure to address an essential element or selection of a person merely because of office or association. The distinction is between evaluation and foundation. Courts should not redo a lawful evaluation; they must be able to test whether an evaluation occurred on a lawful foundation.

<sup>40</sup> *Bakaleeke* (n 2). The Court treated the criminal trial and appeal as the ordinary forums for evidential dispute and held that the applicant had not proved illegality, irrationality or procedural impropriety.

<sup>41</sup> *ibid*. The judgment discussed prior Ugandan authority granting certiorari where natural persons were charged for company conduct without a proper legal basis for personal liability. That example confirms that testing the legal connection between elements, evidence and accused person is not necessarily a determination of guilt.

<sup>42</sup> *Rutayisire* (n 8). The case should be read narrowly. Its force lies in review of the absence of an investigative and rational basis linking the selected individuals to the alleged company-related offence, not in a general power for a civil court to measure the prosecution evidence as a trial court would.

### **7.3 Wanyoto: investigative taint, prosecutorial adoption and an effective remedy**

*Wanyoto v Sgt Ouma and another* exposes the boundary from a different direction. The evidence accepted by the Court of Appeal described an investigating officer who tortured two persons, using a method referred to as the 'baibbuli', to obtain surrender of a land title, then brokered a transaction involving that property. When the arrangement failed, the officer treated Paul Wanyoto Mugoya as a substitute target. The Court found that prolonged unlawful detention supported the allegation of torture even without medical evidence and that the subsequent charges were actuated by malice. The first-instance court had recognised bad faith but declined to nullify the prosecution because the DPP had not been joined or heard.<sup>43</sup>

The Court of Appeal refused to let that procedural obstacle decide the rights claim. Articles 28 and 44(c) place a fair hearing among the non-derogable guarantees, and section 11(2)(b) of the Human Rights (Enforcement) Act empowers a court to order release where detention or prosecution violates rights. A court confronted with an abusive prosecution could not turn a blind eye. The charges were nullified and the appellant acquitted.<sup>44</sup>

The judgment's premise is compelling: a fair hearing cannot always be rescued by holding a formally regular trial. If torture, fabricated purpose and malicious targeting generate the case, permitting the prosecution to continue makes the court process the final instrument of the abuse. The remedy therefore addresses the source of the proceeding, not merely the admissibility of an isolated item of evidence.

Its method also corrects a familiar evidential mistake. Torture may leave medical proof, but the absence of a medical report cannot become a legal presumption that torture did not occur. Detention records, the officer's conduct, the sequence of demands and the implausible shift in targets may together establish the violation. By reading the coercive sequence as a whole, the Court avoided the fragmentation that had made each official act appear less serious in isolation.

The case nevertheless requires a careful prosecutorial bridge. An investigator's malice should not automatically be attributed to the DPP. Article 120 makes the prosecutor an independent decision-maker, and a genuinely fresh assessment may sometimes break the causal chain between a tainted investigation and a lawful charge supported by independent evidence. The better question is what the prosecutor knew or ought reasonably to have discovered, whether evidence derived from abuse was used, whether the conspicuous conflict and change of target were examined, and whether continuation adopted the investigator's improper purpose. Liability should follow prosecutorial judgment or failure of judgment, not mere institutional proximity.<sup>45</sup>

That qualification strengthens rather than weakens *Wanyoto*. It locates responsibility where article 120 places it. Once the DPP assumes a police file, the Office cannot claim both constitutional ownership of the prosecution and indifference to the legality of its investigative foundation. The prosecutor need not answer for every unknown police wrong. The prosecutor must answer for a decision that ignores visible taint, relies on its product or continues after the abuse is credibly exposed.

The first-instance concern about joinder also deserves a direct answer. The DPP should ordinarily be heard before a court condemns a prosecutorial decision, particularly where reasons or independent evidence may alter the picture. Procedural fairness runs both ways. But a rights remedy should not fail merely because the claimant misdescribed the state actor where the Attorney General represents government for civil proceedings and the relevant official can be joined or directed to produce the record. Courts should cure the joinder problem where possible, not convert it into immunity for a single course of state coercion.<sup>46</sup>

The practical effect of *Wanyoto* is its most important contribution. It refuses the idea that trial and later acquittal are always sufficient. Where the prosecution itself carries forward a grave rights violation, stopping the process is not premature adjudication of guilt. It is the remedy required to prevent the judicial system from completing the wrong.

### **7.4 Begira Avito: restraint is justified, but the burden must be workable**

In *SP Begira Avito v Attorney General*, the High Court considered an attempt to halt a theft prosecution that existed alongside a civil dispute. The Court reiterated that a parallel civil claim does not bar criminal proceedings, that judicial review is concerned

---

<sup>43</sup> *Wanyoto* (n 8). The Court of Appeal examined the sequence linking torture, prolonged detention, surrender of a land title, the investigating officer's role in a proposed transaction and the later selection of the appellant as an accused person. The factual sequence, rather than any single missing medical report, supported the finding of abuse.

<sup>44</sup> *ibid*; Constitution of the Republic of Uganda 1995 (as amended) arts 28 and 44(c); Human Rights (Enforcement) Act, Cap 12, s 11(2)(b).

