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**PRIVATE PROSECUTION AS A MEANS OF VINDICATING FUNDAMENTAL RIGHTS AND REINFORCING ACCOUNTABILITY IN A NASCENT CONSTITUTIONAL DEMOCRACY**

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**ABSTRACT**

The dawn of democracy not only heralded respect and protection of human and fundamental rights, but also grand scale corruption committed, among others, by politicians and civil servants. Notwithstanding the highest rate of corruption by representatives of the public in almost all spheres of government, state owned enterprises and government departments, the rate of prosecution is truncated. Corruption inhibits the state from providing basic services such as water, electricity, access to healthcare, access to housing, infrastructure, and sanitation. The scourge of corruption affects every aspect of human life and has intensified with the emergence of the coronavirus pandemic.

Corruption need not be on a grand scale to be reported and/or prosecuted. Instances of corruption may include: a councillor selling food parcels intended to benefit flood victims, a public officer being paid to employ civilians in the Extended Public Works Programme, a traffic officer accepting a bribe from a motorist in return for not issuing a ticket for skipping a stop sign, or a magistrate accepting a sexual favour from a litigant in a case he presides over. In the event that the National Prosecuting Authority declines to prosecute corruption, private prosecution remains the only recourse for civilians to vindicate fundamental rights in a nascent democracy.

# INTRODUCTION

Unless and until the government has the will to outroot corruption, especially in the public sector, no law or system will do so.[[2]](#footnote-2) Stemming out corruption may seem impossible when the government, at all tiers, has been accused of the same. Corruption corrodes the fabric of society and undermines people’s trust in political and economic systems, institutions, and leaders.[[3]](#footnote-3)

Among others, corruption undermines democracy and the rule of law, leads to violations of human rights, distorts markets, and erodes the quality of life.[[4]](#footnote-4) It is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[[5]](#footnote-5) South Africa is state party to international instruments on corruption,[[6]](#footnote-6) and has since enacted the Prevention and Combating of Corrupt Activities Act (PRECCA).[[7]](#footnote-7) However, corruption is neither specifically defined by the international instruments that South Africa has ratified nor by PRECCA, let alone the fact that various definitions are used. In addition, South Africa has the highest incidence of corruption by politicians and civil servants and yet, the rate of prosecution of such crime remains relatively low.

For the purpose of this contribution, corruption should be understood as an act done with the intent to give some advantage inconsistent with official duty and the rights of others.[[8]](#footnote-8) This also refers to the misuse of public power by elected politicians or civil servants[[9]](#footnote-9) for private gain.[[10]](#footnote-10)

Corruption is so widespread that it would appear it has and continues to be committed in all spheres of government, examples can be found in state owned enterprises such as Eskom, Transnet, South African Airways (SAA), the South African Broadcasting Corporation (SABC). It is also in government departments such as the South African Police Services (SAPS), South African Revenue Service (SARS), the South African Social Security Agency (SASSA) and the State Security Agency (SSA). The frequency of corruption ranges from the now infamous Arms Deal to personal protective equipment.

Against the backdrop of the high rate of corruption committed by public officers in almost all spheres of government and the truncated degree of prosecution of such crimes, this article argues that corruption infringes on human rights. It advocates for private prosecution as a means of vindicating human rights and reinforcing accountability. It proposes that the substantial and peculiar interest requirement permits the institution of private prosecution by private individuals affected by corruption. The right of a private person to institute private prosecution, for purposes of this article, emanates from the violation of people’s rights such as access to housing, healthcare, food, water, and social security against which the law must offer recourse.

# 2. PRIVATE PROSECUTION

The right to private prosecution is grounded in section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution). Section 34 of the Constitution makes provision that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. Private prosecution can be brought only when the Director of Public Prosecutions (DPP) has declined to prosecute and has issued a certificate not to prosecute. It cannot be instituted against a child whose case has been diverted pursuant to section 59(2)[[11]](#footnote-11) of the Child Justice Act and against an accused who has been indemnified from prosecution. [[12]](#footnote-12) The right of private prosecution is a matter pertaining to, generally speaking, the “administration of justice”.[[13]](#footnote-13) In *Rapholo v State President*, the court held that “[t]he option of a private prosecution in terms of section 7 of the Criminal Procedure Act[[14]](#footnote-14) (CPA) is a useful safety valve in the absence of which parties might take the war-path”.[[15]](#footnote-15) As it was pronounced in *Fourie v Resident Magistrate Worcester*, private prosecution is unusual and constitutes a departure from the basic law that criminal prosecution must be conducted by a public prosecutor.[[16]](#footnote-16) Private prosecution remains a legal remedy with the objective of vindicating fundamental rights and should not be used as a form of punishment or vengeance.

For private prosecution to be instituted, it is essential that the requirements thereof be met.[[17]](#footnote-17) Among the requirements for institution of private prosecution is that the private prosecutor must have a substantial and a peculiar interest in the matter in respect of which private prosecution is sought to be instituted; and the DPP must have declined to prosecute and must have issued a certificate not to prosecute.

In South African law there are three categories of private prosecutions. Private prosecution by an individual based on a certificate not to prosecute; private prosecution by a statutory body; and private prosecution conferred to an individual by legislation, such as the National Environmental Management Act,[[18]](#footnote-18) the Extension of Security Tenure Act,[[19]](#footnote-19) or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[[20]](#footnote-20) Only the former category of private prosecution, prosecution with a *nolle prosequi* certificate will be discussed. The other forms of private prosecution are excluded on the basis that they are respectively recourse that may be relied on by statutory bodies or have application in environmental, mining and land occupation contexts.

