

The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases

Jameelah Omar

<https://orcid.org/0000-0002-8901-7321>

University of Cape Town, South Africa

jameelah.omar@uct.ac.za

Abstract

In South Africa, the efficacy of the criminal justice system rests on the ability of the National Prosecuting Authority (NPA) to conduct prosecutions fairly and effectively. This is because it enjoys a monopoly over the prosecution of crime, as it decides which cases will proceed to court. While there is some room for private prosecutions, these are few and far between and do not make a dent in the power of the state to prosecute crime. Political pressure can interfere with effective prosecution. Particularly where an alleged perpetrator is a political figure, there is an incentive to try to influence the head of the prosecuting authority. My suggestion is to establish a special prosecuting office, separate from the normal prosecuting authority, to deal with cases involving members of the executive and the legislature. The purpose is to create a greater measure of independence, although comparative examples demonstrate that such an office too can suffer political interference. Removing political cases from the NPA would also enable the head of the NPA to concentrate on increasing the effectiveness of the prosecuting authority and public confidence in its abilities, without derailing its focus by having to fight for institutional independence.

Keywords: National Prosecuting Authority; institutional independence; political interference with the NPA; National Director of Public Prosecutions

Introduction

The National Prosecuting Authority (NPA) is increasingly on the receiving end of criticism for its failure to prosecute apartheid crimes and, more recently, inertia in pursuing allegations of corruption during the post-1994 period, particularly during former President Jacob Zuma's terms. These issues are currently being aired at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (known as the Zondo Commission). It is important to understand the structure, composition, and accountability mechanisms of the NPA in order to try to track these failures and, hopefully, overcome them.

The NPA is not a fully independent arm of the state. While section 179(4) of the Constitution of the Republic of South Africa, 1996, enjoins the national legislature to enact legislation that ensures the NPA 'exercises its functions without fear, favour or prejudice,' this limited autonomy is circumscribed in a number of ways, including by the Constitution itself. Section 179 of the Constitution does not actually use the word 'independent' in describing the authority of the NPA or in instructing legislation to create a semi-autonomous structure.

Whether this failure to prescribe independence is an oversight or is deliberate is somewhat unclear. What is apparent is that the lack of guarantee of independence has had long-term and calamitous consequences for the NPA and its effective functioning. The role of the National Director of Public Prosecutions (NDPP) and the turbulence in the office have also contributed to the problems in the NPA.

The importance of an independent prosecuting authority must be acknowledged. The NPA, as per its constitutional mandate, is the gatekeeper of criminal matters proceeding to public prosecutions.¹ It enjoys a monopoly over prosecuting offences; however, this is not an absolute monopoly. Private prosecutions are possible, but in terms of sections 7 and 8 of the Criminal Procedure Act 51 of 1977, these can only be instituted through cooperation with the NPA. For section 7 private prosecutions, the NPA must first issue a certificate *nolle prosequi*,² which means that the NPA has concluded its investigations and has decided not to prosecute.³ It can be very expensive to run a private prosecution, as the costs are borne by the individual complainant, and the rules on who has standing to conduct a private prosecution are very strict, reducing the efficacy of private

1 Section 179(2) vests the NPA with authority to conduct prosecutions over all criminal offences.

2 Steph van der Merwe, 'The Prosecution of Crime' in JJ Joubert (ed), *Criminal Procedure Handbook* (Juta 2017) 89.

3 With respect to section 8 private prosecutions, academic commentary argues that these are not true private prosecutions, because they do not involve an individual frustrated by the NPA's decision not to prosecute. Instead, they involve prosecutions by a body given such power through legislation. See Van der Merwe (n 2) 86.

prosecutions if state-led prosecutions are ineffective.⁴ South Africa's criminal justice system is premised on state-led prosecutions. While private prosecutions are permitted to avoid absolute power in the hands of the state, private prosecutions are not a sustainable solution to the NPA's capacity shortcomings.

The NPA's role in the criminal justice system is immense. It is imperative that we ensure effective mechanisms for the NPA that guarantee its accountability but simultaneously protect its independence. These two principles are equally important for the proper functioning of the institution. This article will explain the history that underpins the current structure of the NPA and identify a few of the structural problems that prevent its proper and effective functioning, namely the lack of a clear guarantee of institutional independence, the ambiguous powers vested in the Minister of Justice who is responsible (hereinafter the Minister), and the potential for political interference with the NDPP. Suggestions are made as to how these problems can be remedied or at least mitigated by including some comparator examples from a few other jurisdictions that South Africa could adopt. My suggestion is to establish a separate special prosecuting office that prosecutes political cases—that is, those involving members of the executive (primarily) and the legislature (where necessary).

The article proceeds as follows. The historical events preceding the creation of a single prosecuting authority are described in the next section. This will go some way towards explaining the composition and structure of the NPA post apartheid, which is explored more fully in the third section. In the fourth section, the structural problems that impact on prosecutorial independence are detailed. The fifth section proposes mechanisms to mitigate the structural problems that South Africa is currently experiencing. These mechanisms are drawn from examples in Namibia, Australia, Ghana, and the United States of America, with a view to preventing political interference and generally improving the independence of the NPA. Thereafter, the article briefly concludes.

History of the South African Prosecution Service: From the Union to Apartheid

The prosecuting authority's fight for independence is not a new battle. It has always sought to forge an identity and operate separately from the executive. In South Africa, this is a century-long battle.⁵ The current structure of the NPA, with the centralised

4 Section 15(1) of the Criminal Procedure Act of 1977. Dee Smythe and Jameelah Omar, 'Criminal Procedure' in *LAWSA* (vol 12, 3rd edn, LexisNexis 2020) paras 37–38. According to s 7, standing accrues only to the following individuals: a private person who can prove a substantial and peculiar interest in the matter as a result of an individual harm suffered; a husband, if the alleged victim was his wife; the next of kin of a deceased person alleged to have been killed by the offence in question; and the guardian or curator of an alleged victim placed under their wardship.

5 Martin Schönleich, 'A Story of Trials and Tribulations: The National Prosecuting Authority, 1998–2014' (2014) 50 *SA Crime Quarterly* 5.

power vested in the NDPP, is a reaction to this historical context. The structure of the prosecuting authority (with its positives and drawbacks) must be understood in the context of its transformation through time.⁶

Prior to the democratic elections in 1994, there was no single or unitary prosecuting authority in South Africa. A separate prosecuting authority existed in each of the then four provinces, namely the Cape Province, the Orange Free State, the Transvaal, and Natal, which dated back to the Union of South Africa in 1910.

At the inception of the Union, there was already a convoluted marriage of devolved prosecutorial authority and centralised political overview. The Union of South Africa Act of 1909 (hereinafter the Union Act), specifically vested each provincial Attorney General (AG) with ‘all powers, authorities, and functions’ over prosecutions within the jurisdiction of their province.⁷ At the same time that this devolution of power existed, a new centralised position—that of the Minister—was introduced. Over the next century, power and control over the prosecuting authority oscillated between these two offices. Later, in the democratic transition, this history was to shape the ultimate character of the NPA.