<sup>45</sup> *Wanyoto* (n 8); compare *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214 [73]–[85]. The proposed bridge does not dilute the remedy. It distinguishes automatic attribution of an investigator's state of mind from prosecutorial responsibility for knowing adoption, reckless disregard of evident taint, or continuation on material produced by abuse.

<sup>46</sup> Constitution of the Republic of Uganda 1995 (as amended) arts 50, 120 and 250(2); Human Rights (Enforcement) Act, Cap 12. A court should ordinarily ensure that the DPP has notice and an opportunity to answer before condemning a prosecutorial decision, but procedural correction is preferable to allowing joinder formalism to defeat an otherwise established constitutional injury.

with legality rather than the criminal merits, and that the applicant bears the burden of proving illegality, irrationality, procedural impropriety, bad faith or improper purpose. The claim failed.<sup>47</sup>

The premise is sound. Commercial and property dealings can generate both civil rights and criminal conduct. Labelling an allegation 'civil' does not make fraud, theft or forgery legally impossible, and a judicial review court should not determine the contested ownership question as though trying the criminal case. A claimant must identify more than overlap between two proceedings.

Even so, the presence of a civil dispute is not irrelevant. It may reveal motive to use arrest or charge as bargaining pressure; it may expose an investigator's failure to test documents available in the civil record; or it may show that the prosecution adopted one party's account of title without confronting the other. The correct response is contextual. Civil proceedings neither bar prosecution nor immunise the charging decision from inquiry into purpose and evidential foundation.

The burden stated in *Begira Avito* is orthodox as a legal burden. The claimant seeks relief and must establish a public-law wrong. But the evidential burden cannot remain static where the pleaded facts raise a credible concern and the explanation lies exclusively in the prosecution record. Otherwise, *Begira Avito* repeats the practical difficulty in *Bakaleeke*: the less the institution discloses, the less the claimant can prove; the less the claimant can prove, the less the institution must disclose.

### **7.5 A coherent Ugandan test must be record-sensitive**

The authorities can be brought into alignment without loosening review into an appeal. The claimant should first plead a specific public-law concern supported by facts reasonably available outside the file. It may be absence of any apparent link to an element, a documented direction from an unauthorised actor, unexplained reversal of a settled position, selective treatment supported by an identified comparator, reliance on evidence apparently obtained by torture, or use of charge to advance a collateral dispute. Bare assertion should not open the prosecution file.

Once that threshold is crossed, the DPP should lodge the contemporaneous decision record. The record need not be handed over without protection. Privileged advice, witness identifiers, live investigative methods and third-party information may be redacted, with the category and basis of each redaction stated. Where disclosure itself would create risk, the court may inspect the disputed material privately. The point is not discovery of the entire police file. It is access to the documents needed to determine whether the challenged decision was lawfully made.<sup>48</sup>

South Africa's *Democratic Alliance v Acting National Director of Public Prosecutions* is instructive. A challenge to the discontinuance of a politically significant prosecution could not be decided while the decision-maker withheld the record on which the decision rested. Production did not decide rationality; it enabled the court to perform that task. *Zuma v Democratic Alliance* later illustrates the scrutiny that reasons and record make possible. Uganda need not reproduce South African procedure in every detail. It should adopt the basic evidential insight that a review court cannot assess a decision from the public announcement alone.<sup>49</sup>

With the record available, the reviewing court should ask a confined set of questions. Did the authorised prosecutor apply the governing charging or discontinuance test? Was there a rational connection between the identified evidence, the elements and each person affected? Were material exculpatory matters and required public-interest considerations addressed? Did an irrelevant interest, unauthorised direction or collateral purpose determine the result? Was any material departure from published criteria explained? Was the procedure fair in light of the decision's consequence? These questions examine legality of method. They do not authorise the court to prefer its view of a witness or select a different charge from several rational choices.

English authority shows why reasons should influence deference. In *R (Manning) v Director of Public Prosecutions*, a death in custody had produced an inquest verdict of unlawful killing, yet the decision not to prosecute used a threshold more demanding than the published realistic-prospect test and did not confront critical features of the evidence. In an exceptional setting, the court required coherent reasons, quashed the decision and returned it to the DPP. It did not order a prosecution.<sup>50</sup> In *R (B) v Director of Public Prosecutions* and *R (Torpey) v Director of Public Prosecutions*, the courts stressed the character of the charging

<sup>47</sup> *SP Begira Avito* (n 8). The High Court rejected the proposition that concurrent civil proceedings, without more, barred a theft prosecution and reiterated the claimant's burden to establish a recognised public-law ground.

<sup>48</sup> Judicature (Judicial Review) Rules 2009, SI 11 of 2009, as amended by SI 32 of 2019; *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) [37]–[41].

<sup>49</sup> *Democratic Alliance* (n 49) [37]–[41]; *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA) [82]–[89]. Production of the record is analytically distinct from merits substitution: it identifies what the prosecutor considered so that rationality can be assessed on the actual decision rather than a later public summary.

<sup>50</sup> *R (Manning) v Director of Public Prosecutions* [2000] EWHC Admin 342, [2001] QB 330 [22]–[24], [33]–[36]. The court treated the case as exceptional, identified defects in the reasoning, quashed the no-prosecution decision and remitted it. It did not direct that officers be charged.

assessment as an informed prosecutorial judgment and gave real weight to a careful review. Deference followed demonstrated analysis; it was not conferred by institutional title alone.<sup>51</sup>

That approach answers the concern that reasons will invite merits substitution. A full and candid record narrows rather than expands judicial intervention. It lets the court see that the prosecutor identified weaknesses, tested the defence, applied the right threshold and reached one of the rational conclusions available. Where the record is silent on a decisive issue, the court need not invent an unlawful motive. It can remit the matter for a lawful decision.

