Private Prosecutions in South Africa

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Thesis

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Bibliography

Summary

This thesis will examine the question whether private prosecutions in South Africa could be of assistance to the National Prosecution Authority in fulfilling its constitutional mandate in the current post-Apartheid era of South African judicial transformation.

It will further explore the possible effect of private prosecution on the prevailing 'criminal culture' in South Africa. The question as to whether, and if so to what extent, the promotion of private prosecutions could possibly bring about a decrease in the incidence of crime will be investigated. Well-founded arguments in favour of and against the promotion of private prosecutions will also be considered. The discussion will take place with due regard to the fact that any proposed change to the judicial system pertaining to private prosecution in South Africa should only be favoured if its positive impact on society will clearly outstrip any possible minor negative features.

In order to make the best determination as to the possible effect of a new system favouring a substantial increase in the number of private prosecutions in South Africa, the history and development of private prosecutions in South Africa will be discussed and evaluated.

After completing an historic evaluation of private prosecutions in South Africa, a comparative study will be undertaken of international jurisdictions where private prosecutions are, respectively, common, uncommon, or allowed, but not necessarily the preferred route to take in the prosecution of criminals. The relevant legal systems in various Countries will be compared in order to highlight sound academic facts and possible solutions for problem areas in South African law that will become clear later in this thesis.

In conclusion, the thesis will discuss the effect of private prosecutions which would present a clear picture on the effect of post-Apartheid private prosecutions in South Africa and about the extent to which private prosecutions could possibly assist the state in its duty to protect its citizens. Reference will be made to cases discussed in the previous chapters.

Chapter 1

1.1 Introduction

It is the responsibility of the National Prosecuting Authority of South Africa ("the NPA") to decide whether, or not to prosecute an accused in a criminal matter[1].

Should the NPA decide not to prosecute an accused, the law provides for a private person to prosecute the accused, even though it is not specifically mentioned in the Constitution of South Africa.[2]

The general rule that is recognised by South African courts is that a victim of a crime may institute a private prosecution.[3] Private prosecution was historically resorted to by employers in labour law cases if, for instance, an employee was absent from work without permission.[4] In principle, it was a mechanism that a person could use to seek justice on behalf of himself/herself for another person's wrongdoing.

Section 34 of the Constitution of the Republic of South Africa[5] provides that everyone has the right to have any dispute that can be resolved by the application of law in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal of forum. It has been argued before courts that not allowing juristic persons to launch a private prosecution in terms of section 7(1)(a) of the Criminal Procedure Act, may go against the right provided for in section 34 of the Constitution and would therefore be unconstitutional as seen in the *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (1) SACR 284 (CC) case which will be discussed later.

In South African law, there are two types of private prosecutions. Firstly, section 7 of the Criminal Procedure Act provides for private prosecution by an individual, if the

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1 The Constitution of the Republic of South Africa section 179.

2 Law For All https://www.lawforall.co.za/arrest-crimes/private-prosecutions-in-south-africa/ <Accessed 02 April 2021>.

3 Mujuzi JD *The History and Nature to institute a private prosecution in South Africa* Fundamina (25) 2019.

4 Mujuzi JD (See note above).

5 The Constitution of the Republic of South Africa 1996.

Director of Public Prosecutions[6] has confirmed his/her decision not to institute a public prosecution by the issue of a so-called *nolle prosequi* certificate. Secondly, section 8 of the same Act provides for private prosecutions in terms of a specific statutory provision. Section 8 of the Act does not make mention of a *nolle prosequi* certificate as contemplated in section 7 of the same act. Private prosecutions in terms of section 8 can be instituted by either natural- or juristic persons in terms of the relevant legislation authorising the private prosecutor to prosecute.[7] In effect, the Director of Public Prosecutions withdraws its right to prosecute and allows for the private person to prosecute the alleged offence.

The Director of Public Prosecutions may under section 8(2) of the Act, withdraw the right to prosecute based on the condition that the appointment of the private prosecutor will be subject to the approval of the DPP and that the DPP may at any time exercise with reference to such a prosecution any power which they might have exercised if they had not withdrawn their right to prosecute the accused.[8]

It is therefore clear that private prosecutions, in terms of a statutory provision as provided for in the said section 8, still remain under the control of the director of public prosecutions.[9] This issue will be dealt with further in this thesis.

It has become clear in recent cases that private prosecution in South Africa has proved to be a relatively successful mechanism. The civil rights group, AfriForum, launched the country's first institutional private prosecution unit in early 2017.[10] The unit is lead by Advocate Gerrie Nel, a well-known former South African state advocate, and has already been involved in various private prosecution proceedings. This development is expected to be of quite significant importance in light of criminal prosecutions.

1.2 Research problems, hypotheses and motivation of study

Study, for present purposes, entails a motivation for certain reforms to, but still within the framework of the existing criminal justice system, this endeavour stems from the fact that in post-Apartheid South Africa, the crime rate has in recent decades increased

6 Criminal Procedure Act 51 of 1977 section 7.
7 Criminal Procedure Act 51 of 1977 section 8.
8 Criminal Procedure Act 51 of 1977, section 8(2) & 8(3).
9 Joubert JJ *Criminal Procedure Handbook* 13th Edition (2020) p 90.
10 Law For All (See note 1 above) <Accessed 03 April 2021>.

to such an extent that the national prosecution authority cannot on its own fulfil the functions required from an effective state institution of this nature. The establishment of an alternative and / or prosecuting authority should obviously be considered. To this end various research problems have been identified in this study and certain possible solutions proposed.

Firstly, the law with regard to private prosecutions stems from the medieval ages and more specifically, from ancient Britain.[11] This in itself should probably not be regarded as a research problem. However, in modern times when a law is regarded as "old" it automatically resembles alleged outdatedness and irrelevance. In this study relevance, but more specifically, the need for the improvement of the prosecution system will be explained and the possibilities, explored.

Secondly, in the current South African law, juristic persons are not allowed to launch a private prosecution on behalf of another unless there are a specific statute providing the specific juristic person with that right.[12] The court have not made many judgments where a private prosecution by a juristic person was brought before them. However, the *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*[13] case, the court's judgment, as well as the views levelled against this judgment in legal literature will be explored for the sake of thorough research in order to gain a clear understanding of any possible positive and/or negative impact that could result from the institution of an alternative private prosecuting system.

In South Africa very little research has been done on the emerging role of private prosecution, its pros and cons and its regulation. In some cases, the research on private prosecutions was done in a fragmented way and was only focussing on certain aspects of private prosecution. Other research only gives a broad overview of private prosecution, but not much more.

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11 Worrall JL *The Changing Role of the American Prosecutor* 2008 State University of New York Press, Albany page 6-7.

12 National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development 2016 (1) SACR 308 (SCA).

13 National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development 2016 (1) SACR 308 (SCA).

From the latest statistics, newspapers and recent case law it is clear that private persons and civil rights organisations are increasingly seeking justice without the help or interference of the public prosecution system. Some commentators even believe that private prosecutions are a possible cure for the corruption pandemic in government.[14]

1.3 Research Methodology

The present study is predominantly based on a literature review of various primary and secondary sources. The sources include the Constitution of the Republic of South Africa, 1996, South African and foreign legislation, and South African foreign case law. In addition to these primary sources, academic writings including books and journal articles, postgraduate research studies in the form of theses and thesis, ethical guidelines and policy documents from relevant professional bodies and organisations as well as reputable online and electronic sources have been consulted. The interdisciplinary nature of the study has necessitated a multi-disciplinary approach with regard to the use of sources from the different disciplines of law.

Private prosecutions are increasingly relied upon by victims of crime, especially those who are experiencing a sense of the neglect at the prosecution authority's decision not to prosecute a suspect. In such cases private prosecution could deserve serious consideration.

This study is not only focussed on the law regarding private prosecutions in South Africa, but also on the relevant legal framework of other jurisdictions, in particular those with legal systems similar to that of South Africa. The comparative study is aimed at obtaining information about such from other jurisdictions, while fully realising that because of historic and other reasons, foreign rules and guidelines cannot simply be transplanted in South Africa. However, the international approach to private prosecutions is in this study being customised and contextualised to gain local relevance.

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[14] Rebecca Davis *Could Private Prosecutions realistically ensure accountability for State Capture?* Daily Maverick 29 January 2022 https://www.dailymaverick.co.za/article/2022-01-29-could-private-prosecutions-realistically-ensure-accountability-for-state-capture/ <Accessed 10/02/2022>.

1.4 Framework of research

This part contains a brief introductory discussion on each chapter of the thesis.

1.4.1 Historic Development of private prosecution.

This study will firstly focus on the historic development of private prosecutions. Most of South African law has been derived from English as well as Roman-Dutch law. This is the result of the colonial era between 1652 and 1961 when South Africa was colonised, first by the Dutch East Indian Company and thereafter by Britain. With regard to private prosecutions, Roman-Dutch law did not provide for the right of private persons to prosecute. Under British rule English law was gradually introduced in the Cape Colony.[15] The British settlers, for instance, introduced the English criminal procedure law in South Africa as well as many other statutes.[16]

A commission of enquiry was established before the English law could properly be introduced to the Cape of Good hope. From the House of Commons debates it is clear that the legislators wanted the commission to be established with the mandate to look into the state of the laws, whether their application is efficacious and the practical administration of justice.[17]

In 1827 the Governor of the Cape of Good Hope was Major-General Bourke. Secretary of state for War and the Colonies, Viscount Goderich, wrote a letter to Bourke on 5 August 1827 regarding private prosecution in the Cape of Good Hope which reads as follow:[18]

'I presume it to have been their intention to dispose of this question by their general advice respecting the introduction of the Law of England… But the difficulty of adopting the English forms of practice of Criminal Procedure at the Cape of Good Hope would for the present at least appear insuperable.'[19]

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15 *Groenewoud and Colyn v Innesdale Municipality* 1915 TPD 413.

16 Barrat A *"I also am a Barolong": Re Bethell and shaping of Marriage law and conflict of laws doctrine* Fundamina 25 (2019) page 134.

17 *Hansard UK House of Commons Debates* no 7 (25 Jul 1822) col 1801 available at https://api.parliament.uk/historic-hansard/commons/1822/jul/25/commission-of-inquiry <Accessed 10 April 2021>.

18 Theal GM *Records of the Cape Colony* 1793-1831 vol 21 1897.

19 Theal GM *Records of the Cape Colony* 1793-1831 vol 21 1897 page 266-267.

From this quote Goderich's pessimism about the commissioners' report is obvious. This pessimism was justified because at the time the Cape of Good Hope did not have a legal framework similar to that of England within which parts of English law could be accommodated.

Goderich stated that the Cape of Good Hope a more perfect security for the due execution of the law.[20] Goderich further stated that for private prosecutions to take place with little inconvenience, the existence of a Magistracy comprising of magistrates' courts/offices dispersed throughout the Colony. Furthermore, Goderich stated that a large number of Officers of Justice was required to work under the command of the Magistrates.[21] He concluded that the required complex "machinery" was not present in the Cape of Good Hope and that the Colony did not have the necessary material to construct such a legal system.[22]

1.4.2 Criminal Procedure Act

In the second part of this study, the focus will shift from the historic development of private prosecutions towards the present form of private prosecutions in South Africa. Section 179 of the Constitution of the Republic of South Africa 'the Constitution') states that "(t)here is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament". This entails that only the National Prosecuting Authority may prosecute alleged criminals.[23] The Criminal Procedure Act 1977, as mentioned above, does however provide for cases where a private or juristic person may institute a private prosecution.

South African law provides for two categories of private prosecution. Firstly, an individual can prosecute on the basis of a certificate *nolle prosequi* certificate issued by the DPP stating that the office of the DPP will not prosecute the alleged criminal and that a private prosecution may be proceeded with.[24]

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20 Theal GM *Records of the Cape Colony* 1793-1831 vol 21 1897 page 266-267.
21 Theal GM *Records of the Cape Colony* 1793-1831 vol 21 1897 page 266-267.
22 Theal GM *Records of the Cape Colony* 1793-1831 vol 21 1897 page 266-267.
23 Marumoagae C *Prosecute or we will! Is the single prosecuting authority under threat?* De Rebus 34 (2018) https://www.derebus.org.za/prosecute-or-we-will-is-the-single-prosecuting-authority-under-threat/ <Accessed 21 April 2021>.
24 Criminal Procedure Act 51 of 1977 section 7.

Secondly, prosecutions may be instituted by statutory bodies in terms of section 8 of the Criminal Procedure Act. Section 8 provides for private prosecutions to be lodged in terms of a statutory.[25]

In *Barclays Zimbabwe Nominees (Pty) Ltd v Black* (1990),[26] Barclays instituted a private prosecution against Black in terms of section 7(1)(a) of the Criminal Procedure Act 51 of 1977. The facts of the case will be dealt with later in this thesis. However, the presiding judge, Milne JA, gave the following summary of the historical development of private prosecutions in South Africa:

> "Apart from their substantial influence on legislation in the other provinces, the provisions of the Cape Ordinance of 1828…were to a large extent incorporated in the Criminal Procedure Act 31 of 1917. The subsequent Criminal Procedure Act 56 of 1955 substantially re-enacted the provisions of the 1917 Act relating to private prosecutions, the only relevant difference between s 14 of the 1917 Act and s 11 of the 1955 Act being that the former referred to 'any private party' whereas the latter referred to 'any private person'. It is to be noted that there was no definition of the word 'party' in the then current Interpretation Act 5 of 1910. In the 1977 Act s 7 provides substantially the same as ss 11 and 14 of the 1955 Act".[27]

In the second chapter it will become clear that many of the provisions of the Cape Ordinance still feature in contemporary South African law of criminal procedure as mentioned in the *Barclays* case. In this case the judgment further states that the Criminal Ordinance and Evidence Act 31 of 1917 also provided for a right of private prosecution.[28] Section 14 of that Act states that any person who can show some "substantial and peculiar interest" in the issue at trial, arising from the injury he suffered out of the conduct of the alleged offender, may prosecute the alleged offender, if the Attorney-General declines to prosecute.

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25 Mujuzi JD *Private prosecutions and discrimination against juristic persons in South Africa: A comment on National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* African Human Rights Law Journal 15 (2015).

26 *Barclays Zimbabwe Nominees (Pty) Ltd v Black* (1990) ZASCA 92; 1990 (4) SA 720 (A).

27 *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* (1990) ZASCA 92; 1990 (4) SA 720 (A).

28 Criminal Procedure and Evidence Act 31 of 1917 section 14.

The wording of the present Criminal Procedure Act of 1977 will also be analysed with reference to case law. The court in *Mullins and Meyer v Pearlman* laid down important principles with regard to private prosecutions and in particular relevant to the requirements for 'injuries suffered' and 'substantial and peculiar interest'. The court stated: "It is I think clear that where no right of civil redress exists the right of private prosecution would cease".[29] These principles were later upheld by the court in *Ellis v Visser*.[30]

1.4.3 Current status of private prosecutions in South Africa

In this part of the thesis the focus will be on recent case law and the current situation pertaining to private prosecutions in South Africa.

A statutory right to prosecute is provided to the National Society for Prevention of Cruelty to Animals (NSPCA) by the Societies for the Prevention of Cruelty to Animals Act (NSPCA Act).[31] However, it was held in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* that the right of the NSPCA to prosecute remained subject to the state's right to prosecute the accused first.[32]

The *NSPCA* case is probably one of the most prominent cases dealing with private prosecutions in contemporary South African law of procedure. The case has attracted attention from various academics either criticizing or praising the judgment. The *NSPCA* case will be explored in this thesis as it is one of the most recent cases in which a very important question regarding private prosecutions was raised. An important legal question was whether or not a juristic person had the right to prosecute an alleged offender privately in terms of Section 7(1)(a) of the Criminal Procedure Act. The court did not regard this question as the real issue in this case and did not give a clear answer. However, in this part of the thesis focus will be on the case itself and the effect of the judgment on the promotion of private prosecutions in South Africa.

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29 *Mullins and Meyer v Pearlman* 1917 TPD 639.
30 *Ellis v Visser* 1954 (2) SA 431.
31 Societies of the Prevention of Cruelty to Animals Act 169 of 1993 Section 6(2)(e).
32 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (1) SACR 284 (CC) par 62.

1.4.4 The international view on private prosecutions

In this part of the thesis the occurrence of and the views on private prosecutions in other countries will be explored. The international views will then be compared with South African notions. Countries and regions that will be focussed on are the United States of America, Europe, commonwealth countries and some African countries where private prosecutions have been recorded. The motive for this chapter is to broaden the perspective on private prosecutions and to see to what extent other countries have resorted to private prosecutions to assist the state in fighting crime.

1.4.5 The United States of America

The first jurisdiction that will be reviewed is that of the United States of America (USA).

In the USA district attorneys are required by statute to prosecute all matters of state concern. The most unique feature of the USA's criminal prosecution system, is that it is public in nature.[33] Public prosecution is not part of the USA's British common law heritage because the concept of a "district attorney" is a distinctive American one.[34] Interesting to note that Jack M. Kress, professor at the University of New York, states the following:

> "Americans typically describe their legal system as based upon English common law, in terms of both its procedural attributes and substantive state penal codes, the public prosecutor is a figure virtually unknown to the English system, which is primarily one of private prosecution to this day."[35]

To look at the USA as a whole and trying to determine the country's collective perspective on private prosecution would not be of much use for purposes of this thesis. One can however assume that the USA's outlook on private prosecutions and that of the United Kingdom's are of similar origin. Initially, there was practically no difference between a civil case and a criminal case. In both cases the two parties had

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33 Worrall JL *The Changing Role of the American Prosecutor* 2008 State University of New York Press, Albany page 5.

34 Kress, J. M. *Progress and prosecution* 1976 Annals of the American Academy of Political and Social Sciences page 100.

35 Kress JM (See note above) page 100.

to go to court and defend themselves before a judge or magistrate and the presiding officer had to give judgment based on the facts.

After the American revolution, a new government was elected, and a new prosecution structure was implemented, namely the public prosecution structure.[36] Since then the government has slowly improved the public prosecuting authority into its current magnificent structure. I believe that the right approach to private prosecution rights in the USA is that of the states of Idaho and Maryland where a private person still has the right to privately prosecute as a last resort and still affords private persons some way of seeking justice on their own behalf. The different approaches by the American states will also be discussed.

One also has to consider the standard of the public prosecuting authority in the USA in comparison to that of South Africa. Where a proper functioning public prosecution system is in place an additional prosecution system is not necessary.

1.4.6 England

England will form part of the European countries that will be explored in this chapter. England is an important jurisdiction for present purposes because the origin of South African law of criminal procedure is undoubtedly British common law**.** The Dutch legal system will be explored next because of its important connection with the South African Roman Dutch common law. The importance of any comparison between present day South African law pertaining to private prosecution and comparable provisions in the two jurisdictions from which South African common law originates stands to reason.

The concept of private prosecution derives from the early English notion that the best means of bringing criminals to justice is to leave the matter in the hands of the victim and/or his relatives or friends to seek justice for the alleged injustices of the accused.[37] All prosecutions in England are done in the name of the Crown however, private prosecutions are still seen as an essential building block in the British legal justice system. Most criminal prosecutions in England, after the Second World War, were

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36 Worrall JL (See note above) page 7.

37 Stephen J *A History of the Criminal Law of England* 1883 page 245.

private prosecutions.[38] These private prosecutions were merely initiated by the police and since 1940 a variety of acts have influenced the stance on private prosecutions. The most notable creation of these acts is the Crown Prosecution Service that is charged with the responsibility to decide which prosecutions to pursue. The Director of Public Prosecutions and the Attorney-General has however, placed severe limitations on the rights regarding prosecutions by private persons.

