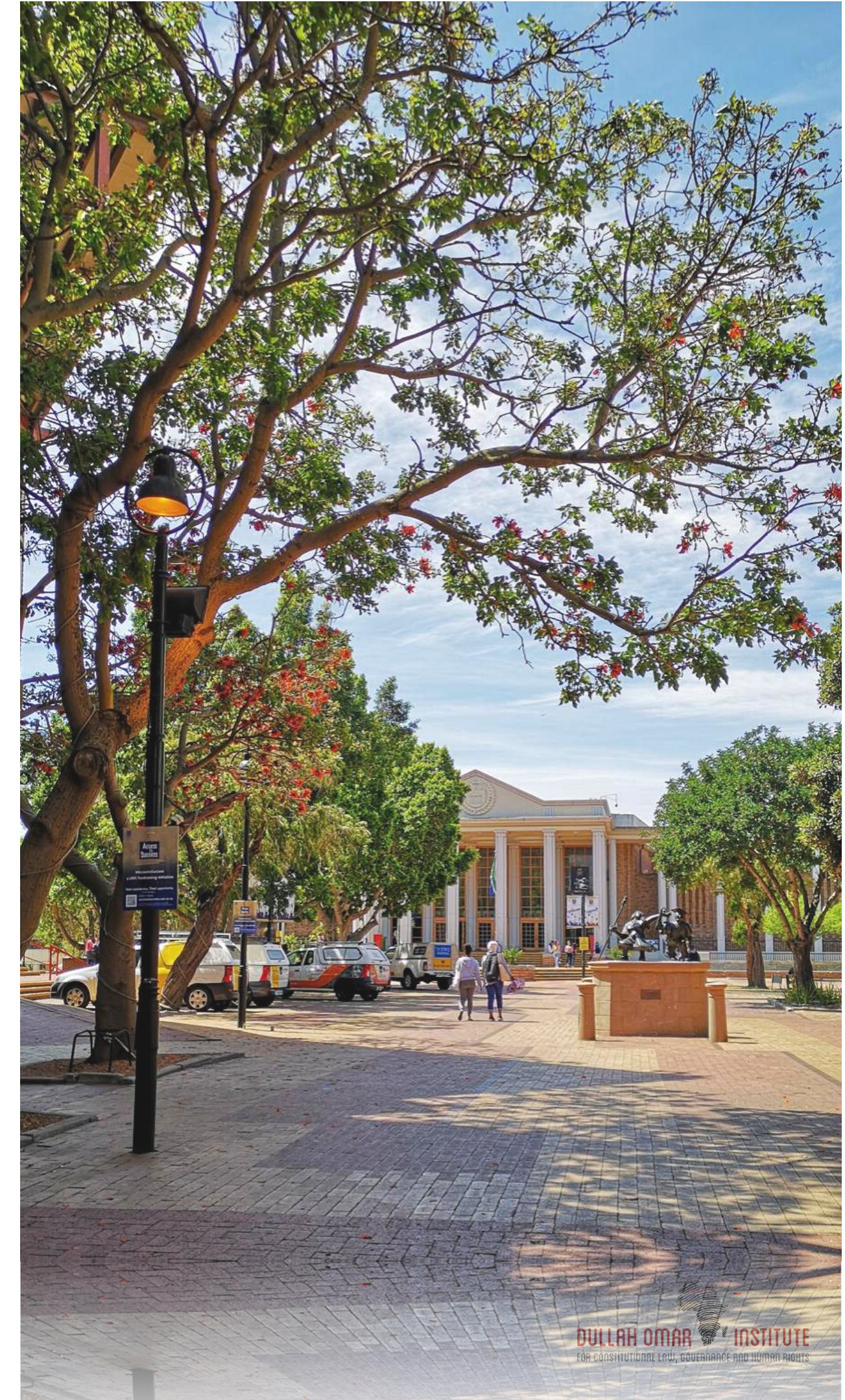


# Prosecutorial independence & prosecuting corruption

**Dr Jean Redpath**

Senior Researcher – Dullah Omar Institute







# The importance of criminal law

- Greg Lamond: criminal law *“serves an important condemnatory function in social life – it marks out some behaviour as especially reprehensible, so that the machinery of state needs to be mobilised against it.”*
- Mark Dsouza: a conviction communicates to the public that the conduct is criminal *“with all the socially expressive content of the term.”*
- While civil law can result in redress, only a criminal conviction serves the public function of social condemnation and the consequences which flow from that.
- Crimes are prosecuted **by the state** because the harms caused by a crime extend beyond a particular victim or the direct harm caused to the victim.
- The condemnatory function of prosecution is undermined if:
  - prosecutions are selective. This occurs when people guilty of equally condemnatory acts are not equally subject to prosecution.
  - the process of prosecution is actually or perceived to be used illegitimately where the accused in fact has no case to answer.



# South Africa's prosecuting authority

- South Africa's Constitution requires that national legislation must ensure that the National Prosecuting Authority (NPA) is able to prosecute "*without fear, favour or prejudice*" i.e. is independent
- While the NPA Act merely repeats these words, this is not enough to ensure independence
- It has been evident that the legislation has not, in practice, resulted in corrupt persons at high levels of government being prosecuted, particularly in the depths of the state capture era (2008-2016)
- Even now, while some investigations and prosecutions are in progress, there have been too few successful convictions
- With the legislative environment largely unchanged, practices of the current era, such as transparent appointment of the NDPP, somewhat greater transparency, and hiring of some additional skills, are not *required* by law and may be jettisoned in the future
- In what ways is the legislation lacking, and how can we better equip the NPA for the future?
- For evidence and indications we look to two cross-country studies.



