

The Politicisation of the Criminal Justice System



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The Criminal Justice System in South Africa has always been a target for political interference – sometimes more obviously than other times. The reason is always the same: to protect well connected individuals at the expense of the Rule of Law.

With the advent of our new Constitutional Democracy, the Criminal Justice System underwent a re-structuring, with the powers and spheres of influence of the (new) National Prosecuting Authority, the South African Police Service and the Judiciary all being restructured in accordance with the new Constitution. After 1994, all serving prosecutors were required to take an oath, undertaking inter alia to uphold the Constitution and to prosecute without FEAR, FAVOUR OR PREJUDICE.

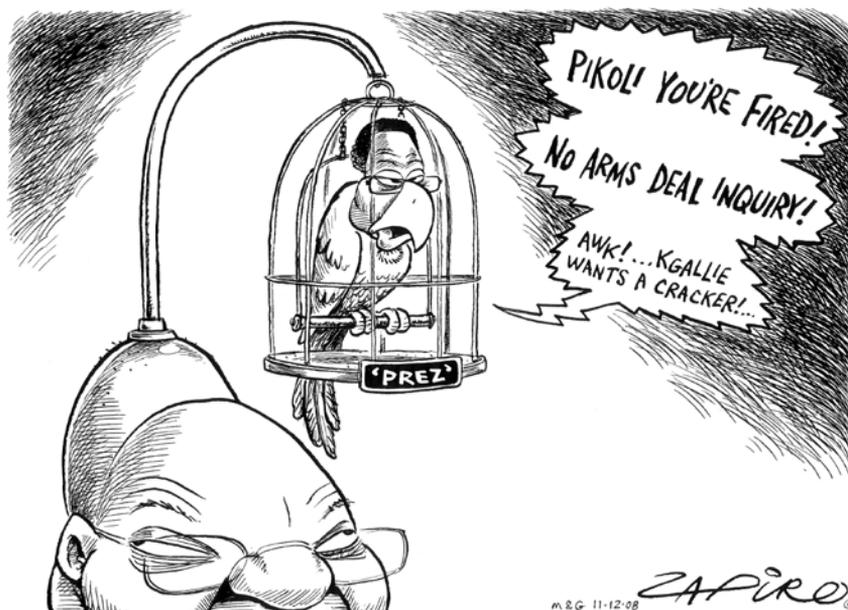
It soon became clear, however, that there was insufficient protection from influence on a political level in the operational affairs of the National Prosecuting Authority. (I am not for one moment suggesting that this did not happen prior to 1994). This is not to say that this was not also the case elsewhere in the Criminal Justice System, but I will confine myself to the affairs of the National Prosecuting Authority. Everything contained in this discussion is a matter of public record, and will not come as a surprise to anyone who is abreast of the current state of affairs in the Criminal Justice System.

Of fundamental importance in any criminal justice system, anywhere in the civilized world, is the principle of equality before the law. It is the pivotal principle underpinning the Rule of Law, and is a most essential element of our Constitutional Democracy.

This principle is what makes South Africa a country that people want to continue to live in, to continue to work towards a better future, to making the country a place that is safe for everyone to live and work in and to conduct business in, and most importantly, to continue to invest in. Without the Rule of Law, we are left with a very unpalatable alternative. We have been there before, and I am sure we do not want to go there again.

The principle of equality before the law is a fundamental part of the Criminal Justice System and an inalienable part of prosecuting. If one cannot prosecute with integrity, one cannot prosecute at all. It is also the one principle that guarantees everyone the same recourse, the same protection and the one guarantee that your investment in this country is as safe as it can be. To achieve this, we naturally need a strong, efficient, effective and INDEPENDENT National Prosecuting Authority (the same applies to the South African Police Service and the Judiciary).

Currently there are still many competent career prosecutors within the National Prosecuting Authority. They go to work trying their best to do a good and honest



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job. Under current circumstances it has become increasingly difficult to do so. Some are still there because they continue to hope that the situation will improve, others are there only because they cannot afford to lose their jobs, despite their disillusionment and dissatisfaction. I need not elaborate on the effect that this situation has on the morale of the prosecution.