In medieval times in England, "appeals" was the word used to refer to private prosecutions. They had no bearing on the correction of legal mistakes. To appeal simply meant to prosecute the accused. For purposes of this thesis, I will continue to use the term private prosecutions although the sources in some instances refer to appeals. Nevertheless, private prosecution was the main form of prosecution during twelfth and thirteenth centuries and it was continuously used until the nineteenth century. It is interesting to note that there were not many privately prosecuted criminals convicted in the thirteenth century.[39]

1.4.7 Netherlands

The statute regulating the prosecution of crimes in the Netherlands is the *'Wetboek van Strafvordering* 2012*'* ('*Wetboek*').[40] The *Wetboek* grants the right to prosecution exclusively to the Public Prosecution Service. This entails that the victim does not have the right to prosecute an accused irrespective of the significance of the injury suffered and notwithstanding the fact that the Public Prosecution Service has declined to prosecute.[41] The Public Prosecution Service therefore has a monopoly over the prosecution of crimes but this does not mean that it is obliged to institute prosecution in every case of an alleged offence brought to its attention. It may decide not to prosecute if it is of the opinion that the prosecution would not lead to a conviction because of insufficient evidence or for any other technical reason. The Public Prosecution Service may also decline to prosecute in terms of the expediency

38 Emsley C *Prosecution and the police in England since 1700* IAHCCJ Bulletin 1993 No 18 page 45.
39 Klerman D *Settlement and the Decline of Private Prosecution in Thirteenth-Century England* Law and History Review Spring 2001 Vol 19 No 1 page 3.
40 English: Code of Criminal Procedure 2012.
41 Tak J P *The Dutch Criminal Justice System* ResearchGate January 2003 page 51.

principle, that is the principle that it may decline to prosecute for reasons of public interest.[42]

There are six grounds on which the public prosecutor can decide not to prosecute due to technicalities. These technicalities may be that the accused was wrongly registered by the police; that there was not enough evidence for a prosecution; that prosecution was, for some peculiar reason, inadmissible; that the court does not have jurisdiction to hear the case; that the conduct of the accused does not constitute a criminal offence; and that the accused is not criminally liable because of the presence of a ground a justification.[43]

The Public Prosecution Service is not obliged to elaborate on its decision not to prosecute due to technicalities or due to policy considerations. It is only required to categorize its decision under any of the recognised grounds excluding prosecution as mentioned in the previous paragraph.[44] This categorization is not a guarantee for a uniform application of the various facts which could serve as grounds upon which a decision not to prosecute may be based. However, it does provide guidance to the nineteen prosecutorial jurisdictions in the Netherlands which could eventually lead to some measure of uniformity as to the applicability of the facts concerned.[45]

1.4.8 Zimbabwe

The Zimbabwean outlook on private prosecutions, which is both an African and former commonwealth country, will now be explained. In early 2010 four senior employees of Telecel Zimbabwe (Pty) Ltd, a mobile phone company, were charged with fraud committed against Telecel, involving an amount of about US $1 700 000[46].The four accused were denied bail as there was overwhelming *prima facie* evidence against them. However, the Attorney-General later refused to prosecute as there was in his view insufficient evidence against the accused. Telecel consequently applied for a *nolle prosequi* certificate in order to institute a private prosecution against the accused persons. Telecel argued that there was sufficient evidence available to ensure a

42 *Wetboek van Strafvordering* 2012 Section 167(2).
43 Tak J P (See note above) page 52.
44 Tak J P (See note above) page 52.
45 Tak JP (See note above) page 53.
46 *Telecel Zimbabwe (Pty) Ltd v Attorney-General of Zimbabwe N.O.* Civil Appeal SC 254/11 [2014] ZWSC 1 (28 January 2014).

conviction. The Attorney-General denied the issue of the required certificate and the matter had to be decided by the Supreme Court of Zimbabwe.

In Zimbabwe the Criminal Procedure and Evidence Act regulates the institution of private prosecution. Section 13 of said Act states the following:

> "In all cases where the Attorney-General declines to prosecute for an alleged offence, any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute, in any court competent to try the offence, the person alleged to have committed it."[47]

The court then looked at the origin of private prosecution and also focussed on how private prosecutions had to some minor extent been introduced in the Cape of Good Hope.[48] The court referred to Dugard's book stating that the British government accepted the conditions prevailing in the Cape of Good Hope which did not permit of the unmodified adoption of the English system of private prosecutions.[49] The British view that the Cape of Good Hope legal system could not accommodate private prosecution as an option available to the victims of crime is further discussed in Chapter 2 of this thesis.

Nevertheless, the court continued by stating that according to Dugard the British government vested the sole right to prosecution of crimes under the authority of the Attorney-General, but where an individual suffered an injury and the Attorney-General declined to prosecute, the victim will be granted the opportunity to prosecute the accused.[50] The court stated that the law governing private prosecutions in both Zimbabwe and South Africa was not part of Roman-Dutch law, but is derived from English common law.

The court observed that in section 7 of the South African Criminal Procedure Act 51 of 1977 the term 'private person' is identified as one who may institute a private prosecution in terms of that act. However, in the Criminal Procedure and Evidence Act

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47 Criminal Procedure and Evidence Act Part III Section 13.
48 *Telecel Zimbabwe* (See note above).
49 Dugard J *South African Criminal Law and Procedure – Vol. IV Introduction to Criminal procedure* (1977) page 25.
50 Dugard J (See note above) page 25.

Part III Section 13 the term 'private party' is used when indicating who may launch the private prosecution in terms of section 13 of that act. As mentioned in Chapter 3 of this thesis, the court in the *Barclays* case said that the term 'private person' referred to a natural person who was capable of experiencing feelings and suffering physical and emotional injury. The court in the *Telecel* case further stated that since the terminology used in the one case differs from that used in the other case, the judgment in the *Barclays* case could not apply to the facts of the current case before the court.[51] The court finally concluded that the right of private prosecution vested in natural persons as well as judicial persons including private corporations.[52]

1.4.9 New Zealand

The next commonwealth country that will be briefly looked at is New Zealand. New Zealand provides for private prosecutions by individuals as well as organisations. Section 6(1)(c) of the Criminal Disclosure Act recognises the right to privately prosecute, stating that the meaning of 'prosecutor' includes the person who filed that charging document and any counsel representing that person in the case of a private prosecution.[53]

Section 16(2)(e)(i) of the Criminal Procedure Act states that a charging document must include the name of the prosecuting organisation as well as the particulars of an appropriate contact person in relation to the prosecution.[54] It is clear that New Zealand does not impose unnecessary burdens on organisation that intends to launch a private prosecution. Although private prosecution is provided for in New Zealand law, its practical application hardly ever occurs.

However, in 2012 Mr McCready, a member of the public, and the owner of New Zealand Private Prosecution Services Ltd, launched a private prosecution against the accused Mr John Banks, for having committed an offence under section 134 in that he had allegedly submitted a return to the electoral officer knowing that it was false.[55] The respondent argued that there was not enough evidence to commit him for trial

51 *Telecel Zimbabwe* (See note above).
52 *Telecel Zimbabwe* (See note above).
53 Criminal Disclosure Act 2008 No 38 Section 6(1)(c).
54 Criminal Procedure Act 2011 No 81 Section 16(2)(e)(i).
55 *Banks v District Court at Auckland* [2013] NZHC 3221 par 14.

after the private prosecution had been launched.[56] The court held that there was **i**n fact sufficient evidence and that the district court's decision to commit the accused for trial pursuant to the private prosecution should not be interfered with [57]

1.4.10 Kenya

In the *Lois Holdings Limited v Ndiwa Tamboi & 184 Others* case Lois Holdings filed a case against 185 defendants claiming the defendants were trespassing, damaging property and illegally occupying pieces of land.[58] Lois Holdings bought pieces of land only identified as (land belonging to) Mr Gadher. He was a farmer who used the land for farming activities. The defendants were workers on the farm and were also living on the farm and specifically on the pieces bought by Lois Holdings.[59]

Lois Holdings wanted the workers to move off the pieces of land of which it was the newly registered owner. At this time, there were only 54 people living on the land, but when this case was heard, the number had jumped to 185 as the community had grown larger and spread over the entire extent of the land. In 1986 Lois Holdings launched a private prosecution against the 54 persons who were initially occupying the land in the Kitale Senior Resident Magistrate's Court Criminal Case No. 3409 of 1986. All of the 54 accused were convicted and ordered to vacate the land.[60]

The court held that when the plaintiff had bought the land in question it instituted a private prosecution against the 54 original occupants. That was in 1986 about two years after it had bought the land.[61] The court held further that the defendants could not claim to have acquired title by adverse possession, either before or after the plaintiff bought the land.[62] It is clear that the court recognised the private prosecution by the company Lois Holdings, not only by deciding in its favour in 1986, but also by confirming suspension of the period of prescription and thus avoiding the "acquiring by adverse possession" rule taking effect. The court subsequently ordered the

56 *Banks* (See note above) par 4.
57 *Banks* (See note above) par 44-48.
58 *Lois Holdings Limited v Ndiwa Tamboi & 184 Others* [2014] eKLR par 3.
59 *Lois Holdings* (See note above) par 5&6.
60 *Lois Holdings* (See note above) par 7.
61 *Lois Holdings* (See note above) par 23.
62 *Lois Holdings* (See note above) par 23.

defendants to vacate the land in three months' time and to pay Kshs. 2 296 000 as general damages for trespassing.

Private prosecution by a company was therefore recognised without any involvement of the public prosecution authority. This seems to have been a fair outcome in Kenya which is, like South Africa, also a country with a developing economy

By allowing a company to launch a private prosecution on its own behalf, gives the public prosecution authority in Kenya the opportunity to focus on other "more important" cases. It is furthermore no secret that governments in certain countries lack sufficient capacity. The private sector can assist in this regard by taking care of their own cases and even other cases of interest.

1.4.11 The Impact of modern-day Private Prosecutions

Throughout this study reference will be made to specific case law, but in this part some of the most recent and ground-breaking cases will be mentioned, explained and evaluated in context of South African procedural law and constitutional law. Some important cases will also be mentioned and their effect on the National Prosecution Authority will be evaluated. The development of private prosecution in case law will also be set out and explained in a chronological order. This part of the study will take all of the above research into consideration and explore its effect on present post-Apartheid South Africa.

1.4.12 Conclusion and final inputs

The last part of this thesis will form the conclusion of the study where some final contributions and a broad overview of the findings and observations of this study will be made.

Some final inputs and recommendations in light of private prosecutions will also be made with reference to findings made in the previous chapters.

Chapter 2

Historic development of private prosecution from 1652 until 1977

2.1 Introduction

A substantial component of South African statutory law is derived from the country's British colonial past, as it was introduced by colonial legislators and developed over time to become part of the unique South African legal system we know and study today.

Roman Dutch law was also introduced by the Dutch settlers and administration that dominated legal development in South Africa between 1652 and 1795, when the Cape Colony was first colonised by the British Empire for a short period during the Napoleonic War until 1803 and again in 1806 when the final annexation of the Cape by the British, became a reality. From then on English criminal procedure law was gradually imported into the South African legal regime.[63] Roman Dutch law did not recognize the right of private persons to prosecute wrongdoers.

Under the Articles of Capitulation, in terms of which the Cape was surrendered by the Dutch to the British Empire, the colonies were allowed to retain their existing laws and privileges.

The Articles of Capitulation followed the famous English-law principle enunciated in the case of *Campbell v Hall*[64] a 1774-ruling of the Court of the King's Bench in London, which had to rule on the tax laws applicable to the territory of Grenada after the British conquered the territory from its former French colonisers and annexed it. The law of conquered territories therefore remained in force until altered by the Sovereign.[65]

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63 Barrat A *"I also am a Barolong": Re Bethell and shaping of Marriage law and conflict of laws doctrine* Fundamina 25 (2019) page 134.

64 (1774) Lofft 655, 98 ER 848; 1 Cowp 204.

65 Van der Merwe, Cornie. *The Origin and Characteristics of the mixed legal systems of South Africa and Scotland and their importance in Globalisation*. Fundamina 18 (1) 2012. pp91- 144.

2.2 Colebrooke and Bigge Commission

Sixteen years after the annexation of the Cape by the British in 1806, the House of Commons in the British Parliament appointed a commission to *inter alia* look into the current state of laws in the Cape Colony, and also to investigate the practical administration of justice.[66]

The Commission became known as the Colebrooke and Bigge Commission. In 1823 the Commission recommended that an independent court system be established to counter corruption and abuse of power. This led to the adoption of the First Charter of Justice in 1827 and the replacement of the *Raad van Justitie* (the highest criminal and civil court under the Dutch) by the new Cape Supreme Court in 1828. This court was staffed by four (and later three) judges recruited from Britain. In 1827 a new system of lower courts presided over by colonial officials, known as magistrates, was established to replace the old Dutch courts of *landdrosts* and *heemraden*.

The law of procedure and the law of evidence were reconfigured in accordance with English law. Ordinance 40 of 1828 adopted English criminal procedure, Ordinance 72 of 1830 introduced the English law of evidence, and various rules of the Cape Supreme Court made English civil procedure applicable, although a few features of Roman-Dutch law were retained. Because of the educational and professional backgrounds of the new judges and soon also of legal practitioners who could only practise at the Cape Bar if they had qualified at Oxford, Cambridge or Dublin, characteristic common-law features were introduced into South Africa. These included public oral trials handled by legal representatives of the parties; adversarial rather than inquisitorial procedures; the institution of the office of the Attorney-General to replace the old Dutch prosecutor (*Fiskaal*) and a public prosecution service based on the English model; the delivery and reporting of well-argued judgments by individual judges and the doctrine of precedent.[67]

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66 Hansard UK House of Commons Debates no 7 (25 Jul 1822) col 1801 available at https://api.parliament.uk/historic-hansard/commons/1822/jul/25/commission-of-inquiry <Accessed 9 June 2021>.

67 Van der Merwe (See note above).

One of the issues the Commission dealt with was the prosecution of offences.[68] The Commission recommended that the cases concerning private persons, and in particular cases of "… libel, assault and other misdemeanours..." should provide the injured parties the right to prosecute if they prefer doing so, and in cases where the Attorney-General declines to prosecute.[69]

In respect of costs, the Commission recommended that the Court should not primarily order costs against the accused, but should also be allowed to exercise its use their discretion in determining a cost order which may sometimes go against those individuals who had exercised their right of private prosecution.[70]

The commission made some recommendations, as mentioned above, that laid the foundation for private prosecutions as we know it in South Africa today.

Firstly, the accused had to be prosecuted by the public prosecutor, and if for some or other reason the public prosecutor did not wish to prosecute, the victim was allowed to do so.[71] Private prosecution was therefore a mere exception to the rule at the time.

Secondly, private prosecutions should only be allowed with regard to smaller crimes of a personal nature, such as defamation and assault.[72] This recommendation was problematic as this would mean that the public prosecutor would be responsible for the prosecution of all major crimes, such as rape and murder, but the victims or their next of kin would be excluded from prosecuting the alleged culprit.

Thirdly, the commission recommended that should a party choose to prosecute, they had to show that they had suffered some form of injury in respect of which they could be regarded as victims of the crime.[73] This again shows that the next of kin of the victim would not be able to prosecute privately, only the victim could do so. This might also put the victim in a difficult position as many victims of crime would choose not to have anything further to do with the prosecution process because this could lead to further trauma and mental suffering.

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68 Barrat A (See note above) page 134.
69 Theal GM *Records of the Cape Colony* 1793-1831 vol 21 1897.
70 Theal (See note above).
71 Theal (See note above).
72 Theal (See note above).
73 Theal (See note above).

Fourthly, the commission recommended that the victim may at any time, exercise their right to institute a private prosecution. This meant that the victim could prosecute either before or after the public prosecutor has decided to prosecute. Unlike the present position in South African law, consent from the public protector was not a prerequisite.

Fifthly, the private prosecutor was required to institute prosecution as soon as possible. The Commission states that the hearing should start at the next court session.[74] Such a provision would be untenable in present day South Africa in view of the constitutional requirements pertaining to a fair trial which obviously entails sufficient available time to prepare for a case.[75] When parties do not have sufficient time to prepare, the case may be lost.[76] This is often referred to as the principle of "equality of arms". "Equality of arms" implies *inter alia* that an accused shall be informed of the fats alleged against them, that they will be given enough time to prepare their case and that he will be given access to all material evidence held by the prosecution authorities which bears on his guilt or innocence.[77] In South Africa parties must always be afforded sufficient time to obtain legal representation and to prepare a proper case.

Finally, the Commission made certain recommendations regarding costs: if the private prosecution is unsuccessful, the court may order the private prosecutor to reimburse the government the costs occasioned by the prosecution.[78] There is no indication as to whether some of that money should be paid to the acquitted accused. There is also no mention about a possible claim which the private prosecutor may have to some of the money should the private prosecution be successful. This recommendation could give rise to various questions. For instance: Is the institution of a private prosecution worth one's while if a successful private prosecutor has no claim to be reimbursed for costs incurred in connection with the private prosecution?[79]

The Commission's report was submitted to the legislative council on the Judicial Establishment of the Colony of the Cape of Good Hope and was considered by the

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74 Theal (See note above).
75 The Constitution of the Republic of South Africa 1996, section 35(3)(b).
76 Theal (See note above).
77 Cassim F *The Right to Prepare for One's Trial* Unisa Bitsream Chapter 7 page 2.
78 Theal (See note above).
79 Theal (See note above).

Secretary of State for War and the Colonies, Viscount Goderich.[80] In 1827 the Governor of the Cape of Good Hope was Major-General Bourke. In a letter to Bourke on 5 August 1827 regarding private prosecution in the Cape of Good Hope[81] Goodrich wrote the following, among other things:

'I presume it to have been their intention to dispose of this question by their general advice respecting the introduction of the Law of England… But the difficulty of adopting the English forms of practice of Criminal Procedure at the Cape of Good Hope would for the present at least appear insuperable.'[82]

From this quote it is clear that Goderich entertained some misgivings about the commissioners' report. In short, his argument clearly supported the view that at that stage the Cape of Good Hope lacked a legal framework like that of England and thatany attempt to apply English law in an underdeveloped legal framework would be a technically untenable exercise.

Goderich stated that the Cape of Good Hope required a more established legal environment for due execution of the law.[83] Goderich further stated that for private prosecutions to proceed with little inconvenience, it was necessary for numerous Magistracy to be dispersed throughout every part of the Colony. Furthermore, Goderich stated that there was also a large number of Peace Officers required to work under the command of the Magistrates.[84] He concluded by saying that the complex "machinery" was not present in the Cape of Good Hope and that the Colony did not have the necessary material to establish such a legal system.[85]

2.3 Ordinance 40 of 1828

Private prosecutions were nevertheless formally introduced in the Cape of Good Hope a year later in 1828. Ordinance No. 40 of 1828 adopted the English law procedure by providing that the public prosecutor had the right to prosecute, but should that person decline to do so and issue the required certificate to the private person intending to

80 Majuzi (See note above).
81 Theal (See note above).
82 Theal (See note above) page 266-267.
83 Theal (See note above) page 266-267.
84 Theal (See note above) page 266-267.
85 Theal (See note above) page 266-267.

prosecute, the right to prosecute will fall upon the private person. Ordinance 40 of 1828 is to be regarded as the first proper criminal procedural law in the Cape of Good Hope, and South Africa as it is presently known.

The relevant sections of the Ordinance can be briefly summarised as follow:

Sections 1 to 5 of the Ordinance dealt with the jurisdictions of the Supreme Court of the Cape of Good Hope, and of the lower courts.[86]

Sections 6 and 7 of the Ordinance explained what was expected from the Attorney General. Section 6 stated that the Attorney General was expected to prosecute crimes committed in the Cape Colony on behalf of the King (of England).[87] Section 7 afforded the right to and imposed the duty upon the Attorney General to give effect to section 6 of the Ordinance. The section stated that the Attorney General had to exercise his right and duty to prosecute in person in the Supreme Court, but that he was entitled to appoint other officials to prosecute on his behalf in the District Courts and Police Court in Cape Town.[88]

Section 8 of the Ordinance stated in a single sentence that the power of prosecution was "absolutely" under the Attorney General's own management and control.[89] Section 8 was apparently intended to emphasise the fact that the power of prosecution lied with the Attorney General who would always have full discretion whether or not to prosecute.

Section 9 of the Ordinance gave the Attorney General the power to stop the proceedings at any time before the conviction had been handed down.[90] The Ordinance granted even more power to the Attorney General. Section 9 stated that if the defendant had previously been arraigned upon any charge, he shall be entitled to a verdict of acquittal of that charge.[91] It is clear that the Crown and British government entrusted all the authority to prosecute in the Cape Colony upon the Attorney General at the time. All offences committed in the Colony had to be investigated and the

86 Statutes of the Cape of Good Hope Act No 40 of 1828 sections 1-5.
87 Statutes of the Cape of Good Hope Act No 40 of 1828 section 6.
88 Statutes of the Cape of Good Hope Act No 40 of 1828 section 7.
89 Statutes of the Cape of Good Hope Act No 40 of 1828 section 8.
90 Statutes of the Cape of Good Hope Act No 40 of 1828 section 9.
91 See note 44 above.

offenders, prosecuted by the Attorney General or by any official representative entrusted to do so.