## **2.1 Prosecution by a private individual**

Section 7 of the CPA states that:

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.

(2) *(a)* No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.

*(b)* The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph *(a).*

*(c)* A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph *(a)* within three months of the date of the certificate.

*(d)* The provisions of paragraph (c) shall apply also with reference to a certificate granted before the commencement of this Act, and the date of such certificate shall, for purposes of this paragraph, be deemed to be the date of commencement of this Act.

Section 7(1)(*a*) of the CPA makes provisions for three different requirements that, though dissimilar, are interlinked. Firstly, the person who institutes private prosecution must be a private person and not a legal person. Secondly, substantial, and peculiar interest in the matter must be established. Thirdly, an injury must have been suffered individually as a consequence to the act that gives rise to the substantial and peculiar interest. The text of subsections 7(*b*)-(*d*) of the CPA appear to create an impression that private persons who may institute private prosecutions are people related to the victim of the crime such as a husband, wife, child, next of kin, guardian or curator. It is the author’s argument that the stipulations of subsections 7(1)(*b*)-(*d*) of the CPA serve as guidelines for persons who may have a substantial and a peculiar interest and do not exclude private prosecution for offences other than against the person, against bodily integrity and against the community. Corruption is an offence against public welfare.[[21]](#footnote-21)

Private prosecution is a legal recourse for vindication of rights and is instituted on the basis that the DPP had declined to prosecute. In *Attorney-General v Van der Merwe and Bornmann,*[[22]](#footnote-22) the object of the phrase “substantial and peculiar interest” was well articulated. The court pointed out that the purpose of the phrase substantial and peculiar interest is “clearly to prevent persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any degree than any member of the public”.[[23]](#footnote-23)

# 2.2 Prosecutorial discretion

The prosecuting authority of the Republic vests in a single prosecuting entity,[[24]](#footnote-24) the National Prosecuting Authority (NPA), which has power to institute criminal proceedings on behalf of the state[[25]](#footnote-25) and is regulated by the National Prosecuting Authority Act.[[26]](#footnote-26) In South Africa, prosecution of crime is not compulsory and the NPA may decline to prosecute even when a case is established at face value.[[27]](#footnote-27) Paragraph C2 of the National Prosecuting Authority Policy[[28]](#footnote-28) states that:

[T]here is no rule in law stating that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

A conclusion whether or not to prosecute must take into account the nature and seriousness of the offence; the interests of the victim and the larger society; and the situations of an offender.[[29]](#footnote-29) The nature and gravity of the offence incorporates considering the impact of the crime on the victim; the method in which the crime was committed; impetus for the act and the association between the accused and the victim; pervasiveness of the offence and its relapse; the effect on public order and morale; the financial influence of the crime on the public; its threat to people or loss to public assets; and its effect on the peace of mind and sense of protection of the public and the possible consequence in the event of a conviction taking into account the sentencing alternatives accessible to the court.[[30]](#footnote-30)

The interests of the victim and the wider public includes having regard to the attitude of the victim of the wrongdoing towards prosecution and the probable effects of stopping it; the necessity for individual and general prevention, and the obligation of preserving public confidence in the criminal justice system; prosecution primacies as decided from time to time; and the expected duration and cost of the trial and whether or not prosecution would be considered counter-productive.[[31]](#footnote-31) The settings of the offender comprise the earlier convictions of the accused; his or her criminal history; background; blameworthiness and personal surroundings as well as other extenuating or exasperating factors; and whether there has been an irrational delay between the date when the misdeed was committed and the date on which prosecution was started, taking into account the intricacy of the crime and the role of the accused in the delay.[[32]](#footnote-32)

Prosecution may be declined in cases of a trivial nature or cases involving accused of a tender age.[[33]](#footnote-33) The NPA may decline to prosecute[[34]](#footnote-34) and opt not to issue a certificate confirming its decision not to prosecute.[[35]](#footnote-35) The decision not to prosecute is not appealable, yet an individual who is aggrieved by the decision not to prosecute may apply to either have the decision reviewed in court or directly to the NPA for the certificate not to prosecute. In *Democratic Alliance v The Acting National Director of Public Prosecutions*,[[36]](#footnote-36) it was pointed out that ‘the review applications are clear attempts to force a public prosecution by those who lack the necessary interest to bring a private prosecution”.

The certificate not to prosecute is one of the prerequisites for the institution of private prosecution. Reviewing a decision not to prosecute especially of high-profile cases against politicians and public office bearers may not only be costly but may be time consuming.[[37]](#footnote-37)

##  **2.3 Substantial and peculiar interest**

The right of an aggrieved person to institute private prosecution had long been recognised in the South African criminal justice landscape. In 1917, in *Mullins and Meyer v Pearlman (Mullins)* it was held that the private prosecutor must show actual damages suffered. [[38]](#footnote-38) However, it was only in 1954 that the court in *Ellis v Visser* elaborated on the concept of suffered damages by including that the person must have a substantial and peculiar interest and that this interest must be construed in its legal sense. [[39]](#footnote-39) The question now remains what constitutes substantial and peculiar interest.