### **7.6 The remedy should answer the defect**

Remittal to a different prosecutor will ordinarily be the proper response where the flaw is inadequate reasons, failure to consider a material factor or an unexplained departure from policy. It respects article 120(6) because the court identifies the legal error but leaves the prosecutorial conclusion to the constitutionally designated office. A short timetable and prohibition on continuation pending reconsideration may be necessary where liberty is at stake.

Certiorari or prohibition is justified where the charge has no rational legal foundation, the authorised decision-maker did not act, or continuation itself would carry forward an incurable abuse. *Githunguri v Republic* remains a powerful regional example: revival of prosecution after an official assurance and long delay could not be treated as an ordinary change of mind. *Kuria and others v Attorney General* likewise recognises that criminal process should not be used to exert pressure in a collateral dispute. *Diamond Hasham Lalji v Attorney General*, however, supplies the essential caution that review is directed to legality, rationality and abuse, not to resolution of disputed criminal evidence.<sup>52</sup>

A declaration may clarify a standard where no immediate coercive order is needed. Article 50 and the Human Rights (Enforcement) Act permit compensation for established rights injury, but damages should not follow every reasonable professional mistake. Canadian authority, including *Henry v British Columbia (Attorney General)*, properly treats civil liability for prosecutorial misconduct as exceptional because routine exposure could produce defensive decision-making. Deliberate suppression, knowing use of an evidentially baseless charge or adoption of an improper purpose stands differently from an honest judgment later proved wrong.<sup>53</sup>

Courts should almost never direct that a named person be prosecuted. Such an order would collapse review into control and disregard changes in evidence after judgment. The ordinary remedy for an unlawful refusal is reconsideration under the correct test, with reasons. A stronger order may be necessary where the DPP refuses to perform a clear legal duty, but the final evidential and public-interest judgment should remain prosecutorial.

The resulting doctrine is restrained in the right place. It gives the DPP latitude over reasonable evaluation while insisting on authority, foundation, purpose, relevant consideration and fair process. It also treats the record as the practical hinge between independence and accountability. Without that hinge, review remains open in theory and closed whenever it is most needed.

## **8. Capacity and measurement: scarcity changes how discretion is exercised**

Doctrine cannot be separated from the conditions in which prosecutors work. An evidential test that is careful on paper will be applied thinly if one officer must peruse too many files, lacks direct access to investigators, cannot retrieve earlier decisions or inherits a matter whose history was never recorded. Resource scarcity does not change the Constitution, but it changes the risk that constitutional duties will fail in predictable ways.

The ODPP's Ministerial Policy Statement for FY 2024/25 reported 325 filled positions across twelve prosecutorial cadres against 818 approved posts, and identified districts and courts without an ODPP presence.<sup>54</sup> The figures should not be used to diagnose misconduct in any individual case. They do explain why prosecutors may depend heavily on police framing, why a threshold charge may outlive its promised evidence, why case ownership fragments and why the quality of written reasons varies by station.

That explanation cannot become an excuse. If the state creates a prosecution system whose vacancies predict delay or superficial review, the resulting burden falls on persons held on remand, victims who repeatedly attend without progress, witnesses whose memory deteriorates and courts asked to manage charges that were not ready. Article 120(5) requires institutional choices as well as individual ethics. The DPP must allocate scarce prosecutors according to seriousness, complexity, vulnerability and

---

<sup>51</sup> *R (B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072 [53]; *R (Torpey) v Director of Public Prosecutions* [2019] EWHC 1804 (Admin); *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 371.

<sup>52</sup> *Githunguri v Republic* [1986] KLR 1, 18–20; *Kuria and others v Attorney General* [2002] 2 KLR 69, 79–80; *Diamond Hasham Lalji and another v Attorney General and four others* [2018] KECA 856 (KLR) [42]–[46].

<sup>53</sup> Constitution of the Republic of Uganda 1995 (as amended) art 50; Human Rights (Enforcement) Act, Cap 12; *Henry* (n 46) [73]–[85].

<sup>54</sup> Office of the Director of Public Prosecutions, *Ministerial Policy Statement FY 2024/25* (2024) 10, 14–15. The percentage is not treated as a measure of individual competence or case legality; it is evidence of the conditions under which file ownership, supervision and review must operate.

regional need; Parliament and the executive must resource the constitutional office sufficiently to make independent judgment possible.

The latest public audit material reveals a more specific problem. PROCAMIS was intended to track cases and support prosecutorial control, but the Auditor General found that it did not exchange data with other justice institutions, that evidence and witness modules were left blank in sampled departments, and that many equipped regional stations were not using the system. The report concluded that cases were not systematically tracked and prosecutorial decisions could not be adequately supervised. This was not a criticism of digital polish. It went to the institution's ability to know what it had decided and what happened next.<sup>55</sup>

A case-management system can either expose judgment or conceal it more efficiently. Counting registrations, court appearances and completed files may improve administration, but those figures do not show why a weak charge survived, whether the threshold-test review occurred, or how often a decision changed after disclosure. The most constitutionally valuable fields are less dramatic: the evidence supporting each element, material pointing away from guilt, the applicable test, the date and author of review, missing evidence and deadline, reason for reversal, disclosure status and final outcome.