Section 10 further empowers the Attorney General to order the release of any person who is in custody for questioning as part of the investigation concerned.[92]

It is clear from the first ten sections of the Ordinance that the intention of the legislator was that the power of prosecution ought to be vested in the hands of the Attorney General. However, the Ordinance did provide for circumstances where a private person was allowed to prosecute an accused.

Section 11 provided for cases where a private person was allowed to start a process of prosecution. Section 11 stated that when an accused was released from detention following authorisation from the Attorney General, the private person may apply for a warrant for the further detention of such person.[93]

Two aspects of section 11 need further scrutiny. Firstly, we see that a private person was entitled to prosecute if allowed to do so by the Attorney-General. In other words, the right to prosecute was not merely available to an aggrieved person.

Secondly, a private person could apply for a court order for the further detention of an alleged criminal. This provision clearly dated from a pre-human rights' dispensation where the emphasis was not at all on the rights of an accused. Section 12 stated that neither the conviction nor the acquittal of the alleged criminal could prevent any party who had suffered injury as a result of the conduct of the alleged criminal, from claiming damages in a civil action.[94]

Laws providing for civil actions for damages are common in the South African justice system. These laws in effect, protect everybody against unfair treatment or damage caused through unlawful conduct. In the event of any such infringements, the victim may institute a delictual claim for damages.

Section 13 provided that where the public prosecutor declined to prosecute the alleged criminal, any private party, who alleged that he had suffered any injury or loss due to

92 Statutes of the Cape of Good Hope Act No 40 of 1828 section 10.
93 Statutes of the Cape of Good Hope Act No 40 of 1828 section 11.
94 Statutes of the Cape of Good Hope Act No 40 of 1828 section 12.

such alleged crime or offence, prosecute in any competent court, the person alleged to have committed such crime or offence.[95]

There are three points of particular interest about section 13.

The first important aspect is that a private person could not institute a prosecution if the public prosecutor did not decline to prosecute the alleged criminal. This shows the importance of the public prosecutor and his duty to prosecute crimes committed in the Cape of Good Hope.[96] This part of section 13 corresponds to a large extent with present South African criminal procedure law.

The second important aspect to note is that the private person was allowed to prosecute any alleged crime or offence committed by the alleged criminal. This was a deviation from the recommendations of the Colebrooke and Bigge Commission which recommended the right to private prosecutions to be limited to crimes such as crimen injuria.

The third point of interest relates to a requirement that still exists. Section 13 stated that the private person instituting the prosecution should have suffered some form of injury as a result of the alleged offence committed by the alleged criminal. In other words, the private prosecutor had to be a victim of the relevant crime.[97] This is a part of the law that has various positive elements such as the provision affording the victim the opportunity to 'fight back' and restore his/her credibility by the institution of a private prosecution. A negative aspect of this provision relates to the fact that only the victim has *locus standi* to institute a private prosecution. It follows that a private prosecution is impossible if the "victim" is not a clearly identifiable individual. This aspect will be dealt with in the next chapter of this thesis.

Section 14 stated the following:

> "In order that no Prosecution, at the instance of a private Party, may take place, until the Public Prosecutor shall have exercised his discretion, whether he will prosecute the Offender at the Public instance, it shall not be competent for any

95 Statutes of the Cape of Good Hope Act No 40 of 1828 section 13.
96 Mujuzi JD (See note above) page 137.
97 Mujuzi JD (See note above) page 137.

private Party to obtain the Process of any Court for summoning any Party to answer to any Indictment or Complaint, unless the said private Party shall produce to the Officer, authorised by Law to issue such Warrant, the Indictment or Complaint, having endorsed thereon where the Indictment is to be tried in the Supreme or Circuit Court, a Certificate under the hand of, and subscribed by, the Attorney-General, that he has seen the Indictment, and declines to prosecute at the Public instance for the Offence therein set forth; and where the Indictment or Complaint is to be tried in any Inferior Court, a Certificate, under the hand of, and subscribed by, the Officer who by Law is entitled to prosecute at the Public instance in such Court, that he has seen the said Indictment or Complaint, and declines to prosecute at the Public instance for the Offence therein set forth; and in every case, in which the Attorney-General declines to prosecute, he and the Officers, through whom he exercises the right of Prosecution in the Inferior Courts, shall, at the request of the Party intending to prosecute, grant the Certificates abovementioned on every Indictment submitted to them by such private Party."[98]

Section 14 of the Ordinance gives rise to two issues that requires further attention. Firstly, the certificate from the Attorney-General or public prosecutor is a prerequisite for any person who wishes to institute a private prosecution. This means that if the private prosecutor does not have the *nolle prosequi* certificate entitling him/her to institute the private prosecution, the court could not issue the necessary court documents to compel the accused to appear before the court, and the private prosecutor cannot compel the accused on their own following the fact that they do not have the right to prosecute. Therefore, one could say a private prosecution without a certificate is to be declared invalid.[99] It becomes troublesome in cases where the state does not issue the *nolle prosequi* certificate in instances where the private prosecutor has a strong case against the accused as this would hinder the private prosecutor from initiating and conducting a successful private prosecution.

The second aspect that needs attention relates to the requirement that Attorney-General "shall" provide a certificate if he/she decides not to prosecute. It is important

98 Statutes of the Cape of Good Hope Act 40 of 1828 section 14.
99 *Mcunu v Landsberg* (1913) 34 NPD 140.

to note that section 14 did not provide the public prosecutor with a discretion as to whether or not to issue the certificate. The word “shall” and not “may” suggests that the public prosecutor is obliged to issue the certificate. This means that when the public prosecutor decided not to prosecute the accused, the power to do so is conferred upon the alleged victim of the crime. In other the words, the obligation of the state to prosecute, transformed itself into a right of the private person to be able to prosecute.

The two aspects referred to above, could give rise to various questions. For instance: what would be the position if a victim of the crime is not in the financial position to prosecute the accused privately? Private persons who can afford it will obviously more likely to institute a private prosecution than those who cannot afford it. This might clearly create an imbalance in the legal system. The statutory provisions now under consideration are to some extent resembling similar provisions in the present South African law of criminal procedure. These similarities will be dealt with in the next chapter and in subsequent parts of this thesis.

Section 15 of the Ordinance provided:

“To support a Prosecution at the private instance, the private Party prosecuting must be able to show some substantial and peculiar interest in the issue of the Trial, arising out of some injury, which he individually has suffered by the commission of the alleged Crime or Offence set forth in the Indictment or Complaint.”[100]

According to section 15 only victims of the alleged crime were allowed to prosecute the alleged accused.[101] This obviously limited the pool of potential private prosecutors, and for good reason because it ensured that third parties who might have unrelated reasons to act against the accused, are excluded from becoming private prosecutors. Section 16, however, provided that a husband may prosecute an accused on behalf of his wife. The right to prosecute on behalf of a spouse becomes relevant especially in cases where the victim is unable to prosecute the crime committed against them

100 Statutes of the Cape of Good Hope Act No 40 of 1828 section 15.
101 Statutes of the Cape of Good Hope Act No 40 pf 1828 section 15.

such as murder or serious assault which led to the inability to prosecute crimes committed to oneself.[102]

Section 17 provided that guardians may prosecute on behalf of their "wards".[103] The wife, children or next of kin may also privately prosecute the accused where the accused caused the death of the victim as mentioned in section 18.[104]

From section 16 and 17 it is clear that the Ordinance distinguished between "husband" and "wife". Section 16 states that only the husband has the right to prosecute crimes committed against his wife. The wife could not prosecute crimes committed against their husband. At the time when the Ordinance, was enacted women's rights were clearly not considered to be similar to those of men. However, this discriminatory provision has been retained in section 7 of the present Criminal Procedure Act in terms of which a husband may institute private prosecution for an offence committed against his wife but a wife may not do so in respect of an offence committed against her husband. This provision will in all likelihood not pass constitutional muster.

Section 19 empowered the court to order the private prosecutor to repay the expenses of the accused if the latter had successfully avoided a conviction. This provision protects the accused from *mala fide* private prosecutions.[105]

Section 20 stated that the private prosecutor had to pay £20[106] before the accused could be summoned to be prosecuted. Firstly, this provision intended to ensure that only 'serious' prosecutions took place. Secondly, the provision might have further consequences: as some proposed private prosecutors could easily afford £20 while others might find it unaffordable. It follows that private prosecution would not have been available to the poor.[107]

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102 Statutes of the Cape of Good Hope Act No 40 of 1828 section 16.
103 Statutes of the Cape of Good Hope Act No 40 of 1828 section 17.
104 Statutes of the Cape of Good Hope Act No 40 of 1828 section 18.
105 Statutes of the Cape of Good Hope Act No 40 of 1828 section 19.
106 According to the website https://www.in2013dollars.com/uk/inflation/1828?amount=20, visited on 16 July 2022, the current value of £20, adjusted according to inflation since 1828, is £2417.03. According to existing ZAR: GBP exchange rates the existing rand value is almost R50 000,00.
107 Statutes of the Cape of Good Hope Act No 40 of 1828 section 20.

Finally, in terms of section 21 of the Ordinance the crime of murder would never prescribe but the period of prescription in respect of all other offences was 20 years.[108]

In addition to the said Ordinance, there were many other Acts that also permitted private persons to institute private prosecutions. These Acts distinguished between two forms of private prosecution. Firstly, the victim of the crime could institute a private prosecution. [109] Secondly, in terms of certain statutory provisions private prosecution was possible regardless of whether or not the private prosecutor was a victim of the crime.[110] There were also statutory provisions prescribing that if there were more than one victim of a crime, the Attorney-General was entitled to choose the one that he/she considered to be the "most fit and proper" to conduct the private prosecution.[111] Trustees could institute private prosecutions on behalf of companies, organisations and societies.[112]

2.4 Subsequent legislation and developments through case law

As mentioned above, there were many questions raised after the introduction of the 1828 Ordinance in the Cape of Good Hope. In 1830 the 1828 Ordinance was explained by a further Ordinance, namely Ordinance 73 of 1830. Ordinance 73 stated that a certificate from the Attorney-General was not a prerequisite for section 14 private prosecutions, unless the offence was of such a nature that it "ought not to be permitted to be prosecuted" by the private prosecutor.[113]

Amendments to the 1830 ordinance which were brought about in 1852 did not affect the provisions relating to the issue of the certificate permitting private persons to prosecute.[114]

During the *Great Trek,* which took place from 1836 to 1838, a substantial number of white Dutch/Afrikaans speaking settlers of the Cape Colony moved northwards to

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108 Statutes of the Cape of Good Hope Act No 40 of 1828 section 21.

109 For example: Cattle Theft Repression Act 16 of 1864 (Cape of Good Hope) section 12.

110 For example: Corrupt Practices at Elections Prevention Act 21 of 1859 (Cape of Good Hope) sections 8, 10 and 11.

111 Merchandise Marks Act 12 of 1864 (Cape of Good Hope) section XVI.

112 Friendly Societies' Act 7 of 1882 (Cape of Good Hope) section 5.

113 Ordinance 73 of 1830 (Ordinance for Explaining, Altering and Amending the Ordinance No 40 of 1828) (Cape of Good Hope) Sections 6 & 7.

114 Ordinance 8 of 1852 (Cape of Good Hope) (Ordinance for Regulating in Certain Respects the Prosecution of Crimes in Districts in Which There Shall Not Be Resident Clerks of the Peace, and for Other Purposes).

escape British rule in the Cape Colony.[115] They resettled in the interior in areas known to colonial settlers as Transoranje, Transvaal and Natal. However, the British regarded the whole of Southern Africa, including the said areas as a British colony and extended the application of British law, including the law of criminal procedure, to Natal and the Transvaal.[116]

The British introduced the 1828 Ordinance in Transvaal and Natal before the 1830 amendments were made.[117]

In *Groenewoud and Colyn v Innesdale Municipality* [118]*,* (a case concerning the private prosecutions by municipalities.) [119] the court noted that the right of prosecution vested solely in the state according to the Criminal Ordinance of 5 July 1570.[120] The Criminal Procedure Ordinance No. 40 of 1828 dealt extensively with the provisions of the right of prosecution. The provisions regarding prosecution were included in the Transvaal By-law 9 of 1866 and in the Criminal Procedure Code No. 1 of 1903.

The Ordinances mentioned above provided that the only persons entitled to prosecute privately were "those who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which they have suffered by the commission of the alleged offence".[121]

In conclusion, the court held that the right to prosecute privately was a matter that pertained to the administration of justice.[122]

Rule 63 of the Magistrate's Courts Proclamation, 21 of 1902, stated that any private person was allowed to prosecute even without any certificate showing the public protector's intention not to prosecute.

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115 Laband, John (2005). The Transvaal Rebellion: The First Boer War, 1880-1881. Abingdon: Routledge Books. pp. 10–13. ISBN 978-0582772618.

116 Barrat (See note above) page 140.

117 Ordinance 18 of 1845 (Cape of Good Hope) (Ordinance for Regulating the Manner of Proceeding in Criminal Cases in Districts in Which There Shall not be Resident Clerks of the Peace and for other Purposes).

118 Groenewoud (See note 9 above) page 419.

119 Groenewoud (See note 9 above) page 419.

120 Groenewoud (See note 9 above) page 415.

121 Groenewoud (See note 9 above) page 415.

122 Groenewoud (See note 9 above) page 415.

Furthermore, the court in the *Groenewoud* case stated that although Rule 63 allegedly gave a private person the right to prosecute privately, the rule did not define the right to prosecute privately, and therefore Law 9 of 1866 had to be considered.[123]

The court ruled that such a right is "practically a necessary adjunct of municipal institutions."[124] The court ruled that even though the municipality did not in itself suffer an injury, necessity dictates that a municipality should have the power to prosecute privately.[125]

This shows how the right of private prosecution has been developed by the courts. It is unthinkable that at some point in South African law there was any about a municipality's right to prosecute.

In *Barclays Zimbabwe Nominees (Pty) Ltd v Black* (1990),[126] Barclays instituted a private prosecution against Black in terms of section 7(1)(a) of the Criminal Procedure Act 51 of 1977. The facts of the case will be explored later in this thesis. However, the judgement contained the following summary of the historical development of private prosecutions in South Africa:

> "Apart from their substantial influence on legislation in the other provinces, the provisions of the Cape Ordinance of 1828…were to a large extent incorporated in the Criminal Procedure Act 31 of 1917. The subsequent Criminal Procedure Act 56 of 1955 substantially re-enacted the provisions of the 1917 Act relating to private prosecutions, the only relevant difference between s 14 of the 1917 Act and s 11 of the 1955 Act being that the former referred to 'any private party' whereas the latter referred to 'any private person'. It is to be noted that there was no definition of the word 'party' in the then current Interpretation Act 5 of 1910. In the 1977 Act s 7 provides substantially the same as ss 11 and 14 of the 1955 Act."[127]

It is clear from the above that many of the provisions of the Cape Ordinance do still feature in modern South African Criminal law as mentioned in the *Barclays* case. The

123 Groenewoud (See note 9 above) page 415.
124 Groenewoud (See note 9 above) page 419.
125 Groenewoud (See note 9 above) page 419.
126 ZASCA 92; 1990 (4) SA 720 (A).
127 *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* (1990) ZASCA 92; 1990 (4) SA 720 (A).

extract goes further stating that the Criminal Ordinance and Evidence Act 31 of 1917 also provided for a right of private prosecution.[128] Section 14 states that any person who can show some "substantial and peculiar interest" in the issue at trial, arising from the injury of such person suffered resulting from out of the conduct of the alleged offender, may prosecute the alleged offender, if the Attorney-General declines to prosecute.

In terms of section 15 the following persons are also entitled to institute private prosecutions: (a) a husband in respect of offences committed against his wife; (b) the legal guardians or curators of minors or lunatics in respect of offences committed against their wards; (c) the wife or children or, where there is no wife or child, any of the next of kin of any deceased person in respect of any offence by which the death of such person is alleged to have been caused; (d) public bodies and persons on whom the right is specially conferred by statute in respect of particular offences.[129]

From sections 14 and 15 it is clear that the Criminal Procedure and Evidence Act of 1917 provided for private prosecutions by individuals.

One year after the Criminal Procedure and Evidence Act of 1917 was promulgated the *Brown v Moffat* case was decided.[130] In this case Brown instituted a private prosecution against Moffat for perjury in the Heidelberg magistrate's court.[131] The respondent's counsel argued that Brown did not have the right to prosecute Moffat. However, the court held that section 15(d) of the Criminal Procedure and Evidence Act indeed provided the applicant the right to prosecute privately.[132]

In the *Thoppaya v Kynochs* case, the court stated that section 15(d) of the Criminal Procedure and Evidence Act "must refer to a statutory provision that expressly gives the right to prosecute privately".[133] It is therefore that not every private prosecution will be allowed. Primarily it is the responsibility of the Attorney-General to institute prosecutions. Any private prosecution is an exception to the rule which could only find application if specifically authorised in terms of relevant legislation. The court in the

128 Criminal Procedure and Evidence Act 31 of 1917 section 14.
129 Criminal Procedure and Evidence Act 31 of 1917 section 15.
130 *Brown v Moffat* 1918 TPD 242.
131 *Brown* (See note above) 243.
132 *Brown* (See note above) 245.
133 *Thoppaya v Kynochs Ltd* (1923) 44 NPD 349.

Thoppaya case ruled that there could not be a private prosecution, because of non-compliance with the requirements to launch a private prosecution.[134]

The Criminal Procedure and Evidence Act of 1917 was in 1955 replaced by the Criminal Procedure Act, 56 of 1955. Unlike the 1917 Act, the 1955 Act did not specifically provide that the victim of crime had a right to institute a private prosecution as mentioned above. This distinction gave rise to certain questions.[135]

Section 11 of the Criminal Procedure Act of 1955 provided as follows:

> "In any case in which the attorney-general declines to prosecute for an alleged offence:
>
> (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; or
>
> (b) a husband, if the said offence was committed against his wife; or
>
> (c) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward; or
>
> (d) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence, may, subject to the provisions of sections 14 and 15 prosecute in any court competent to try the said offence, the person alleged to have committed it.[136]

Section 11 of the Criminal Procedure Act of 1955, does not specifically refer to private prosecution as such. However, the mere reference in section 11 to a private person within the context of the rest of the section, is a clear indication that the section relates to private prosecution and nothing else. This view is supported by the definition of a private prosecutor in section 1 as "any public body or person who in terms of section

134 *Thoppaya* (See note above) 349.
135 Barrat (See note above) page 141.
136 Criminal Procedure Act 56 of 1955 section 11.

11 or 12 has the right to prosecute in respect of any offence".[137] The 1955 Act was replaced with the Criminal Procedure Act 51 of 1977.

2.5 Conclusion

In conclusion of this chapter, it is clear that the idea of ceding the right to prosecute an accused to a private person is not new in law. It is unclear why the English moved away from the idea of private prosecution and towards a public prosecution authority, but one might argue that the public prosecution system operates more orderly and that during the time and development of public prosecutions, various different private prosecutions lead to chaos.

It is furthermore clear from the above-mentioned legislation that thanks to the English law principles, private prosecutions found its place in the South African legal framework. It will also be discussed later in this thesis, what the views of modern England are in respect of private prosecutions, as well as other countries such as Commonwealth countries, African countries and European countries.

137 Criminal Procedure Act 56 of 1955 section 1 (Definitions).

Chapter 3

Private prosecutions in South Africa since 1977

3.1 Introduction

The previous chapter illustrated how the right to institute private prosecutions in South Africa has developed over a period of almost 150 years from 1828 until 1977 into the present statutory provisions dealing with private prosecution.

In this chapter the current legal provision with regard to private prosecutions in South Africa will be analysed with reference to the Criminal Procedure of 1977.

The criticism levelled against these provisions will also be dealt with and where necessary certain proposals will be put forward.

Section 179 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as 'the Constitution') states that-

"There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament".

This entails that only the National Prosecuting Authority established in terms of the National Prosecuting Authority Act 32 of 1998 being the Act of Parliament contemplated in section 179 may prosecute alleged criminals.[138] The Criminal Procedure Act of 1977, does however provide for cases where a private or juristic person may institute a private prosecution.

Contemporary South African law provides for three categories of private prosecution.