In 1917, the legislature enacted the Criminal Procedure and Evidence Act 31 of 1917. This Act, in section 7(2), cemented the near ‘absolute’ authority of the provincial AGs to ‘manage and control’ the prosecution of crimes and offences in their jurisdiction: ‘This right and duty of prosecution vested in and entrusted to such Attorneys-General or Solicitor-General (as the case may be) is absolutely under his management and control.’ This was perhaps an early high-water mark indicating considerable independence for the AGs, operating within the confines of their provincial authority.

The presence of independent provincial prosecutorial authorities was a by-product of the pre-Union compromise between the British government and the two defeated Boer republics. While the different spheres of national government were split between the capitals of Cape Town, Pretoria, and Bloemfontein, the regional control of prosecutorial authority in each of the previous colonies was essentially maintained.

6 Jens Christian Keuthen, ‘The South African Prosecution Service: Linchpin of the South African Criminal Justice System?’ (LLM minor dissertation, University of Cape Town 2007).

7 Section 139 of the Union Act states: ‘The administration of justice throughout the Union shall be under the control of a minister of State, in whom shall be vested all powers, authorities, and functions which shall at the establishment of the Union be vested in the Attorneys-General of the Colonies ... save and except all powers, authorities, and functions relating to the prosecution of crimes and offences, which shall in each province be vested in an officer to be appointed by the Governor-General in Council, and styled the Attorney-General of the province, who shall also discharge such other duties as may be assigned to him by the Governor-General in Council: Provided that in the province of the Cape of Good Hope the Solicitor-General for the Eastern Districts and the Crown Prosecutor for Griqualand West shall respectively continue to exercise the powers and duties by law vested in them at the time of the establishment of the Union.’

As the central government in the then Union of South Africa began to find its feet and cement its authority, the government started to move steadily towards centralising the prosecuting authority, shifting control away from the provincial bureaucracy and into the hands of the national executive. In 1926, the legislature, in an act that moved in the polar opposite direction of localised control, deleted a significant portion of section 136 of the Union Act.⁸ In its place, the statute sought to shift significant authority to the Minister. The legislature enacted a provision that allocated ‘all powers, authorities and functions’ regarding the prosecution of crimes and offences to the Minister.⁹

This position was revised and moderated in 1935, when the legislature enacted a revised allocation of powers. The powers of the AGs were instead made ‘subject to the control and directions of the Minister.’¹⁰ This watered-down role for the Minister was a patent recognition that the ministry was not institutionally equipped to give effect to this mandate.¹¹

This exact phrase, ‘subject to the control and directions of the Minister,’ was reconfirmed in section 5(3) of the Criminal Procedure Act 56 of 1955 and section 5 of the Criminal Procedure Act of 1977. It became the basis for an ambiguous but growing role for the central government in the operations of the prosecuting authority. What this meant was that there was no tangible separation of powers between the Minister (as a member of the executive) and the AGs. Although ministerial interference was rare,¹² such interference was lawful and thus the potential was created for executive intervention in the prosecuting authority.¹³

This tension between the executive and the provincial AGs was again exacerbated when the legislature enacted the Criminal Procedure Act of 1977. The statute then held, in section 3(5), that ‘[the Minister] may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.’ The AGs and the prosecutorial authority had, in effect, lost their institutional independence. This provision was repealed by section 8(1) of the Attorney-General Act 92 of 1992 (the AG Act); however, as

8 Section 1(1) of the Criminal and Magistrate’s Courts Procedure Amendment Act 39 of 1926.

9 Section 1(3) of the Criminal and Magistrate’s Courts Procedure Amendment Act.

10 General Law Amendment Act 46 of 1935, as amended, s 7(4): ‘Every Attorney-General and Solicitor-General shall exercise their authority and perform their functions under this Act and under any other Act subject to the control and direction of the Minister who may, if he thinks fit, reverse any decision arrived at by an Attorney-General or a Solicitor-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function.’

11 Peet Bekker, ‘National or Super Attorney-General: Political Subjectivity or Judicial Objectivity?’ (April 1995) 8(1) *Consultus* 27.

12 Schönteich (n 5) 89.

13 Martin Schönteich, *Lawyers for the People: The South African Prosecution Service* (Monograph 53, ISS 2001) 57.

discussed below, the Constitution, in section 179(6), vests certain powers in the Minister.

The Road to a National Prosecuting Authority

A *Sui Generis* Solution to the Attorney Generals

As discussed above, historically, the Union of South Africa granted significant independence to the provincial AGs. Each AG was vested with the power to prosecute crimes and offences within the jurisdiction of their province. This authority was increasingly encroached upon by the central government, with the formation of the Republic of South Africa in 1961 and further with the consolidation of the apartheid government, which sought to gain political control over the power to prosecute.

During the 1980s, there was a marked move by AGs to crusade for institutional independence.¹⁴ In 1992, the AG Act was enacted. The AG Act removed the authority to prosecute from the Minister and vested such authority exclusively in AGs. The determination of AGs' salaries was also removed from the Minister's role, thus further enhancing security of tenure and independence of the offices of the AGs.¹⁵ Similar to the accountability mechanisms the Constitution has attempted to establish, the role of the Minister after the AG Act became largely administrative, with the AGs being required to submit reports to the Minister and to Parliament.¹⁶

Under the AG Act, the AGs again enjoyed substantial powers to exercise almost unfettered discretion to prosecute, as they did prior to the Union Act. Perhaps considering the uncertainty regarding the potential prosecution of apartheid officials and fears regarding the future conduct of the prosecuting authority, the AGs were in fact given even greater independence than the original position codified in the Union Act. In addition to repealing the Minister's ability to reverse and substitute the decisions of the AGs, the AG Act went further. Far from being able to supplant the decision-making role of the prosecuting authority, the Minister was confined to 'co-ordinating' the various AGs' operations. The Minister could only 'request' either 'information' or 'reasons' for a decision taken by the prosecuting authority.¹⁷ The Minister was not given any means to instruct or impose punitive conditions upon the AGs.

This move in 1992 can be seen, cynically, as a final attempt by the apartheid government to ensure that prosecutorial discretion was vested provincially, in order to alleviate any move to a more central prosecuting authority. The timing of the AG Act, with the

14 Schönsteich (n 5) 89.

15 Dirk Van Zyl Smit and Esther Steyn, 'Prosecuting Authority in the New South Africa' in Robert D Nicholson (ed), *Centre for the Independence of Judges and Lawyers Yearbook* volume VIII (ICJ, January 2000) 8.

16 These reports served as accounting mechanisms.

17 Section 5(5) of the AG Act.

imminent collapse of the apartheid regime on the horizon and prior to the democratic elections in 1994, supports this cynical view. This restructuring of power played a significant role in the construction of the NPA as imagined by the constitutional drafters.