Although the concepts substantial and peculiar interest are often defined as complementary to each other, an attempt to explain them separately is made. Substantial in the most basic sense can be described as something that is of real worth, not seeming or imaginary, not illusive, solid, true, or veritable.[[40]](#footnote-40) It is a concept that applies in many contexts and often is not capable of a precise, restrictive definition. It may be applied to describe an interest that is not remote or nominal and that affects a proprietary or pecuniary interest.[[41]](#footnote-41) The term substantial must however garner its meaning from the context in which it is used. In the context of section 7(1)(*a*) of the CPA, substantial must refer to the interest being such as to be capable of resulting in a conviction. Public prosecution will not commence or continue unless a conviction is possible.[[42]](#footnote-42) Correlatively, if the private prosecutor fails to prove that he or she has a substantial interest or possibility of conviction, then no private prosecution can ensue. An example of an insubstantial interest would be if the issue is frivolous and vexatious.[[43]](#footnote-43) Where no civil remedy exists, the right to private prosecution would cease.

Peculiar interest may be described as something strange, atypical, different, abnormal, unusual or unpleasant[[44]](#footnote-44) or something that is distinctive and uncommon.[[45]](#footnote-45) In an attempt to define the phrase peculiar, Van der Heever J pointed out that:

[T]he 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 safety-valve. An action for damages may be futile against a man of straw and private prosecution affords a way of vindicating those imponderable interests other than the violent and crude ones of shooting the offender.[[46]](#footnote-46)

The reasoning that violation of one’s dignity or reputation may result in private prosecution being instituted was confirmed in *Bothma v Els*.[[47]](#footnote-47) In that case the applicant applied for and was granted a certificate not to prosecute which then enabled her to privately prosecute an elderly man she alleged raped her when she was 13 years of age. However, a permanent stay of the private prosecution was granted by the Kimberly High Court and the applicant then approached the Constitutional Court for an order setting aside the permanent stay of private prosecution.

In upholding the appeal that culminated in the setting aside of the permanent stay of private prosecution, the Constitutional Court among others, pointed out that the applicant was entitled to vindicate her rights by seeking redress from the law. In *Singh v Minister of Justice*,[[48]](#footnote-48) a contradictory example, the applicant sought to compel the DPP to issue to him a certificate not to prosecute after the DPP declined to prosecute officials who the applicant perceived to be responsible for his earlier prosecution that was eventually stayed permanently. In dismissing the application for the issue of a certificate not to prosecute, the court held that the applicant had, among others, failed to establish that he meets the substantial and peculiar interest requirement to institute private prosecution.

## **3. NEXUS BETWEEN PRIVATE PROSECUTION AND CORRUPTION**

South Africa has the highest incidence of corruption committed among others by politicians and public office bearers and yet the rate of prosecution for such corruption is truncated. The Commission of Inquiry into State Capture that commenced in August 2018[[49]](#footnote-49) is but one example of how rampant corruption is in government departments and in state owned enterprises. The Commission of Inquiry into State Capture is not the first Commission to investigate allegations of corruption in the public sphere. The Jali[[50]](#footnote-50) and Seriti[[51]](#footnote-51) Commissions among others, probed the extent of corruption by public representatives respectively in relation to correctional services and procurement of arms by the government of the Republic of South Africa.

By reason that the costs of commissions of inquiry are paid from the public purse, two legitimate concerns arise. Firstly, why are public funds utilised to carry out commissions of inquiry relating to politicians and public officials who are alleged to have breached the trust bestowed on them by the South African public by acting corruptly and in a manner that infringes the right of the community to basic services? If the establishment of commissions of inquiry results in the prosecution and recovery of funds looted from the state coffers it is logical to set them up. In the event the establishment of commissions of inquiry yields to truncated prosecution, it is contended that the public is not likely to receive justice. The public, will, in fact suffer double prejudice by reason that funds would have been diverted to politicians and public representatives in a corrupt manner and the taxpayers’ money would have to be utilised to cover the expenses of the commissions of inquiry. Secondly, given the low rate of prosecution of corruption committed by public servants and politicians, does the law offer recourse that vindicates human and fundamental rights that may result in politicians and public officials convicted of corruption being held accountable?

The law does provide for a way of vindicating human and fundamental rights and of reinforcing responsibility in a nascent democratic society. Corruption committed by politicians and public officials results in the looting of public funds that are earmarked for provision of basic services such as access to housing, healthcare, and water and sanitation. The South African society has the right to basic services and the government has the duty to ensure that communities have access to basic services. However, provision of basic services to the public is hindered by corruption committed among others by politicians and public representatives. For every infringement of rights, the law must offer recourse. Private prosecution, this contribution argues, is the only recourse that the public may resort to in vindicating human and fundamental rights and in reinforcing accountability in a fledgling democracy.

The right of a private person to institute private prosecution emanates from a violation of a legal right and can only be conferred by the issuing of a certificate not to prosecute by the DPP. This contribution maintains that the institution of private prosecution against an offender that the DPP has declined to prosecute does not amount to parallel prosecution nor to abrogation of prosecutorial functions.

The substantial and peculiar interest requirement requires a critical examination with a view of determining whether a private individual may prosecute a politician or a public servant for corruption. The substantial and peculiar requirement lies at the heart of private prosecution and is imperative for conferment of legal standing to a private prosecutor. The requirement has been challenged and elaborated on in various cases. For purposes of this contribution, selected case law examples will be discussed to illustrate how courts interpret the substantial and peculiar interest requirement.

