

No Need for INDECOM to Have Prosecutorial Powers

Samoi Campbell | August 5, 2020



The announcement by Justice Minister, the Hon. Delroy Chuck of the Government's decision not to endow INDECOM with prosecutorial powers has deepened the proverbial wound the Commission suffered as a result of the Privy Council's ruling in the *Commissioner of the Independent Commission of Investigations v Police Federation and Dave Lewis v Albert Diah [2020] UKPC 11*. The ode of the opposition asserts that the decision has resulted in the neutering of the watchdog organization, however it begs the question, should INDECOM be given the power to initiate prosecutions against those it investigates? The answer – a resounding no.

INDECOM's origins in 2010 came about against the backdrop of frequent extra-judicial killings and the perceived failure of the Police Public Complaints Authority to hold members of the security forces accountable. The objective then was to create an independent body whose function would be to conduct impartial investigations into cases of alleged misconduct by members of the security forces. Since its inception,

INDECOM has received its fair share of criticisms, however, the need for an impartial body to investigate incidents involving members of the security forces and citizens remains beyond rebuke. What is clear from a reading of the 2010 INDECOM Act, as is evident in the Privy Council's ruling, is that the framers of the legislation only envisioned a system where the Commission would only have investigative functions, and rightfully so.

At this point, it is imperative that the distinction be made between the Commission's power to prosecute offences contrary to section 33 of the INDECOM Act and the power to initiate a prosecution for an offence which has been the subject of investigation by the Commission. The Commission's power to prosecute offences under section 33 is indisputable. These offences, for example, obstructing, hindering or resisting the Commission in the exercise of its functions without lawful justification or excuse (section 33(a)), are directly related to the Commission discharging its investigative functions. What is disputed, is the argument that the Commission should be given the power to initiate prosecutions for offences that are the subject of its investigations.

To give INDECOM both investigative and prosecutorial powers would provoke the sanctity of the line of demarcation separating those who prosecute from those who investigate. This cannot be said to be a desirable position, lest we forget that line exist for good reason. Prosecutors have an overarching duty to be ministers of justice, which means that they are to prosecute cases in a manner that is fair, impartial, and objective. Simply put, the functions of a prosecutor are independent from those of an investigator, and while the two run parallel, they should never collide. There is an inescapable bias where those who conduct an investigation, gathering incriminating evidence, some of which may not be admissible in a court of law, would then have the

obligation to prosecute the very subjects of their investigations. In fact, the argument can be made that the position as it currently is, to some extent, protects INDECOM from allegations of bias. Where the Commission submits a case to the Office of the Director of Public Prosecutions (ODPP) with a view that criminal charges are warranted; and the ODPP exercises its discretion to prosecute, INDECOM can take solace in the fact that its position was fortified by an independent body.

The obvious retort to this position will most certainly be that the bodies such as the Major Organised Crime and Anti-Corruption Task Force (MOCA) and the Integrity Commission have legislative authority to initiate prosecutions without the need to request a ruling from the ODPP. What is curious, however, is despite the existence of these legislative provisions, both MOCA and the Integrity Commission still follow the procedure of preparing their investigations and submitting files to the ODPP for rulings. In fact - to date, there has never been a case where either MOCA or the Integrity Commission independently had conduct of the prosecution, perhaps in deference to the ODPP for the sake of transparency. It seems in my opinion, that senseless theory of allowing for prosecutorial powers to be vested in these two organisations has given way to practicability and common sense.

Another often cited point of contention is the long delays in getting rulings from the ODPP and the long wait suffered by the citizens affected. Unfortunately, this situation is not unique to cases where members of the security forces are charged. Delay in the administration of justice has long been a feature that has plagued us. The solution however, is not always found in setting fire to the entire edifice, especially one built on the foundation of separation of powers and fairness. What we should instead do is to look towards ways of improving the inadequacies. To that end there has been a paradigm shift in judicial thinking in terms of proper case management and trial

certainty. Also of note, is the increase in the staffing of the ODPP with a view to, in the words of Minister Chuck, “allow for the sufficient and timely decision on the files sent by INDECOM.”

The assertion that the decision not to give the Commission prosecutorial powers reduces its effectiveness in holding members of the security forces accountable is without substance. The effectiveness of the Commission cannot and should not be measured by a function that falls outside its remit. In assessing its effectiveness, INDECOM sympathisers should consider that from its inception in 2010 to date, there has been 156 arrests with 10 convictions, some of which were overturned on appeal. Conversely, prior to INDECOM, the Bureau of Special Investigations between 1999 and 2010 recorded 322 arrests and 31 convictions.

INDECOM’s function is purely investigative, a function that remains unscathed by the absence of prosecutorial powers. To assert otherwise would mean that the ODPP has either failed or refused to prosecute members of the security forces despite the existence of credible evidence to mount a prosecution. Unsurprisingly, the statistics do not support this assertion. It is also worthy to note that the option to request a fiat from the ODPP, allowing the Commission to associate itself with the Crown remains an option open to the Commission. An option that the Commission has availed itself of numerous times in the past.

To be clear, the moment we embark on giving statutory bodies more powers than necessary for them to achieve their mandate, we start paving the road for chaos. Afterall, justice can only be done by balancing the rights of ALL those involved, including the right of members of the security forces to be prosecuted by an impartial, independent body. Interestingly, it is police officers that INDECOM often relies on to make arrests.