

Editorial

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Personal Reflections

In the last few years before the Covid-19 pandemic caused global shock it had become our tradition to embark on an annual academic pilgrimage to Polokwane, where the renowned academic and scholar, Professor Chuks Okpaluba resides after retirement. His academic career began five decades ago and spans more than nine universities across the globe, where he has trained and mentored students and academics.

During these visits we discussed many issues such as the conceptualisation of research projects; contemporary legal questions decided by international courts in that year, as well as African and global politics. We feasted on delicious West African food prepared by Mrs Okpaluba, a lawyer in her own right. Besides getting away from Johannesburg for a few days, this annual academic pilgrimage provided us with an opportunity to be mentored and draw on Professor Okpaluba's vast fountain of knowledge and experience. As a father or an 'old junk' as he likes to call himself, he is generous in sharing his knowledge, experience and advice about life in general. We have benefited immensely from these gatherings, both professionally and personally, for which we are eternally grateful.

Most importantly, several projects have been conceptualised and successfully completed since our first visit six years ago. For example, in 2018, a special double issue of the *Southern African Public Law (SAPL)* in honour of the former Chief Justice Sandile Ngcobo, entitled: *Twenty-first Century Constitutional Jurisprudence of South Africa: The Contribution of Former Chief Justice S. Sandile Ngcobo Special Issue Vol 32 No 1&2 (2017)*, was published and solely edited by one of the contributing co-editors of this Special Issue, Ntombizozuko Dyani-Mhango. In addition, a doctoral degree entitled: *Separation of Powers and the Political Question Doctrine in South Africa: A Comparative Analysis* by one of the contributing co-editors, Mtende Mhango, was conceptualised at this gathering and successfully completed. In May 2019, it was revised and published as a book under the title *Justiciability of Political Questions in*

South Africa: A Comparative Analysis (2019) Eleven International Publishers 2019 ISBN 978-94-6236-918-4. Many other smaller academic initiatives were conceptualised at these meetings and subsequently completed.

Therefore, it was no surprise that following the successful completion of the Ngcobo Project mentioned above, that Professor Okpaluba asked: ‘now that the “Ngcobo Project” is completed what next?’ Anyone who knows Professor Okpaluba is aware that this prominent scholar is the epitome of a vigorous academic, even at his then age of seventy-seven. One of the ideas he shared with us was the proposal of a collection of academic essays examining the prosecuting authorities in South Africa and the Commonwealth. After a long discussion about the envisaged project, Professor Okpaluba shared with us a draft concept note, which he had committed to paper just before our arrival and which contained most of our discussions. A few additions were made, but the concept remained intact. Consequently, the project was assigned to us as contributing guest-editors.

The Concept

Professor Okpaluba’s concept departed from the viewpoint that the office of the National Prosecuting Authority (NPA), quite apart from the courts, is pivotal to the success or otherwise of the administration of the criminal justice system in contemporary South Africa. Established in terms of section 179 of the Constitution of the Republic of South Africa, 1996, as ‘a single national prosecuting authority’, the NPA is ostensibly designed ‘to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.’ Further, the office of the NPA and its head, the National Director of Public Prosecutions (NDPP), have been in the public spotlight, by attracting considerable litigation and public debate—to the extent that the case law that has accumulated over the last decade of the twenty-seven years of South Africa’s democracy, has become so comprehensive as to warrant a book of its own.

The NPA plays a significant role in the criminal justice system since it is responsible for instituting criminal proceedings on behalf of the state in South Africa. Although the NDPP is appointed by the President as head of the national executive, and the NPA forms part of the executive branch of government, section 179(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 32 of the National Prosecuting Authority Act 32 of 1998 require the prosecuting authority to exercise ‘its functions without fear, favour or prejudice.’ The Constitutional Court, in its interpretation of section 179(4) has held that ‘there is a constitutional guarantee of independence and any legislative or executive action inconsistent therewith would be subject to constitutional control’—*In re: Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (10) BCLR 1253 (CC) para 146. The outline of this independence is still being developed by the courts.

Since its establishment, the NPA has encountered legal challenges at multiple levels, among them:

- the top leadership of the authority tend not to serve their full terms of office;
- there is the perceived attempt to politicise the NPA and hence the perceived lack of prosecutorial independence;
- threats of prosecutorial liability for perceived unscrupulous decisions or where there is no decision at all;
- judicial review of its decisions to prosecute, refusal to prosecute or withdrawal of prosecution;
- the legal issues surrounding the appointment and removal from office of the NDPP by a President engaged in an unending wrangling over 783 charges purportedly dropped in 2009 for alleged political interference; and
- the consequent litigation—the so-called ‘spy-tape saga’.

All these and more raise the question whether possible constitutional amendments could be effected so as to transfer the power to appoint the NDPP from the President to Parliament and to work out proper standards for appointing the NDPP.