**3.1 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development***

The substantial and peculiar requirement was challenged in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*.[[52]](#footnote-52) The challenge was to the effect that section 7(1)(*a*) of the CPA is unconstitutional in so far as it does not permit a juristic person to institute private prosecution. The applicant contended that there is no rational basis for treating juristic persons differently to natural persons. The constitutional validity of section 7(1)(*a*) of the CPA was dismissed by the High Court. The High Court found that in terms of sections 7 and 8[[53]](#footnote-53) of the CPA, only natural persons and public bodies have the power to privately prosecute. It concluded that although the exclusion of juristic persons amounts to discrimination, such discrimination is not unfair because it serves a legitimate government purpose, underpinned by a “rational relationship between this purpose and the differentiation”.

The NSPCA appealed to the Supreme Court of Appeal (SCA). The SCA considered whether the impugned provision is rationally connected to regulating private prosecutions, and whether there is an acceptable reason for limiting access to private prosecutions. It held that the policy of limiting private prosecutions to certain kinds of cases “cannot be faulted” and upheld the constitutional validity of section 7(1)(*a*) of the CPA.

The NSPCA’s appeal was accordingly dismissed, it then appealed to the Constitutional Court. The Constitutional Court declared that the NSPCA has the statutory power of private prosecution conferred on it by section 6(2)(*e*) of the Societies for the Prevention of Cruelty to Animals Act (SPCAA)[[54]](#footnote-54) read with section 8 of the CPA. Whilst it is trite that the NSPCA is a juristic person, it is not constituted as a legal person[[55]](#footnote-55) such as a company or close corporation. The NSPCA is a voluntary organisation like a country club, political party, sport club or residents’ association. It is statutorily regulated over and above its voluntary association premise.[[56]](#footnote-56)

The author argues that the challenge by the NSPCAon the constitutional validity of the substantial and peculiar interest requirement was flawed. Section 7(1)(*a*) of the CPA refers to a private person and not to a legal or juristic person. Had the intention of the legislature been to include a legal or juristic person, section 7(1)(*a*) of the CPA would have read

any private person including any company incorporated or registered as such under any law, 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.[[57]](#footnote-57)

The NSPCA, as a legal person,has the authority to institute private prosecution in terms of section 8 of the CPA. It could therefore not assign itself powers that the legislature had ordained to explicitly apply to a human being. Section 1(*iv*) of the SPCAA makes it clear that, whilst the NSPCA is incorporated pursuant to the Companies Act[[58]](#footnote-58) as amended,[[59]](#footnote-59) it is an association not for gain.

**3.2 *Phillips v Botha***

Private prosecution is susceptible to abuse, and courts have a duty to secure that it is instituted to vindicate fundamental rights and not as punishment or revenge. In *Phillips* v *Botha*,[[60]](#footnote-60)the SCA had to decide whetherthe appellant had a substantial and a peculiar interest to prosecute the respondent privately for fraud and whether he suffered any injury arising from illegal gambling with the respondent. The respondent was acquitted and discharged in the private prosecution brought against him by the appellant. The appellant then lodged an appeal to the SCA against the acquittal and discharge of the respondent. The charge of fraud in respect of which the respondent was acquitted pertained to gambling chips to the value of R105 000 that the appellant offered to the respondent against cheques that were drawn to him by the respondent.The cheques were dishonoured after the respondent had instructed his bank not to effect payment.

The SCA held that the appellant had a substantial and peculiar interest to institute private prosecution against the respondent. However, the appellant failed to prove that he suffered injury because of the dishonouring of the cheques.[[61]](#footnote-61) The chips had no inherent value, their value would be determined by the result of the game. By reason that the gambling was illegal and unenforceable, the court pointed out that “where no civil redress exists the right to private prosecution would cease”*.*[[62]](#footnote-62)Inthat case the appellant was found to have embarked on the private prosecution not to extract money from the respondent, but in order to “teach the respondent a lesson”.[[63]](#footnote-63)

**3.3 *Tsholo v Kgafela***

In *Tsholo v Kgafela*,[[64]](#footnote-64)the applicant and the respondent were accomplices in the murder of the ex-husband of the respondent. During the trial the applicant turned state witness, however he testified against the respondent in respect of sentence only because the respondent pleaded guilty to the charge. The respondent then instituted private prosecution against the applicant. She contended that the applicant should have been tried for the murder of her erstwhile husband. The applicant then brought an application permanently interdicting the respondent from proceeding with private prosecution.

The court found that the private prosecution brought by the respondent against the applicant amounted to an abuse of the court process.[[65]](#footnote-65) The respondent was divorced from her former husband and furthermore the respondent had hired the applicant to kill her ex-husband. The respondent had no substantial and peculiar interests to institute private prosecution against the applicant. An order for a permanent interdict against the private prosecution was granted. The court further observed that the respondent could not be said to have a substantial and peculiar interest in respect of the death of her former husband that she was an accomplice to.[[66]](#footnote-66)

**3.4 *Nandulal v The Director of Prosecutions***

In *Nandulal* v *The Director of Prosecutions, KZN,*[[67]](#footnote-67) the respondent sought to prosecute the appellant privately on charges of defeating the ends of justice and of making a false statement. The respondent was issued with a certificate not to prosecute after the DPP had a protracted attempt to prosecute the appellant,[[68]](#footnote-68) the summons was issued in an irregular manner and security for costs was not furnished. The appellant appealed against the issue of the certificate not to prosecute and against non-compliance with the other jurisdictional requirements. In upholding the appeal, the court found that the private prosecutor had a peculiar but not a substantial interest in the matter. He did not show that he had suffered any personal injury. He failed to discharge the onus of proving that his alleged interest and injury were such that they would result in the conviction of the applicant.[[69]](#footnote-69)

**3.5 *Van Deventer v Reichenberg***

In*Van Deventer v Reichenberg,*[[70]](#footnote-70) the respondent instituted a private prosecution against the applicant, a Supreme Court judge, for allegedly defeating the ends of justice because he had set aside the respondent's earlier private prosecution. In making an order for the stay of prosecution, the court held that it would be contrary to public policy for a judge to be cross-examined on a case he had presided over and that the respondent had abused court process by instituting private prosecution.