The Auditor General also found weaknesses in performance reporting and the absence of an operational annual monitoring and evaluation framework. In sampled activities, reported targets did not always match verified delivery. For prosecution outputs, the audit recorded different planned categories, noted that only 442 of 2,000 cases in one activity were concluded and 647 of 1,500 in another were prosecuted, and could not determine how many cases remained ongoing because the stages had not been adequately disaggregated.<sup>56</sup> Those figures should not be combined into a conviction rate or used as if all categories describe the same work. Their value lies in the warning: when the institution cannot distinguish preparation, trial, plea, conclusion and closure, aggregate 'cases prosecuted' conceals more than it explains.

Performance incentives must therefore be chosen with care. A target that rewards sanctions may encourage premature charge. A target that treats every withdrawal as failure may punish the prosecutor who corrects an unsustainable case. A conviction target may distort disclosure and plea practice. None of these consequences is inevitable, but each becomes rational behaviour under the wrong measure. Decisional quality is harder to count, yet it can be audited through sampled files: correct test, sufficient foundation, timely review, explanation of changed position, disclosure compliance and consistency with comparable matters.<sup>57</sup>

Equality data require equal care. Anonymised reporting by offence, region, decision and legally permissible demographic category can expose patterns that deserve investigation. A disparity is not itself proof of discrimination; crime reporting, evidence, geography and vulnerability may explain part of it. But refusal to collect the data ensures that no pattern can ever be tested. Quantitative signals should trigger a qualitative review of sampled files, not a mechanical conclusion about motive.

Capacity is thus part of accountability, not a rival to it. More prosecutors, transport, secure information systems and specialised training are necessary. They become constitutionally valuable when joined to a design that records reasons, prompts review and learns from correction. Additional capacity poured into an opaque system may increase volume without improving judgment.

## **9. Comparative experience: safeguards should be translated, not copied**

### **9.1 England and Wales: public criteria, reasons and reconsideration**

The Code for Crown Prosecutors uses a two-stage test and insists on continuing review. The Victims' Right to Review scheme provides reconsideration of defined no-charge or termination decisions by a prosecutor who was not responsible for the original conclusion.<sup>58</sup> The institutional setting differs from Uganda, but two functions are immediately relevant: the public can know the general test, and an affected complainant can obtain a fresh prosecutorial judgment without asking a minister or court to direct prosecution.

The case law also shows a useful relationship between reasons and judicial restraint. *Manning* did not create a general duty to publish detailed reasons for every no-charge decision. It responded to an exceptional death-in-custody case in which the stated reasoning did not engage with an unlawful-killing verdict and appeared to apply too demanding a standard. *Purdy* did not tell the DPP which assisted-suicide cases to prosecute. It required a policy sufficiently clear to make the discretion intelligible. *Torpey*

<sup>55</sup> Office of the Auditor General (n 11) 2–4. The audit reported non-integration with other justice systems, blank evidence and witness modules in sampled areas, and non-use at numerous equipped stations. It expressly connected those deficiencies to inability to track cases and supervise prosecutorial decisions.

<sup>56</sup> *ibid* 21–25. The report also identified weaknesses in verification of reported performance and the absence of an operational annual monitoring and evaluation framework. Its recommendation to disaggregate preparation, proceedings, plea, conclusion and closure supports the distinction drawn in the text.

<sup>57</sup> Babe K Howell, 'Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System' (2014) 27 *Georgetown Journal of Legal Ethics* 285, 290–303; Miller and Wright (n 12) 127–40; Bibas, 'Prosecutorial Regulation' (n 5) 992–1005.

<sup>58</sup> Crown Prosecution Service, *The Code for Crown Prosecutors* (2018) paras 3.1–4.14 <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 8 September 2026; Crown Prosecution Service, 'Victims' Right to Review Scheme' (May 2021 revision) <https://www.cps.gov.uk/prosecution-guidance/victims-right-review-scheme> accessed 8 September 2026.

illustrates the other side: a careful and independent review commands substantial respect even where another prosecutor or judge might have evaluated the material differently.

The lesson is not that Uganda should reproduce the CPS hierarchy. It is that reasons and independent reconsideration protect professional judgment. A reasoned review gives the institution an opportunity to correct itself and gives a court a basis for staying out of the merits. Opacity, by contrast, leaves both the affected person and the judge with only suspicion and institutional assertion.

## **9.2 Canada: protect core discretion, not misconduct around it**

Canadian doctrine draws a distinction between core prosecutorial discretion and conduct that falls outside it. *Krieger v Law Society of Alberta* protects choices such as whether to prosecute and what charge to bring from ordinary external supervision, while recognising that dishonest or bad-faith conduct is not sheltered merely because it occurs in a prosecution office. *R v Nixon* applies a high abuse-of-process threshold to repudiation of a plea agreement, and *Henry* confines damages liability to serious prosecutorial wrongdoing.<sup>59</sup>

This distinction is valuable if used carefully. It prevents professional discipline, civil liability or judicial preference from becoming routine control over charge. It becomes dangerous if 'core' is made to mean 'unreviewable'. The Ugandan Constitution supplies a more explicit textual discipline in article 120(5). A charging choice remains at the core of the DPP's function, but must still have regard to public interest, the administration of justice and prevention of abuse. Constitutional centrality increases the need for lawful exercise; it does not remove it.