The incoming government, with the dominant political party being the African National Congress (ANC), was sceptical about the power restructuring in the AG Act, for three primary reasons. Firstly, and obviously, it allowed the AGs unfettered discretion to prosecute or not to prosecute. Secondly, it safeguarded the provincial AGs' offices and the staff, even if there was a regime change. Lastly, the ANC supported a unified, central prosecuting authority structure.¹⁸

In the period between 1993 and 1998, the ANC developed a *sui generis* solution. In 1994, the Minister of Justice established the National Consultative Legal Forum on the Administration of Justice. This was aimed at revisiting the structure of the prosecuting authority and the power vested in the AGs and the Minister. The *sui generis* solution solved the multidimensional challenge of balancing the negotiated agreement to keep the AGs in place with the desire to transform the prosecuting authority and to provide it with a new national head. This solution vested central power in the form of the head of the new authority, namely the NDPP.

The Structure of the NPA

The Interim Constitution of 1993 maintained the status quo inherited from the AG Act, with the 'authority to institute criminal prosecutions' remaining vested in the AGs.¹⁹ It was only with the election of the new democratic government in 1994 and the passing of the Constitution of 1996 that the new NPA became a national entity, with centralised powers in the hands of the newly created position of the NDPP.²⁰ Section 179(1)(a) and (b) of the Constitution creates a single prosecuting authority and constitutes its leadership as follows: the NDPP; Directors of Public Prosecution (DPPs), who head each High Court; and prosecutors, who operate under the DPPs.

Legislation had to give effect to the operations of the NPA, as mandated by section 179(3), and hence the National Prosecuting Authority Act 32 of 1998 (the NPA Act) was enacted. The NPA Act, in section 20, authorises the NPA to institute and conduct criminal prosecutions on behalf of the state. Section 32 of the NPA Act, similar to section 179(4) of the Constitution, requires every member of the NPA to carry out their duties without fear, favour, or prejudice. The NPA Act, in section 32, goes further than the Constitution, stating that no organ of state or any other person shall improperly interfere with, hinder, or obstruct the NPA in carrying out its duties.

18 Schönsteich (n 13) 19.

19 Section 108(1) of the Constitution Act 200 of 1993.

20 Section 179 of Constitution of the Republic of South Africa, 1996.

Despite this statement of intent, a number of structural problems persist, limiting the independence of the NPA.

Structural Problems with the NPA

The Interim Constitution of 1993 provided a framework for the drafting of the Constitution of 1996. Part of that framework required compliance with certain predetermined constitutional principles. One of those principles required that there be ‘a separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.’²¹ The NPA should be one of the mechanisms of accountability, ensuring that prosecutors are free to perform their functions without interference from any arm of government. Section 179, unfortunately, does not create an NPA capable of independent functioning. The European Network of Councils for the Judiciary (ENCJ) correctly points out that the confusing status of the NPA is indicative of the type of legal system adopted in South Africa, because ‘[i]n common law jurisdictions, prosecutors are entirely separate from the judiciary, and they operate much as any other represented party would operate before the courts.’²² In terms of the NPA’s location and status within the structure of the arms of government, obvious conflicts are observable that discredit the notion of a constitutionally protected independent prosecuting authority. These conflicts are elaborated on below.

The NPA plays an executive function, namely directing the investigation and the prosecution of criminal offences. The NDPP is appointed by the President, as head of the national executive. The NPA also plays a quasi-judicial role, as it is the institution that determines which matters appear before a court. The Minister has final responsibility over the NPA.²³ This ambiguous ‘final responsibility’ has been the source of a few controversial prosecutorial decisions or failures to prosecute,²⁴ demonstrating that this ambiguity is not simply a theoretical problem.

This section considers three of the primary structural problems facing the NPA: (1) the insufficient measures in place to guarantee the independence of the NPA’s operations; (2) the ambiguous power of the Minister of Justice in so far as the Constitution grants the Minister ‘final responsibility’ over the NPA; (3) the fact that, while the office of the NDPP is vested with significant control over the functioning of the NPA, the

21 Constitutional Principle VI.

22 ENCJ, ‘Independence and Accountability of the Prosecution: ENCJ Report 2014–2016’ <https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_prosecution_2014_2016.pdf> accessed 31 May 2018, 10.

23 Section 179(6) of the Constitution.

24 For example, the situation of Advocate Vusi Pikoli, which is elaborated on later in this article.

appointment and removal of individuals from this office and the influence exercised over the office holder's functions are open to potential abuse.

The General Systemic Failure to Create an Independent NPA

The significant role that the NPA plays in the criminal justice system should cause us to look more closely at its institutional functioning. In criminal matters, prosecutors play an early and important role in the process, by deciding which cases go to court. Section 179(2) of the Constitution vests the discretion to decide whether the prosecution of individual matters should be instituted, conducted, or discontinued in the hands of the NPA. These functions must be exercised judicially and within the rule of law.²⁵ Section 179(4) of the Constitution purportedly guarantees independence and any legislation or executive action that infringes this guarantee is subject to control by the courts.²⁶

Section 32 of the NPA Act states that prosecutors must perform their duties without fear, favour, or prejudice. Prosecutors are to be protected against arbitrary action by governments in order to ensure that they are able to carry out their professional responsibilities independently. Prosecutors should, in general, be entitled to perform their professional functions without intimidation, hindrance, harassment, or improper interference. Ensuring that prosecutors are able to exercise their powers 'without fear, favour and prejudice' is key to the NPA's accountability and proper functioning.

The phrase 'without fear, favour and prejudice' places a duty on the NPA to ensure that prosecutors, at all levels of the NPA, act ethically and in line with their Code of Conduct.²⁷ In terms of section 32(2) of the NPA Act, every prosecutor is required to take an oath of office, which binds them to act ethically and in line with professional standards. The Constitutional Court (hereinafter the Court), in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* also stated that 'prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public.'²⁸

However, acting 'without fear, favour or prejudice,' as required by section 179 of the Constitution and section 32 of the NPA Act, is not the same as guaranteeing the independence of the institution. Prosecutors are expected to exercise discretion

25 According to the ENCJ (n 22) 4, 'The independence of the Judiciary as a whole and the independence of judges and prosecutors play a critical role in strengthening the *Rule of Law*.'

26 JJ Joubert (ed), *Criminal Procedure Handbook* (9th edn, Juta 2009) 53, 4.1.

27 NPA, 'A Practical Guide to the Ethical Code of Conduct for Members of the National Prosecuting Authority' <https://www.npa.gov.za/sites/default/files/resources/public_awareness/Ethics_final.pdf> accessed 27 June 2018. The Court, in *S v Yengeni* (A1079/03) [2005] ZAGPHC 117 (11 November 2005), 51–53, pointed out the link between the oath of office of prosecutors and the (purported) constitutional guarantee of professional independence.

28 2002 (1) SACR 79 (CC) para 72 at 105.

impartially, and no person or office should try to influence a prosecutor.²⁹ The phrase has an inward focus, as it creates a duty on individual prosecutors to act ‘without fear, favour or prejudice.’ It is not an outward-looking approach, focused on protecting the NPA from interference from external actors. In this way, the phrase protects the independent functioning of the NPA only if individual prosecutors act with integrity. The remainder of section 179 reinforces the argument that there is no clear injunction on the legislature to structurally compose the NPA as a truly independent institution.