The cases examined above firstly demonstrate that private prosecution pursuant to section 7(1)(*a*) of the CPA is recourse that can be availed to by a private individual to the exclusion of a legal or juristic person. Secondly, they show that courts remain custodians of the private prosecution system by ensuring that it is not abused. In *NSPCA*, the court pointed out that although section 7(1)(*a*) of the CPA may appear to discriminate against legal or juristic persons, such differentiation is justified. The author argues that the issue of discrimination should not have been considered. Legal or juristic persons have the authority to bring private prosecution in accord with section 8 of the CPA. A legal or juristic person cannot abrogate functions that are exclusively ordained for a private individual. In *Phillips,* *Tsholo* and *Van Deventer*, the courts were able to thwart the abuse of the private prosecution machinery. In *Phillips*, private prosecution was instituted to “teach the respondent a lesson” for “dishonouring” an illegal gambling transaction, whilst in *Van Deventer*, it was brought because the respondent had set aside an earlier private prosecution by the applicant. In *Tsholo*, private prosecution was instituted because an accomplice to murder was indemnified from prosecution, and in *Nandulal,* the applicant was found to have had a peculiar interest in the case but unable to prove that he suffered an injury because of the act that gave rise to private prosecution.

## **4. PRIVATE PROSECUTION AS A MEANS OF COMBATTING CORRUPTION AND REINFORCING ACCOUNTABILITY**

Realisation of human rights is cardinal in a democratic society and Landman[[71]](#footnote-71) correctly points out that “human beings are entitled to economic and social structures that afford them with access to means of subsistence”. Provision of basic services such as access to water, social security, and electricity are tied to the implementation of human rights,[[72]](#footnote-72) however, corruption has an adverse impact on rendering of basic services to communities.[[73]](#footnote-73) The South African Human Rights Commission, in 2014 and 2015, reported a steady increase in the number of human rights’ complaints related to service delivery.[[74]](#footnote-74) According to the Institute of Justice and Reconciliation barometer many South Africans believe that corruption in the public sector is getting worse and it estimates that around R 700 billion could have been lost through corruption since 1994.[[75]](#footnote-75)

This contribution argues that the high incidence of corruption committed, amongst others, by politicians and civil servants as well as the truncated rate of prosecution creates the opportunity and need that private prosecution be utilised to hold politicians and public servants accountable. Ngidi[[76]](#footnote-76) posits that corruption places strain on the government’s mandate of service delivery. Lack of the will to prosecute corruption may prompt civilians to take the law into their own hands, not as a way of seeking vengeance but as a method of pursuing justice which must not only be done but must be seen to be done. For every violation of peoples’ rights the law must provide a recourse. Private prosecution, as opposed to review of the decision not to prosecute, secures participation of victims in the criminal justice system. This contribution holds that the imbalance resultant from the DPP’s decision not to prosecute then becomes settled.

## **4.1 Advantages and disadvantages of private prosecution**

For private prosecution to be an effective and adequate tool in combatting and eradicating corruption by public office bearers and politicians, it is significant to have regard to its advantages and disadvantages. Private prosecution remains how protection of human rights may be vindicated and accountability for use of public funds may be attained. For purpose of this contribution, the principal advantages as summarised by Beech[[77]](#footnote-77) bears reference:

[I]t ensures that victims of offences or persons who prove substantial and peculiar interests participate in the justice system. It achieves the imbalance arising from the decision not to prosecute; it offers expedient justice. It is a process that must be done within three months of the issue of the certificate not to prosecute; and it saves resources. Whilst in exceptional circumstances, the private prosecutor may have to carry out an investigation, evidence gathered by investigating agencies is used in a private prosecution.

Beech[[78]](#footnote-78) elaborates further on the disadvantages:

[I]t may destruct efforts to bolster the legitimacy and efficacy of state prosecution. Instead of focusing on efforts to improve the prosecutions operations by the state, a robust private prosecution regime can divert scarce resources, attention, and talent to the private sector; may result in a parallel prosecution that might distort decision making in the NPA. The investigation may be shoddy and decisions whether to prosecute may not be based on evidence available but on the understanding that private prosecution may be instituted; and it is open to abuse and politicisation, especially on corruption charges.

Even though the benefits of private prosecution outweigh its risks, it is critical that perils associated with private prosecution be minimised. Of the three risks identified by Beech, only the last risk calls for minimisation. There is no documented evidence that proves that private prosecution threatens the legitimacy and efficacy of the prosecuting authority and further that it is a parallel process of prosecution. As already discussed at length, private prosecution can only be instituted by a person who has a substantial and peculiar interest in a case and who complies with the requirements to be issued with the certificate not to prosecute. It is a recourse that becomes available only when the NPA has declined to prosecute an offender. It is therefore not possible that private prosecution may be instituted whilst an offender is prosecuted by the NPA on a same matter. It is intended to achieve justice and not to punish an offender whom the NPA has declined to prosecute.