As was clear to all, the decision taken some years ago to not prosecute the sitting President was not based entirely on (recognizable) legal principles, and that some of the reasons given for not prosecuting lacked substance. This is, however, an ongoing saga, and is still the subject of legal action, so I will not discuss this particular issue any further. Except to say that, thereafter, the position at the National Prosecuting Authority took a distinct turn for the worse, more so when Vusi Pikoli was fired. This signaled the introduction of overt influence in the operational decision making of the National Prosecuting Authority. That such influence is in contravention of the National Prosecuting Authority Act and the Constitution appears to be of no great concern. Certainly the silence has been both deafening and disappointing.

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The disbanding of the Directorate of Special Operations and the dilution of the considerable skills contained within that Unit in such an open and cynical fashion should have warned all of us of what was to come. More and more, the inability or unwillingness of the Criminal Justice Components to take on – in any significant fashion – contraventions by those in power has been diminished, overtly, and sometimes more subtly. Since the appointment of Adv Mpshe SC as the Acting National Director of Public Prosecutions (NDPP) and thereafter the appointment of Adv Menzi Simelane, the effectiveness and independence of the National Prosecuting Authority has been systematically and dramatically



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undermined. This was not improved by the audacious and somewhat astonishing appointment of Adv Jiba as Acting NDPP. This was, however, not the most astonishing appointment by some considerable margin. The influence became more and more obvious and overt, and prosecutors watched with growing discomfort, as the National Prosecuting Authority was effectively “hijacked” by a few well-placed individuals. We all hoped that the senior management of the National Prosecuting Authority would find (lets call it) “their voice” and act, but this proved to be a somewhat forlorn hope.

Clearly, this influence over the Criminal Justice System became necessary because the Constitution protects the tenets of the Rule of Law, and the amendment thereof is extremely difficult. It is much easier, then, to undermine the independence of the structures underpinning the Criminal Justice System, to achieve the same goal – the protection of those who are sufficiently well connected and have committed offences for which they fear prosecution and possible incarceration.

In order to influence operational functions of the National Prosecuting Authority it is a simple matter to, over time, appoint to positions of power in the relevant departments, persons who will follow a specific agenda, and some would argue that even the Judiciary is under threat of the same type of influence.

Establishing this type of political control allows those placed in positions of power to influence investigations conducted (or not conducted) by the South African Police Service and prosecutions conducted (or not conducted) by the National Prosecuting Authority. This leaves us in the position of having little or

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I am sure that all present here are aware of the history of the National Prosecuting Authority and myself, and I do not propose to explore it in any detail here tonight. Suffice it to say that the fact that I felt it necessary to deal with the Mdluli investigation and prosecution personally, and the ICT/Kumba investigation myself should speak volumes. (See how that turned out for me). It was as a direct result of questionable appointments made into decision-making positions that this was necessary at all, and demonstrates the untenable position that has been reached within the National Prosecuting Authority. I should hasten to add, however, that the new NDPP had then not been appointed and has not yet had the time or the opportunity to demonstrate whether or not he can and will exercise his requisite independence, and I hold the view that he should be given the opportunity to show his own worth.

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Since 1994, and in some instances prior to that date, people, for various reasons, have done things that they no doubt regret, and would probably do differently if given the opportunity to do them over. Some of them, as a result, may, if investigated, be prosecuted and could conceivably face imprisonment if convicted. This is a very real fear for some, and not a prospect that they (understandably) relish. In my view it is this fear that is motivating many of these actions designed to reduce, if not totally eliminate, any danger to their personal positions. The lengths to which they are prepared to go to avoid this consequence should be quite clear for all to see, and has resulted in the ongoing and systematic destruction of the Rule of Law, which is something that should concern us all very deeply.