The Court, in *In re: Certification of the Constitution of the RSA, 1996*,³⁰ had an opportunity to evaluate whether the NPA was sufficiently independent. The challenge brought before the Court was whether the presidential power to appoint the NDPP impacted negatively on institutional independence and infringed the doctrine of separation of powers. The Court was, however, satisfied that the appointment of the NDPP by the President did not compromise the doctrine of separation of powers.³¹ The Court found that section 179(4) was tantamount to a ‘constitutional guarantee of independence.’³² Furthermore, the Court noted that the NPA was not part of the judiciary and therefore a strict separation of powers was not required to ensure institutional independence.³³ I argue that a duty to act ‘without fear, favour and prejudice’ was confused with structural independence. The Court overstated the duty to act without ‘fear, favour or prejudice’ as signifying the intention to create an independent institution.

The overall duty on prosecutors is to assist the court with its fact-finding mission to fashion a just sentence.³⁴ While there is scope to take a decision not to prosecute on review,³⁵ this can only be on the grounds of judicial review and is limited to testing

29 Section 32 of the NPA Act; *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).

30 1996 (4) SA 744 (CC).

31 *ibid* para 141.

32 *ibid* para 146.

33 *ibid* para 141.

34 *S v Jija and Others* 1991 (2) SA 52 (E) para 68A: ‘[A prosecutor] stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth ...’

35 *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC) para 84: ‘In terms of the [Promotion of Administrative Justice Act 3 of 2000] a decision to institute a prosecution is not subject to review. The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions [as opposed to the decision to institute a prosecution] and that there may possibly be circumstances in which a decision not to prosecute could be reviewed by a Court. But even if this assumption is made in favour of the applicants, they have failed to establish that this is a case in which such a power should be exercised.’ Conversely, in *Democratic Alliance & Others v Acting National Director of Public Prosecutions & Others* 2012 (3) SA 486 (SCA) para 27, it was stated: ‘Before us it was conceded on behalf of the first and third respondents that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made.’

legality and rationality.³⁶ This means that internal accountability mechanisms, such as through the office of the NDPP, are crucial. It is through the hierarchical structure that effective checks and balances must be implemented, to ensure that appropriate decisions to prosecute or not to prosecute are taken.

Because the NPA decides which cases come before a court, it is necessary that the independence of the NPA be viewed in the context of the broader judicial system. Section 33(2) of the NPA Act re-affirms that the Minister must exercise final responsibility over the NPA and obliges the NDPP, at the request of the Minister, to furnish the latter with information or a report with regards to any case and to provide the Minister with reasons for any decision taken.

It should also be noted that section 22(4)(f) of the NPA Act provides that the NDPP must bring the United Nations Guidelines on the Role of Prosecutors (hereinafter the UN Guidelines) to the attention of directors and prosecutors to ‘promote their respect for and compliance with the principles.’ These principles include that states should ensure that prosecutors are able to perform their professional duties without intimidation, hindrance, harassment, or improper interference.³⁷

Section 13(b) of the UN Guidelines provides that ‘[i]n the performance of their duties, prosecutors shall ... [p]rotect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.’ The UN Guidelines therefore direct signatory states to ensure protection for prosecutorial independence.³⁸

In *Democratic Alliance v President of the Republic of South Africa and Others*,³⁹ the Court confirmed that the Constitution requires the NPA to act independently from the executive and that, as such, the NDPP must be viewed as a ‘non-political chief executive officer directly appointed by the President.’⁴⁰ The office of the NDPP must be ‘non-political’ and ‘non-partisan’ and ‘its role is closely related to the function of the judiciary.’⁴¹ Yet it lacks the independence clearly provided to the judiciary. Section 165(2) of the Constitution provides that ‘[t]he courts are independent and subject only

36 *National Director of Public Prosecutions v Freedom Under Law* [2014] ZASCA 58 para 27.

37 ‘United Nations Guidelines on the Role of Prosecutors’ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (OHCHR) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>> accessed 25 May 2018.

38 Hannah Woolaver and Michael Bishop, ‘Submission to the Enquiry into the National Director of Public Prosecutions’ (South African Institute for Advanced Constitutional, Public, Human Rights and International Law 2008) 26–27.

39 *Democratic Alliance* (n 35).

40 *ibid* para 16.

41 *ibid* para 26.

to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.’ In my view, a failure to mandate structural independence for the NPA has an impact on individual prosecutors’ ability to perform their functions professionally.

In his study of the prosecuting authority in South Africa, De Villiers argues that the injunction for independent decision making is underscored by the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (hereinafter the Standards), adopted by the International Association of Prosecutors on 23 April 1999.⁴² The Standards were adopted by the United Nations Association to reinforce the UN Guidelines on the role of prosecutors.⁴³

The Standards provide that prosecutorial discretion, when permitted in a particular jurisdiction, is to be exercised independently and must be free from political interference.⁴⁴ If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be transparent, consistent with lawful authority, and subject to established guidelines to safeguard perceived and actual prosecutorial independence.⁴⁵ The right of non-prosecutorial authorities to command the institution or termination of legally instituted proceedings must be exercised in similar fashion.⁴⁶

Ministerial Accountability or Control?

The low-water mark of prosecutorial independence occurred with the enactment of the Criminal Procedure Act of 1977, section 3(5) of which permitted the Minister to interfere in a decision of an AG.

Fortunately, this was changed with the advent of section 179 of the Constitution. The fact that the Minister has not been given legislative power to intervene in individual cases should be seen as a victory, at least as compared to the above provision in the Criminal Procedure Act of 1977. Had the Minister been given legislative authority to intervene in individual exercises of prosecutorial discretion, this ‘would have destroyed

42 International Association of Prosecutors, ‘Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors’ (April 1999) <[http://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](http://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx)> accessed 20 June 2018; WP de Villiers, ‘Is the Prosecuting Authority under South African Law Politically Independent? An Investigation into the South African and Analogous Models’ (2011) 74 *Journal of Contemporary Roman-Dutch Law* 256, 258.

43 International Association of Prosecutors (n 60) Foreword.

44 *ibid* s 2.1.

45 *ibid* s 2.2.

46 *ibid* s 2.3.

any notional independence of the prosecutorial authority.⁴⁷ However, the Minister's role in the functioning of the NPA remains a site of contestation.

The Constitution, in subsection 179(6), grants the Minister the authority to 'exercise final responsibility over the prosecuting authority.' While this is a far cry from the excessive control over prosecutions that was vested in the equivalent office of the Minister at the height of apartheid, the ambiguity of the phrase 'final responsibility' cements the notion that the Constitution is ambivalent about granting the NPA absolute independence.