The older Canadian statement in *Boucher v The Queen* remains pertinent. A prosecutor's role is not to win at all costs but to present the case fairly as a minister of justice.<sup>60</sup> That description can become sentimental if detached from practice. In Uganda it should mean, concretely, testing exculpatory inquiry, selecting proportionate charges, making disclosure, correcting a case when evidence fails and refusing investigative or political pressure.

## **9.3 South Africa and Kenya: the record, institutional conditions and abuse**

South African experience contributes two separate insights. *Democratic Alliance* and *Zuma* show why the record of a challenged discontinuance is indispensable to rationality review. *Corruption Watch NPC v President of the Republic of South Africa*; *Nxasana v Corruption Watch NPC* shows that prosecutorial independence is not secured only by telling office-holders to resist interference. Appointment, tenure and removal arrangements must not create incentives that compromise independent judgment.<sup>61</sup> The second point matters to reform. Accountability should not expose Ugandan prosecutors to political retaliation, insecure tenure or budgetary punishment for an unpopular lawful decision. A statute that regulates reasons and review should also protect appointments, recusal, tenure, professional progression and publication of improper attempts to influence a live case. Independence needs institutional shelter if candour is expected.

Kenyan decisions mark the remedial boundary. *Githunguri* shows that a court may stop a prosecution where revival after official assurance and delay makes the process oppressive. *Kuria* addresses criminal proceedings used as pressure in a civil contest. *Diamond Hasham Lalji* insists that the court intervene for illegality, irrationality or abuse, not because it would resolve disputed evidence differently.<sup>62</sup> Those propositions fit Uganda's constitutional text. They also demonstrate why labels do not decide cases. 'Civil dispute' does not bar a charge; 'prosecutorial discretion' does not answer abuse; 'sufficient evidence' does not remove the need to show a rational basis.

## **9.4 The comparative conclusion is structured discretion**

Kenneth Culp Davis described discretion as a principal source of injustice where its exercise is unnecessarily broad and its standards hidden. Angela Davis and Stephanos Bibas later showed how concentrated charging and bargaining power can determine outcomes outside public adjudication. Soubise adds a different caution: detailed central rules and managerial targets can themselves deform judgment when prosecutors complete forms rather than own decisions.<sup>63</sup>

Taken together, that scholarship rejects two simple answers. Unstructured autonomy permits unexplained variation and makes improper influence difficult to expose. Dense command-and-control can displace judgment, encourage formulaic reasons and create political routes into individual cases. The proper response is structured discretion. Law fixes the threshold, relevant purposes, process and route to review. The prosecutor retains room to evaluate human evidence and individual circumstances. Reasons, records and data make that room visible without filling it with somebody else's decision.

---

<sup>59</sup> *Krieger v Law Society of Alberta* 2002 SCC 65, [2002] 3 SCR 372 [43]–[50]; *R v Nixon* 2011 SCC 34, [2011] 2 SCR 566 [52]–[64]; *Henry* (n 46) [73]–[85].

<sup>60</sup> *Boucher v The Queen* [1955] SCR 16, 23–24.

<sup>61</sup> *Democratic Alliance* (n 49) [37]–[41]; *Zuma* (n 50) [82]–[89]; *Corruption Watch NPC v President of the Republic of South Africa*; *Nxasana v Corruption Watch NPC* [2018] ZACC 23, 2018 (2) SACR 442 (CC) [17]–[20], [74]–[88].

<sup>62</sup> *Githunguri* (n 53) 18–20; *Kuria* (n 53) 79–80; *Diamond Hasham Lalji* (n 53) [42]–[46].

<sup>63</sup> Davis, *Discretionary Justice* (n 4) 52–61; Davis, *Arbitrary Justice* (n 4) 180–88; Bibas, 'Prosecutorial Regulation' (n 5) 959–71, 992–1005; Soubise (n 10) 138–49, 160–63.

## 10. Reforming the architecture rather than adding another form

### 10.1 Give article 120 a statutory framework that protects both independence and candour

Parliament should enact an ODPP administration and accountability statute. It should affirm the prohibition on directions in individual cases; regulate delegation and recusal; give the core charging standards durable legal status; require a record of attempted improper influence; protect professional appointment, tenure and progression; and state the reporting and review duties of the Office. General prosecution policies should be published. Communications about a named live case from political office-holders or other external authorities should be recorded and disclosed to an internal integrity function, subject to legitimate security exceptions.<sup>64</sup>

The statute should not make every paragraph of an operational manual directly enforceable. It should distinguish mandatory legal criteria from internal guidance and require a prosecutor to justify any material departure from published criteria. That approach preserves adaptation to unusual facts while preventing the Office from presenting standards publicly and disowning them when their application is questioned.

No external inspectorate, minister or parliamentary committee should be empowered to direct charge in an individual matter. Oversight bodies may examine systems, anonymised files, compliance rates and patterns of error. Courts may remedy illegality. The final lawful choice among rational prosecutorial options must remain with the DPP.

