PRE- AND POST-TRIAL EQUALITY IN CRIMINAL JUSTICE IN THE CONTEXT OF THE SEPARATION OF POWERS

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SUMMARY

The previous Westminster criminal justice system entailed a different kind of separation of powers insofar as it concerns the role of state prosecutors. In the Westminster system prosecutors are part of the executive branch, whereas they were a split-off from the judiciary in constitutional states and function like a *de facto* second organ of the third branch of state power. Currently executive interference in state prosecutions often leads to pre-trial inequality. A further difficulty arises from the unconsidered manner in which the former royal prerogative of pardoning was retained in the Constitution of the Republic of South Africa, 1996. It used to be a royal veto of judicial sentences in the constitutional monarchy of the former Westminster model. Although the corresponding veto of parliamentary legislation by the head of state did not survive into modern times, the pardoning power has not been discontinued. Section 84(2)(j) thus causes an irreconcilable conflict with section 165(5) of the Constitution which guarantees the legally binding force of judicial decisions. It undermines the rule of law and leads to post-trial inequality in the execution of sentences. The parole system, which dates back to 1959, likewise allows the executive to overrule judicial sentences and is in conflict with section 165(5). The perpetuation of the status quo in criminal justice is in effect leading to a re-Westminstering of the constitutional state.

KEYWORDS: prosecutors; nolle prosequi; pre-trial equality; post-trial equality; pardon; parole; administrative act; administration of justice; criminal justice; judicial power; prerogative power

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