Indeed, the phrase 'final responsibility' has caused the judiciary some measure of discomfort. The issue of independence has been raised during a number of high-profile cases.⁴⁸ When confronted with allegations of political interference in the performance of the functions of the office of the NDPP, Nicholson J, in *Zuma v National Director of Public Prosecutions*,⁴⁹ held that there 'should be no relationship with the Minister of Justice—certainly insofar as [the NDPP's] decisions to prosecute or not to prosecute anybody.'⁵⁰ This view was, however, undermined by the Supreme Court of Appeal (hereinafter the SCA) in the judgment of *National Director of Public Prosecutions v Zuma*,⁵¹ wherein the court held that such an unqualified position was 'overstated'.⁵²

Instead, the SCA expressly recognised the existence of a role for the Minister in the functioning of the NPA. The court located the source of this role not only in the NPA Act, but also in the Constitution itself, noting that the NDPP is required in terms of the NPA Act to 'furnish [the Minister] with information or report with regard to any case ... [giving] reasons for any decision taken' and that the NDPP is enjoined when 'exercising the review power to prosecute or not to prosecute ... [to] advise the Minister.'⁵³ This statutory measure was held by the SCA to mirror the Minister's constitutionally granted authority to act with 'final responsibility' over the NPA.

Hence, it is correct to say that the Constitution is somewhat ambiguous. In *NDPP v Zuma*, the SCA found that the provision requiring that members of the NPA act without fear, favour, or prejudice, and the provision stating that the Minister must exercise final

47 Van Zyl Smit (n 15) 153.

48 *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* [2017] ZAGPPHC 743; [2018] 1 All SA 471 (GP); 2018 (1) SACR 317 (GP). Paragraphs 16–39 of the judgment provide a useful chronology of a few of the controversial incidents of removal and appointment of NDPPs.

49 [2009] 1 All SA 54 (N).

50 *ibid* para 207.

51 2009 (2) SA 277 (SCA).

52 *ibid* para 33.

53 *ibid* para 34.

responsibility over the NPA, are not compatible,⁵⁴ if it means that the Minister can influence the primary responsibility of the NPA, namely the discretion to prosecute.

In my own view, I read this jurisprudence as suggesting that a balance must be struck. The Minister may not instruct the NPA to prosecute or decline to prosecute or to terminate a pending prosecution. In other words, the Minister may not interfere with individual prosecutorial decisions, because that would interfere with the independence of the NPA.⁵⁵ However, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve aspects of legal or prosecutorial authority.⁵⁶

The only thing that is clear about the phrase ‘final responsibility’ is that it is ambiguous. Any positive measures put in place to grant the NPA autonomy are brought into doubt by the shadow of this overbearing power. It has in fact resulted in identified breaches of the NDPP and NPA’s independent operation. This authority was referred to and relied upon by then President Thabo Mbeki in 2008 when suspending then NDPP Advocate Vusi Pikoli.

In 2005, President Mbeki appointed Advocate Pikoli as the NDPP; in 2007, he suspended him. In 2008, President Kgalema Motlanthe, who had succeeded Mbeki, began proceedings to remove the NDPP from office. This followed the report by the Ginwala Commission, which investigated Pikoli’s fitness to hold office.⁵⁷ While the Commission found that there was no basis to remove Advocate Pikoli, President Motlanthe interpreted some of the Commission’s findings as adverse. On 18 February 2009, Pikoli launched a review and set aside the President’s decision to remove him from office.⁵⁸

Vusi Pikoli was suspended for two reasons, according to his letter of suspension, quoted in the report of the Ginwala Commission. The first was the allegation that immunity had been given to members of organised crime syndicates.⁵⁹ This is not relevant for the context discussed here and will not be elaborated upon further. The second reason was as a result of ‘[a] breakdown in the relations between the office of the NDPP and that of the Minister due to several incidents, such as the evidence presented by Advocate

54 *ibid* para 32.

55 Van der Merwe (n 2) 63.

56 *NDPP v Zuma* (n 51) para 32.

57 Ginwala Commission, ‘Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions’ <<https://www.gov.za/documents/report-enquiry-fitness-advocate-vp-pikoli-hold-office-national-director-public#>> accessed 28 June 2018.

58 *Pikoli v The President of South Africa* 8550/09 [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP) (11 August 2009).

59 Ginwala Commission (n 57) 306.

Pikoli at the Khampepe Commission of Enquiry.⁶⁰ This was confirmed in President Mbeki's affidavit submitted to the Ginwala Commission.⁶¹

Even though the Minister is not given direct powers to intervene in the NPA's discretion to prosecute, section 33 of the NPA Act requires the NDPP to carry out a number of duties, at the request of the Minister, in order to enable the Minister to exercise this responsibility. These duties include:

- (1) to furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions;
- (2) to provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her function;
- (3) to furnish the Minister with information with regard to the prosecution policy;
- (4) to furnish the Minister with information with regard to the policy directives;
- (5) to submit the reports contemplated in section 34 to the Minister; and
- (6) to arrange meetings between the Minister and members of the prosecuting authority.

The Constitution is somewhat ambiguous on the independence of the institution. On the one hand, it dictates that 'national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice,' while on the other, it regulates that the 'Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.'⁶²

The wording of section 33 of the NPA Act is crucial to the delimitation of the Minister's responsibility over the prosecuting authority. In this section, the Minister is expected to exercise his or her final responsibility over the prosecuting authority 'in accordance with the provisions of this Act.' In my view, the Minister's powers of oversight must be understood to be confined to those included in the Act. As already discussed, these include the requirement that the Minister approve prosecution policy, and various duties on the NDPP to provide information and submit reports to the Minister. The NPA Act gives no power to the Minister regarding the exercise of prosecutorial discretion in individual cases. As such, individual decisions regarding whether or not to prosecute in

60 *ibid* 306.

61 Thabo Mbeki, 'Why I Sacked Pikoli' (*Politicsweb*, 14 May 2009) <<http://www.politicsweb.co.za/news-and-analysis/why-i-sacked-pikoli--thabo-mbeki>> accessed 27 April 2018.

62 Nico Horn, 'The Independence of the Prosecutorial Authority of South Africa and Namibia: A Comparative Study' (Undated) <http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf> accessed 20 June 2018.

a particular case are not within the purview of the Minister's 'final responsibility'. These rest in the exclusive discretion of the prosecuting authority and, as a final decision maker, the NDPP.⁶³

In addition, section 2(2)(c) of the NPA Act states that in exercising power to review the decision to prosecute or not to prosecute, the NDPP may advise the Minister 'on all matters relating to the administration of justice.' In terms of section 35(2), the NDPP must, annually, submit to the Minister a comprehensive report, referred to in section 22(4), in respect of the operations of the NPA. Section 35 provides that the NPA must report to the Minister with regard to its functions in order to keep the Minister adequately informed so as to enable the latter to report to Parliament. It is my own view that these provisions of the NPA Act do not provide the basis for or confer the power on the Minister to interfere in the prosecution process.

However, the NPA is only accountable to Parliament in respect of its powers, functions, and duties.⁶⁴ The NDPP submits a report to the Minister so that the Minister can report to Parliament. Parliament therefore does not play an oversight role in terms of prosecutorial discretion, but rather a more high-level one that, for the most part, is played indirectly through the Minister.