### 10.2 Make reasons proportionate to consequence

Every charge, no-charge decision, threshold charge, takeover, material charge reduction, discontinuance and reversal should carry contemporaneous reasons. Proportionality should govern detail. A routine charge on clear evidence may need a concise element-by-element conclusion and public-interest notation. A threshold charge should identify missing evidence, its expected significance, the timetable and bail basis. A reversal should state what changed. Discontinuance of a serious matter or a private prosecution should address the earlier decision, evidential position, article 120(5) factors and any allegation of improper intervention.<sup>65</sup>

The complete reasons should remain on the institutional file. The affected person should receive an intelligible version stating the decision, material basis and application of the governing test. Protected content may be removed, but the reason for redaction should be identified by category. A statement that 'the matter was considered under the Guidelines' is not a reason. It names the standard and says nothing about its application.

This tiered duty avoids two opposite errors. It does not require a prosecutor to write a judgment for every police file. It does not allow the greatest exercises of power to disappear behind the shortest formula. Depth follows consequence, departure and risk.

### 10.3 Create genuine internal reconsideration

A victim or complainant should be entitled to request review of a final no-charge or termination decision within a published period. An accused person should be able to request review where identified new material, a material policy departure or a specified evidential development plausibly undermines continuation. Neither entitlement creates a right to the requested outcome. It creates a right to a fresh and reasoned prosecutorial decision.<sup>66</sup>

The reviewer should sit outside the original line of decision wherever institutional scale permits, disclose any conflict, consider representations and resolve the request within a presumptive thirty days. Delay should be explained. If further investigation is needed, the decision should state what is sought and when the matter will return. In a threshold case involving custody, the period must be much shorter and aligned with the fourteen-day review already required by the Guidelines.

Supervisory review is not enough where the supervisor participated in the first decision or where office culture rewards preservation of that decision. Independence within the institution matters as much as independence from outsiders. A small quality-assurance unit may sample completed reviews and identify recurring errors without directing the result in a live named case.

### 10.4 Make judicial review possible without opening the whole police file

The Judicial Review Rules or the proposed statute should establish a staged record procedure. The claimant must first plead a credible and specific ground. If that threshold is met, the DPP lodges the relevant charging or discontinuance record. The Office

<sup>64</sup> Constitution of the Republic of Uganda 1995 (as amended) art 120(6); Council of Europe, Recommendation Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System (6 October 2000) paras 11–16; *Corruption Watch* (n 62) [74]–[88].

<sup>65</sup> Constitution of the Republic of Uganda 1995 (as amended) arts 42 and 120(5); *The Decision to Charge Guidelines* (n 3) paras 1.6.1, 2.1.6, 2.4.6, 2.10.1 and 2.11.5–2.11.7; *Manning* (n 51) [33]–[36].

<sup>66</sup> Crown Prosecution Service, 'Victims' Right to Review Scheme' (n 59); *The Decision to Charge Guidelines* (n 3) paras 2.6.1–2.9.1. The proposed accused-person review is narrower than the victim review: it depends on identified new material, policy departure or evidential change and does not create a general interlocutory appeal against charge.

may redact protected information with an itemised justification, and the court may inspect disputed material privately. Disclosure should be limited to what the pleaded ground requires.<sup>67</sup>

The presumptive remedy for a curable defect should be prompt reconsideration by a different prosecutor. Certiorari or prohibition remains available where power was absent, the rational foundation was missing or continuation would itself be abusive. Compensation addresses completed rights injury under article 50 and the Human Rights (Enforcement) Act, subject to a demanding standard that separates serious misconduct from honest professional error.

This procedure gives both sides something important. The claimant receives a practical route to prove illegality. The DPP retains protection for witnesses, investigations and legal advice. The court sees enough to review method without trying guilt. Most importantly, the existence of a disclosure route gives contemporaneous record-keeping a purpose beyond internal filing.

### **10.5 Measure the decisions that matter**

Annual reporting should distinguish files received, returned for further investigation, sanctioned, declined, diverted, taken over, discontinued, reviewed, reversed, prosecuted to plea, tried to judgment and closed. It should report median decision and review times, threshold-test use and expiry, reasons compliance, disclosure failures, court-consent applications in private prosecutions and judicial review outcomes. Definitions must remain stable enough for comparison, with any change in counting explained.<sup>68</sup>

Anonymised equality analysis should examine offence, region, outcome and legally permissible demographic characteristics. Material disparities should prompt sampled review before causation is asserted. Published results may be aggregated where small numbers threaten privacy, but aggregation should not become a reason to conceal every regional difference.

Quality audit must reward correction. A withdrawn case may reveal poor initial judgment, or it may reveal excellent continuing judgment in response to new facts. An acquittal may expose an avoidable evidential failure, or it may follow a properly charged case in which a court reasonably disagreed. The audit should ask why the outcome occurred. Counting it as success or failure before reading the file reproduces the mechanical thinking that prosecutorial discretion is meant to avoid.

### **10.6 Resource the chain of judgment**

Vacancies, regional gaps, witness protection, secure digital systems, forensic access and transport require sustained funding. Training should use anonymised files in which a charge was revised, disclosure failed, investigator pressure appeared or public-interest factors genuinely conflicted. Ethical instruction becomes useful when a prosecutor must explain what should have been done at the difficult point, not merely recite the duty to act impartially.<sup>69</sup>

PROCAMIS should be repaired around prosecutorial work. Mandatory fields should record the governing test and reasons without encouraging copied prose. Version history should show who changed a decision and why. Review deadlines should generate alerts. Evidence and disclosure modules must be populated and interoperable with other justice systems on secure, legally governed terms. Digitalisation should preserve the reasoning trail, not simply accelerate case counts.