Firstly, an individual can prosecute on the basis of a certificate *nolle prosequi* which refers to the instance where the Director of Public Prosecution issues a certificate

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138 Marumoagae C *Prosecute or we will! Is the single prosecuting authority under threat?* De Rebus 34 (2018) https://www.derebus.org.za/prosecute-or-we-will-is-the-single-prosecuting-authority-under-threat/ <Accessed 21 April 2021>.

stating that the National Prosecution Authority will not prosecute the alleged criminal and that the prosecution may commence by way of private prosecution.

Secondly, South African law provides for prosecutions by statutory bodies and thirdly, the law provides for private prosecutions conferred on individuals by certain legislation.[139]

3.2 Private prosecutions by individuals

Section 7(1) of the 1977 Act provides four instances where persons other than the National Prosecution Authority may privately prosecute an alleged criminal. Section 7 reads as follows:

> "7. Private prosecution on certificate *nolle prosequi*
>
> (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-
>
> (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
>
> (b) a husband, if the said offence was committed in respect of his wife;
>
> (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
>
> (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward;
>
> may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence."

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139 Majuzi JD *Private prosecutions and discrimination against juristic persons in South Africa: A comment on National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* African Human Rights Law Journal 15 (2015).

The first instance referred to in section 7(1)(a) relates to a situation where an individual can prove that he/she suffered some injury as a result of the commission of the alleged offence.[140] In other words, the person who launches the private prosecution has to be the victim of the alleged criminal's conduct.

Section 7(1)(b), (c) and (d) are instances where a family member may prosecute on behalf of the victim's family member. Such family members could be the husband, wife, child or next of kin, if the said offence caused the death of the family member or rendered the victim unable to lodge a private prosecution.

3.2.1 Nundalal v Director of Public Prosecutions

In *Nundalal v Director of Public Prosecutions* the court made clear what was meant by the requirements set in section 7.[141] The case was heard in the Constitutional Court after the private prosecutor, Niemesh Singh, had sought to prosecute the applicant, Arnold Denzil Nundalal, privately for allegedly defeating the ends of justice and for making a false statement.[142]

The court ruled that the onus was on the private prosecutor to prove that all the requirements for a private prosecution had been complied with.[143] In terms of section 7(1)(a) of the 1977 Act there are certain phrases from which the meaning could determine whether or not the private prosecutor may prosecute.

Firstly, the word 'substantial' which refer to the interest of the private prosecutor which must be of such nature and extent that it would (in addition to other essential elements which had to be proved) justify a conviction.[144] If the interest in question is not "substantial. It serves no purpose to institute a prosecution. Different persons will have different views as to whether a particular interest should be regarded as "substantial" or not. This also applies to different prosecutors, be they private or public prosecutors. A prosecution depended on a criterion which could lead to a different conclusion could

140 Criminal Procedure Act 51 of 1977 Section 7(1)(c).
141 *Nundalal v Director of Public Prosecutions KZN and Others* ZAKZPHC 25 (2015).
142 *Nundalal* (See note above) par 4.
143 *Nundalal* (See note above) par 53.
144 *Nundalal* (See note above) par 47.

lead to an unfair trial.[145] If the prosecutor cannot prove that he or she has a substantial interest in the case then the prosecution will not be allowed.

The private prosecutor has to further show that he/she has a substantial and peculiar interest and that he/she 'individually' suffered some personal injury.[146] In the case under discussion, the court required a causal connection between the injury suffered and the alleged offence.[147] Finally, the court went further stating that harm to an individual's feelings and good name can also constitute injury which could justify a private prosecution.[148] When the summons is issued the available information should 'at least prima facie' show that the the requirements of section 7 of the 1977 Act have been complied with.[149]

Typically, the accused would rely on section 106(1)(h) of the 1977 Act as in support of a plea that the prosecutor has no locus standi.[150]

This plea may be raised at any stage of the trail. However, courts should remain cautious as denying the prosecution the right to prosecute may implicate the prosecution's right to access the court as required in terms of section 34 of the Constitution. Therefore, if the private prosecutor meets all of the requirements of the Criminal Procedure Act the court should allow the prosecution to proceed.

3.2.2 Makhanya v Bailey

The next important case that needs to be explored in this thesis is *Makhanya v Bailey*.[151] This case was argued by the later Chief Justice, adv Arthur Chaskalson, SC in the Transvaal Provincial Division (now known as the Gauteng Provincial Division, Pretoria) in the apartheid-era and was an appeal to a full bench of the court against a magistrate's court ruling that the private prosecutor had not sufficiently shown substantial or peculiar interest to institute a private prosecution in terms of section 7 of the Criminal Procedure Act.[152]

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145 *Nundalal*(See note above) par 47.
146 *Nundalal* (See note above) par 53.
147 *Nundalal* (See note above) par 53.
148 *Nundalal* (See note above) par 53.
149 *Nundalal* (See note above) par 53.
150 *Nundalal* (See note above) par 54.
151 *Makhanya v Bailey NO* [1980] 4 ALL SA 509 (T).
152 *Makhanya* (See note above) page 510.

The accused was the former employer of the complainant who allegedly contravened section 25(c), read with sections 32 and 34(10), of the Wage Act 5 of 1957.[153] The relevant sections created a statutory offence which prohibited the dismissal of an employee for ulterior reasons (In this case the complainant had allegedly been dismissed as a result of her trade union activities). In short, the complainant, Angel Makhanya was dismissed by Mrs Rinke and/or Mr Jonker in exercising their duties on behalf of SAG Ceramics (Pty) Ltd. William S Bailey as director of SAG Ceramics, was charged in his representative capacity.[154]

The accused relied on section 106(h) of the Criminal Procedure Act to challenge the section 7(1)(a) private prosecution, arguing that the private prosecutor had no locus standi to prosecute the accused.[155]

The accused argued that the complainant did not have the peculiar and substantial interest referred to in section 7(1)(a) to launch the private prosecution. The magistrate held that Ms Makhanya did not have the required substantial and peculiar interest because she had been dismissed in terms of her contract of service.[156]

The magistrate followed the decisions in *Mullins and Meyer v Pearlman* 1917 TPD 639 and *Ellis v Visser* 1954 (2) SA 431 (T) and found that the complainant had suffered no injury and that there was no an actionable wrong in civil law.[157]

The court in *Mullins and Meyer v Pearlman* laid down important principles with regard to private prosecutions and in particular with regard to the requirements relating to ~~for~~ 'injuries suffered' and 'substantial and peculiar interest'. In this regard the court said: "It is I think clear that where no right of civil redress exists the right of private prosecution would cease".[158] These principles were later upheld in *Ellis v Visser*.[159]

Nevertheless, the court held in *Makhanya* that according to *Rooiberg Minerals Development Co Ltd v Du Toit* 1953 (2) SA 505 (T) it was unfair to dismiss an employee based on bias against a trade union. This meant that the contract of service

153 *Makhanya* (See note above) page 510.
154 *Makhanya* (See note above) page 510.
155 *Makhanya* (See note above) page 511.
156 *Makhanya* (See note above) page 511.
157 *Makhanya* (See note above) page 511.
158 *Mullins and Meyer v Pearlman* 1917 TPD 639.
159 *Ellis v Visser* 1954 (2) SA 431.

would still be in operation as if there were no dismissal. The court held that various civil remedies were available in terms of which the aggrieved employee could claim loss of wages or damages for unfair dismissal.[160] The court concluded that the applicants had proved their interest required in terms of section 7(1)(a) and that the case be remitted to the magistrate for further hearing.[161]

The *Makhanya* case dates from the pre-1994 dispensation when a disenfranchised labour activist in a legal regime in which labour rights were not recognised as basic human rights, successfully resorted to private prosecution in order to obtain redress after having been unfairly dismissed. The decision in this case clarified how the *Mullins* and *Ellis* cases should be interpreted in future; and held that unfair dismissal in this case did in fact constitute a substantial and peculiar interest required in terms section 7(1)(a) of the Criminal Procedure Act.

3.3 Private prosecutions in terms of statutory right

Section 8 of the Criminal Procedure Act deals with private prosecutions in terms of statutory right and provides as follows:

> "(1) Anybody upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
>
> (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the Director of Public Prosecution [DPP] concerned and after the DPP has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.

160 *Makhanya* (See note above) page 514.
161 *Makhanya* (See note above) page 514.

(3) A DPP may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the DPP, and that the DPP may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution."[162]

It is common for some municipalities to prosecute under section 8.[163] Subsection (2) states that it is the responsibility of the person or body who intends to prosecute, to consult with the DPP after the DPP has withdrawn the right of prosecution.[164]

In order to obtain the right to institute a private prosecution in terms of section 8 of the Criminal Procedure Act, the prosecuting entity must be enabled to do so by an enabling statutory provision.

This leads to the question whether a prosecution under section 8 really constitutes a private prosecution. These prosecutions are often instituted by municipalities, as mentioned above, which are public bodies and authorities as is the office of the DPP.[165]

The DPP may under section 8(2) withdraw his/her right to prosecute subject to such condition as he/she may deem fit including the condition that the appointment by such a body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the DPP and that the DPP may at any time exercise, with reference to any such prosecution, any power which he/she might have exercised had he/she not withdrawn the right to prosecute.[166] It could be argued that this principle derives from the *Groenewoud* case, mentioned in Chapter 2, in terms of which municipalities may be afforded the right to institute private prosecutions. It is sometimes convenient to have the right to prosecute transferred to competent

162 Criminal Procedure Act 51 of 1977 section 8.
163 Joubert JJ *Criminal Procedure Handbook* 13th Edition (2020) p 90.
164 Criminal Procedure Act 51 of 1977 section 8(2).
165 Barrat (See note above) page 143.
166 Criminal Procedure Act 51 of 1977 section 8(3).

municipalities so that the DPP could have more time and resources available to focus on crimes of a more serious nature.[167]

It is interesting to note that at the time when the *Groenewoud* case was decided there was apparently no need for Attorneys-General to have certain prosecutions diverted to local authorities. It was only after *Groenewoud* that this avenue of prosecution, as alluded to earlier, was explored.

3.3.1 National Environmental Management Act 107 of 1998

Section 33(1) of the National Environmental Management Act 107 of 1998 (NEMA) reads as follows:

> "33(1) Any person may—
>
> (a) in the public interest: or
>
> (b) in the interest of the protection of the environment, institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence."[168]

However, any juristic or natural person may institute a private prosecution under NEMA[169] and the state automatically forfeits its first right to prosecute after 28 days of receiving the private prosecutor's notice of intention to institute a private prosecution, if the DPP does not show any intention to institute a public prosecution.[170] In this case section 8(2) of the Criminal Procedure Act of 1977 becomes irrelevant and the private prosecution proceeds in terms of section 9 to 17 thereof. There is therefore also no *nolle prosequi* certificate required.[171]

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167 Joubert JJ *Criminal Procedure Handbook* 13th Edition (2020) p 90.
168 National Environmental Management Act 107 of 1998 section 33(1).
169 National Environmental Management Act 107 of 1998 section 33(1).
170 National Environmental Management Act 107 of 1998 section 33.
171 Joubert JJ *Criminal Procedure Handbook* 13th Edition (2020) p 91.

In *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd,* Uzani Environmental Advocacy CC ("Uzani") instituted a private prosecution in terms of section 33 of NEMA against BP Southern Africa ("BP").[172] Uzani claimed that it had complied with all the requirements set out in section 33 of NEMA to enable it to initiate a private prosecution. This was subsequently put in issue.

The accused pleaded in terms of section 106(1)(h) of the Criminal Procedure Act, and among other things, stated that the private prosecution was not in the public interest of the protection of the environment as required by section 33(1) of NEMA.[173] Section 33 of NEMA also sets out the requirements a private prosecutor must comply with before a prosecution in terms of NEMA may be instituted. The After having decided that Uzani had complied with all the requirements, the court allowed the subsequent private prosecution.[174] Uzani in its private prosecution and BP Southern Africa was convicted.[175]

In terms of a private prosecution by statutory right as per section 8 of the Act, it is not necessary for the private prosecutor to obtain a *nolle prosequi* certificate from the DPP as required in terms of section 7 of the same Act. It is merely required from the private prosecutor to consult with the DPP, whereafter the DPP has to withdraw their right of prosecution of a specified offence. In the *Uzani* case, the court ruled that a consultation as required by section 8(2) need not to be face to face but may also be by means of telephone or correspondence.[176]

NEMA provides that natural persons as well as juristic persons may in the public interest or in the interest of the environment institute a private prosecution under NEMA.[177] This ensures that if there is no public prosecution, a prosecution a prosecution in terms of NEMA may take place. NEMA is implemented with the purpose to protect national environmental assets or interests and the offenders are prosecuted therefore, contributing to justice and the rule of law.

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172 *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* (unreported, GP case no 82/2017 1 April 2019).
173 *Uzani* (See note above) par 25.
174 *Uzani* (See note above) par 130.
175 *Uzani* (See note above) par 130.
176 *Uzani* (See note above) par 89.
177 National Environmental Management Act 107 of 1998 section 33(1).

Section (8)(3) states that the DPP may withdraw the rights to prosecute subject to such conditions as may be deemed fit and the DPP may also at any time withdraw any power which might have been available to him/her had he/she not withdrawn the right of prosecution.[178]

3.3.2 Societies for the Prevention of Cruelty to Animals Act, 169 of 1993

The right to prosecute under statutory right is also conferred to the National Society for Prevention of Cruelty to Animals (NSPCA) in the Societies for the Prevention of Cruelty to Animals Act (NSPCA Act).[179] However, it was held in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* that the right of the NSPCA to prosecute remained subject to the state's right to prosecute the accused first.[180]

The *NSPCA* case is probably one of the most prominent cases dealing with private prosecutions in contemporary South African law of procedure. The case has attracted attention from various academics both criticizing and praising the judgment. It is therefore important to explore all the aspects of this case first.

The NSPCA were informed about an incident of two camels having been brutally slaughtered for religious purposes in front of a crowd of people.[181] The DPP waived the right to prosecute and the NSPCA subsequently launched a private prosecution in terms of section 7(1)(a) of the Criminal Procedure Act. However, the DPP refused to issue a *nolle prosequi* certificate on the ground that 7(1)(a) does not provide for a juristic person to privately prosecute under section 7(1)(a) of the Criminal Procedure Act.[182]

The case was heard in the High Court where the court held that the differentiation between a juristic person and a private person was a fair discrimination because it upholds a fair purpose in accordance with the intention of the legislator.[183]

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178 Criminal Procedure Act 51 of 1977.
179 Societies of the Prevention of Cruelty to Animals Act 169 of 1993 Section 6(2)(e).
180 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (1) SACR 284 (CC) par 62.
181 *NSPCA* (See note above) par 4.
182 *NSPCA* (See note above) par 6.
183 *NSPCA* (See note above) par 13.

The judgement was taken on appeal to the Supreme Court of Appeal where the constitutionality test applied in *Prinsloo v Van der Linde* 1997 ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) par 25, to determine the constitutionality of section 7(1)(a) of the Criminal Procedure Act.[184] The court found that there was in fact some form of differentiation between private persons and juristic persons; according to the court this differentiation was justified, but the reasoning behind this finding differed from that of the High Court.

The court considered section 7(1)(a) of the Criminal Procedure Act and whether the impugned provision was rationally connected to the regulation of private prosecutions, and whether there were cogent reasons for limiting access to private prosecutions in some cases.[185] The court concluded that the policy of limiting private prosecutions to certain kinds of cases "cannot be faulted" and stated that section 7(1)(a) is and should remain constitutionally valid.[186]

In a subsequent appeal to the Constitutional Court the NSPCA argued that section 7(1)(a) ought to be declared unconstitutional as it unlawfully discriminated against juristic persons. In paragraph 27 the court held that if section 6(2)(e) of the NSPCA Act could be construed in a constitutionally compliant manner that would provide the NSPCA with the remedy it seeks, this would be the best outcome in this case.[187]

In other words, if section 6(2)(e) could be interpreted in a manner which provided the NSPCA with the right to privately prosecute in terms of section 7(1)(a), then the case could easily be concluded. The court was therefore faced with three enquiries.[188]

First, it had to be explored whether the SPCA Act expressly conferred the right of private prosecution on the NSPCA in terms of section 8 of the Criminal Procedure Act.

Secondly, if the SPCA Act did not provide the NSPCA with the right to privately prosecute in terms of section 8 of the Criminal Procedure Act, it had to be determined

184 *NSPCA* (See note above) par 16.
185 *NSPCA* (See note above) par 16.
186 *NSPCA* (See note above) par 16.
187 *NSPCA* (See note above) par 27.
188 *NSPCA* (See note above) par 27.

whether section 7(1)(a) of the Criminal Procedure Act permitted the NSPCA to privately prosecute.

Thirdly, if section 7(1)(a) in fact did not permit the SPCA to prosecute, the court would have to rule on the constitutionality of section 7(1)(a).[189]

The court subsequently considered whether the SPCA could launch a private prosecution in terms of section 8 of the Criminal Procedure Act. The court considered the SPCA Act and found it necessary to read it together with the Animals Protection Act 71 of 1962 (APA), because a proper interpretation of the SPCA Act requires an understanding of the framework within which it (the SPCA Act) operates and this framework is provided by the APA.[190]

The main function of the APA is to empower societies for the protection of animals. The SPCA Act gives effect to a society envisaged by the APA.[191] The court held that the SPCA Act set out the functions of the NSPCA which has the protection of animal welfare as its principal objective the protecting animal welfare as mentioned in the APA. Since it has been established that the SPCA may institute legal proceedings the next step is to determine what this entails. The court held that the term “institute legal proceedings” takes on a specific and nuanced meaning in the context of this case. It means that the SPCA has the right to initiate legal proceedings as well as the right to institute private prosecutions.[192]

Without the right the right to institute a private prosecution, the SPCA would be like a “toothless tiger” in its quest to protect animals and fight animal cruelty.[193]

It is important to note that the Constitutional Court did not focus much on the constitutionality of section 7(1)(a) as it was not necessary seeing that the SPCA does have the statutory right to institute private prosecutions. The court ruled that the constitutionality of section 7(1)(a) was not a live dispute argued before the court and that it would therefore not be necessary to make a ruling in that regard.[194] The court

189 *NSPCA* (See note above) par 27.
190 *NSPCA* (See note above) par 38.
191 *NSPCA* (See note above) par 39.
192 *NSPCA* (See note above) par 48.
193 *NSPCA* (See note above) par 48.
194 *NSPCA* (See note above) par 63.

further stated that the importance of the SPCA's ability to prosecute privately was obvious and that section 6(2)(e) of the SPCA Act, read with section 8 of the Criminal Procedure Act, armed them with this important right and function.[195]

The *NSPCA* case is a prime example of a section 8 private prosecution by statutory right.

The case did however, receive some criticism as some academics are of the opinion that section 7(1)(a) does unfairly discriminate against juristic persons. The constitutionality of section 7(1)(a) of the Act will be explored later in this thesis.

There are a few other statutes providing public and private bodies with the power to launch private prosecutions in terms of section 8 of the Criminal Procedure Act. It is important that these statutes are mentioned and, in some instances, explained by looking at relevant case law.

3.3.3 Legal Practice Act 28 of 2014

Section 63(1)(i) of the Legal Practice Act[196] states the following:

> "In addition to the powers conferred upon it in this Act, and in the furtherance of the purpose of the Fund, the Board may—through any person authorised thereto in writing by the chairperson of the Board, institute a prosecution for the misappropriation or theft of property or trust money, and the provisions of the laws relating to private prosecutions apply to such prosecution as if the Board is a public body."

In terms of the above-mentioned legislation the Legal Practitioners' Fidelity Fund Board may privately prosecute through any person authorised by the chairperson of the board.[197] Section 63(1)(i) also clearly states that law relating to private prosecutions applies to such a prosecution as if the board is a public body.[198] It is therefore clear that section 8 of the Criminal Procedure Act applies when a section 63(1)(i) private prosecution is launched.

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195 *NSPCA* (See note above) par 51-53.
196 Legal Practice Act 28 of 2014.
197 *Legal Practice Act* 28 of 2014 Section 63(1)(i).
198 *Legal Practice Act* 28 of 2014 Section 63(1)(i).