Abuse and politicisation of private prosecution is the only possible risk that may require minimisation. Emergence of institutes such as Afriforum,[[79]](#footnote-79) a civil rights watchdog with a private prosecution unit, may result in the abuse and or politicisation of the private prosecution machinery.[[80]](#footnote-80) That may be the case when private prosecution is pursued in respect of certain individuals to the exclusion of others along political allegiance. However, the risk of abusing and politicising private prosecution remains minimal.

The substantial and peculiar interest and individually suffering an injury consequent to an act that gives rise to an interest in a case, and the oversight of the DPP and courts over private prosecution serve as safety valves. Even if civil rights groups, such as Afriforum, intend pursuing private prosecution along political lines, they will not be able to do so. The certificate not to prosecute that among others enables an individual to bring private prosecution is issued to the individual concerned and not to an institution. It is the affected individual who appoints a legal representative to assist him or her with private prosecution. A legal representative appointed cannot therefore continue with private prosecution when the individual with a substantial and peculiar interest resolves to withdraw private prosecution.

As of December 2019, Afriforum withdrew its first case of private prosecution against a prominent businessman which the DPP declined to prosecute for rape of his three-year-old granddaughter.[[81]](#footnote-81) The rationale behind the withdrawal of private prosecution was that the girl’s mother had indicated her intention of not pursuing private prosecution against the daughter’s grandfather any further.

## **4.2 NPA’s oversight over private prosecution**

Private prosecution is conducted under the watch of the DPP and of the courts. The DPP may intervene in private prosecution pursuant to section 13 of the CPA[[82]](#footnote-82) and a court may interdict private prosecution by ordering permanent stay of private prosecution when it is satisfied that such private prosecution was brought for a reason other than securing justice. To argue that private prosecution is a parallel process is to deny that an aggrieved person has legal recourse against the DPP’s decision not to prosecute.

Private prosecution as sanctioned by the CPA resonates with section 9(1) of the Constitution which guarantees to everyone the right to equality before the law and the right to protection and benefit of the law. Private prosecution remains a tool for vindicating fundamental rights in a nascent democracy.

Prevention and combatting of corruption and related corrupt activities is a responsibility of states, requiring mutual cooperation, with support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community based organisations, if their efforts in this area are to be efficient and effective.[[83]](#footnote-83) The apparent inability of the NPA to prosecute corruption and corrupt activities efficiently and effectively creates the platform for private prosecution to be utilised to assert fundamental rights in a nascent democracy.[[84]](#footnote-84) Among incidence of corruption where no politician or civil servant has been prosecuted is corruption relating to the Estina Dairy Farm in Vrede in Free State,[[85]](#footnote-85) Passenger Rail Agency of South Africa,[[86]](#footnote-86) Eskom,[[87]](#footnote-87) Denel,[[88]](#footnote-88) South African Broadcasting Corporation[[89]](#footnote-89) and South African Airways.[[90]](#footnote-90) The cost of corruption is not quantifiable and the most affected sector of society are residents and citizens.[[91]](#footnote-91) Grand scale corruption by politicians and public office bearers, even during the subsistence of the Covid-19 pandemic, among others, undermines the government’s *Batho Pele*[[92]](#footnote-92) policy. Principle 8 of the *Batho Pele* policy declares that there must be “value for money”.[[93]](#footnote-93) “Value for money”, in the context of *Batho Pele* means that, among others, taxpayers must be provided with services by the government.

The only hope that ordinary civilians have is that perpetrators of corruption will be prosecuted, convicted and the assets acquired through corruption forfeited to the state. However sporadic prosecution[[94]](#footnote-94) despite its prevalence[[95]](#footnote-95) amid availability of evidence to secure convictions, does not inspire such hope in ordinary civilians. In view of the truncated rate of prosecution of corruption by politicians and civil servants, private prosecution remains the only means of vindicating fundamental rights and of holding, among others, politicians, and civil servants accountable for corruption.

The substantial and peculiar interest requirement that enables a person to prosecute privately is not dependent on family relations. A private individual who can prove, in the context of this contribution, that because of an act or acts of corruption, he or she has suffered an injury qualifies to bring private prosecution. The harm that ordinary civilians experience on daily basis due to corruption by civil servants and politicians remains immeasurable. For the daily lives of humans to improve, it is fundamental that their rights be protected, respected, and fulfilled in a democratic society and not to be impeded by corruption.

**5. CONCLUSION**

This contribution has been able to allude to the grand scale corruption committed by, among others, civil servants and politicians in almost all tiers of government, state owned enterprises and government departments. It has demonstrated that notwithstanding the high incidence of corruption by public officials and politicians, the rate of prosecution remains low. It has further been able to validate that corruption infringes fundamental rights that the state has the duty to protect, respect and fulfil. Corruption impedes the government’s provision of basic services such as access to housing, water, electricity, and social security. In the event the DPP has declined to prosecute civil servants and politicians for corruption, private prosecution must be utilised to assert the human rights that are intruded by corrupt activities. The law must provide recourse in respect of infringement of rights and the obligations arising from ratification of international instruments on prevention and combatting of corruption must be honoured. Preventing and combatting corruption is not the responsibility of the state only. Civil societies and non-governmental organisations also have a role to play in preventing and combatting corruption.