Based on the foregoing reasoning, any attempt by the Minister to influence prosecutorial discretion in individual cases would therefore be contrary to the Constitution.⁶⁵ And any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.⁶⁶

Notwithstanding this principle, the Ginwala Commission found that Advocate Pikoli did not inform the Minister of the decision to obtain a warrant of arrest for then National Commissioner of Police, Jackie Selebi. The Commission noted:

It is clear that in the circumstances of the impending prosecution of a state official as senior as the National Commissioner of Police, Adv Pikoli was obliged to inform the Minister at every step of the way. It was necessary that he do so in order to enable the Minister to exercise her final responsibility, namely to report to the President and to Cabinet on such matters especially if they may affect national security. This duty would specifically include informing the Minister of the DSO's intention to apply for warrants of arrest and search and seizure against the National Commissioner of Police.⁶⁷

63 Woolaver (n 38) 31.

64 Section 35(2) of the NPA Act.

65 Woolaver (n 38) 19.

66 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 146.

67 Ginwala Commission (n 57) 299.

It is obvious that even someone in the position of the NDPP is unclear about the role of the Minister.

In my view, requiring that the NDPP informs the Minister about any and all decisions in a matter on an ongoing basis is beyond the scope of the power conferred on the Minister. Requiring ongoing reports renders the NDPP answerable to the Minister and hence opens up the NDPP's office—and by extension the NPA—to political interference.

It would have been desirable if the NPA Act were clearer about reporting mechanisms. In order to mitigate against a return to pre-1994 near-complete independence of the AGs, the current structure awards too much oversight to the Minister, which poses a risk to the NPA's independence.

The Innovation of the NDPP and the Potential for Political Interference

With the creation of the office of the NDPP in the Constitution, the incoming democratic government—which was a regime change from apartheid—was able to fashion a neat solution to the twin tensions of desiring a modern, centralised national prosecuting authority and the potential pitfalls of concentrating the power of the discretion to prosecute in the hands of elected officials. The Constitution was drafted to allow the President the power to appoint the NDPP, just as the President was previously empowered to appoint the AGs. The institutional difference is that there was no need to displace the incumbent AGs. Instead, the AGs were converted to provincial directors and a new centralised official, namely the NDPP, was appointed to supersede their authority.

The office of the NDPP was granted the authority to determine the prosecution policy of this new national authority. The exercise of this power was, however, fettered by the requirement that this be done with the 'concurrence' of the Minister and on 'consultation' with the AGs, now referred to as DPPs.⁶⁸ Beyond this, the NDPP was given the power to issue directives to the authority, to intervene in prosecutions where those directives are not complied with, and to review prosecutorial decisions.⁶⁹

NDPP v Zuma emphasised the fact that the NDPP must be able to make prosecutorial decisions without regard to political considerations, and that his or her prosecutorial discretion must not be subject to the authority of government.⁷⁰ On the other hand, the Minister is entitled to influence prosecutorial policy and directives and, at least indirectly, can determine prosecutorial priorities.

68 Section 179(5)(a) of the Constitution.

69 Section 179(5)(b) to (d) of the Constitution.

70 *NDPP v Zuma* (n 51) para 28.

The political implications of a particular decision for the government of the day, or for individual members of government, cannot be part of the NPA's decision-making process. The underlying rationale for this independence in prosecutorial discretion stems from the fact that the decision should be made based on pure legal criteria.⁷¹ Only then will the law be applied fairly and equally to all.⁷²

In order to appoint an independent NDPP within the bounds of the Constitution and the NPA Act, the Court has set out a list of goals which the President must aim to achieve when making the appointment.⁷³ The Court stated that the purpose of empowering the President to make the appointment was to ensure that the person appointed is sufficiently conscientious and has the integrity required to be entrusted with the responsibilities of the office. In particular, it was to ensure that the NPA performs its functions honestly and without fear, favour, or prejudice. Further, the aim was to ensure that decisions to institute criminal prosecution are taken honestly, fairly, and without fear, favour, or prejudice, and that no improper interference, hindrance, or obstruction of the prosecuting authority by any organ of state is tolerated.⁷⁴ The rationale was that making it a presidential appointment would ensure that the NDPP is not beholden to any arm of government.

Section 9(1)(a) of the NPA Act requires the NDPP to have a legal qualification that permits practice in the high courts of South Africa. Furthermore, according to section 9(1)(b), the NDPP must 'be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.' The fit and proper criteria must be objectively determinable. This means that the President's purely subjective opinion is insufficient; the appointment must be based on objective factors.⁷⁵ Ordinarily, an NDPP serves a non-renewable term of ten years.⁷⁶ South Africa has not yet had an NDPP that has served a full term.

Another factor hindering the independence of the office is the fact that, under the NPA Act, the NDPP may be provisionally suspended by the President, pending a final decision by Parliament. This is unlike under Namibian law, where the suspension of the head of the prosecuting authority may only happen upon the recommendation of the Judicial Service Commission.⁷⁷ This is a mechanism that South Africa should consider to ensure that there are adequate checks and balances through the Judicial Service

71 De Villiers (n 42) 256.

72 Kent Roach, 'Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law' (2006) 598 Queen's LJ 1.

73 *Democratic Alliance* (n 35) para 49.

74 *ibid* para 49.

75 *ibid* para 102.

76 Section 12 of the NPA Act.

77 Horn (n 62) 130.

Commission and that the decision to suspend does not rest with the President alone. This is to mitigate the potential for the President to influence the NDPP.

It is submitted that the independence of the NDPP is further upheld by the fact that his or her salary is not entirely controlled by the president who appoints him or her. Under South African law, prosecutors do not have to fear that their salaries could be reduced if they do not toe the line. The salaries of the NDPP, Deputy National Directors of Public Prosecution (DNDPPs), and DPPs are linked to the salary of a judge of the High Court and can, practically, only be reduced by an Act of Parliament.⁷⁸ The salaries of other prosecutors may only be reduced by an Act of Parliament.

Although the members of the executive are generally members of the legislature, and the governing political party has the majority of members in the legislature, the executive is answerable to the elected legislature, which includes members of opposition political parties who may not be part of the executive. As in other matters, the opposition in Parliament can control the political power of the executive by way of public criticism, which may lead to a loss of support for the governing party. Thus, '[t]he executive will not be able to make, amend or repeal an act of Parliament with regard to the remuneration of prosecutors as this will infringe upon the doctrine of separation of powers.'⁷⁹

A counter-argument to the above point is that the senior leadership of the NPA are all political appointees. The NDPP is appointed by the President. The President appoints a maximum of four persons as DNDPPs and DPPs after consultation with the Minister and the NDPP, both of whom are political appointees.⁸⁰

The appointment and removal procedures in the NPA Act are problematic. Primarily, the President can appoint an NDPP and suspend him or her without consultation and at the President's discretion.⁸¹ There are some checks and balances, such as the criteria for a fit and proper person, and the requirement that an order of suspension must be tabled in Parliament before it can be finalised. However, judging from the number of NDPPs who have been appointed despite having been criticised for not meeting the threshold criteria, and the fact that Parliament ratified President Mbeki's decision to suspend Advocate Pikoli, these mechanisms are likely inadequate.