3.3.4 Extension of Security of Tenure Act 62 of 1997

Section 23 (4) and (5) of the Extension of Security of Tenure Act (ESTA)[199] states the following:

> "(4) Any person whose rights or interests have been prejudiced by a contravention of subsection (1) shall have the right to institute a private prosecution of the alleged offender.
>
> (5) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) shall apply to a private prosecution in terms of this Act: Provided that if—
>
> (a) the person prosecuting privately does so through a person entitled to practise as an advocate or an attorney in the Republic;
>
> (b) the person prosecuting privately has given written notice to the public prosecutor with jurisdiction that he or she intends to do so; and
>
> (c) the public prosecutor has not, within 14 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence.[200]

Section 23(4) of ESTA provides that occupiers of property may privately prosecute when they were evicted in any way, other than the way set out by court, from the property that had been under the protection of ESTA.[201] Section 23(5) states that the provisions of the Criminal Procedure Act will apply in these situations, however there are some exceptions. A *nolle prosequi* certificate is replaced by a notice to the state as mentioned in section 23(5)(b) of ESTA.

In the *Crookes v Sibisi* case the appeal arises from a private prosecution instituted by the respondents against the appellant on charges of alleged contravention of section 23(1) of ESTA.[202] The private prosecutors (victims) resided on one of the farms owned

199 Extension of Security of Tenure Act 62 of 1997
200 Extension of Security of Tenure Act 62 of 1997 Sections 23(4) & (5).
201 Extension of Security of Tenure Act 62 of 1997 Section 23(4).
202 *Crookes v Sibisi* 2011 (1) SACR 23 (KZP) par 1.

by the accused.[203] A dispute over the fairness of their dismissal was eventually resolved in favour of the employer.[204] At the time of the dismissal dispute, there were no steps taken to ensure the fair eviction of the former employees from the farm, but after the dispute had been determined Mr Crookes claimed that they were evicted pursuant to an order for their eviction granted by the Magistrate's Court in New Hanover.[205] The court considered the provisions governing the private prosecution in section 23 of ESTA, the Constitution and the facts at hand and came to the conclusion that the private prosecution could not proceed and that the appeal was therefore not successful.[206] The court however, confirmed that prosecutions under ESTA did not require a *nolle prosequi* certificate, but rather a notice followed by failure on the part of the state to indicate intention to prosecute.[207]

The origin, development and rationale for private prosecutions in South Africa are described and explored in depth in Chapter 2 of this thesis. To summarise the main reason for private prosecutions: one could say that an individual's right to privately prosecute is a 'safety valve' in the machinery of the law, something which is apparent from almost every successful private prosecution case.[208] One might also argue that private prosecutions could be a significant tool to keep the state alert and to prevent it from allowing corruption and incompetence to go unpunished

We have now to some extent proven and established the necessity of private prosecutions as well as shown the basic requirements for a private prosecution. However, it is not only sections 7 and 8 of the Criminal Procedure Act that regulate private prosecutions. Sections 9 to 16 also provide information relating to private prosecutions specifically. This will be explored briefly.

203 *Crookes* (See note above) par 3.
204 *Crookes* (See note above) par 3.
205 *Crookes* (See note above) par 3.
206 *Crookes* (See note above) par 12-26.
207 *Crookes* (See note above) par 15.
208 Joubert JJ (See note above) p 92.

3.4 Procedural provisions relevant to private prosecutions

Section 9 prescribes the security payable by a private prosecutor, in order to show the seriousness of the private prosecution. The amount is determined by the Minister from time to time and published in the *Gazette*.[209] The determination of the total amount is set out in section 9(1) and (2). Section 9(3) merely states that should the private prosecutor fail to commence with the private prosecution, the total amount determined shall be forfeited to the state.[210]

The private prosecution must be launched and conducted in the name of the private prosecutor. [211] The same goes for all procedures, from the notice to prosecute and the verdict, everything must be done in the name, and at the expense of the private prosecutor.[212]

This means that it must be in the name of the person who suffered the injury in terms of section 7(1)(a) or the person mentioned in the relevant statute in terms of which the relevant body is afforded the right in terms of a section 8 private prosecution by statutory right.

The summons or indictment must define the private prosecutor in correct detail and must be signed by the private prosecutor or their legal representative.[213] As noted from the cases mentioned above, the prosecution is cited in the names of the parties.

Section 11 prescribes the consequences should the private prosecutor to appear on the date determined for the accused to appear in the magistrate's court or for the trial. If the private officer should fail to attend the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor is prevented from attending for reasons beyond their control, in which case the court may adjourn the case to a later date.[214]

In the event of dismissal of a charge in circumstances alluded to above the accused shall be set free and may not be privately prosecuted for the alleged offence. The case

209 Criminal Procedure Act 51 of 1977 section 9(1)(a).
210 Criminal Procedure Act 51 of 1977 section 9(3).
211 Criminal Procedure Act 51 of 1977 section 10(1).
212 Criminal Procedure Act 51 of 1977 sections 10(1) and 14.
213 Criminal Procedure Act 51 of 1977 section 10(2).
214 Criminal Procedure Act 51 of 1977 section 11(1).

could however, be reopened by the attorney-general or a public prosecutor with the consent of the attorney-general.[215]

In terms of section 12 the procedure to be followed when a private prosecution takes place is the same as that of a prosecution at the instance of the state. This also means that the accused enjoys all procedural rights available to an accused prosecuted by the state.[216] The accused can only be brought before the court by way of a summons or an indictment except in cases where the accused is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.[217]

The accused is also entitled to a fair trial as required in terms of section 35(3) of the Constitution. It is however, important to protect the accused against harassment and abuse from a vexatious private prosecutor.

According to section 13 an attorney-general (now the Director of Public Prosecutions) may intervene in any private prosecution by way of a motion before the court, to stop proceedings in the case so that a prosecution for the offence in question may be instituted or, be continued at the instance of the state.[218] Section 13 could once again raise various questions with regard to private prosecutions. A private prosecution remains a private prosecution until the attorney-general decides to intervene in terms of section 13.

This implicates that proceedings in a perfectly well- handled private prosecution could be stopped and the continuation of the prosecution be taken over by the public prosecution.

There are also some advantages to section 13 in the sense that the state takes over the burden of the private prosecutor at the state's expense.[219]

Sections 14 and 15 deal with the costs of the private prosecution. In terms of section 14 stating that the private prosecutor shall in respect of any process relating to the

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215 Criminal Procedure Act 51 of 1977 section 11(2).
216 Joubert JJ (See note above) p 93.
217 Criminal Procedure Act 51 of 1977 section 12.
218 Criminal Procedure Act 51 of 1977 section 13.
219 Joubert JJ (See note above) p 90.

private prosecution, pay the fees prescribed under the rules of court for the service and the execution of the process.[220] Section 15 states that the costs and expenses of a private prosecutor shall be paid by the private prosecutor subject to the provisions in subsection (2).[221] Subsection (2) provides that there are possibly two other parties that might be responsible for the costs of the private prosecution.

If a private prosecution is instituted after the grant of a *nolle prosequi* certificate by an attorney-general (now Director of Public Prosecutions) and the accused is convicted, the court may order that the state be liable for the costs of the private prosecution including the costs of an appeal. The court may also order that the person convicted in a private prosecution must pay the costs and expenses of the prosecution, including the costs of an appeal.[222]

Section 15(2) is an incredible piece of legislation as it somewhat ensures that the state retains the responsibility to prosecute crimes, and in the event of the State failing to prosecute a crime, the State will still be held responsible for the costs, as it is expected of the State to prosecute cases that are worth prosecuting.

Section 16 states that should the accused, in the event of a private prosecution, be acquitted the court may order that the costs be paid partially or in full by the private prosecutor.[223]

If the court concludes that a private prosecution was launched vexatiously and without legal grounds, the court shall award the accused at his/her request the costs and expenses incurred in connection with the prosecution.[224]

It is important to note that section 16 has been amended by the General Law Third Amendment Act, 129 of 1993. The amendment clearly provides that the expenses should have been incurred 'by him' specifically. Prior to the amendment of Section 16 of the Criminal Procedure Act, the section read: "…the costs and expenses incurred in connection with the prosecution…" whereas after the amendment the section read: "…the costs and expenses incurred by him [the Accused] in connection with the

220 Criminal Procedure Act 51 of 1977 section 14.
221 Criminal Procedure Act 51 of 1977 section 15(1).
222 Criminal Procedure Act 51 of 1977 section 15(2).
223 Criminal Procedure Act 51 of 1977 section 16(1).
224 Criminal Procedure Act 51 of 1977 section 16(2).

prosecution…". This amendment protects the private prosecutor and the accused. It ensures that the private prosecutor does not pay costs to a party who is not the accused and the accused is refunded for costs which would not have been costs if the private prosecutor did not lodge the private prosecution.

In conclusion, section 16 provides a form of protection towards alleged offenders in the sense that it protects them from malicious, vexatious or overly emotional private prosecutions, instituted by aggrieved alleged victims.

3.5 Current Status of Private Prosecutions

Under this part of chapter 3, I will elaborate on the current shape and form private prosecution in South Africa. As well as focus on the critique shown towards the courts' *modus operandi* with regards to private prosecutions.

The first issue arises after the *NSPCA* case was held in 2016. The Constitutional court in this case did not rule on the Constitutionality of section 7(1)(a) of the Criminal Procedure Act which kept the door closed for juristic persons to prosecute privately in terms of section 7(1)(a). Instead, the court held that for purposes of that case the NSPCA did have the right to institute the private prosecution, but under section 8 of the act. However, the court did rule on the constitutionality of section 7(1)(a). By not ruling on the constitutionality the court made clear that it does not believe juristic persons should have an easier path towards instituting private prosecutions.

The court held that in order to determine whether or not a right is available to a juristic person, the court has to first determine the nature of the right in question as well as the nature of the juristic person.[225] In paragraph 27 of the *NSPCA* case the court stated that the entire prosecution system would change, and a new prosecution system would emerge if it would allow all persons to institute private prosecutions. This would, according to the court, be contravening the constitutional imperative of having a single prosecuting authority.

To form an opinion on the judgment of *NSPCA,* one will have to also look at *Barclays Zimbabwe Nominees (Pty) Ltd) v Black* (1990) ZASCA 92; 1990 (4) SA 720 (A). In this case Barclays launched a private prosecution against Black after the attorney-general

225 *NSPCA* (See note above) par 20.

for the Witwatersrand Local Division declined to prosecute on charges of fraud and perjury and subsequently issued a *nolle prosequi* certificate in terms of section 7(2)(a) of the Criminal Procedure Act.[226] The respondent gave due notice of his intention to plead, in terms of section 106(1)(h), that the appellant had no title to prosecute, based on the contention that the appellant, a juristic person, was not a "private person" as stated in section 7(1)(a).[227] The magistrate dismissed the plea, the trial proceeded and the respondent was convicted of fraud.[228] The respondent appealed the case and the case ended up before the Supreme Court of Appeal to determine whether or not the applicant had the title to launch the private prosecution.

The appellant submitted that in terms of the Interpretation Act No 33 of 1957 the word "person" in section 7(1)(a) of the Criminal Procedure Act must be interpreted as including:

> "any company incorporated or registered as such under any law" unless the context "otherwise requires" or unless it was "otherwise provided".[229]

He stated that seeing as there are nothing mentioned in the Criminal Procedure Act prohibiting the Interpretation Act to apply the court could continue to provide for companies to also form part of "person" in section 7(1)(a). He finally concluded by stating that there is no good reason in principle why a company should not be allowed to institute a private prosecution in terms of section 7(1)(a).[230]

He also reasoned that the word "private" was used in section 7(1)(a) to differentiate between a person not holding public office or an official position.[231] However, the court held that one should read section 7(1)(a) as a whole and where section 7(1)(a) stipulates that only one who suffered "some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence" it becomes clear that no official person in his capacity as such could prosecute under section 7(1).[232]

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226 *Barclays* (See note above) page 1.
227 *Barclays* (See note above) page 2.
228 *Barclays* (See note above) page 2.
229 Interpretation Act No 33 of 1957 section 2(b).
230 *Barclays* (See note above) page 5.
231 Oxford Dictionary (2nd ed) Vol XII page 515.
232 *Barclays* (See note above) pages 7&8.

The court then looked at the judgment of *Attorney-General v Van der Merwe & Bornman* where Judge van den Heever held:

"The object of the phrase was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies."[233]

It is therefore clear that the word "private" in the phrase "private persons" is not there to prevent officials such as a public prosecutor from using their authority to prosecute. A public prosecutor would use section 4 of the Criminal Procedure Act to prosecute the accused. The word "private" is therefore not used to differentiate between private persons and public officials. The word "private person" can also be an "individual" and one of the meanings of an individual is "a single human being".[234]

The court again looked at the judgment in *Van der Merwe & Bornman* which stated:

> "The interest the legislature had in mind may be pecuniary but may also be such that it cannot sound in money - such imponderable interests, for example, as the chastity and reputation of a daughter or ward, the inviolability of one's person or the persons of those dear to us. Permission to prosecute in such circumstances was conceived as a kind of safety-valve. An action for damages may be futile against a man of straw and a private prosecution affords a way of vindicating those imponderable interests other than the violent and crude one of shooting the offender."

The court then stated that based on the above mentioned one could not argue that a company has human passions and feelings and subsequently no violence would derive from the company itself. Should section 7(1)(a) were to be read as to include a company then it would only be an injury suffered by a company which would give rise to a private prosecution and not an injury suffered by an individual shareholder or a group of shareholders. These would not coincide according to Judge Milne.[235] The

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233 *Attorney-General v Van der Merwe & Bornman* 1946 OPD 197 at 201.
234 Oxford Dictionary (2nd ed) Vol VII page 880 meaning 3a.
235 *Barclays* (See note above) page 22.

court concluded that the general policy of the legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the state.[236] The court finally stated that in view of the above it is not necessary to deal with the merits of the conviction as the private prosecution could not be instituted in terms of section 7(1)(a). The appeal was subsequently dismissed with costs.[237]

The Supreme Court of Appeal referenced the *Barclays* case in chapter 27 of the *NSPCA* case[238], but did not even mention the case in the Constitutional Court judgment. Nevertheless, the two cases are very similar in most instances and the court had the same legal question to deal with in both cases namely whether section 7(1)(a) discriminates against juristic persons. One thing however that distinguishes the one case from the other is the time which both these cases occurred. *Barclays* was held in 1990. *NSPCA* was held late 2016. During that period South Africa had a major transformation in both the political and judicial system. The first democratic election was held in 1994 and The Constitution of the Republic of South Africa Act 108 of 1996 was promulgated. Subsequently, various Apartheid legislation were piece by piece declared unconstitutional and various other acts were reinstated. A new government took control under Mr Nelson Mandela and a new National Prosecution Authority were reinstated.

The court in the *NSPCA* case held that the legal framework for prosecution is established through the Constitution, the National Prosecuting Authority Act[239] and the Criminal Procedure Act.[240] The Constitution provides for a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament has the power to prosecute criminals on behalf of the state.[241] The National Prosecuting Authority Act gives effect to the power mentioned in the Constitution and then re-emphasises that proceedings are instituted and conducted on behalf of the state and that this power is exercised on behalf of the republic.[242] In the *Barclays* case the court held that the

236 *Barclays* (See note above) page 23.
237 *Barclays* (See note above) page 23.
238 National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development (20781/2014) [2015] ZASCA 206; 2016 (1) SACR 308 (SCA) (4 December 2015).
239 National Prosecuting Authority Act 32 of 1998.
240 *NSPCA* (See note above) par 31.
241 The Constitution of the Republic of South Africa Act 108 of 1996 section 179.
242 National Prosecuting Authority Act 32 of 1998 section 20.

general policy of the legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the state.[243]

It seems to me that South Africa has reached a point where the criminals or at least alleged criminals are hiding behind the technicalities if the law. We have many crimes, in some instances the most in the world, annually. As seen above only one out of 5 of these criminals get convicted for rape (which is seen by many as the worst crime there is to commit). There is an opportunity for courts to transform the law so that it simplifies the private prosecution process. Section 20 of the National Prosecuting Authority Act states that the prosecuting authority's right to prosecute is to be exercised on behalf of the Republic. This is true and thankfully there are various successful criminal cases convicting criminals and keeping the Republic safe. However, 19,8% is not enough and as it means that more than 80% of criminals are still roaming free, probably continuing with the same and/or other crimes.

With regards to the *Barclays* case, I completely agree that the court interpreted the law correctly and that Barclays did not have the right to launch the private prosecution in terms of section 7(1)(a) as they do not qualify as a "private person". However, one still must wonder is a company then supposed to do when it finds themselves in that same position.

The National Prosecuting Authority did not see any reason to prosecute the accused for fraud. *Accountability Now* has recently made public that they were willing to drag the National Director of Public Prosecutions, Advocate Shamila Batohi, to court to force her to investigate and prosecute former president Jacob Zuma, Police Minister Bheki Cele and other high-profile cases as they believe it is in the interest of justice to do so.[244] In order for a company in the position of Barclays in the *Barclays* case they would have to first bring an application to court to compel the National Prosecuting Authority to institute a prosecution against the accused. Therefore, one could argue

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243 *Barclays* (See note above) page 22 & 23.

244 Masondo S "Prosecute or else! NPA, Batohi threatened with legal action over sluggish investigations" 1 December 2021 https://www.news24.com/news24/southafrica/investigations/court-challenge-mooted-to-force-npa-to-speed-up-prosecution-of-high-profile-cases-20211201 <Accessed 4/12/2021>.

that there are various elements in our current criminal prosecution process that may cause, unnecessary delays when attempting to prosecute the alleged criminals.

With regards to the *NSPCA* case one must state that the court interpreted the law correctly and that a very formalistic approach was followed in writing the conclusion of the judgment. However, one cannot ignore the fact that the court did not explicitly rule on the Constitutionality of section 7(1)(a) of the Criminal Procedure Act. The court held that in terms of *Transvaal* Judge Skweyiya held that the court's responsibility is to adjudicate live disputes.[245] The court subsequently approved the proposition of the Canadian Supreme Court in *Borowski* that it is "possibly an intrusion into the role of the Legislature of a court to pronounce judgments on Constitutional issues in the absence of a dispute affecting the rights of the parties to the litigation".[246] The court argued that in light of the fact that the NSPCA already has the right to prosecute in terms of section 8 of the Criminal Procedure Act the question regarding the constitutionality of section 7(1)(a) no longer serves a live dispute before court.[247] The court held that determining whether the NSPCA could prosecute in terms of section 7(1)(a) would not necessarily make a difference in the case before them as the NSPCA already has the right to prosecute. The court then referenced the *Fose* case where the court held that "it is prudent not to anticipate a question of constitutional law in advance of the necessity of deciding it".[248] In my opinion this was a very convenient approach by the court, however, one also understands that if the court had to rule that section 7(1)(a) is unconstitutional it would have major implication on the currant legal system in South Africa.

It is now clear that the difference between the *Barclays* case and the *NSPCA* case is that the NSPCA had the right to prosecute in terms of section 8 of the Criminal Procedure Act and Barclays had no right to prosecute whatsoever. There is however another difference between the two cases namely the year in which these cases were heard. With reference to the above-mentioned crime rates in South Africa one can understand the court acknowledging the importance of one prosecuting authority in

245 *Director of Public Prosecutions, Transvaal v Minister of Constitutional Development* [2009] ZACC 8; 2009 (2) SACR 130 (CC); 2009.
246 *Borowski v Canada (Attorney General)* [1989] 1 SCR 342.
247 *NSPCA* (See note above) par 63.
248 *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC)

Barclays. Crime in 1990 were still high, but quite lower than the current rates we see today and as mentioned above.

The *NSPCA* case was held in late 2016 where the crime rates have jumped out of control. The argument that it is important to have a sole prosecuting authority becomes weaker. Of course, the Constitutional Court does not have the right to amend the Constitution. However, it would not be necessary in the writer's opinion to amend the Constitution as it provides for a "single national prosecuting authority" and to provide a juristic person to prosecute an accused for an alleged crime committed against that juristic person and after the state have notified that they do not intend to prosecute, would not contravene the principles of the Constitution.[249] As a matter of fact it could be argued that providing juristic persons with the right to prosecute in terms of section 7(1)(a), would uphold other Constitutional principles that gets less attention in modern days such as section 9(1) which states that everyone is equal before the law and that everyone has the right to equal protection and benefit of the law and section 10 which states that everyone has the right to dignity and have the right to have their dignity respected and protected.

If the National Prosecuting Authority cannot protect the Republic's human rights, then it seems that a sole prosecuting authority might not be enough.