Section 7(1)(*a*) of the CPA permits private prosecution by a person who proves a substantial and peculiar interest and who has individually suffered harm or a loss consequent to the act that gives rise to the substantial interest. Whilst the substantial and peculiar interest requirement and injury sustained individually excludes legal persons such as companies and voluntary associations from instituting private prosecution, it does not exclude civil society and communities from bringing private prosecution. The PRECCA encourages the involvement of civil societies and communities in preventing and combatting corruption. To the extent that civil societies and communities do not institute private prosecution in the public interest as private persons who may adversely be affected by corruption, private prosecution remains the legal recourse to ensure that corrupt public officials are not only prosecuted but that assets they have acquired through corruption and corrupt activities are forfeited to the state.

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2. Transparency International “What is Corruption”, available at [https://www.transparency.org/what-is-corruption (visited](https://www.transparency.org/what-is-corruption.%20%28visited) 4 August 2024). [↑](#footnote-ref-2)
3. Institute of Business Ethics – IBE “Anti-Bribery & Corruption”, available at https://www.ibe.org.uk/knowledge-hub/anti-bribery-corruption.html (visited 15 December 2024). [↑](#footnote-ref-3)
4. Snyman CR (2014) *Criminal Law* 6th ed LexisNexis at 401. [↑](#footnote-ref-4)
5. Foreword 1 and 2 of the UN General Assembly (2003) *United Nations Convention against Corruption* UN Doc A/58/422 (adopted 31 October 2003, entered into force 14 December 2005) (UNCAC). [↑](#footnote-ref-5)
6. UNCAC; African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006, South Africa signatory since 11 November 2005); OECD (2024) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* UN Doc OECD/LEGAL/0293 (adopted 17 December 1997 entered into force 1998, South Africa signatory since 18 August 2007). [↑](#footnote-ref-6)
7. Prevention and Combating of Corrupt Activities Act 12 of 2004. [↑](#footnote-ref-7)
8. The Law Dictionary “Definition of Corrupt”, available at [https://dictionary.thelaw.com/corruption/ (visited](https://dictionary.thelaw.com/corruption/.%28visited) 6 August 2024). This is in light of the fact that different definitions may be offered. The author by design, adopts this definition. [↑](#footnote-ref-8)
9. Sec 4 of PRECCA details offences in respect of corrupt activities relating to public officers. (1) Any- (a) public officer who, directly or indirectly, accepts or agrees or offer to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, to act, personally or by influencing another person so to act, in a manner – (i) that amounts to the – (aa) illegal, dishonest, unauthorized, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; (ii) that amounts to – (aa) the abuse of position of authority; (bb) a breach of trust; or (cc) the violation of a legal duty or a set of rules; (iii) designed to achieve an unjust result; or (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public officers. [↑](#footnote-ref-9)
10. Corruptie.org “What is Corruption?”, available at <http://www.corruptie.org/en/corruption/what-is->corruption/ (visited 6 August 2024). [↑](#footnote-ref-10)
11. Sec 59(2) states: “A private prosecution in terms of s 7 of the CPA may not be instituted against a child in respect of whom the matter has been diverted in terms of this Act”. [↑](#footnote-ref-11)
12. Child Justice Act 78 of 2008. [↑](#footnote-ref-12)
13. *Groenewoud and Colyn v Innesdale Municipality* 1915 TPD 413. [↑](#footnote-ref-13)
14. Criminal Procedure Act 51 of 1977. [↑](#footnote-ref-14)
15. *Rapholo v State President* 1993 (1) SA 680 (T) 688 – 689. Private prosecution is a means of ensuring justice and preventing people from taking the law into their own hands. [↑](#footnote-ref-15)
16. *Fourie v Resident Magistrate Worcester* 1897 (14) SC 54 at 57 it was held that private prosecution is an unusual departure from public prosecution. [↑](#footnote-ref-16)
17. The requirements are that: (a) substantial and peculiar interest in the case must be established; (b) private prosecution must be carried out in the name of the private prosecutor; (c) the DPP must have issued a certificate not to prosecute; (d) it must be conducted within three months of the issue of the certificate not to prosecute; and (e) the private prosecutor is liable for costs that may be incurred by the accused in attending to the private prosecution. [↑](#footnote-ref-17)
18. National Environmental Management Act 107 of 1998. [↑](#footnote-ref-18)
19. Extension of Security Tenure Act 62 of 1997. [↑](#footnote-ref-19)
20. Unlawful Occupation of Land Act 9 of 1998. [↑](#footnote-ref-20)
21. Snyman (2014) at 401. [↑](#footnote-ref-21)
22. Attorney-General v Van der Merwe and Bornmann 1946 OPD 197. [↑](#footnote-ref-22)
23. At 201. [↑](#footnote-ref-23)
24. Sec 179(1) of the Constitution. [↑](#footnote-ref-24)
25. Sec 179(2) of the Constitution. [↑](#footnote-ref-25)
26. National Prosecuting Authority Act 32 of 1998. [↑](#footnote-ref-26)
27. National Prosecuting Authority, available at https://www.npa.gov.za (visited 6 August 2024). [↑](#footnote-ref-27)
28. Final as revised on June 2013 and 27 November 2014. [↑](#footnote-ref-28)
29. Joubert JJ (2016) *Criminal Procedure Handbook* 12th ed Juta at 73. [↑](#footnote-ref-29)
30. Joubert (2016) at 74. [↑](#footnote-ref-30)
31. Joubert (2016) at 74. [↑](#footnote-ref-31)
32. Joubert (2016) at 74. [↑](#footnote-ref-32)