78 Section 17(1)(a) of the NPA Act.

79 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 62. Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn, Juta 2009) 20.

80 De Villiers (n 42) 260.

81 In *Corruption Watch NPA and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 paras 115–117, the Court emphasised that the suspension of the NDPP is a power enjoyed by the President, as long as the procedure in section 12 of the NPA Act is followed.

Thus, there are structural problems, including those related to appointment, removal, ministerial interference, and budgetary constraints, that may allow for political interference in the proper functioning of the NPA. This political interference has manifested in the alleged lack of willingness to prosecute apartheid crimes⁸² and the NPA's seeming inertia in prosecuting offences associated with 'state capture'.⁸³ The proceedings of the currently ongoing Zondo Commission has been highlighted in the media as outing corruption in the state, but a lesser discussed issue is that none of the allegations discussed have been prosecuted by the NPA. This, in my view, points to potential political interference and a lack of willingness to prosecute public officials for corruption and fraud.

Mitigating the Potential for Political Interference

South Africa is by no means alone in facing the ever-present tension between granting effective independence to the prosecuting authority and the pragmatic desire to create democratic checks and balances. Many other countries, including Namibia, Australia, Ghana, and the United States of America, have confronted this challenge, sometimes through innovative and unique measures. In particular, the focus has been on limiting the direct impact of politicians in respect of the core business of the prosecuting authority, namely determining whether to proceed with a particular prosecution, especially in cases where the accused is a member of the political class.

In South Africa, given the *sui generis* solution selected by the incumbent government, namely to create the centralised office of the NDPP with the concentrated power to determine the direction of the NPA and to interfere in any prosecution, it would seem obvious that this would become the key site of political contestation. Similar to other jurisdictions, South Africa has witnessed the corrosive effects of a destabilised national leadership structure within the NPA, which has seen five NDPP appointees in the space of a single ten-year tenure.

Other jurisdictions have confronted this obvious point of friction with some interesting mitigating mechanisms, including the creation of a separate prosecutorial office to prosecute cases where members of the political class are the accused. The core benefit that might be derived from such a mechanism lies in transferring the site of contestation over this power, where it affects the political class, in order to prevent it affecting the

82 See, for example, Lukhanyo Calata and Abigail Calata, *My Father Died for This* (Tafelberg 2018); Imtiaz A Cajee, *The Murder of Ahmed Timol* (STE Publishers 2005).

83 Penelope Andrews, 'Why It's Taken so Long to Prosecute State Capture Cases in South Africa' (The Conversation, 22 January 2018) <<https://theconversation.com/why-its-taken-so-long-to-prosecute-state-capture-cases-in-south-africa-90394>> accessed 3 February 2020; Corruption Watch and Institute for Security Studies, 'State Capture and the Political Manipulation of Criminal Agencies: A Joint Submission to the Judicial Commission of Inquiry into Allegations of State Capture' <<https://www.corruptionwatch.org.za/wp-content/uploads/2019/06/ISS-Corruption-Watch-Submission-to-the-Zondo-Commission-1-April-2019.pdf>> accessed 3 February 2020.

proper functioning of the NPA itself, which is responsible for all public prosecutions. Such a special prosecutorial office, dedicated narrowly to the prosecution of members of the executive, could receive additional layers of protection from political interference. The following subsections will identify several examples of an office of a special prosecutor.

Namibia's 'Independent' Prosecutor General

Until the United Nations Resolution 435 that started Namibia on its road to independence, South Africa's and Namibia's prosecuting authorities were similarly composed, with South Africa dictating much of the structure.⁸⁴ Unlike the frail division between the executive and the prosecuting authority in South Africa, Namibia opted for a stricter separation. The Namibian Supreme Court, in *Ex Parte Attorney General, Namibia: in Re Constitutional Relationship between the Attorney General and the Prosecutor General*,⁸⁵ ruled that political appointees should not control the prosecuting authority or interfere with its operation.⁸⁶

The Namibian Constitution, in Article 88, created the position of the Prosecutor General. Article 87(a) of the Namibian Constitution also created an Attorney General, who is appointed by the President to exercise 'final responsibility for the office of the Prosecutor-General.' The Prosecutor General is appointed by the President on recommendation by the Judicial Service Commission.

The Prosecutor General is totally independent where their mandate to prosecute is concerned.⁸⁷ The role of the Prosecutor General is more closely aligned to the judiciary than the executive.⁸⁸ This makes sense based on arguments made above about the role of the prosecution as playing a quasi-judicial function and as gatekeepers of the criminal justice system.

The difference in language between the South African and Namibian constitutions, while appearing essentially the same on a prima facie reading, actually creates quite different roles for the Minister in South Africa and the Attorney General in Namibia, respectively. Horn describes the distinction succinctly:

The South African minister executes final responsibility over the prosecuting authority, while the Namibian Attorney-General exercises the final responsibility for the office of

⁸⁴ Horn (n 62) 4–7.

⁸⁵ SA 1995 (8) BCLR 1070.

⁸⁶ *ibid* 1088F.

⁸⁷ Horn (n 62) 126.

⁸⁸ *ibid* 127: 'While the court did not declare outright that prosecution was a judicial function, reference to the appointment of the Prosecutor-General as well as his/her functions being defined as *quasi-judicial* indicates a strong sense of alignment between the judiciary and the prosecutorial authority. To put it differently, the functions of the prosecutorial office do not fit into the political functions of the executive.'

the Prosecutor-General. The synonyms of the authoritative preposition *over* do not include the preposition *for*. Instead, the Thesaurus uses phrases such as *in excess of* and *on top of*, and *more than*, *greater than*, *larger than*, *above*, *more* and *on*. Synonyms of the preposition *for* include *intended for*, *in favour of*, *on behalf of*, *in lieu of*, *in place of*, *instead of*, *representing*, *in support of* and *pro*. None of the synonyms for *for* carry the authoritative, commanding meaning of the preposition *over*.⁸⁹

Whilst Namibia's prosecutorial independence is not perfect, it is clearer in terms of delineating the distinct roles of the executive head, the Attorney General, and the prosecuting head, the Prosecutor General. South Africa ought to consider adopting two lessons from Namibia, namely the use of the Judicial Service Commission to interview and appoint a suitable candidate for the position of NDPP and, secondly, a clear delineation of powers between the NDPP and the Minister.

The Australian Position

Under the Australian legal regime, the Attorney General—the equivalent of the Minister in South Africa—is responsible for the criminal justice system as a whole. In a similar role to the NDPP, the office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for all federal prosecutions and works in tandem with state-level prosecuting authorities.⁹⁰

The office of the CDPP in Australia was created at a similar time as the NDPP in South Africa, in recognition that a semi-autonomous and specialist prosecuting authority was required in Australia. Prior to its creation, a significant proportion of prosecutions continued to be conducted by so-called police prosecutors, who are largely indistinguishable from the police.