These reforms depend on one another. Reasons are weak if no reviewer can test them. Review is weak if the record cannot be accessed. Data are misleading if case stages are undefined. Additional staff cannot cure incentives that reward unsustainable charge. A statute that imposes duties without securing independence may create new channels of control. Reform should therefore be assessed as a constitutional architecture, not as a collection of attractive clauses.

## **11. Conclusion**

The constitutional case for prosecutorial independence is strong. Criminal proceedings should not begin, continue or end because a minister, police commander, wealthy complainant, media campaign or private adversary demands a result. Article 120(6) protects Uganda from that danger. It does not answer the different danger that an insulated decision may be unsupported, unequal, opaque or abusive.

Article 120(5) supplies the answer. Public interest, the administration of justice and prevention of abuse are cumulative disciplines on every function in article 120(3). Read with equality, fair-hearing, administrative-justice and remedial rights, they require the DPP to exercise judgment through law and evidence. They do not guarantee agreement with the result. They require a result capable of explanation.

The 2023 Guidelines bring the institution closer to that standard. Their realistic-prospect test, separate public-interest inquiry, written reasons, threshold safeguards and continuing review are significant. Their constitutional weakness lies in the wall built around application: mandatory internally, non-invokable externally; reasons recorded, reviews withheld; a person challenging

---

<sup>67</sup> Judicature (Judicial Review) Rules 2009, SI 11 of 2009, as amended by SI 32 of 2019; *Soon Yeon Kong Kim* (n 30); *Democratic Alliance* (n 49) [37]–[41].

<sup>68</sup> Office of the Auditor General (n 11) 21–25; *Miller and Wright* (n 12) 127–40; Davis, ‘Prosecution and Race’ (n 17) 35–41.

<sup>69</sup> *Howell* (n 58) 290–303; *Soubise* (n 10) 145–49, 222–23; Office of the Auditor General (n 11) 2–4, 23–25; International Association of Prosecutors (n 37) paras 1 and 6.

charge directed to the general text rather than the decision made in that person's case. A carefully limited reasons and record regime would correct that weakness without exposing witnesses or turning policy into inflexible law.

The Ugandan cases contain the beginnings of a coherent doctrine. *Bakalee* is right that review must not become a criminal trial on affidavit, but too ready to treat trial as the answer where process may be the harm. *Rutayisire* shows that a court can test the rational bridge without deciding guilt. *Wanyoto* is right to stop a prosecution that carries forward torture, malice and a corrupted investigative purpose, while future cases should identify precisely how the prosecutor adopted or failed to cure that taint. *Begira Avito* properly refuses to treat a civil dispute as immunity from criminal law, but its claimant burden must be joined to access to evidence held only by the state.

The resulting position is neither hostile to prosecutors nor indulgent to them. Reasons protect a conscientious prosecutor from speculation. Independent reconsideration corrects error before litigation. Controlled record production lets a court respect decisions that deserve respect. Better data expose pressures and patterns that individual discipline cannot repair. Adequate resources give those safeguards a chance to operate.

Prosecutorial discretion is legitimate because judgment is necessary. It remains legitimate only while that judgment is exercised under law. The DPP must have independence enough to decide and accountability enough to show that a constitutional decision was made. That is discretion without dominion.

**Funding:** This research received no external funding

**Conflicts of Interest:** The authors declare no conflict of interest

**Publisher's Note:** All claims expressed in this article are solely those of the authors and do not necessarily represent those of their affiliated organizations, or those of the publisher, the editors and the reviewers

**Artificial Intelligence (AI) Use Disclosure:** The authors declare that no artificial intelligence tools were used in the preparation of this manuscript

## References

- [1] 'DPP Explains Withdrawal of Basajjabalaba Charges' *The Independent* (Kampala, 9 October 2022).
- [2] 'DPP Withdraws Shs142 Billion Case against Basajjabalaba' *Daily Monitor* (Kampala, 7 October 2022).
- [3] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* DOC/OS(XXX)247 (2003).
- [4] *Bakalee v Attorney General* (Miscellaneous Cause No 212 of 2018) [2019] UGHCCD 4 (27 February 2019).
- [5] Bibas S, 'Prosecutorial Regulation versus Prosecutorial Accountability' (2009) 157 *University of Pennsylvania Law Review* 959.
- [6] Bibas S, 'The Need for Prosecutorial Discretion' (2010) 19 *Temple Political and Civil Rights Law Review* 369.
- [7] *Boucher v The Queen* [1955] SCR 16.
- [8] Children Act, Cap 59.
- [9] Constitution of the Republic of Uganda 1995 (as amended).
- [10] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23, 2018 (2) SACR 442 (CC).
- [11] Council of Europe, Recommendation Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System (6 October 2000).
- [12] Criminal Procedure Code Act, Cap 122.
- [13] Crown Prosecution Service, 'Victims' Right to Review Scheme' (May 2021 revision) <https://www.cps.gov.uk/prosecution-guidance/victims-right-review-scheme> accessed 8 September 2026.
- [14] Crown Prosecution Service, *The Code for Crown Prosecutors* (2018) <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 8 September 2026.
- [15] Davis AJ, 'Prosecution and Race: The Power and Privilege of Prosecutorial Discretion' (1998) 67 *Fordham Law Review* 13.
- [16] Davis AJ, *Arbitrary Justice: The Power of the American Prosecutor* (OUP 2007).
- [17] Davis KC, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1969).
- [18] *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA).
- [19] *Diamond Hasham Lalji and another v Attorney General and four others* [2018] KECA 856 (KLR).
- [20] Evidence Act, Cap 8.
- [21] *Githunguri v Republic* [1986] KLR 1.
- [22] *Hassan Basajjabalaba and another v Attorney General* (Constitutional Appeal No 1 of 2018) [2021] UGSC 64 (19 November 2021).
- [23] *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214.
- [24] Howell BK, 'Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System' (2014) 27 *Georgetown Journal of Legal Ethics* 285.
- [25] Human Rights (Enforcement) Act, Cap 12.
- [26] Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.
- [27] International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (23 April 1999).
- [28] Judicature (Judicial Review) Rules 2009, SI 11 of 2009, as amended by SI 32 of 2019.
- [29] Judicature (Plea Bargain) Rules 2016, SI 43 of 2016.
- [30] *Krieger v Law Society of Alberta* 2002 SCC 65, [2002] 3 SCR 372.
- [31] *Kuria and others v Attorney General* [2002] 2 KLR 69.