33. National Prosecuting Authority, available at https://www.npa.gov.za (visited 5 August 2024). [↑](#footnote-ref-33)
34. Declining to prosecute an offender is not synonymous with withdrawal of a charge. In withdrawing a charge, a public prosecutor does not require the authority of the DPP and the charge may be reinstated at a later stage. [↑](#footnote-ref-34)
35. The DPP may review a decision to prosecute or not to prosecute in terms of sec 179(5)(d) of the Constitution. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) also allows for review of a decision made by an administrative body. Sec 6(1) of PAJA states that “any person may institute proceedings in a court or a tribunal for the judicial review of administrative action”. [↑](#footnote-ref-35)
36. Case No 19577/09 NGHC. Review applications are clear attempts to force a public prosecution by those who lack the necessary interest to bring a private prosecution. [↑](#footnote-ref-36)
37. *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA). The NPA was compelled to reinstate charges after it had withdrawn them and had not issued the certificate not to prosecute. In this case Freedom Under Law challenged the NPA’s decision to withdraw corruption charges against the then president of the Republic of South Africa, Jacob Zuma. Though this case was concerned with withdrawal of charges, it has relevance to vindication of fundamental rights through holding public office bearers accountable. The charges of corruption were eventually reinstated. [↑](#footnote-ref-37)
38. *Mullins and Meyer v Pearlman* 1917 TPD 639 – 640. [↑](#footnote-ref-38)
39. *Ellis v Visser* 1954 (2) SA 431 (T). [↑](#footnote-ref-39)
40. The Free Dictionary, available at [https://legal-dictionary.thefreedictionary.com/substantial (visited](https://legal-dictionary.thefreedictionary.com/substantial.%28visited) 5 August 2024). [↑](#footnote-ref-40)
41. US Legal “Substantial Interest Law and Legal Definition”, available at <https://definitions.uslegal.com/s/substantial-interest/> (visited 4 August 2024). [↑](#footnote-ref-41)
42. Sec 3(A) of the Prosecution Policy (Final as revised on June 2013 and 27 November 2014). [↑](#footnote-ref-42)
43. *Nundalal v Director of Public Prosecutions* (AR723/2014) [2015] ZAKZPHC 25 (8 May 2015) at 48. [↑](#footnote-ref-43)
44. Reverso (2023) “Peculiar Interest Meaning, Peculiar Interest Definition”, available at [https://dictionary.reverso.net/english-cobuild/peculiar+interest](https://dictionary.reverso.net/english-cobuild/peculiar%2Binterest) (visited 4 August 2024). [↑](#footnote-ref-44)
45. Collins Dictionary, available at <https://www.collinsdictionary.com/dictionary/english/peculiar> (visited 4 August 2024). See also Dictionary.com “Peculiar”, available at <https://www.dictionary.com/browse/peculiar> (visited 6 August 2024). [↑](#footnote-ref-45)
46. *Telecel Zimbabwe (Private) Limited v Attorney- General of Zimbabwe N.O.* (Civil Appeal SC 254 of 2011; SC 1 of 2014) [2014] ZWSC 1 (27 January 2014) at 6. See also *Polovin v The Director of Public Prosecutions* (1230/2022) [2024] ZASCA 140 (17 October 2024). [↑](#footnote-ref-46)
47. *Bothma v Els* 2010 (2) SA 622 (CC). Private prosecution is a process that vindicates human rights. [↑](#footnote-ref-47)
48. *Singh v Minister of Justice* 2013 (12) BBLR 1155 (LAC). [↑](#footnote-ref-48)
49. Judicial Commission of Inquiry into Allegations of State Capture, available at <https://www.statecapture.org.za/site/hearings/date/2021/2/25> (visited 6 August 2024). [↑](#footnote-ref-49)
50. Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence, or Intimidation into the Department of Correctional Services Appointed by Order of the President of the Republic of South Africa in terms of Proclamation 135 of 2001, as amended, available at <https://www.gov.za/sites/default/files/gcis_document/201409/jalicommfull0.pdf> (visited 6 August 2024). [↑](#footnote-ref-50)
51. *Mail & Guardian* “Seriti Commission”, available at <https://mg.co.za/tag/seriti-commission-of-inquiry/> (visited 6 August 2024). [↑](#footnote-ref-51)
52. *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (29677/2013) [2014] ZAGPPHC 763. [↑](#footnote-ref-52)
53. Sec 8 of the CPA makes provision that: (1) Any body on which or person on 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 attorney-general concerned and after the attorney-general 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. (3) An attorney-general 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 attorney-general, and that the attorney-general 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. [↑](#footnote-ref-53)
54. Prevention of Cruelty to Animals Act 169 of 1993. [↑](#footnote-ref-54)
55. Dictionary.com “Voluntary Association”, available at [https://www.dictionary.com/browse/voluntary-association (visited](https://www.dictionary.com/browse/voluntary-association%20%28visited) 6 August 2024). [↑](#footnote-ref-55)
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57. *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A). [↑](#footnote-ref-57)
58. Companies Act 61 of 1973. [↑](#footnote-ref-58)
59. Companies (Amendment) Act 71 of 2008. [↑](#footnote-ref-59)
60. *Phillips v Botha* 1999 (2) SA 555 (SCA). [↑](#footnote-ref-60)
61. *Phillips* at 19 – 20. [↑](#footnote-ref-61)
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67. *Nandulal v The Director of Prosecutions* (AR723/2014) [2015] ZAKZPHC 25 (8 May 2015). [↑](#footnote-ref-67)
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82. Such as when an accused pleads guilty. [↑](#footnote-ref-82)
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