# International quantitative literature (1)

- **Anne van Aaken et. al. (2010)**
- First cross-country study of the effects of *prosecutorial independence* on *public-sector corruption*
- Tests the following theory:
  - 1) corruption committed by government officials more likely to be prosecuted if the prosecutors enjoy independence from influence by the government
  - 2) non-prosecution of corruption crimes increases the attractiveness of committing them
  - 3) clear association expected between high levels of prosecutorial independence and low levels of public-sector corruption
- Unsurprisingly, the regressions do show that *de facto* **independence of prosecution agencies robustly reduces corruption of officials**
- However, *de facto* independence is *negatively* correlated with *de jure* independence



# International quantitative literature (2)

- **Stefan Voigt and Alexander Wulf (2017)**
  - Ask the question of the data, what makes prosecutors independent?
  - **No impact** detectable in data:
    - *de jure* independence
    - degree of federalism
    - per capita income
    - level of democratization
    - ethnic, religious and linguistic fractionalization
  - **Key determinants conducive to a high level of de facto independence :**
    - common law as legal origin
    - a free press
    - regulations granting Parliamentarians immunity from prosecution.
  - Independence is not a **sufficient** condition for the prosecution of corruption
  - **A prosecutor who is independent of the state may still be susceptible to incompetence, bribery or malicious acts**



# Common law as legal origin

- Voight and Wulf merely comment this is “not amenable to policy considerations”
- Yet prosecution agencies emanating from a common law tradition tend to share aspects of policy which are amenable to greater independence, greater competence, and greater transparency, which may support the prosecution of corruption. These are:
  - (1) Prosecution structured to separate decision-making from actual prosecution (split-bar replicated in prosecution) and/or provision for a non-state prosecutor in political matters (“special counsel”)
  - (2) Prosecutors are required to be qualified legal professionals admitted to practice and subject to professional control
  - (3) Limited security of tenure for sub-national jurisdictional prosecution leadership (“DPP”s), typically 5, 7 or 10 years.



# Free Press (1)

- Voight and Wulf argue countries should aim to implement transparency policies for all institutions in the criminal justice value chain, and particularly the prosecution.
- They theorise that press freedom works to support prosecutorial independence, because of the political costs when the failure to prosecute wrongdoers or abuse of the prosecutorial process is exposed in the press.
- Accordingly, the authors argue that comprehensive and prompt disclosure of information relating to the prosecution or dismissal of cases with a political dimension is needed.
- This must include transparency as to both the policy and directives applied.





## Free Press (2)

- A prosecution service unwilling or unable to prosecute wrongdoers or which is abusing the process will not voluntarily seek transparency unless compelled to by legislation or oversight institutions, to avoid such political costs.
- The will to implement transparency depends to a great degree on a confidence that such transparency will not have political costs.
- Compulsory transparency is likely to be the last of any reforms to be adopted, unless the prosecution is already making good-faith decisions and progress, in which case a lack of transparency is counter-productive and there is every incentive to be transparent.





# Immunity from prosecution (1)

- Voight and Wulf consider immunity from prosecution for Parliamentarians important in preventing *misuse of the prosecution against political rivals of the government of the day*
- They argue that such immunity would protect the prosecution from interference by government
- Such immunity is not useful if it is Parliamentarians (from all political sides) who need to be prosecuted
- In Commonwealth countries there tends to be only limited immunity (Parliamentary privilege) relating to things said in Parliament
- In many countries there is some degree of immunity for executive government for “official acts”
- Some of the most corrupt countries have blanket immunity – their prosecution may be free from interference, but this is of little use in preventing high-level corruption as they are barred from prosecuting Presidents etc.



# Immunity from prosecution (2)

- In South Africa there has been *de facto* immunity for some, achieved not always by direct interference as measured in the data but by weakening the prosecution through
  - 1) appointments to senior prosecution roles without a transparent process by the President alone
  - 2) the botched OSD process which kept salaries low and created conflict – half the posts at level of chief prosecutor and DDP as a result vacant; salary increments in the gift of the Minister alone
  - 3) hiring of additional, needed skills on *ad hoc* basis dependent on Minister (s38)



# Conclusion

- **South Africa's legislation does not ensure that the prosecution is able to prosecute without fear, favour or prejudiced, as required by the Constitution**
- Financial independence – a separate budget for the NPA apart from that of the Department of Justice – will be inadequate and possibly irrelevant to independence and the prosecution of corruption if the rules around spending of the budget are unchanged i.e. the hiring of outside counsel remains *ad hoc* and it and the setting of salaries remains effectively in the control of the Minister.
- Furthermore, if the President alone continues to appoint the top 14 posts in the NPA, with only the NDPP on a limited term of 10 years, stagnation in the NPA will continue.





# Recommendations

- Legislative amendments needed:
  - Transparency in the appointment of the most senior members of the NPA necessary.
  - The limiting of terms of the DPPs is also crucial to ensuring not only independence, but dynamism and career progression.
  - Legal requirement for prosecutors to be admitted legal practitioners; transitional provisions should assist current employees to qualify.
  - A split-bar system with a pre-approved panel of counsel with certain specialities is likely to vastly increase decisions to prosecute, and will render s38 unnecessary.
  - The way in which salaries are set should be changed.
  - Transparency requirements regarding reporting should be legislated in detailed fashion and not left up to the decision of whomever is the incumbent NDPP.
    - Transparency should relate to both policy and directives, as well as decision-making in terms of that policy.