3.5.1 Asmal v Hendricks

The last case to be discussed in this chapter, which sums up the current status of private prosecutions in South Africa, is the case of Asmal v Hendricks. During May 2009 an inquest was held subsequent to the death of late Ms Rochelle Naidoo and on 8 December 2009 the Directorate of Public Prosecutions declined to prosecute the accused, Mr Faizel Hendricks. The mother of the deceased, Ms Sarah Asmal instituted a private prosecution in terms of section 7(1)(c) if the Criminal Procedure Act. As mentioned above, section 7(1)(c) also provides for persons closely related to the victim to lodge a private prosecution on behalf of the victim. This provision of the act indirectly provides for cases of murder or other crimes against the victim, which leaves the victim unable to prosecute their own crimes in cases where the state fails to do so.

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249 The Constitution of the Republic of South Africa Act 108 of 1996 section 179(1).

On 9 July 2014 the Regional Court sitting at Malmesbury found Mr Hendricks guilty for the murder of Ms Naidoo and on 13 May 2016, Mr Hendricks was sentenced in terms of section 51(2) of the Criminal Law Amendment Act of 1997 to 15 years' imprisonment.

Mr Hendricks was unsuccessful in obtaining leave to appeal in the trial court, however, he lodged an appeal via petition against his conviction. He succeeded with this application and the matter was heard in the Cape Town High Court. The appeal was heard and the accused argued that the Criminal Court failed to consider his expert evidence and allowed expert evidence of the prosecution which under normal circumstances would not be allowed.

The court subsequently held that the private prosecutor proved beyond reasonable doubt that the deceased had been murdered and that the Magistrate correctly convicted the Appellant on a charge of murder. On 13 January 2022, during the time of writing this thesis, the judgment was handed down and made an order of court.

3.6 Conclusion

The case of Asmal v Hendricks leads to various questions such as why is it that when private prosecutions were always available, it is only now that an accused is convicted of murder by way of prosecution. The answer to this question must have some causal connection to the current criminal prosecution climate in South Africa. The climate of criminal prosecution in South Africa is indicative that criminal prosecution in South Africa cannot be done by a single prosecution authority alone, because some cases might fall through the cracks and some criminals may never be prosecuted for their crimes. The case of Asmal v Hendricks is a perfect example of the necessity of private prosecutions in South Africa giving the fact that is facing the danger of becoming criminal friendly.

Chapter 4

The international view of private prosecutions

4.1 Introduction

In this chapter I will explore the incidence of and the views held about private prosecutions in other countries. The international interpretations will then be compared to the South African perspective. Countries that will be focussed on are the United States of America, Europe, commonwealth countries and some African countries where private prosecutions have been recorded. The intention with this chapter is to broaden the perspective on private prosecutions and to establish whether, and if so to what extent private prosecutions are internationally being employed to combat crime at various levels and irrespective of the seriousness of the crimes concerned.

4.2 The United States of America and the crimes concerned.

In the United States of America (USA), district attorneys are required by statute to prosecute all matters of state concern. The most unique feature of American prosecution is that it is conducted in public[250]. It is not part of the USA's British common law heritage because the "district attorney" is a distinctive and unique American concept. [251] In this regard JM Kress states as follows:

> Americans typically describe their legal system as based upon English common law, in terms of both its procedural attributes and substantive state penal codes, the public prosecutor is a figure virtually unknown to the English system, which is primarily one of private prosecution to this day.[252]

England has moved towards a system of public prosecution when the office of the director of public prosecutions was introduced in 1879, something which did not

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250 Worrall JL *The Changing Role of the American Prosecutor* 2008 State University of New York Press, Albany page 5.

251 Kress, J. M. *Progress and prosecution* 1976 Annals of the American Academy of Political and Social Sciences page 100.

252 Kress JM (See note above) page 100.

happen in the USA.[253] In terms of English common law a crime was viewed as a wrong inflicted upon a victim. The victim or friend or relative of the victim would personally arrest and prosecute the culprit and the court would then adjudicate the matter as in a civil case.[254] The tension between private prosecutions and public prosecutions prevailed for a long time in English history, but it was not such an issue in the USA colonies. Private prosecutions ran counter to the democratic process.[255] In 1704 Connecticut adopted a system of public prosecution which was soon followed in other colonies. There are still some traces of private prosecution in the USA, for example in the institution of the grand jury. However, the grand jury itself is ultimately tied to public prosecution because prosecutors are required to present evidence to the grand jury.[256]

In *Mallery v Lane* the court explained the position as follows:

> In all criminal cases in Connecticut, the state is the prosecutor. The offenses are against the state. The victim of the offense is not a party to the prosecution, nor does he occupy any relation to it other than that of a witness, an interested witness perhaps, but none the less, only a witness ... It is not necessary for the injured party to make complaint, nor is he required to give bond to prosecute. He is in no sense a relator. He cannot in any way control the prosecution and whether reluctant or not, he can be compelled like any other witness to appear and testify.[257]

This extract put forward appealing advantages for public prosecution without disregarding the advantages of private prosecution in a perfect world. However, considering our experience in South Africa, the advantages of a private prosecution are less than what one might have expected.

Nevertheless, the American colonists shunned all aspects of centralized British government. Their desire to transfer some of the power of government to the general

253 Worrall JL (See note above) page 6.
254 Kress JM (See note above) page 100.
255 Worrall JL (See note above) page 6.
256 Worrall JL (See note above) page 6.
257 *Mallery v Lane* 1921 page 138.

public while also taking into consideration the geography of the early colonies, gave rise to a unique form of decentralized prosecution. [258]

The British government's neglect of the USA colonies is explained as follows by Surrency:

> The British government claimed the sole right to create courts, and the early courts except in the charter and proprietary colonies, were created by executive action. However, after the initial settlement, the judiciary received little attention from the King, and colonial courts were left to evolve without much thought, or consideration. England never tried to make the judicial system in the colonies uniform.[259]

It is interesting to note how the British government neglected the judicial system in the USA, while in South Africa it held on tight to keep the prosecuting authority under its control. This could perhaps be ascribed to the fact that the USA had already gained independence from Britain in 1776, 30 years before South Africa was colonised.

Given the isolation of the colonies, different experiments with prosecution occurred throughout the 1600's, and many of those experiments retained elements of private prosecution.[260] Connecticut was the first colony to use "county attorneys" as prosecutors and in 1704 it was also the first colony to totally distance itself from private prosecutions and thereby essentially introduced in general public prosecution.[261] It is interesting to note how the different needs in the USA at the time inspired them to establish a public instead of a private prosecuting system. This might possibly be due to the isolation of the colonies where aggrieved persons would in all likelihood prefer the state to handle their cases thereby saving them the effort to personally conduct prosecutions and allowing them to proceed with their daily tasks (usually farming).

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258 Worrall JL (See note above) page 6.
259 Surrency E *The courts in the American colonies* 1967 American Journal of Legal History page 253.
260 Worrall JL (See note above) page 7.
261 Worrall JL (See note above) page 7.

In each county there was one “sober discreet and religious” person appointed by the county court to be the attorney for the Queen to prosecute accused persons.[262]

The American revolution in 1765 to 1791 enhanced the “progression” from private prosecution to public prosecution.[263] In the postrevolutionary era in the USA the first Congress created the office of the Attorney General as well as the US Attorney’s Office. These were both uniquely American institutions.[264] The role of the US Attorney was set out in the Judiciary Act of 1789 “to prosecute and conduct all suits within the Supreme Court of the United States in which the United States might be concerned”. It was also expected of the US Attorneys to give legal advice to the President and other officials of the executive departments.[265] However, prosecutions were primarily controlled by the local prosecutors.

The predominantly privately based criminal prosecution system in the USA was therefore transformed into a predominantly publicly based criminal prosecution system. However, there were still some instances where the victim of a crime could prosecute privately. Courts in Washington upheld the “seldom used” state law of private prosecutions to allow for vigilante criminal prosecutions.[266] At present it is now possible for Washington residents to bring charges against anyone, and they may, in theory at least seek a court order forcing the prosecutor to prosecute an accused, or should it come to light that the prosecutor is unwilling to do so, they could do so themselves at their own expense.[267]

The Washington State Supreme Court had the opportunity to eliminate the option to launch a private prosecution. In the case concerned, an Olympic Peninsula man tried to file criminal charges against a Child Protective Services worker. However, the court side-stepped the question regarding private prosecutions. In the American state of Washington private prosecutions are therefore still possible.

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262 Van Alstyne, W. S. (1952). The district attorney—a historical puzzle. Wisconsin Law Review, 11(3), 125–138.

263 Worrall JL (See note above) page 7.

264 Worrall JL (See note above) page 7.

265 Worrall JL (See note above) page 7.
Worrall JL (See note above) page 7.

266 Levi Pulkkinen *How Washington courts allow for private prosecutions* Crosscut 28 September 2021 https://crosscut.com/news/2021/09/how-washington-courts-allow-private-prosecutions <Accessed 06/12/2021>.

267 Levi Pulkkinen (See note above).

There are states other than Washington, where private prosecutions are allowed in full or allowed to some extent. I will not cover the current situation in every state but will briefly deal with the situation in some of them and, where deemed necessary, refer to relevant statutory provisions and case law. statute or case. In Alabama the court in *King v Second National Bank & Trust Co* held that "public policy demands that the citizen may freely bring before the grand jury the fact that a crime has been committed, request an investigation, and furnish such information as he has in aid of the investigation".[268]

According to the Idaho Statute, Title 19 Chapter 5, a private person may file a complaint under oath stating alleged facts of an alleged public offence. If the magistrate finds that the alleged offence is indeed a public offence, the magistrate shall order the clerk of the court to file the complaint and refer the complaint to the appropriate county or city prosecuting attorney for further action.[269] In *State v Murphy* the court held that a warrant for arrest may be issued upon a complaint filed by a private person, if the magistrate is convinced that the offense has been committed.[270]

Although the abovementioned do not technically relate to private prosecution, it does in a way provide the private person with an option to seek redress.

In Louisiana the relevant statutory provision states that "The grand jury shall inquire into all capital offenses and offenses punishable by life imprisonment triable within the parish. It may inquire into other offenses triable by the district court of the parish and shall inquire into such offenses when requested to do so by the district attorney or ordered to do so by the court."[271] With this in mind the court in *State v Sullivan* held that it was proper for private citizens to request permission to see members of the grand jury to request an investigation of the crime; and that any person has the right to go before the grand jury and prefer a charge against an accused.[272] This could almost be regarded as a private prosecution as it gives a private person the right to bring an accused before the grand jury.

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268 *King v Second National Bank Trust & Co* 173 So. (Ala. 1937) par 498-500.
269 Idaho Statute Title 19 Chapter 5 section 19-504.
270 *State v Murphy* 99 Idaho 511 516 584 P.2d 1236, 1241 (1978).
271 Louisiana State Legislature Criminal Procedure Article 437.
272 *State v Sullivan* 159 Louisiana 589, 596, 105 So 631, 633 (1925).

States such as Indiana, Iowa, Kansas, and Kentucky do not provide any rights relating to private prosecutions. However, the Court of Appeals in Maryland in *Brack v Wells* held that in the case of a *writ of mandamus* by a private person seeking an order to compel the prosecutor to present a case to the grand jury on several grounds, may ask the grand jury for permission to present his/her case. However, the applicant must first exhaust other remedies such as, for example, the power to seek relief from a magistrate.[273] This at least gives the private person the opportunity to compel prosecutors to act, an option which would otherwise not have been available.

However, the process would still take much longer than would have been the case had the private person merely been afforded the right to appear in person or to be represented by a legal representative before the grand jury as the prosecuting counsel.

To look at the USA as a whole in an attempt to determine the country's collective perspective on private prosecution would not be of much use for purposes of this study. One can however, assume that the country's approach to private prosecutions started in a similar way than that of the United Kingdom. There was practically no difference between a civil case and a criminal case. In both cases the two parties had to go to court and defend themselves in front of a judge or magistrate and the presiding officer had to rule and make a judgment based on the facts. After the American revolution, a new government was elected, and a new prosecution structure was implemented, namely the public prosecution structure. From then on, the government slowly improved the public prosecuting authority into its current well-established structure. I believe that the correct approach towards private prosecution rights in the USA is that of the states of Idaho and Maryland, where private persons are still entitled to privately prosecute and thus enabled some way of seeking justice on their own behalf. One also has to consider the standard of the public prosecuting authority in the USA in comparison to that of South Africa. It would in that case make sense to have a single prosecuting authority with the sole purpose of protecting the citizens of the country against criminals.

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273 *William F Brack v J Bernard Wells* 184 Md. 86 (Md. 1944) 40 A.2d 319.

4.3 Canada

In Canada the courts have referred to a private prosecution as a valuable constitutional safeguard against inertia or partiality on the part of authority.[274] Canadian criminal law is derived from English law both in terms of substance and procedure.[275] However, in terms of the Director of Public Prosecutions Act, the Director of Public Prosecutions, exercises the authority of the Attorney General of Canada respecting private prosecutions, including the authority to intervene and assume the conduct of such prosecutions.[276]

The general rule in Canada is that the Director of Public Prosecutions has full authority to intervene in private prosecutions lodged in terms of offences listed in the Criminal Code.[277] Therefore, Canada has adopted the criminal law of England except as altered or varied by the Criminal Code or other federal statutes.[278] The Criminal Code and other federal statutes do not prohibit private prosecutions, it merely in some instances, require the consent of the Attorney General or a minister of an enforcement agency.

In Canada, the Criminal Code provides for summary conviction procedures, which applies to all federal enactments and are inter alia applicable to all federal environmental statutes. Summary offence is the term used for the least serious kinds of criminal offences under Canada's Criminal Code. It is also commonly known as "petty crimes". The maximum punishment for a summary offence is six months in jail or a $5 000.00 fine.[279]

Interestingly, most provinces in Canada expressly provide, by way of statute, that the summary conviction procedure of the Criminal Code also applies to provincial offences. The summary conviction part of the Criminal Code does not prohibit private prosecutions, and therefore private prosecutions will always be available for provincial

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274 G*ouriet v Union of Post Office Worker* [1978] AC 435 at 477 (HL).

275 Burns P *Private Prosecutions in Canada: The Law and a Proposal for Change* 21 MCGILL. J 269 (1975) page 6.

276 Director of Public Prosecutions Act, SC 2006, c 9 Section 3(3)(f).

277 Criminal Code R.S.C. 1985, c.C-46.

278 John Swaigen *Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environsment* Journal of Envirnonmental Law and Practice, Toronto Vol 26 Iss 1 (Des 2012) pages 31-57.

279 British Columbia https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-accused-of-a-crime/understanding-charges/types-of-offences#:~:text=A%20summary%20conviction%20offence%20is,for%20example%2C%20disturbing%20the%20peace <Accessed 10 June 2022>.

offences in some Canadian provinces, unless otherwise specified.[280] The right of private prosecution for provincial offences is retained either by way of prosecution under the summary conviction procedure in terms of the Criminal Code, or in terms of provincial penal procedure statutes.[281]

In Ontario, prosecutions for violations of provincial statutes and municipal by-laws are conducted under the Provincial Offences Act.[282] They are not conducted in terms of the summary conviction procedure of the Criminal Code, because the Provincial Offences Act explicitly states that private prosecutions may be instituted after, what is being referred to as *laying an Information.*

In terms of section 504 of the Criminal Code, anyone who, on reasonable grounds believes that a person has committed an indictable offence may "lay an information" in writing and under oath before a justice, and the justice shall receive the information.[283]

Where a justice considers that a case is made out for compelling an accused to appear before him or her to answer to a charge of an offence, the justice must issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.[284]

The right to prosecute privately in Canada as an "informant" is well established, however an Attorney General of the province may intervene in private prosecutions, where it is deemed necessary to do so in terms of the Criminal Code before a written order of a judge was obtained.[285] The Attorney General can either stay or withdraw charges, proceed by substituting their own Information, or simply prevent the prosecution from proceeding.

Should the private prosecution proceed, section 507.1(1) of the Criminal Code provides that a justice who receives an information laid under section 504 shall refer

280 Swaigen J (See note above) page 35.
281 Swaigen J (See note above) page 35.
282 Provincial Offences Act, RSO 1990, c P.33 Section 23.
283 Criminal Code R.S.C. 1985 c.C-46 Section 504.
284 Criminal Code R.S.C. 1985 c.C-46 Section 504(4).
285 Criminal Code R.S.C. 1985 c.C-46 Section 574.

it to a provincial court judge, or in Quebec, a judge of the court of Quebec, or to a designated justice to consider whether to compel the appearance of the accused on the information.[286] The judge to whom an information is referred under subsection (1) and who considers that a case for doing so is made out, shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.[287] This hearing is known as a pre-enquete, which is an ex parte, in camera process, whether the prosecuting attorney attends.

In the case of P.C. v Ontario (Attorney General) the court held that the purpose of a pre-enquete under section 507.1(2) of the Criminal Code is for the presiding judge or justice to determine whether a case has been made out for the issuance of process to compel the putative accused named in the information to appear or attend in answer to any of the charges contained in the information.[288] The court further held that the task of the judge presiding at the pre-enquete is twofold, namely to determine whether the information is valid on its face, and whether the evidence adduced on the hearing discloses a prima facie case on the offence(s) charged.[289]

The judge or designated justice will subsequently decide whether or not to issue a summons or warrant to the accused.[290] The judge will firstly have to hear and consider the allegations of the informant and the evidence of witnesses.[291] The judge has to further be satisfied that the Attorney General has received a copy of the information, has been given reasonable notice of the hearing under paragraph (a) and has been given an opportunity to attend the hearing.[292] The Attorney General may then appear at the hearing held under paragraph (3)(a) without being deemed to intervene in the proceeding.[293]

The rest of Section 507.1 gives information regarding the evidence to be brought before court, which is irrelevant for present purposes. The only important element for

286 Criminal Code R.S.C. 1985 c.C-46 Section 507.1(1).
287 Criminal Code R.S.C. 1985 c.C-46 Section 507.1(2).
288 *P.C. v Ontario (Attorney General)* Ontario CA, 2020 par 27.
289 *Ontario* (See note above) par 28.
290 For the remainder of this part of the study relating to Canada, reference to 'judge' will also include 'designated justice'.
291 Criminal Code R.S.C. 1985 c.C-46 Section 507.1(3)(a).
292 Criminal Code R.S.C. 1985 c.C-46 Section 507.1(3)(b)-(d).
293 Criminal Code R.S.C. 1985 c.C-46 Section 507.1(4).

purposes of this study is that it is the judge who issues a summons or warrant and not the private prosecutor. The private prosecutor merely lays an information.[294]

Canada was one of the first countries to recognise the use of private prosecutions as a method of protecting environmental rights.

Since the late 1960's Canadians have become aware of the environmental crisis in respect of which lawyers, environmental groups and concerned citizens have urgently searched for effective legal remedies.[295] Private prosecution is the first method that concerned Canadian citizens have identified to use in their efforts to fight for environmental protection and conservation.

One would perhaps not regard private prosecution as the best way to employ in order to instil awareness of environmental issues and to promote the protection of environmental rights. The most feasible route to achieve these aims could perhaps be to take steps towards activating the public prosecuting authority to enlist the private prosecution's involvement. This is known as a *request for investigation right*.[296] In other words, a private person would raise their concerns with the police individual the police, and if those concerns are supported by the necessary evidence, law enforcement by competent Crown Attorneys should follow. However, this is not what usually happens because public prosecuting authorities are often understaffed, under-resourced, untrained and unwilling to prosecute, particularly when the alleged offender is another body or even their own state department.[297] Private prosecutions are then called upon when the public prosecuting authority's enthusiasm is lacking.

The private prosecution procedure often encounters various difficulties, the main of which being an inability to obtain enough evidence to ensure a successful prosecution. In the case of public prosecutions, the government enforcement agency has inspectors and investigators with authority to, for instance enter business premises or other restricted areas not accessible to private investigators. Private prosecutions are

294 Criminal Code R.S.C. 1985 c.C-46 Section 507.1(6) & (7).
295 Swaigen J (See note above) page 240.
296 See for example section 17 of the Canadian Environmental Protection Act S.C. 1999, c.33.
297 Swaigen J (See note above) page 241.

therefore used as a last resort when all efforts to ensure a public prosecution involving an environmental offence have been unsuccessful.