While it is conceded that the foregoing list is by no means exhaustive, it does represent a demand for academics to conduct a thorough investigation into the office of the NPA in the form of a collection of academic essays. The importance of the institution and its function to maintain peace, law and order and to prosecute the corrupt, will enhance South Africa as an investment destination where the rule of law reigns. The jurisprudence underpinning these makes it imperative that the developments concerning criminal prosecutions be investigated and subjected to comprehensive academic analysis. The objective will be to ascertain whether the office of the NPA is functioning efficiently and effectively, and to expose shortfalls and what should be done to improve them. The exercise will offer a singular opportunity to put the law in its proper perspective. It was in the above context and tradition that a collection of essays for this Special Issue of the *SAPL* was conceived.

As envisaged, contributors have incorporated comparative analyses of developments within the southern African region, the African continent, the Commonwealth, other common law jurisdictions, and indeed other jurisdictions. Since South Africa is a relatively young democracy and still in transition, comparative studies will enable the reader to evaluate existing law and to recognise any defect(s) in the system and sometimes to choose which system would be preferable. Hence, the essays in this volume are arranged in two sections, according to theme: independence and Commonwealth comparative analysis and private prosecutions.

The first section is concerned with the independence of the prosecuting authority. This is a topical issue in South Africa and most of the Commonwealth countries. Recently,

the South African Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) noted that ‘the recent history at the NPA has been one of paralysing instability.’ This case and its surrounding issues provide a foundation for the first three papers on this subject. Firstly, Omar tackles a controversial issue affecting the independence of the prosecuting authority in South Africa, namely political interference. She traces the history of the independence of the prosecuting authorities from the Union of South Africa and finds that significant independence was historically granted to the prosecuting authorities, without the authority being adequately insulated from political interference. Omar advocates for the establishment of a special prosecuting office, akin to the US Special Counsel or Ghana’s Office of the Special Prosecutor, which deals with cases involving members of the executive and legislative branches. She argues that the removal of political cases from the NPA would, among other things, allow the NPA to increase its effectiveness.

Secondly, Dyani-Mhango draws on the concepts of prosecutorial independence and impartiality and the relationship between them. She argues that whilst these are interconnected, they are distinct, and she demonstrates this by citing recent jurisprudence. Dyani-Mhango uses this discussion as a launching pad to consider a different question about independence—is prosecutorial independence the same as judicial independence? She delves deep into the Constitutional Court’s jurisprudence to uncover a surprising conclusion: the two concepts are different. She argues that a prosecutor’s role should not be equated to that of the judicial officers especially on rules governing recusal because of bias. Dyani-Mhango then demonstrates how the principle of independence was invoked by courts in relation to other independent institutions. Even though Mhango, below, problematises this development, Dyani-Mhango appears to find no fault in this development.

Lastly, Mhango uses the High Court and Constitutional Court cases in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* to examine the constitutional provisions governing the removal of the head of the NPA in South Africa. He argues against the proposal to strip the President of the power to remove the head of the NPA because such power is critical to the President’s ability to control the executive branch and perform his functions effectively. He also advances the concept of internal and external separation of powers to argue that South Africa requires a nuanced separation of powers jurisprudence that recognises these distinct imperatives. He contends that cases such as *Justice Alliance of South Africa v President of the Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) should not be employed as a normative standard to resolve disputes that concern the internal separation of powers. Thus, he points out that *Justice Alliance* is not the appropriate authority for the regulation of the relationship between a traditional branch of government and agencies that fall within that branch. In those cases, a distinct separation of powers of an internal nature must apply.

The second section covers the Commonwealth comparative analysis and private prosecutions. Okpaluba commences with an analysis of prosecutorial discretion and judicial review in South Africa and Canada. He acknowledges that courts in the Commonwealth generally agree that prosecutors must function independently, act fairly and responsibly in the interests of the public and must be free from political interference. Therefore, the exercise of prosecutorial discretion should ordinarily not be interfered with by the courts except in exceptional cases. His research reveals that the extent to which the courts in respective Commonwealth jurisdictions review prosecutorial discretions differs from country to country. Citing the case of *R v Anderson* [2014] 2 SCR 167, Okpaluba notes that in Canada, the courts hardly interfere in or review the manner in which the prosecutor performs his or her duties. On the other hand, his research states that the South African prosecutor's exercise of public power is subject to the constitutional principles of legality and rationality. He discusses recent judgments such as *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP) to illustrate the South African position.

Nyane takes us to the Kingdom of Lesotho where he explores the question of the independence of the prosecuting authority. He suggests that in that country, the constitutional provision that safeguards the independence and corresponding duty of accountability by the prosecuting authority is weak. Nyane critiques the constitutional design of Lesotho's Director of Public Prosecution. His main contention is that while section 141 of the Constitution of Lesotho is weak on the independence and accountability of the Director of Public Prosecutions, the broader structure of the Constitution regarding the independence and accountability of the office is feeble.

The last article asks, 'should the scope of private prosecution be extended to include victimless offences?' to which Msaule responds in the affirmative. Msaule gives an overview of private prosecutions in South Africa, by taking into account recent developments to examine the institution of private prosecution and makes recommendations for reform.

We like to thank the authors for their patience during this process. We know that it could not have been easy to wait this long before seeing the result of their contributions. We also like to thank all the 'blind' peer reviewers who contributed their time and effort to this volume—and as always, the chief editor, the editors, and staff of the *SAPL* for their support.