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PROSECUTORIAL POWER AND ITS CONSTITUTIONAL LIMITS IN SOUTH AFRICA: REFLECTIONS ON THE PIKOLI SAGA.

Abstract:

The suspension and subsequent dismissal by the President of the Republic of South Africa of the national director of public prosecutions, Advocate Vusi Pikoli, in 2007 and 2008 respectively, sparked a heated debate among legal scholars and political commentators concerning the extent to which the national prosecuting authority can freely exercise its prosecutorial powers in South Africa. The suspension in particular evoked widespread criticism against the President for what legal scholars and opposition political parties across South Africa referred to as the political interference with the functions of an independent institution. This paper revisits the case of the dismissed director to look closely at the nature and extent of prosecutorial power and to try to understand its limits under the Constitution of the Republic of South Africa. An attempt is made to address a few interesting legal questions that emerge from the case. The first concerns the extent to which the national prosecuting authority can perform its functions independently, without interference and free from partisan politics. The second concerns the relationship between the political agenda of the prosecuting authority and its ability to execute its constitutional mandate. Because of the difficulty of reconciling the impartiality required for the proper discharge of the prosecuting authority's constitutional responsibilities and its political accountability, the relationship between the prosecuting authority and the executive is critically examined. Thus, two fundamental concepts that are relevant to the effective functioning of the prosecuting authority, namely prosecutorial independence and prosecutorial accountability, are critically analysed. Drawing on the lessons from the case of the dismissed director, this paper makes an observation that the current constitutional structure pertaining to the national prosecuting authority in South Africa does not support the notion of complete prosecutorial independence. On the contrary, it is argued that under certain circumstances, such as in matters affecting or involving national security, the intervention of the relevant political head in the functions of the prosecuting authority may be legally justified.

Keywords:

Constitution, national prosecuting authority, national security, Pikoli saga, prosecutorial accountability, prosecutorial independence, prosecutorial power

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