Private prosecutions are not always successful in the Canadian courts, but they do however, raise some awareness. Businesses are always wary of bad publicity and they are likely to propose a settlement, like for example in the *Podolsky v Cadillac Fairview Corporation Ltd* case.[298] In this case, Liat Podolsky brought a private prosecution on behalf of Ecojustice, an advocacy group, against Cadillac Fairview Corporation Ltd and CF Realty Holdings Inc, the owners of three buildings in Toronto Canada.[299] Podolsky's case was based primarily on evidence that birds collided with the building's highly reflective glass windows and spandrels severely injuring themselves and in most cases, are killed.[300] Justice Melvyn Green held that although the private prosecutor had established the *actus reus in* each of two of the three offences brought before court, the defendants had also demonstrated, in all the circumstances, that they acted with due diligence and thus discharged the burden rested upon them The defendants were subsequently found not guilty.[301]

Although the defendants were found not guilty of the charges brought by Podolsky, the ruling of the *Podolski* case will now require alle building owners and managers to implement remedial measures where birds injure of even kill themselves in window strikes.[302]

Private prosecutions in Canada are therefore not only a safety net to those who are and were victims of crimes, they are also a remedy and tool for concerned citizens to fight for environmental rights.

4.4 England

England is an important jurisdiction to explore for purposes of this study because it is the predominant source of South African law of procedure. The Dutch legal system will also have to be taken into consideration in view of its close relation to Roman Dutch law, which is an important cornerstone of the South African common law. The

298 *Podolsky v Cadillac Faiview Corporation Ltd* (2013) (Ont CJ).
299 *Podolsky* (See note above) par 1.
300 *Podolsky* (See note above) par 1.
301 *Podolsky* (See note above) par 95.
302 Swaigen J (See note above) page 252.

importance of a comparison between the relevant parts of English and Dutch law, on the one hand, and the apposite provisions of South African law, stands to reason.

The concept of private prosecution derives from the early English notion that the best means of bringing criminals to justice was to leave the matter in the hands of the victim the victim's relatives or friends to seek justice for any alleged injustice inflicted by the accused.[303] All prosecutions in England are conducted in the name of the Crown however, private prosecutions are still seen as an essential building block in the British legal justice system. Historically, a citizen in Britain had a generally unrestricted common law right to prosecute an alleged offender for the commission of a statutory offence. This capacity to prosecute has always up to this very day been referred to as a basic right.[304]

Most prosecutions in England after the Second World War were private prosecutions.[305] These prosecutions were initiated by the police and since 1940 a variety of statutory provisions have influenced the stance on private prosecutions. The most notable creation of these provisions is the Crown Prosecution Service, charged with the responsibility to decide which prosecutions to pursue. The Director of Public Prosecutions and the Attorney General had, however imposed severe limitations on the rights of private persons to institute private criminal prosecutions.

During the medieval times in England, "appeals" was the word used to refer to private prosecutions. They were not related to the correction of legal mistakes, but to appeal simply meant to prosecute the accused. For purposes of this study, I will continue to use the term private prosecutions although the sources in some instances refer to appeals. Nevertheless, private prosecutions were the predominant ways of prosecution during the 12th and 13th centuries and this practice continued until the 19th century. It is interesting to note that there were not many privately prosecuted criminals convicted in the 13th century.[306]

303 Stephen J *A History of the Criminal Law of England* 1883 page 245.

304 Richard Jackson *The Machinery of Justice in England* 5th ed (Cambridge: Cambridge University Press) 1967 at 129-301.

305 Emsley C (See note above) page 45.

306 Klerman D *Settlement and the Decline of Private Prosecution in Thirteenth-Century England* Law and History Review Spring 2001 Vol 19 No 1 page 3.

A private prosecution in the 13th century, and even today, involved a long and complicated process that often took many years to come to conclusion. Immediately after the commission of the crime the victim had to "raise the hue and cry". This basically entailed yelling out[307] at the neighbours to rush to the crime scene in an attempt to avoid any tampering with evidence to possibly ensure the apprehension of the villain.

The victim was then required to make "fresh suit" by spreading the word in neighbouring villages and notifying the coroner.[308] The victim then had to initiate a suit at the next county court which was held every four weeks. The private prosecutor could be either male or female and especially female when, an alleged homicide was committed against a woman, which frequently happened.[309]

The private prosecution had to be conducted by the victim personally unless the prosecution was launched by the family or friends of a victim that was killed. No solicitor or barrister was allowed to act on behalf of the victim unless the victim was incapacitated.[310] The accused had to appear at the county court and if they failed to do so, they would be given the opportunity to appear at any of the next three county court sessions. If they failed to avail themselves of any of these opportunities they would subsequently be outlawed.[311] Outlawed persons would forfeit all property rights, and it was also regarded as a crime to assist outlawed persons by shelter or by communicating with them.[312]

Not only the accused but the private prosecutor as well, was obliged to attend the hearings as explained above. The private prosecutor was required to attend in order to affirm the charges against the accused. The private prosecutor could withdraw the charges by either not showing up, or by attending and then submitting a notice to withdraw the charges against the accused. Should both the parties attend the hearing on the first day of the county court, the accused was required to give the court some form of surety with regard to further attendance of the proceedings. Failure to provide

307 Klerman D (See note above) page 10.
308 Woodbine G E *Bracton on the Laws and Customs of England* Belknap Press of Harvard University Press, 1968 page 40.
309 Klerman D (See note above) page 10.
310 Klerman D (See note above) page 10.
311 Klerman D (See note above) page 10.
312 Klerman D (See note above) page 10.

such surety would result in the detention of the accused for the duration of the trial. Because of its harshness this rule was not always enforced, however not in serious cases where the accused was regarded as a danger to society. [313] Serious criminal cases of this nature involved allegations of "breach of the king's peace" and therefore had to be postponed in anticipation of the arrival of the royal justices who had to hear these cases instead of the county court, where the sheriff was presiding, and was lacking jurisdiction to do so.[314]

If the private prosecutor had decided to proceed with the prosecution, the accusation against the accused person would be repeated in court. If the private prosecutor was a female, her aim would be to prove the case "as the court adjudges", and in the case of a male private prosecutor his purpose would be to prove his case "by his body" meaning by a physical battle,[315] but cases were almost never judged by battle. The accused would then have the opportunity to plead by denying the commission of the crime (in other words by pleading not guilty) or put forward a technical defence such as the failure by the private prosecutor to raise the hue and cry or failure to sue at the first county court. If the technical defence was accepted by the court, the private prosecution would be dismissed. An accused convicted of a serious crime was executed by hanging. An accused convicted of a less serious crime was held in custody until a fine was paid. The amount of the fine was determined on a case-by-case basis in accordance with the offender's means and the severity of the offence. In some extreme cases offenders were castrated or blinded, however such punishments were very uncommon.[316]

In 1700 criminal offences in England were divided into two categories, namely felonies and misdemeanours. Felonies were old crimes such as murder and rape which were punishable by execution. Misdemeanours were less serious offences such as so-called petty crimes and minor regulatory offences.[317] The state did not concern itself with the prosecution of alleged offenders, other than those involved in serious crimes

313 Klerman D (See note above) page 11.
314 Klerman D (See note above) page 11.
315 Klerman D (See note above) page 11.
316 Hyams P *The Strange Case of Thomas of Eldersfield* History Today 36 1986 pages 9-15.
317 Emsley C *Prosecution and the police in England since 1700* IAHCCJ Bulletin 1993 No 18 page 46.

such as treason or offences against the revenue.[318] The general practice was that prosecutions were conducted by private individuals that would usually be the victim of the offence. Regulatory offences (misdemeanours) were generally prosecuted by the constable (a local official). However, to conduct a prosecution would be very expensive as it would normally involve the issue of an indictment which required the payment of legal fees to various officials, which often made the prosecution not worth the effort.[319] In such event the victim could request a magistrate to mediate between the victim and the offender. The private prosecutor could then ask the magistrate to issue a recognizance forcing the offender to appear before the magistrate.[320]

It is important to note the relationship between the police and the prosecuting authority. In countries such as Japan and the USA, prosecutors form an integral part of the investigation of the crime and district attorneys in the USA often have their own investigators employed to gather evidence and to determine the facts of the case. In England and other countries, such as Indonesia and Thailand, the prosecution and the investigation are conducted by completely separate entities. [321]

In modern English law there are a number of organisations that regularly prosecute cases before the courts of England and Wales, but they are private institutions acting in terms of the right to conduct private prosecutions which are available to every individual in those countries.

The RSPCA, for instance, is the largest animal welfare charity in the United Kingdom. It is an organisation similar to the National Society for the Prevention of Cruelty to Animals (NSPCA) in South Africa.[322]

The right to bring a private prosecution in England is provided for in section 6(1) of the Prosecution of Offences Act[323] which reads as follows:

> Prosecutions instituted and conducted otherwise than by the Service.

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318 Emsley C (See note above) page 46.
319 Emsley C (See note above) page 46.
320 Emsley C (See note above) page 47.
321 Worrall JL (See note above) page 16.
322 CPS Private Prosecutions October 2019 https://www.cps.gov.uk/legal-guidance/private-prosecutions <Accessed 08/12/2021>.
323 Prosecution of Offences Act 1985 section 6(1).

(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.

(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.

The provisions are subject to certain limitations set out in section 6(2). The Director of Public Prosecutions has the power to take over the prosecution which is from then on conducted in the name of that Director.[324] Private prosecutions in England may be instituted quite freely and with little involvement of the Director of Public Prosecutions.[325] Only in some cases the consent of the Attorney General or the Director of Public Prosecutions is required before the private prosecutor can proceed with or stop the private prosecution. There are some instances when the Criminal Prosecution Services will interfere with private prosecution proceedings. A decision to this effect could be made by the reviewing lawyer and endorsed by a Chief Crown Prosecutor or relevant Head of Casework Divisions and recorded in writing. A private prosecution will not be stopped by the Criminal Prosecution Services if the evidential stage or the public interest stage of the Full Code Test is not met. This Code (The Code for Crown Prosecutors) is issued by the Director of Public Prosecutions under section 10 of the Prosecution of Offences Act.[326]

The Full Code Test has two stages and should a private prosecution not adhere to these stages the Criminal Prosecution Services will interfere and bring the prosecution to an end.[327]

I will not go into detail on the Full Code Test. However, one can confidently state that the English legal system fully provides for private persons to prosecute, unless the prosecution seems to be conducted maliciously or in bad faith or if for any other reason

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324 Prosecution of Offences Act 1985 section 6(2).
325 Prosecution of Offences Act 1985 section 6(2).
326 Prosecution of Offences Act 1985 section 10.
327 CPS The Code for Crown Prosecutions 26 October 2018 www.cps.gov.uk/publication/code-crown-prosecutors <Accessed 10/12/2021>.

that it might obstruct the course of justice. When, after a private prosecution has already begun, the Criminal Prosecution Service is of the view that that case is worthy of prosecution, they could take over the case and proceed with the prosecution in conjunction with the private prosecution council. This is probably the correct approach to follow in order to establish cooperation and not conflict when both private and public prosecutions become involved in the same case.

In South Africa a similar approach to that of England is followed with regard to private prosecutions, because South Africa inherited its legal system from England when South Africa was colonised by England, as alluded to in chapter 2. It is however, interesting to note that even though private prosecution was the main form of prosecution in England, the English government was not inclined to allow the same system to take root in the Cape of Good Hope. The reason for this policy is unknown, but it could have been motivated by an intention to retain the sole power of prosecution in the hands of the colonial government thereby preventing the local inhabitants from acquiring any private prosecutorial powers. The sole right of prosecution in the hands of a colonial power could obviously, in various ways be abused in order to retain political influence.

4.5 Netherlands

The statute regulating the prosecution of crimes in the Netherlands is the *'Wetboek van Strafvordering* 2012*'* (*Wetboek*).[328] The *Wetboek* grants the right to prosecution exclusively to the Public Prosecution Service. This entails that the victim has no right to prosecute the accused, no matter what the nature and extent of the injury suffered by the victim might be and notwithstanding any valid dissatisfaction of the victim, or anybody else for that matter, about a decision of the Public Prosecution Service not to prosecute.[329] The Public Prosecution Service therefore has a monopoly over the prosecution of crimes. A prosecuting authority is of course not obliged to institute a prosecution whenever it is requested to do so. There may be very good reasons for a decision not to prosecute. A refusal to prosecute may be motivated by the lack of sufficient evidence to justify a prosecution; or for some or other technical reason; or because the prosecution may be considered to be undesirable in terms of the so-called

328 English: Code of Criminal Procedure 2012.
329 Tak J P *The Dutch Criminal Justice System* ResearchGate January 2003 page 51.

expediency principle, that is the principle that a prosecution should not be instituted if it would not be in the public interest.

There are six grounds on which the public prosecutor can decide not to prosecute due to technicalities. These technicalities may be that the accused was wrongly registered by the police; or that there is not enough evidence for a prosecution; or because of the inadmissibility of available evidence; or because the court does not have jurisdiction to hear the case; or because the alleged conduct of the accused did not constitute a criminal offence; or because the alleged conduct was not unlawful or because the accused was not criminally liable due to a justification of excuse defence.[330]

The Public Prosecution Service is not obliged to elaborate on its decision not to launch a prosecution due to technicalities or due to policy considerations, it is merely required to categorize their decisions under one of the reasons or grounds for non-prosecution as mentioned in the previous paragraph. [331] This categorization is not a guarantee for a uniform application of reasons not to prosecute. However, it does provide information applicable to each of the 19 prosecutorial jurisdictions in the Netherlands, and provide clarity with a view to uniformity in the different jurisdictions.[332]

Chapter 4 of the *Wetboek* provides for a *'Beklag over het niet vervolgen van strafbare feiten'*[333] in terms of which the victim of a crime is afforded some form of power to ensure justice that is served. The law provides that the directly interested party may file a complaint against the decision of the public prosecutor not to prosecute.[334] The complaint will be filed with the Court of Appeal within which area of jurisdiction the decision not to prosecute was taken or where the punishment order was issued.[335] The "directly interested party" who may lodge this complaint is understood to be a legal person whose interests have been directly affected by the decision of the public prosecutor not to institute or to discontinue prosecution.[336]

330 Tak J P (See note above) page 52.
331 Tak J P (See note above) page 52.
332 Tak JP (See note above) page 53.
333 Translation: Complaint against Non-Prosecution of Criminal Offences.
334 *Wetboek van Strafvordering* 2012 Section 12(1).
335 *Wetboek van Strafvordering* 2012 Section 12(1).
336 *Wetboek van Strafvordering* 2012 Section 12(2).

The court will examine the manner in which the discretionary power was exercised by the public prosecutor. The examination extends to both the legality of the decision (by determining whether there was a proper application of the law) and the propriety of the discretion (by determining whether the decision not to prosecute was in line with the relevant policy).[337]

The interested party who has lodged the complaint has the right to be heard by the court and be assisted by legal counsel. The court of appeal will take a decision as to whether or not the public prosecutor's discretionary powers have been exercised in accordance with the demands of propriety and if not, the court may order the public prosecutor to institute a criminal prosecution. Almost 1 200 complaints of this nature are filed annually, but proceedings hardly ever result in the institution of a prosecution ordered by the court of appeal.[338]

Apart from the judicial control of a private person over the public prosecution in the circumstances mentioned above there are also the following administrative steps a private person can take: The private person may request a public prosecutor to review the decision of another public prosecutor not to prosecute. Alternatively, a private person may write a letter to a higher official in the hierarchy of the prosecution authority requesting such official to review the decision of the subordinate prosecutor.[339]

4.6 Commonwealth and African jurisdictions

At this stage, it is deemed necessary to examine to what extent, if at all, private prosecution has taken root firstly, in certain common law countries**;** and secondly, in certain other African countries. Common law countries are important because, as pointed out earlier, private prosecutions in these countries originate from the legacy of British colonial rule.

As regards private prosecutions in other African countries, it is no secret that there is an uncontrollable rise in poverty and unemployment in most of the African countries[340]. This situation is increasingly manifesting itself in South Africa and in this regard the

337 Tak JP (See note above) page 67.
338 Tak JP (See note above) page 67.
339 Tak JP (See note above) page 67.
340 Ndubisi Nwokoma *A third of Nigerians are unemployed: Here's why* The Conversation April 2021.

crime rate has already been alluded to earlier. Crime, poverty and unemployment are fertile breeding ground for ever increasing demands relevant, amongst other, to the maintenance of law and order and social stability.

4.6.1 Zimbabwe

The following case study serves as a starting point for the discussion of private prosecution in Zimbabwe:

In early 2010 four senior employees of Telecel Zimbabwe (Pty) Ltd were charged with fraud of about US $ 1 700 000 committed against Telecel.[341] The four accused were denied bail as at first sight there were overwhelming evidence against them. However, the Attorney General later denied prosecution because of insufficient evidence.

Telecel consequently applied for a *nolle prosequi* certificate with a view to private prosecution. The Attorney General refused to issue the certificate and the case eventually had to be decided by the Supreme Court of Zimbabwe.

In Zimbabwe the Criminal Procedure and Evidence Act regulates the institution of private prosecution. Section 13 of said Act states the following:

> "In all cases where the Attorney General declines to prosecute for an alleged offence, any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute, in any court competent to try the offence, the person alleged to have committed it."[342]

The Act also provides for persons other than the "private party" mentioned in section 13 to launch private prosecutions. Section 14 states:

> "The following shall possess the right of prosecution –
>
> (*a*) a husband, in respect of offences committed against his wife;

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341 *Telecel Zimbabwe (Pty) Ltd v Attorney General of Zimbabwe N.O.* Civil Appeal SC 254/11 [2014] ZWSC 1 (28 January 2014).

342 Criminal Procedure and Evidence Act Part III Section 13.

(*b*) the legal guardians or curators of minors or mentally disordered or defective persons, in respect of offences committed against their wards;

(*c*) the wife or children or, where there is no wife or child, any of the next-of-kin of any deceased person, in respect of any offence by which the death of such person is alleged to have been caused;

(*d*) public bodies and persons on whom the right is specially conferred by statute, in respect of particular offences."[343]

The court considered the origin of private prosecution and focussed on how private prosecutions were to some minor extent introduced in the Cape of Good Hope.[344] The court referred to Dugard[345] stating that the British government accepted that there had been no adoption of an unmodified English system of private prosecutions in the Cape of Good Hope. The fact that the British view was that the Cape of Good Hope lacked the legal framework to accommodate private prosecution as an option available to the victims of crime was also mentioned in Chapter 2 of this thesis, and will be discussed later. Nevertheless, the court further mentioned hat according to Dugard the British government had vested the sole right to prosecution under the authority of the Attorney General, but where an individual suffered an injury and the Attorney General declined to prosecute, the victim would be granted the opportunity to prosecute the accused.[346] The court stated that the law governing private prosecutions in both Zimbabwe and South Africa did not fall within the ambit of Roman-Dutch law, but was derived from English common law.

The court observed that in section 7 of the Criminal Procedure Act 51 of 1977 of South Africa the term 'private person' is used to identify the person entitled to institute a private prosecution in terms of that Act. However, in the Criminal Procedure and Evidence Act Part III, Section 13 the term 'private party' is used when indicating the person entitled to launch a private prosecution in terms of section 13 of that Act. As was mentioned in Chapter 3 of this thesis, the court in the *Barclays* case argued that

343 Criminal Procedure and Evidence Act Part III Section 14.
344 *Telecel Zimbabwe* (See note above).
345 Dugard J *South African Criminal Law and Procedure – Vol. IV Introduction to Criminal Procedure* (1977) page 25
346 Dugard J (See note above) page 25.

the term 'private person' indicated a natural person with feelings and capable of suffering some form of physical and emotional injury. The court in the *Telecel* case states that because the terminology of the two statutes differ, the judgment in the *Barclays* case cannot be relied on as support for any finding in the present (the *Telecel)* case.[347] The court finally concluded that the right of private prosecution vests in natural persons as well as juristic persons including private corporations.[348]

In October 2015, the Zimbabwean National Assembly passed the Criminal Procedure and Evidence Act[349] in terms of which juristic persons may not prosecute under section 13 of the Act. During the assembly Mr Emmerson Mnangagwa (now president of Zimbabwe) expressed the view that to entitle juristic persons to institute private prosecutions could have dangerous consequences because it would enable corporations to use this right to pursue their own interests at the expense of the "poor accused persons who cannot defend themselves". He concluded that this[350] would be in conflict with the principle of equal protection before the law.[351]

As regards to the Zimbabwean Government's view on private prosecution by juristic persons, it is important to take note of the course of events over the years relevant to this and related issues. In 2003 and earlier, various Western nations, including the USA, imposed sanctions on the Zimbabwean government because of election rigging and human rights abuses in Zimbabwe.[352] In Chapter 2 of this thesis reference was made to the fact that the British had believed that the settlers of the Cape of Good Hope were not ready to be entitled to institute private prosecutions for crimes committed against them. It was also pointed out that the British did not advance this argument with regard to the USA which declared independence from the British government in 1776.[353]

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347 *Telecom Zimbabwe* (See note above).