How to deal with this situation is obviously no simple task. Solutions are all relatively unpalatable, but one has to be found, and quickly, if we are to restore the Rule of Law and thereby restore confidence in any kind of future in South Africa. It is equally essential to restore confidence in the Criminal Justice System, as each day we see the effects of people taking the law into their own hands. In Diepsloot (Gauteng) people are demanding that suspected perpetrators (without a trial) be handed over to them by the Police, in order that they can mete out what can only be termed mob-justice. In Khayelitsha (Western Cape) there is currently a Commission sitting to determine the causes and effects of vigilantism, and the role of the lack of effective policing therein. This is a direct result of the erosion of the confidence of the general public in the effectiveness of the Criminal Justice System.

One solution to address this problem was mooted in a Sunday newspaper some weeks ago. The suggestion was to offer a blanket amnesty from prosecution (within specified parameters). While initially it is startling and the first reaction must be one of “over my dead body”, given time to digest it, it becomes more and more acceptable and seems, all things considered, to be a possible solution to the problem with which we are faced. This is clearly not quite as easy as just placing such a suggestion on the table, and will have to be explored at length, and



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be defined by very specific parameters. It is certainly worth exploring in the context of where we currently find ourselves.

To recap - I hold the view, and I am sure that we will all agree, that a strong, independent, fully functioning National Prosecuting Authority is vital to the success of a democratic South Africa. If ordinary South Africans no longer have any faith in the ability of the country and the legal system to protect them and their interests, they will leave. If they cannot leave, we will see more and more lawlessness, mob-justice and vigilantism. If investors have no confidence in

the recourse available to them, they will certainly take their money elsewhere, and without investment and the development of entrepreneurs, we all realize that there can be no future worth mentioning for South Africa. The importance of the Rule of Law cannot be overstated if we want this country to succeed.

This solution then, it is suggested, would rid us of those elements undermining the Criminal Justice System and all the questionable appointments that have been made as a result of the desire to protect themselves and their cronies from investigation and possible prosecution. To do this, one would, of course, have to remove the source of their fear – the fear of possible or certain prosecution. Once this is removed, they will serve no purpose and the system will rid itself of them. They will have, quite literally, outlived their usefulness.

If such an offer is made, and accepted, and as a quid pro quo we demand and receive, expertly and very carefully drafted and cast in concrete, the removal of the entire Criminal Justice cluster from any possible political interference or influence, including appointments of Senior Management in all of these institutions, forever.

This would guarantee that the Rule of Law is untouchable, and place it beyond the sphere of political manipulation and influence.

It sounds, upon first hearing, untenable. Upon reflection however, it is clear that the gains far outweigh that which is being offered. If we can achieve an independent, strong and fully functioning Criminal Justice System, underpinned by an indestructible position of the Rule of Law, then amnesty for a number of persons is a relatively small price to pay. Provided, of course, that a variety of conditions could or would be met. This is but one suggestion, I am sure there are many others.

The saying that a fish rots from the head down is true, and by removing the rot, we will all be in a much stronger position to address the rampant and institutionalized corruption currently crippling this country, and will allow the institutions of the Criminal Justice System to conduct themselves with independence and distinction, as they have done in the past.

A vast amount of experience has been lost to the private sector and abroad as a result of the current position. A lot of hard work will have to be done to rebuild the National Prosecuting Authority. Again, one must accept that this is the goal of the new National Director, and to that end we will have to co-operate with him as far as possible to assist in achieving this outcome. Sitting about and criticizing will achieve nothing, and the destruction of the National Prosecuting Authority should be the last thing any of us want to see.

Are there people in positions of power who should not be there – of course there are.

Should they be removed – of course they should.

Should we throw the baby out with the bathwater – definitely not.

Constructive engagement on as many levels as possible should be undertaken, to make a concerted effort to get the Prosecuting Authority back to where it should be. We need to find and execute a workable solution in order to restore the Rule of Law. If it is left to continue down this slippery slope, we may find that it will be too late.