Interestingly, the Australian CDPP frequently uses independent members of the Australian Bar in the prosecution of criminal cases. While the appointment of independent counsel remains at the discretion of the CDPP, this well-recognised procedure lends itself to assisting with the operation of an independent prosecuting authority.

There seems to be no clear prohibition on the option to use advocates who are briefed per matter instead of state prosecutors. Were this to be implemented in South Africa, it would afford a measure of independence to 'advocate prosecutors' conducting prosecutions, which could assist with minimising influence over the prosecuting authority. However, it would not assist with ensuring that the decision to prosecute or not to prosecute is made without influence, as this power must necessarily remain with

⁸⁹ *ibid* 127.

⁹⁰ Damian Bugg, 'The Role of the DPP in the 20th Century' Paper presented by the Commonwealth Director of Public Prosecutions at the Judicial Conference of Australia, Melbourne, 13 November 1999 <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressre%2FMX136%22>> accessed 9 July 2018.

the NPA. Furthermore, in my view, capacitating the NPA to perform its constitutionally mandated functions without fear, favour, or prejudice ought to be the objective, rather than outsourcing it. The use of independent advocates remains an option nevertheless, and could form the structure for a hybrid special prosecuting office for the prosecution of politically related matters in South Africa.

The Ghanaian Special Prosecutor

In 2017, the Parliament of Ghana passed the Office of the Special Prosecutor Act 959 into law. The purpose of this statute was to establish a separate prosecuting office with the power to investigate and prosecute ‘certain categories of cases and allegations of corruption and other criminal wrongdoing, including those involving alleged violations of the Public Procurement Act, 2003 (Act 663) and cases implicating public officers and politically exposed persons.’⁹¹

The purpose underlying the creation of a distinct office was to separate the specialised prosecution of politically linked crimes from the highly centralised office of the national Attorney General. The efficacy of this new regime remains to be determined, and it has already been the subject of negative speculation given its limited initial resources.⁹²

The key mechanism for the office’s independence, a managing board, is yet to be appointed. The office therefore lacks the institutional means to operate according to its legislative mandate. A recent report further indicates that the office is critically under-resourced and lacking funding in order to properly function.

The Special Prosecutor in the United States of America

The United States of America has a long and complex history with the appointment of so-called ‘special counsel’ or independent prosecutors, appointed to investigate and prosecute specific acts of politically related crimes.⁹³ In 1875, then President of the United States Ulysses Grant appointed John Henderson, a qualified member of the Bar, to investigate the possible misappropriation of tax funds.

The embryonic use of a ‘special counsel’ was not without controversy, as Henderson was fired by President Grant for perceived impertinence and perhaps as a result of the investigation of the President’s private secretary. This difficulty has persisted into the twentieth and twenty-first centuries. The system of appointing special prosecutors was again tested during the Watergate scandal in the 1970s, when then President Richard

91 Kaunain Rahman, Roberto Martinez, B Kukutschka and Samuel Kaninda, ‘Overview of Corruption and Anti-corruption in Ghana’ (Transparency International 2018) 13.

92 “‘Under-resourced” Special Prosecutor, Staff Get “Small House” as Office’ (Peace FM Online, 23 March 2018) <<https://www.peacefmonline.com/pages/politics/politics/201803/347718.php>> accessed 29 June 2018.

93 Donald Smaltz, ‘The Independent Counsel: A View from Inside’ (1998) 86(6) Georgetown LJ <<http://govinfo.library.unt.edu/oic/SMALTZ/speeches/GTLJ.htm>> accessed 17 June 2018.

Nixon was the subject of investigation. During the investigation, the Attorney General and his deputy were removed from office by Nixon after refusing to fire the appointed special prosecutor.

In the wake of this turbulence, the United States Congress passed the Independent Counsel Act,⁹⁴ providing for a greater measure of independence being granted to future special counsel appointed to investigate bespoke acts of alleged politically related crimes. At the time of writing this article, the office of the independent counsel is being tested by the presidency of Donald Trump. In May 2017, President Donald Trump dismissed the Director of the Federal Bureau of Investigations (FBI), who had been leading an investigation into the Trump presidential campaign and possible Russian influence.

It is obvious that a special prosecutor is not without problems or the potential to be the subject of political interference. What it does afford, however, is the protection of the general prosecuting authority, which can fulfil its primary mandate without political cases tripping up its proper functioning.

Conclusion

Much of the debate by commentators and courts regarding the independence of the NPA has centred on the appointment and removal procedures in relation to the NDPP. In my view, there is no bullet-proof appointment and removal process that will remove the potential for political interference with the NDPP, particularly if the accused is a member of the executive. These procedures should be reviewed and strengthened, but South Africa requires further intervention.

The problem with over-emphasising appointment and removal is that we risk placing too much emphasis on one person, the NDPP. When we have a suitably qualified, appropriately tempered, and ethical office holder, then the mechanism works. However, as can be seen from several previous examples, where the office holder is open to influence, the independence of the entire NPA is placed in jeopardy. Omar contends:

The office of the director has been the subject of controversy over the past 18 years, with the appointment and subsequent removal of four directors. Some of this controversy has centred on whether the prosecuting authority would, or wouldn't, prosecute certain political cases ... The fact that these types of cases are within the

⁹⁴ 28 USC §§ 591–599 (1994).

purview of the director provides grounds for political interference over the office. This interferes with its overall performance.⁹⁵

Because the primary problem exists in relation to political cases, separating the majority of criminal cases from these political cases will likely ensure that the NPA can function without being derailed by political machinations.

Private prosecutions are not a viable alternative to public prosecutions. This is because of the strict rules of standing and the cost to an individual of running a private prosecution. More fundamentally, however, it is because privately funded prosecutions could potentially suffer similar interference from private or corporate bodies. There is no alternative to strengthening the state capacity to prosecute, unless a deliberate decision to move away from state-led prosecutions is sought. Given the new interest in private prosecutions,⁹⁶ this may be an area ripe for legal development in the future.

I am not so naïve to think that an office of a special prosecutor will not itself suffer from attempted political interference. Steps can be taken to mitigate this through appropriate appointment, removal, and disciplinary processes. What it would ensure is that we do not have an NPA that is without a stable leader for a lengthy period of time because of political interventions. The NDPP would then be able to focus on the day-to-day functioning of the NPA.

South Africa should consider adopting the ad hoc position of a special prosecutor that can be employed as needed. As observed through the mechanisms in the various jurisdictions discussed above, there are a number of ways that this could be done. This would not be a miracle cure, but it would remove the incentive to interfere in the NPA for political reasons.

95 Jameelah Omar, 'How South Africa Can Stop Political Interference in Who Gets Prosecuted' (The Conversation, 26 June 2016) <<http://theconversation.com/how-south-africa-can-stop-political-interference-in-who-gets-prosecuted-79442>> accessed March 2018.

96 Notably, AfriForum's Private Prosecution Unit. See <https://afriforum.co.za/en/tag/private-prosecution-unit/>.

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