348 *Telecom Zimbabwe* (See note above).

349 [HB 2, 2015].

350 Mnangagwa is referring to Clause 6 of the new Criminal Procedure and Evidence Bill which explicitly prohibits juristic persons to launch private prosecutions in terms of the Bill.

351 National Assembly Hansard 14 October 2015 Vol 42 No 13 https://parlzim.gov.zw/download/national-assembly-hansard-14-october-2015-42-13/ <Accessed 14/12/2021>.

352 Columbus Mavhunga *ZIMBABWEANS DEVIDED OVER WESTERN SANCTIONS* Voice of America https://parlzim.gov.zw/download/national-assembly-hansard-14-october-2015-42-13/ <Accessed 14/12/2021>.

353 Office of the Historian *The Declaration of Independence 1776* https://history.state.gov/milestones/1776-1783/declaration <Accessed 14/12/2021>.

In the Cape of Good Hope, the British controlled the prosecution authority until 1828 when the Criminal Procedure Ordinance was introduced. It provided for victims of crime to launch private prosecutions in certain extraordinary cases.[354] It seems that keeping the prosecuting authority under government control was important for some governments, not necessarily only to ensure that criminals get prosecuted.

During the colonisation era, the importance of total control of all forms of prosecution is well-illustrated by the independence of the USA which occurred once the British government had lost part of its prosecutorial power. In Zimbabwe, a clear resemblance between characteristics of the old British government and those of present-day Zimbabwean government that is obviously bent on the power to control every form of prosecution in a country that, similar to South Africa, has a crime rate which is so high that the prosecutorial power required to bring about any significant difference is far beyond the capability of the public prosecution authority alone. It leads to believe that the power to prosecute crimes and to 'keep the citizens safe and protected' might mean more than just that, to some governments.

4.6.2 New Zealand

New Zealand provides for private prosecutions by individuals as well as organisations. Section 6(1)(c) of the Criminal Disclosure Act[355], recognises the right to privately prosecute, stating that the meaning of 'prosecutor' also includes the person who filed the charging document and any counsel representing that person in the case of a private prosecution.[356]

Section 16(2)(e)(i) of the Criminal Procedure Act[357] states that a charging document must include the name of the prosecuting organisation as well as the particulars of an appropriate contact person in relation to the prosecution.[358] It is clear that in New Zealand any private organisation intending to institute a private prosecution is not burdened with unnecessary obstacles.

354 Theal (See note above) page 266-267.
355 Act 38 No of 2008.
356 Criminal Disclosure Act No 38 of 2008 Section 6(1)(c).
357 Act No 81 of 2011.
358 Criminal Procedure Act No 81 of 2011 Section 16(2)(e)(i).

On 24 September 2012, Mr McCready, a member of the public, and the owner of New Zealand Private Prosecution Services Ltd launched a private prosecution through his company against Mr John Banks[359], at the time a member of parliament and leader of the ACT political party. In 2010 Mr Banks was a candidate for the Auckland mayoralty. In 2010, under the Local Electoral Act, mayoral candidates were required to make a return of electoral expenses and donations.[360] During his campaign Mr Banks received two donations totalling to $50 000, which were not expressly disclosed in the return.[361] Mr McCready alleged that the accused, Mr John Banks, had committed an offence under section 134, in that Mr Banks had allegedly transmitted a required return to the electoral officer knowing that it was false.[362]

The court in *New Zealand Private Prosecution Services Ltd v Banks DC Auckland*[363] held that there in fact sufficient evidence adduced by the New Zealand Private Prosecution Services for the case to proceed Mr Banks launched a judicial review of the committal decision.

Mr Banks argued that there was not enough evidence to commit him for trial after the private prosecution had been launched.[364] The court concluded that there was indeed sufficient evidence and that the court of review should not interfere with the District Court's decision to commit the accused for trial under the private prosecution.[365] The court further held that a fact-finder could have inferred that Mr Banks had deliberately refrained from checking the contents of that part of the return relating to donations so that he could distance himself from any failure to identify the two donors in question. The court finally decided not to interfere with the District Court Judge's decision to commit Mr Banks for trial.[366]

The *Banks* case is a case of a private prosecution by an organisation that successfully prosecuted an accused, or at least provided its assistance to the public prosecutor. The accused did have the opportunity to argue the case and the court was empowered

359 *Banks v District Court at Auckland* [2013] NZHC 3221 par 14.
360 Local Electoral Act 2001 section 109.
361 *Banks* (See note above) par 2.
362 *Banks* (See note above) par 14.
363 New Zealand Private Prosecution Services Ltd v Banks DC Auckland CRN 12085501798, 16 October 2013.
364 *Banks* (See note above) par 4.
365 *Banks* (See note above) par 44-48.
366 *Banks* (See note above) par 46.

to decide whether or not the prosecution was aimed at benefitting the personal interest of the private prosecuting company. It would appear that private prosecution is conducted, at least in New Zealand, subject to close scrutiny by the court with a view to avoiding any undue personal benefit to the private prosecutor.

4.6.3 Kenya

In Kenya the Criminal Procedure Code[367] provides that a trial magistrate may permit the prosecution of the accused to be conducted by any person, but no person other than a public prosecutor or other officer generally or specifically authorized by the Director of Public Prosecutions to act on behalf of the public prosecutor, shall be entitled to prosecute without permission from the trial magistrate.[368] The Criminal Code further states that any such person or officer conducting the prosecution shall have the same power as the public prosecutor to withdraw from the prosecution.[369] The withdrawal shall not act as a bar to subsequent proceedings against the accused on account of the same facts.[370]

The Kenyan approach to private prosecutions is therefore very much the same as those of the majority of previous jurisdictions discussed above: basically, a public prosecution authority, but the exception of a private prosecution should the private person obtain the necessary permission from the trial magistrate. The Criminal Procedure Code also provides that a judge or magistrate may order the convicted person to pay costs in addition to any penalty that be imposed for the crime committed. The Criminal Procedure code also provides that the private prosecutor will, in the event of an unsuccessful prosecution be liable for costs, unless the judge or magistrate is of the belief that the private prosecutor had reasonable grounds for the complaint.[371]

In *Lois Holdings Limited v Ndiwa Tamboi & 184 Others*[372] (*Lois Holdings*) Lois Holdings filed a case against 185 defendants claiming that the defendants were trespassing, damaging property and illegally occupying pieces of land.[373] Lois

367 Laws of *Kenya*. *Criminal Procedure Code*. Chapter 75. Revised Edition 2012
368 Criminal Procedure Code (CAP.75) 1930 Section 88(1).
369 Criminal Procedure Code (CAP.75) 1930 Section 88(2).
370 Criminal Procedure Code (CAP.75) 1930 Section 87(a).
371 Criminal Procedure Code (CAP.75) 1930 Section 171(1) & (2).
372 [2014] eKLR.
373 *Lois Holdings Limited v Ndiwa Tamboi & 184 Others* [2014] eKLR par 3.

Holdings bought pieces of land known as Mr Gadher who was a farmer and used the land for farming activities. The defendants were workers on the farm and also living on the farm, specifically on those pieces bought by Lois Holdings.[374]

Lois Holdings wanted the workers to move off the pieces of land of which it was the newly registered owner. Initially, there were only 54 people living on the land, but at the time of the trial this number had increased to 185 as the community had expanded over the entire extent of the lands. In 1986 Lois Holdings launched a private prosecution of the 54 initial occupiers of the land in the Kitale Senior Resident Magistrate's Court (Criminal Case No. 3409 of 1986) and all of the 54 were convicted and ordered to vacate the lands.[375]

The court held that in 1986, two years after Lois Holdings had bought sections of land, they brought a private prosecution against the 54 original defendants, for alleged trespassing.[376] The court held further that the defendants could not claim to have acquired title by adverse possession either before or after the plaintiff bought the suit lands.[377] Here it is clear that the court recognised the private prosecution by the company Lois Holdings, not only by winning the initial case in 1986, but also by interrupting the 'period of acquiring by adverse possession' remedy.

Justice E. Obaga ordered, firstly that the defendants had to vacate the land within three months from the date of the judgment, and failing to do so would lead to a subsequent eviction from the relevant sections of land without further recourse.

Secondly, the court ordered that the defendants had to pay Kshs. 2 296 000 general damages as remuneration to the plaintiff for trespassing. Thirdly, the court ordered that the defendants were allowed to remain on the one piece of land pending a mutual agreement between the parties.[378]

However, the *Lois Holdings* case did not stop in 2014. The Chesitia Marketing Co-Operative Society (Chesita), registered in Kenya, brought an application to set aside

374 *Lois Holdings* (See note above) par 5&6.
375 *Lois Holdings* (See note above) par 7.
376 *Lois Holdings* (See note above) par 23.
377 *Lois Holdings* (See note above) par 23.
378 *Lois Holdings* (See note above) par 27.

the decision of Justice E. Obaga. Chesitia further applied to be enjoined as a party to the suit and that in the interest of justice, the court make all further orders[379].

In this case, Loise Nyegera Kimbui, the director of Lois Holdings filed a replying affidavit in response to the application brought by Chesitia.[380] In the replying affidavit the respondent in this case stated *inter alia* that when the matter was "advertised" in 2006, all the parties that had a specific interest in the matter could join the case and Chesitia did not do so in time. The respondents further submitted that the piece of land in dispute had been utilized and that there was no justifiable group upon that piece of land that had the right, or any interests to apply for a review of the judgment of 2014.[381]

The arguments advanced by Chesitia and the reply thereto by Loise Nyegera Kimbui are irrelevant for purposes of this study. The question regarding the validity or justifiability of a private prosecution also did not arise in this follow-up case. This might be indicative of how the concept of private prosecutions and the opportunities it could offer are viewed in Kenya.

Private prosecution by a company was therefore successful where the public prosecution authority did not even look at the case. To allow private prosecutions in Kenya seems to be fair given the fact that Kenya is also a country with a developing economy such as South Africa. By allowing a company to launch a private prosecution on its own behalf, affords the public prosecution authority in Kenya the opportunity to focus on other "more important" cases as mentioned earlier in this study. The private sector can assist in this regard by taking care of their own cases and, when necessary, even other cases of public interest as well.

4.7 Conclusion

From the various jurisdictions of the above stated different countries, it clear that countries with an English background are more open to the idea of private prosecutions, whereas where European countries such as the Netherlands do not favour the idea of private prosecutions.

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379 *Lois Holdings Limited v Ndiwa Tamboi & 184 others; Co-operative Society (Proposed 2nd Defendant)* [2021] eKLR (hereafter '*Co-Operative Society*') *par* 3.

380 *Co-Operative Society* (See note above) par 5.

381 *Co-Operative Society* (See note above) par 5.

African countries on the other hand, such as Zimbabwe shows scepticism towards private prosecutions, however, private prosecutions have shown to be quite useful as was seen in the discussion on Kenya.

One cannot deny that there is dividedness on whether or not private prosecutions has a place in a criminal prosecution system. Which is not surprising when one keeps in mind that different the different jurisdictions have different histories and was developed to suit the relevant jurisdiction in its present state. However, where a private prosecution was instituted, the outcome has always proven to be of use and in the interest of justice. Irrespective of the history and development of the certain jurisdiction, private prosecutions are remedies to victims of crime who did not benefit from the protection of the public prosecution system.

Chapter 5

Final Recommendations and Conclusion: The impact of modern-day private prosecution in South Africa

5.1 Introduction

In this final chapter, focus will shift to the impact of modern-day private prosecutions and the possible benefits it could offer in a democratic society.

Private prosecutions, as described in the previous chapters, originated in the medieval era where people had to fend for themselves and protect their own basic rights, and seek justice on their own behalf. Today, in many countries one finds a fully developed public prosecution authority whose main role in society is, to keep its citizens safe and protected.

It is not always the case that the citizens in their countries feel safe and protected, because if they did, the concept of private prosecutions would not have been incorporated in modern-day jurisdictions. Nevertheless, seeing that private prosecutions are in fact part of so many international jurisdictions the effect thereof is to be noted.

In some cases, it is clear that authors in other countries do not necessarily favour private prosecutions above public prosecutions. In most cases authors from countries with well-established and functioning public prosecuting systems are less supportive of alternative systems that makes adequate provision for private prosecutions.

In South Africa, however, various authors are of the opinion that the national prosecuting authority is not always capable of coping with all prosecutions, which could be true in in view of the increasing crime rate.

Whilst the legal position in South Africa have already been covered in the previous chapters of this study, it would be of importance to discuss the stance of South African courts towards private prosecutions.

5.2 The effect of private prosecutions on the National Prosecution Authority (NPA)

Crime rates in South Africa are of the highest in the world.[382] In the most recent official South African Police Services report the second quarter (July to September 2022) the following numbers were reported:

From July to September 2022 there were a total of 7 004 murders, 13 283 sexual offences, 6 155 attempted murders, 41 251 assaults with the intention to inflict grievous bodily harm, 44 389 common assault cases, 12 024 common robberies and 38 412 robberies with aggravating circumstances.[383]

In a study done in 2000, when crime rates were prominently lower than 20 years later in 2020, research was done on the outcomes of rape cases.[384] The paper states that several studies confirm that almost half of all respondents who experienced rape reported the incident to the police.[385] Police statistics show that 47,6% of the rape cases reported to the police were prosecuted in court. 45,6% were withdrawn in court and 4,5% of rape cases were settled out of court.[386] Of the 22 121 reported cases that went to court, only 19,8% resulted in the conviction of the accused, which indicates that 4 out of 5 rapists do not go to jail.[387]

One could go on and reference the rates of murderers and burglars being convicted, however for this thesis I will only use the statistics concerning rape cases seeing that South Africa is also seen as the “Rape Capital” of the world.[388]

Private prosecution will impact upon the NPA in accordance with the manner in which it performs its intended functions. From a South African perspective, it is difficult to determine what effect successful private prosecutions could have on the NPA. What we do know from the previous chapters of this study is that there were various

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382 Hirschowitz R Quantitative research findings on rape in South Africa / Statistics South Africa. - Pretoria: Statistics South Africa, 2000 page 3.

383 Police Recorded Crime Statistics, Republic of South Africa (July to September 2022) page 3 https://www.saps.gov.za/services/downloads/July-to-September-2022-Presentation.pdf <Accessed 27/11/2022>.

384 Hirschowitz R (See note above) pages 2-3.

385 Hirschowitz R (See note above) page 2.

386 Hirschowitz R (See note above) page 2.

387 Hirschowitz R (See note above) page 3.

388 SA “Rape Capital of the World” News24 22 November 2005. Retrieved 4/12/2021.

successful private prosecutions in South Africa. Furthermore, for a private prosecution to be lodged it is first of all necessary for the NPA to indicate that it does not intend to prosecute. Should a private prosecution then succeed, it would be somewhat embarrassing for the NPA. It would show that a private prosecutor with far less resources than the NPA, was capable of proving beyond reasonable doubt that a criminal was guilty of a crime.

Private prosecutions will also affect the NPA in a financial sense. Where a private prosecution is instituted after the director of public prosecutions has issued a so-called *nolle prosequi* certificate and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the state.[389] A private prosecutor does not need to be successful to get the state to pay its costs. It merely has to indicate that there was sufficient evidence and reason to institute the prosecution. These costs could be excessive.

On the other hand, if a public prosecution requires the employment of a private lawyer the costs could also be substantial but would not be regarded as wasted costs.

As was clear from the previous chapters and in particular from the discussion on the *NSPCA* and *Uzani* cases, private prosecutions can also play an integral role in the protection of the environment.

South African legislation provides for the well-being of our environment and by keeping offenders of this legislation accountable. The relevant Acts include the Animals Protection Act[390], the Society for Prevention of Cruelty to Animals Act[391](SPCA Act) and the National Environmental Management Act[392]. These Acts all provide for private prosecutions and particularly in terms of the SPCA Act which provides the NSPCA with the statutory right to lodge private prosecutions where the NPA does not prosecute in circumstances such as those mentioned in the previous chapters.[393]

389 Criminal Procedure Act 51 of 1977 Section 15(2).
390 Act 71 of 1962.
391 Act 169 of 1993.
392 Act 107 of 1998.
393 Society for Prevention of Cruelty to Animals Act 169 of 1993 section 6(2)(e).

5.3 Private prosecution as a remedy for any governmental corruption

The three spheres of government namely the executive, legislative and judicial, function independently, each with its own responsibilities towards the South African citizens.

High levels of corruption in the South African government environment have however, in recent years been exposed with allegations involving amongst others the former president Jacob Zuma.[394]

On 23 January 2018 President Cyril Ramaphosa appointed a commission of inquiry to investigate allegations of state capture, corruption and fraud in the public sector, which colloquially became known as the Zondo Commission.[395]

Shortly after the first part of the Zondo Commission report was published in January 2022, a webinar was held to discuss the findings and way forward.[396] A former director general in the Office of the President, Reverend Frank Chikane, stated that if the NPA was incapable of prosecuting, the offenders identified in the report and that members of the public should be allowed to lodge private prosecutions.

Private prosecutions could serve as a mitigator of the problems that so many public prosecution authorities across the globe experience due to shortage of staff, insufficient resources or lack of motivation to prosecute.

However, before private prosecutions could be instituted against members of state for alleged corruption the Criminal Procedure Act will have to be amended in order for a group of citizens to lodge private prosecutions against state officials**.**

This could also give rise to the question as to the constitutionality of section 7(1)(a) of the Criminal Procedure Act. Section 7(1)(a) provides for the institution of a private prosecution when an individual has suffered loss or injury as a result of the conduct of

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394 Bernadette Wicks. Jacob Zuma's Corruption Case Returns To High Court. Eyewitness News 31 January 2022 https://ewn.co.za/2022/05/17/jacob-zuma-s-corruption-case-returns-to-high-court. Accessed 12 06 2022.

395 Government Gazette, 25 January 2018, Proclamation No. 3 of 2018.

396 Rebecca Davis. Could private prosecutions realistically ensure accountability for state capture? Daily Maverick 29 January 2022. https://www.dailymaverick.co.za/article/2022-01-29-could-private-prosecutions-realistically-ensure-accountability-for-state-capture/. Accessed 13 06 2022.

an accused, but it does not authorise private prosecution if loss or injury has befallen groups of people. An example of a group of people that could "suffer loss or injury" as a result of corruption would be taxpayers. Tax payers pay money and in return expect certain basic services such as proper protection by the police, access to fresh water and electricity. Where government officials steal money from taxpayers, it would make sense for a human rights organisation or public interest organisation to lodge a private prosecution on behalf of its members.[397]

5.4 Final Recommendations and Conclusion

The main theme of this thesis was twofold:

- Firstly, whether private prosecutions have, or should have an important role to play part in our criminal justice system.

- Secondly, whether South African law, and specifically the Criminal Procedure Act, should be further developed in order to facilitate private prosecutions and in particular to enable juristic persons to institute private prosecutions against other juristic persons.

Private prosecutions as it is presently provided for is the most efficient way of ensuring a safety net in the South African criminal prosecution system. As was discussed in the chapters above it is clear that private prosecutions are becoming more and more viable and will probably settle into an important role in securing justice.

The foundation for the expansion of private prosecution of serious cases such as murder has been established and victims of crime will now, not only have the right to, but also be encouraged to lodge a private prosecution for a crime in respect of which a public prosecutor was not prepared to conduct a public prosecution.

Throughout this paper, legal, political, and economic arguments in favour of and against private prosecutions have been discussed and examined, and the respective consequences for the citizens of different countries have been explored. It is submitted

397 See for instance "OUTA" Organisation Undoing Tax Abuse https://www.outa.co.za/projects/special-projects/private-prosecution <Accessed 13 06 2022>.

that in the final analyses the conclusion must be predominantly in favour of the argument that the promotion of private prosecution is a beneficial necessity.

Private prosecutions can and should, with proper administration, be used as a legal remedy and as a tool to rectify prejudice to private individuals and to assist the DPP in their almost impossible fight to prosecute all accused of severe crimes.

Although the danger of having the right to freely prosecute surely exists, there are sufficient restrictive measures in place to ensure that private prosecutions are not misused.

The Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.[398] In order to uphold these principles and to ensure equality and justice before the South African law, private prosecution should be developed and enhanced in a democratic South Africa.

398 The Constitution of the Republic of South Africa 1996 section 9(1).

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