- [32] Lippke RL, *The Ethics of Plea Bargaining* (OUP 2011).
- [33] Magistrates Courts Act, Cap 19.
- [34] Mashaw JL, *Due Process in the Administrative State* (Yale University Press 1985).
- [35] *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 (Supreme Court of Fiji).
- [36] Miller ML and Wright RF, 'The Black Box' (2008) 94 *Iowa Law Review* 125.
- [37] *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343.
- [38] Mujuzi JD, 'Strengthening the Right to Institute a Private Prosecution in Uganda by Amending Article 120(3) of the Constitution: A Comment on *Uganda v Inspector General of Police, General Kale Kayihura and 7 Others*' (2017) 25 *African Journal of International and Comparative Law* 590.
- [39] Nsereko DDN, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124.
- [40] Office of the Auditor General, *Report of the Auditor General on the Office of the Director of Public Prosecution for the Audit Year Ended December 2025* (December 2025) <https://www.oag.go.ug/storage/reports/JLO CG DPT 2024 25 1775572785.pdf> accessed 8 September 2026.
- [41] Office of the Director of Public Prosecutions, *Ministerial Policy Statement FY 2024/25* (2024) [https://budget.finance.go.ug/sites/default/files/Sector%20Spending%20Agency%20Budgets%20and%20Performance/Directorate%20of%20Public%20Prosecution%20\(DPP\).pdf](https://budget.finance.go.ug/sites/default/files/Sector%20Spending%20Agency%20Budgets%20and%20Performance/Directorate%20of%20Public%20Prosecution%20(DPP).pdf) accessed 8 September 2026.
- [42] Office of the Director of Public Prosecutions, *The Decision to Charge Guidelines* (2023) <https://dpp.go.ug/wp-content/uploads/2024/03/THE-DECISION-TO-CHARGE-GUIDELINES.pdf> accessed 8 September 2026.
- [43] Office of the Director of Public Prosecutions, *Vote Performance Report FY 2024/25: Quarter 4* (2025) <https://budget.finance.go.ug/sites/default/files/Sector%20Spending%20Agency%20Budgets%20and%20Performance/Directorate%20of%20Public%20Prosecution 16.pdf> accessed 8 September 2026.
- [44] Örüçü E, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205.
- [45] Penal Code Act, Cap 128.
- [46] *R (B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072.
- [47] *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.
- [48] *R (Manning) v Director of Public Prosecutions* [2000] EWHC Admin 342, [2001] QB 330.
- [49] *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345.
- [50] *R (Torpey) v Director of Public Prosecutions* [2019] EWHC 1804 (Admin).
- [51] *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326.
- [52] *R v Nixon* 2011 SCC 34, [2011] 2 SCR 566.
- [53] *Rutayisire and another v Uganda Revenue Authority* (Miscellaneous Cause No 236 of 2020) [2021] UGHCCD 10 (19 March 2021).
- [54] *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780.
- [55] *Soon Yeon Kong Kim and another v Attorney General* (Constitutional Reference No 6 of 2007) [2008] UGCC 2 (6 March 2008).
- [56] Soubise L, 'Prosecutorial Discretion and Accountability: A Comparative Study of France and England and Wales' (PhD thesis, University of Warwick and Université Lumière Lyon 2, 2015).
- [57] *SP Begira Avito v Attorney General* (Miscellaneous Cause No 23 of 2024) [2026] UGHCCD 236 (22 July 2026).
- [58] Trial on Indictments Act, Cap 25.
- [59] *Uganda v Inspector General of Police, General Kale Kayihura and seven others* (Criminal Revision Cause No 34 of 2016) [2016] UGHCCRD 75 (17 August 2016).
- [60] United Nations, *Guidelines on the Role of Prosecutors* (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990).
- [61] *United States v Armstrong* 517 US 456 (1996).
- [62] *Wanyoto v Sgt Ouma and another* (Civil Appeal No 91 of 2021) [2022] UGCA 185 (8 July 2022).
- [63] *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA).