

**THE RULE OF LAW, PROSECUTORIAL INDEPENDENCE AND
ACCOUNTABILITY IN A NASCENT CONSTITUTIONAL
DEMOCRACY**

BY

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DECLARATION

I declare that the dissertation submitted by me is my original work in design and execution and that it has not been submitted at this or any other university and further that all material used herein has been duly acknowledged.

SIGNATURE

DATE

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ABSTRACT

This study probes the topical issue of prosecutorial independence in post 1994 South Africa in order to begin to determine how the new democratic constitutional dispensation has and should have affected the independence of our prosecutors. It also explores, albeit introductorily, the intersection of prosecutorial and judicial independence by suggesting that the much vaunted judicial independence in South Africa can prove mythical if prosecutorial independence is not vigorously and unflinchingly championed. The study also looks into what role accountability plays both as a pro and a con for prosecutorial independence within the parameters of the rule of law. Furthermore a comparative analysis of some fellow Commonwealth of Nations jurisprudences is embarked upon with a view to see what lessons can be learned and which prosecutorial approach tutorials are worth bunking. With a critical approach which is historical, contemporary and contextual, the study goes on to marry South African legal instruments, prosecutorial policies and other relevant literary insights to contemporary intersections ,interactions and frictions between law and politics in South Africa. The study seeks to begin to suggest a rule of law based but reasonably accountable prosecutorial approach for this country.

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THE RULE OF LAW, PROSECUTORIAL INDEPENDENCE AND ACCOUNTABILITY IN A NASCENT CONSTITUTIONAL DEMOCRACY

'The NPA reports to government; it's not a thing flying in the sky on its own – unconnected – there are decisions ... that have implications and that's why we have a department of justice", Zuma said in an interview on Talk Radio 702

Mail & Guardian online "Zuma: Govt is NPA's boss' Dec 14 2009

'Intervention is not interference –that is, what we are talking about. Not all this peripheral stuff about autonomy...It is not only you who makes decisions to prosecute without fear or favour. There is a political environment you operate in where you must ask if this will have unintended consequences.'

Butana Khompela, MP addressing Adv Pikoli, National Director of Public Prosecutions during a parliamentary debate on whether Adv. Pikoli's dismissal by President Motlanthe should be endorsed by parliament or not. Quoted in the *Sowetan Newspaper* of 21 January 2009.

'We have come across information about collusion between the former heads of the directorate of special operations (DSO) and NPA to manipulate the prosecutorial process before and after Polokwane elections'.

The Mpshe Decision of 6th April 2009.

I. Framing the issue

The above succinct passages provide a contemporary insight into complexities and myriad political and public interest considerations that inhere in the prosecutorial charging decision, implicating the rule of law, prosecutorial independence and accountability in a nascent constitutional democracy. Barely fifteen years after the adoption of the widely acclaimed progressive and liberal Constitution,¹ the protracted

¹ For example see recent collection of essays in the *International Journal of Constitutional Law: Editors' Introduction* (2003) 1 *International Journal of Constitutional Law* 177 (arguing that borrowing is "part of a wider phenomenon of constitutional design and evolution" and has the power "to influence the direction of constitutional development and change"); Davis, DM 'Constitutional borrowing: The legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1 *International Journal of Constitutional Law* 181 (discussing the nature and extent of borrowing in the South African Constitution) ; Epstein, L & Knight, J 'Constitutional borrowing and non-borrowing' (2003) 1 *International Journal of Constitutional Law* 196 (asserting that borrowing is just a subset of the larger phenomenon of institutional design); Hasebe, Y 'Constitutional borrowing and political theory' (2003) 1 *International Journal of Constitutional Law*

and aborted prosecution of Jacob Zuma and a series of court appearance remain one matter that has engaged the notions of public confidence and the need for a public perception that proper prosecution decisions have been or will be made. This arose, undoubtedly, by virtue of the players that were involved in the case – as accused, victim, witness or those who headed and managed the prosecution at the relevant times – and the nature of graft allegations² and the conduct of the criminal investigations,³ and the accused’s quest for ascendancy to the highest political office in the land.

Largely as a consequence of Zuma’s prosecution the dominant political elite has found it convenient to launch scurrilous attacks on the judiciary,⁴ and even more strident assault on the National

124; Osiatynski, W ‘Paradoxes of Constitutional Borrowing’ (2003) 1 *International Journal of Constitutional Law* 224; Schepple, KL ‘Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models’ (2003) 1 *International Journal of Constitutional Law* 296; Choudry, S ‘The Lochner era and comparative constitutionalism’ (2004) 2 *International Journal of Constitutional Law* 1; Issacharoff, S ‘Constitutionalizing democracy in fractured societies’ (2004) 82(7) *Texas LR* 1861.

² The genesis of Zuma’s criminal prosecution is traceable to the Arms Deal (Joint *Investigation Report into the Strategic Defence Procurement Packages*, RP 184/2001, and November 2001) and his mutually discrediting relationship with his financial advisor Schabir Shaik. On 6 November 2000, the Director of the Investigating Directorate: Serious Economic Offences, instituted a “preparatory investigation”, in terms of section 28(13) of the National Prosecuting Authority Act, Act No 32 of 1998. The preparatory investigation was aimed at ascertaining whether there were reasonable grounds for conducting an investigation, in terms of section 28(1)(a) of the Act, into allegations of corruption and/or fraud in connection with the acquisition of armaments by the Department of Defence. In the wake of Shaik’s conviction for corruption under section 1(1)(a)(ii) and (ii) of the Corruption Act 92 of 1994 (*S v Shaik & others* [2007] 2 All SA 9 (SCA)), Zuma was released from his position of as Deputy President by then President Thabo Mbeki in July 2005.

³ On 12th August 2005, an *ex parte* application was made by NPA, in terms of section 29(4) to Ngoepe JP, in the Transvaal Provincial Division of the High Court, for the issue of the warrants to obtain documents from ANC Deputy President and his lawyer Michael Hulley. The Durban High Court in *Zuma & another v National Director of Public Prosecutions & others* 2006 (1) SACR 468 (D) declared warrants used to search the premises belonging to Zuma and his lawyer unlawful. See also *Mail & Guardian online* “Warrants necessary, Zuma hearing told” August 28 2007.

⁴ The *Mail & Guardian* of 4-10 July 2008 carried on its front page a headline: “ANC Boss’s Shock Attack on Judges” while the *Sunday Times* of 6 July 2008 headlined: “ANC War on Judges”. In these two separate weekly newspapers, it was reported that the General Secretary of the ruling party had described the Constitutional Court judges as being “counter-revolutionary forces”. Another member of the ruling party was reported as having suggested that the Government should consider “regulating judges”. A third item of the threatening outburst stated that veteran of

Prosecuting Authority.⁵ The coming into effect of the 1993/96 Constitutions brought the Republic face to face with modern democratic values such as constitutionalism and the rule of law⁶ within the framework adumbrated by the various agencies of the United Nations especially the International Commission of Jurists.⁷ However, it should be remembered that prior to April 27 1994 there was a total absence of democratic culture, democratic conventions, usages or precedents of political leaning. The managers of the various democratic institutions, political party office holders, political leadership and political operatives are themselves all new to the practice of democratic politics. Another strand to the dual assault on the courts and prosecuting authorities is that the emerging political class needed a lot more time to appreciate the nature of the democratic process including the judicial process and the intricacies of prosecutorial charging discretion. It is not surprising that in public discourse from time to time one may witness that, in the process of

the military wing of the ANC (Umkhonto we-Sizwe) had expressed the opinion that the Constitutional Court should recuse itself from all matters involving their party President, Jacob Zuma. All these public utterances arose because the Constitutional Court had alleged that the Judge President of the Western Cape had lobbied two members of that court to sway them in favour of Zuma who had four cases pending before that court of which adverse findings in one or all of them (*Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC)) might affect his ascendancy to the presidency of the country.

⁵ See eg: *Mail & Guardian online* Feb 04 2009 "Heath lashes out at 'bizarre' NPA appeal" In this piece the former judge Willem Heath called for criminal charges against the President Thabo Mbeki, former justice minister Penuell Maduna and former NPA boss Bulelani Ngcuka for their "irregular inference in the administration of justice". *Mail & Guardian online* Feb 04 2009 "Mantashe: Zuma's prosecution is an attack on the ANC" In this article ANC Secretary General is quoted as telling a crowd gathered outside the Pietermaritzburg High Court that Zuma's prosecution was "not about Jacob Zuma, it is about the ANC" and that dark powers were intent on dividing the ANC, "derailing the revolution" and obliterating "the gains" of an ANC government. See also *Mail & Guardian online* 15 Jan 2009 "Malema: NPA must drop Zuma charges".

⁶ For excellent exposition of the Commonwealth experience: Okpaluba, C 'Constitutionality of legislation relating to the distribution of governmental powers in Namibia: A comparative approach' in *The Constitution at work: Ten years of Namibian nationhood* (2002) 110; 'Constitutionality relating to the distribution of the exercise of judicial power: The Namibian experience in comparative perspective (part 1)' (2002) TSAR 308; and 'Constitutionality relating to the distribution the exercise of judicial power: The Namibian experience in comparative perspective (part 2)' (2002) TSAR 436.

⁷ See *The Act of Athens* (1956); *The Declaration of Delhi* (1959); *The Law of Lagos* (1961); the *ICJ Congress of Rio de Janeiro* (1962).

exercising the hard-fought freedom of political expression, this constitutional right may be over-extended to the point that it impairs on other equally valuable fundamental rights, principles of democracy and the rule of law.

These ominous developments make it imperative that the role of the national prosecuting authority and in the process, the nature of prosecutorial charging decisions and the importance of prosecutorial independence and accountability in a constitutional state be stated and restated in no uncertain terms. Several challenges in relation to prosecutorial charging decisions have arisen in Commonwealth countries and the United States in recent times. In Canada, for instance, by a split of four-to-three the Supreme Court⁸ found a prosecutor civilly liable for proceedings with a first-degree murder charge, absent reasonable and probable cause, while motivated by an improper purpose.

In dealing with *The Rule of Law, Prosecutorial Independence and Accountability in a Nascent Constitutional Democracy*, the study has taken a five-dimensional path. Part Two explores the concept of the rule of law, the intersection of the notion of prosecutorial independence with the much-cherished notion of judicial independence.

Part Three examines the constitutional and statutory framework of the independence of the prosecution service. Lessons from Commonwealth jurisdictions will be discussed and analysed.

Part Four attempts are made to provide the reader with all information that is necessary for a clear comprehension of the dual role of the prosecutor and the charging decision as well as prosecutorial accountability in its broader legal ramifications.

⁸ *Proulx v Queen (Attorney General)* (2001), 159 C.C.C. (3d) 255, C.R. (5th).

Part Five, sets down the fundamental issues and problems encountered in the prosecution of the Zuma matter, the Mushwana report, the suspension and termination of Adv Pikoli's services, the Ginwala report, the Nicholson and Supreme Court of Appeal judgements, and the Mpshe decision to abort the prosecution.

2. The Rule of law and constitutionalism

The expression rule of law means no more than government business must be conducted according to law;⁹ not arbitrarily and not in accordance with the whims and caprices of those governing.¹⁰ It stands to reason that when the very opening sentence that it is founded upon the principles of democracy, the rule of law, justice and equality for all,¹¹ the founders must have had in their contemplation certain well established standards of good governance and democracy. Okpaluba has succinctly deduced the relevant factors:¹²

- that powers can only be exercised in accordance with law, not arbitrarily or capriciously. This means that every act of government or its officials must have a valid foundation in the law and that in acting, the government or authority must not exceed its powers or act without constitutional or statutory authority.
- that the exercise of governmental acts must be subject to review by the courts of law, so that, it is not in the spirit of the rule of law for the legislature to enact laws that take away the ordinary jurisdiction of the courts; there must be access to court for the ventilation of disputes and grievances.
- that each organ of state must treat the other with respect, especially, the executive must not only respect the due process of law but must also treat the judgements of courts of competent jurisdiction with uttermost respect. This entails the absence of resort to the use of brute force or self-help against using the judicial process to settle disputes;

⁹ See definition of this concept by the European Court of Human Rights in *Sunday Times v UK* (1979) 2 EHRR 245 at para 49; *Malone v UK* (1984) 7 EHRR 14; *Halford v UK* (1997) 24 HER 523.

¹⁰ Beinart 'The rule of law' (1962) *Acta Juridica* 99; Allan 'Legislative supremacy and the rule of law: Democracy and constitutionalism' (1985) *CLJ* 111; Bukurura, SH 'The Namibian Constitution and the constitution of the judiciary; in *The Constitution at work: Ten years of Namibian nationhood* (2002) 147.

¹¹ Section 1(a), (b) (cc) and (d) of the Constitution Act 108 of 1996.

¹² 'Constitutionality of legislation relating to the distribution of governmental powers in Namibia: A comparative approach' in *The Constitution at work: Ten years of Namibian nationhood* (2002) 110, 116-118 (footnotes omitted).

- that as a consequence of the foregoing, the constitutional state must ensure the independence and impartiality of the judiciary, the organ of government upon which the settlement of disputes between the government and its citizens is entrusted;
- that the law should conform to certain minimum standards of justice, both substantively and procedurally;
- that every person including public functionaries and officials are equal before the law, so that public officials are as well subject to effective legal sanctions just as other citizens; and that government officials, except with the express authorisation of the law, must not discriminate against citizens in respect of public privileges and rights;
- that the State is itself subject to law. For instance, it is beyond the State to purport by way of policy decision to alter the right which a citizen has acquired by virtue of the Constitution, nor could the legislature give effect to such policy by way of legislation without following the due process of amending the Constitution.

The modern concept of constitutionalism can be easily subsumed by the doctrine of the rule law and *vice versa*. Prosecutorial independence, the requirement that prosecutors themselves must be impartial, that prosecutorial decisions are taken without fear, favour or prejudice are fundamental aspects of principles contemplated by the rule of law.

A public prosecutor plays a ubiquitous and unique role in the criminal justice process; derived from the fact the State lawyer's notional client is a public that seeks the attainment of justice as opposed to victory in court.

‘A prosecutor must dedicate himself to the achievement of justice ... He must pursue that aim impartially ... Since he represents the State, the community at large and the interest of justice in general, the task of the prosecutor is more comprehensive and demanding than of the defending practitioner... Like Caesar's wife, the prosecutor must be above any trace of suspicion.’¹³

Justice must be attained in a fair and impartial manner, within a system that both searches for truth and values the protection of the individual's fundamental rights.¹⁴ Prosecutorial discretion is an essential feature of the criminal justice system.¹⁵

¹³ *Smyth v Ushewokunze & another* 1998 (2) BCLR (ZS).

¹⁴ The Canadian Bar Association's *Code of Professional Conduct* is representative in this regard:

It is impossible to pinpoint wherein the principle of the rule of law ends and where that of constitutionalism begins. Leon AJA of the Supreme Court of Namibia noted in *Ex parte Attorney-General: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*:¹⁶

In a constitutional state the government is constrained by the Constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes. But it means much more. It is a wonderfully complex and rich theory of political organisation. It is a composite of different historical practices and philosophical traditions. These are structural limitations and procedural guarantees that limit the exercise of State power. It means in a single phrase immortalized in 1656 by James Harrington in *The Commonwealth of Oceana* “a government of laws and not of men”.¹⁷

In the landmark Canadian rapeshield case of *R v Mills*,¹⁸ McLachlin and Iacobucci JJ speaking for the majority made the following observations regarding the relationship between the courts and the legislature:¹⁹

‘... we affirm the proposition that constitutionalism can facilitate rather than undermine it, and that one way in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection. Courts do not hold monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups.’

“When engaged as a prosecutor, the lawyer’s prime duty is not to seek conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.” See also American Bar Association *Standards for Criminal Justice, Prosecution Function*, 3-3.9.

¹⁵ See generally, *R v Beare* (1988), 45 CC (3d) 57 at 76, 66 CR (3d) 97, [1988] 2 SCR 387; *R v Cook* [1997] 1 SCR 1113 at 1123.

¹⁶ 1995 (8) BCLR 1070 (NmS).

¹⁷ *Ex parte Attorney General: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* at 1078H.

¹⁸ *R v Mills* [1999] 3. S.C.R 668.

¹⁹ *R v Mills* [1999] 3 S.C.R 668 at para 58.

Suffice to say that by virtue of the concept of constitutionalism legislative and executive powers must be exercised in such a manner as not to infringe the provisions of the Bill of Rights guaranteed the individual by the Constitution. The Constitutional Court of South Africa has emphasized that the exercise of presidential powers is subject to the principles of legality²⁰ and as is implicit in the Constitution, the President must act in good faith and must not misconstrue his powers.²¹

2.1 The intersection of judicial and prosecutorial independence

The independence of the judicial department is an indispensable attribute of the rule of law²² as well as a pillar upon which democracy is founded. Okpaluba observes:²³

‘The independence of the judiciary is the cornerstone of judicial review of legislation, of executive conduct and the sure foundation for the protection of fundamental rights of the individual. Take away the independence of the judiciary and the constitution will crumble and the democratic fabric of society collapse. It is therefore imperative for the sustenance of democracy that the independence of the judicial arm must be assured at all times. The independence of the judiciary is not only neatly tied to the supremacy of the constitution; it is an essential ingredient of the rule of law and the modern concept of constitutionalism.’

The doctrine of separation of powers and judicial independence are interdependent.²⁴ The proposition that justice must be administered without fear, favour or prejudice, rests on the delicate balance between the two pillars; on the one hand, the independence of the judiciary as an institution from the other arms of government, and on the other, the requirement of impartiality of judges in the adjudicatory

²⁰ *President of the RSA v SARFU* (3) 2000 (1) SA 1 (CC) at para 148.

²¹ *President of the RSA v Hugo* 1997 (4) SA 1 (CC) at paras 68-69.

²² Walker *The Rule of Law (Foundation of Constitutional Democracy)* (1988) 29; Carpenter *Introduction to South African Constitutional Law* (1987) 90-92.

²³ ‘Constitutionality of legislation relating to the distribution the exercise of judicial power: The Namibian experience in comparative perspective (part 1)’ (2002) *TSAR* 308, 322.

²⁴ *SA Personal Injury Lawyers Association v Heath* 2001 1 SA 883 ((CC) at paras 45 and 46.

process. In the leading Canadian case of *R v Valente*,²⁵ Dickson CJC explained the meaning and relationship between independence and impartiality – both of which are separate but distinct values or requirements:²⁶

‘Impartiality refers to a state of mind or attitude of the tribunal to the issues and the parties in a particular case. The word “impartial ... connotes absence of bias, actual or perceived. The word “independence” in s 11(d) [of the Charter] reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government, that rests on objective conditions or guarantees.’

Another classic passage defining the principle of impartiality to be an ingredient of independence is found in the case of *Smyth v Ushewokunze & another*²⁷ where Zimbabwean Supreme Court stated:²⁸

‘Section 18(2) embodies a constitutional value of supreme importance. It must be interpreted therefore in a broad and creative manner so as to include within its scope and ambit not only the impartiality of the decision making body but the absolute impartiality of the prosecutor himself whose function, as an officer of the court, forms an indispensable part of the judicial process. His conduct must necessarily reflect on the impartiality or otherwise of the court.’

Judges Bertelsmann and Preller captured the vital link between prosecutorial independence and judicial independence in *S v Yengeni*.²⁹ as follows:

‘The independence of the Judiciary is directly related to, and depends upon, the independence of the legal profession of the NDPP. Undermining this freedom [of the prosecution] from outside influence would lead to the entire legal process, including the functioning of the Judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.’³⁰

²⁵ (1985) 24 DLR (4th) 161 (SCC).

²⁶ *R v Valente* (1985) 24 DLR (4th) 161 (SCC) at 180 184 187 and 190.

²⁷ 1998(2) BCLR 170(ZS).

²⁸ *Smyth v Ushewokunze & another* at 178.

²⁹ 2006(1) SACR 405 (T).

³⁰ *S v Yengeni* at para 52.

An understanding of the principle of judicial independence is necessary to enable the reader to determine whether the level of prosecutorial independence and accountability pass the constitutional and legislative must to ensure that the public has confidence in the decisions being made.

3. The National Prosecuting Authority in the Constitution of South Africa

The proposition that ‘prosecutors have always owed their duty to carry out their public functions independently and in the interests of the public’³¹ is axiomatic. In *Grant v DPP*³² Lord Diplock went on to remind the statutorily independent Director of Public Prosecutions of proper role in criminal prosecution:³³

‘The office of the Director of Public Prosecutions was a public office newly created by section 94 of the Constitution. His security of tenure and independence from political influence is assured. In the exercise of his functions, which include instituting and undertaking criminal prosecutions, he is not subject to the direction or control of any other person.’

Before the advent of the 1993 Constitution,³⁴ the independence of the Attorney-General’s decision making concerning prosecutions was placed on firm legal footing by the Attorney-General Act 92 of 1992. In terms of section 5 the Minister had to coordinate their functions and could request them for information or a report on any matter, and they had to submit annual reports to him. Section 108 of the Interim Constitution also recognised that the authority to institute criminal proceedings vested in the Attorney General.

³¹ *Carmichele v Minister of Safety and Security & another* 2002(1) SACR (CC) at para 52.

³² (1982) AC 190.

³³ *Grant v DPP* at para 201.

³⁴ For extensive historical account: Joubert, J (ed) *Criminal Procedure handbook* 8 ed 46 et se; Du Toit, E *et al Commentary on the Criminal Procedure Act* (loose leaf ed) ch 1; Schonteich, M “Lawyers for the people: The South African Prosecution Service”, Monograph No 53, March 2001. See also *National Director of Public Prosecutions v Zuma* (273/08 [2009] ZASCA 1 (12 Jan 2009) at pars 28-30.

The fundamental change brought the creation of single national prosecuting authority (NPA) comprising a National Director, who is head of the prosecuting authority and a political appointee assisted by DPPs and prosecutors has its origins in section 179 of the Constitution. The NPA has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

Section 179(4) of the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. It would seem that the constitution sought to make it peremptory that legislation had to ensure prosecutorial independence. The question here is whether the Act³⁵ fulfils that constitutional imperative by being seen to be ensuring that prosecutorial decisions are taken without fear, favour or prejudice. This therefore is not necessarily an exhaustive dissection of the Act, but rather a brief interrogation of the question whether and to what extent the Act promotes prosecutorial independence.

3.1 Appointments

The regrettable fact concerning prosecutorial independence is that the president of the country has a sole prerogative regarding the appointment of the National Director of Public Prosecutions (NDPP), his deputies and other directors of public prosecutions³⁶. It is also worth pointing out that the president a member of the executive and a politician from the ruling party is not expected to be guided by anything regarding whom he should appoint. It is sad because nothing in the Constitution or the National Prosecuting Authority Act precludes the president from appointing a character or characters amenable to particular political, social or economic views, which views

³⁵ The National Prosecuting Authority Act 32 of 1998 (“NPAA”).

³⁶ Sections 5, 11 and 13 of Act 32 of 1998.

may prove themselves handy or problematic when certain prosecutorial decisions with particular political ramifications have to be taken.

One needs to pause for a moment here and reflect on what the Constitutional Court had to say on this aspect of the president's appointment powers over the prosecuting authority. It was argued in the *First Certification judgment*³⁷ that the appointment of the NDPP³⁸ by the president impedes the separation of powers. The constitutional court rejected this argument by holding that the prosecuting authority is not part of the judiciary and that therefore the president's appointment powers did not contravene the separation of powers.³⁹ Apparently, in arguing by inference that the NDPP was an ordinary civil servant whose job could be interfered with by the executive without flouting the separation of powers doctrine, the court failed to see the *sui generis* nature of the prosecuting authority as a tributary which, if polluted by executive interference, pollutes the judiciary, an ocean into which it flows.

Clearly hampered by the fact that at that stage⁴⁰ national legislation had not yet been enacted to give effect to section 179(4) of the Constitution, the court held the view that prosecutorial independence could still be guaranteed by an Act of parliament,⁴¹ that is, despite the head of the executive's wide appointment powers over the prosecuting authority. One wonders whether that court can still hold the view that prosecutorial and judicial independence are still safe under the constitution and the Act as they stand today.

³⁷ *Ex parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa* 1996(4) SA 744(CC).

³⁸ The head of the National Prosecuting Authority.

³⁹ *Ibid* Fn 138 at para 141G.

⁴⁰ When certification judgement was passed, the National Prosecution Authority Act 32 of 1998 had not yet been enacted.

⁴¹ The Constitutional Court was optimistically looking forward to what was to be Act 32 of 1998.

However, in the appointment of Deputy National Directors the president may consult the Justice Minister⁴² and the NDPP is cold comfort to true prosecutorial independence adherents. Firstly the president is not compelled to consult them and secondly, even if he does consult them they have no veto over any of his appointments. Thirdly, both the minister and the NDPP are themselves appointees of the president and cannot be seen to be giving him instructions or contesting the views of one at whose mercy they serve.⁴³

3.2 Removal of the NDPP from office⁴⁴

In accordance with section 12(6) of the Act,⁴⁵ the president may provisionally suspend the NDPP or deputy NDPP from office pending an inquiry into such an incumbent's fitness to hold office. Post the inquiry the president may decide to terminate the services of such a person on account of one or more of the following reasons:⁴⁶ misconduct; ill-health; incapacity to carry out duties effectively; and/or no longer being a fit and proper person to hold the said office.

This decision to terminate services only comes into effect if endorsed by parliament.⁴⁷ That parliament has to ratify the president's decision on the termination of service of the NDPP or deputy is admittedly some measure of ensuring that the president does not have as much *carte blanche* in dismissal as he has in appointing. This seems to be an accountability measure; some check and balance to ensure some degree of prosecutorial independence. However, the likelihood of parliament voting against a decision of the president on this score is

⁴² Section 11(1) of Act 32 of 1998.

⁴³ See *Pikoli v President and Others* (8550/09) [2009] ZAGPPHC 99 (11 August 2009). See too *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).

⁴⁴ For excellent exposition: *Pikoli v President and others* (8550/09) [2009] ZAGPPHC 99 (11 August 2009).

⁴⁵ Act 32 of 1998.

⁴⁶ Section 12(6) (a) (i-iv) of Act 32 of 1998.

⁴⁷ Section 12(7) of Act 32 of 1998.

at its best an extreme improbability for a number of reasons. For one reason, parliament which according to our electoral system,⁴⁸ elects a president from amongst its members by a simple majority from the ruling party is most unlikely to vote against a president's decision to fire a NDPP who is at odds with the president for refusing to tow the ruling party line. For another, even if parliament did the unthinkable and vetoed the president and a NDPP was to stubbornly hold on to his employment, his stubbornness is unlikely to add any value to his job more so that he will still be enjoined by the Constitution⁴⁹ and the Act⁵⁰ to co-operate with and submit to the Justice Minister, a political appointee who himself has to satisfy the president's wishes.

3.3 The prosecution policy and policy directives

Section 21(1) (a) of the Act⁵¹ provides that the NDPP shall determine prosecution policy. But such a determination is done after consulting the minister of Justice,⁵² a political appointee with a clear political oversight role. There is no guessing how the minister could and would influence the tone of the policy to either be equivocal on political and executive intervention in prosecution decisions through reference to such slippery and pliable concepts as national security and public interest.

Therefore whatever policy directives the NDPP issues in terms of section (1) (b) of the Act flow from a policy tainted with, decorated with, embellished with and or condensed with whatever political checks and balances deriving from the over-bearing influence of the minister's final responsibility over the NPA.

⁴⁸ South Africa's electoral system is one where the President is not elected directly by the voting public. The President in this party-list proportional representation system is elected by parliament by a simple majority. This effectively means that the majority party's candidate in parliament gets elected president.

⁴⁹ Section 179(6) of the Constitution.

⁵⁰ Section 33(1) of Act 32 of 1998.

⁵¹ Act 32 of 1998.

⁵² Section 21(1) (a) of the Act of 1998.

3.4 Does the Act fulfil the constitutional mandate of Section 179(4)?

Mention has already been made that the Constitutional Court looked forward to the Act to safeguard prosecutorial independence by ensuring that the prosecuting authority exercises its functions without fear, favour or prejudice. The question which remains is whether the constitution and the constitutional court's anticipation were satisfactorily met by the NPAA or not.

Section 32(1) (a) of the NPAA merely regurgitates the constitutional provisions that the prosecuting authority should be impartial and act without fear, favour or prejudice. In all scholarly honesty, it adds nothing to entrench prosecutorial independence as mandated by the constitution particularly when one considers that section 33 of the statute endorses and almost quotes verbatim the troublesome constitutional provision about the minister having final responsibility.

It is indeed true that section 32(1) (b) of the NPAA emphatically states that no member or employee of an organ of state or any other person shall interfere with, hinder or obstruct the prosecuting authority in the exercise, carrying out or performance of its powers, duties and functions. But then there is a salient rider, which brings to nil the whole bravado and it is gleaned from the words 'improperly interfere'.⁵³ It would seem that the legislature thought of some circumstances where some person or organ of state could be allowed to interfere with the prosecuting authority in a manner deemed proper. This cannot be reference to judicial review nor accountability to parliament, for if it were, there would direct reference thereto. It surely seems like the legislature sought to avoid cutting all ways in which the executive can rein the prosecuting authority in. Surely, true

⁵³ Section 32(1)(b) of Act 32 of 1998.

and unadulterated prosecutorial independence ought to be couched in less ambiguous terms.

Section 33(2) of the NPAA calls on the NDPP to perform certain duties, so as to enable the minister to 'exercise final responsibility over the prosecuting authority'. The obvious question is that since this Act is more about ensuring prosecutorial independence than it is about enabling ministers to do their jobs, then why is it that there should be an express provision about the NDPP enabling the minister to do something?

Section 33(2) of the Act calls upon the NDPP to do the following:

- furnish the minister with information or reports regarding any case, matter or subject dealt with by the NDPP or a Director of public prosecution.
- provide the minister with reasons for any prosecutorial decision taken.
- furnish the minister with information regarding the prosecution policy.
- furnish the minister with information regarding policy directives.
- submit annual reports and reports in terms of section 34 to the minister.

At first glance the afore mentioned duties owed by the NDPP to the minister may appear to be routine accountability measures put in to ensure that, in terms of the rule of law, the prosecuting authority has to account somewhere. But a closer and scholarly scrutiny reveals the section 33(2) duties as measures deliberately purposed to eat away at prosecutorial independence by ensuring that the prosecuting authority is micro-managed all the way by the executive.

The section 33(2) duties cannot be accountability checks and balances because the accountability of the prosecuting authority is expressly

provided for in a different section, which is section 35 of the NPAA. In terms of section 35 of the statute the prosecuting authority accounts to parliament. Therefore it is to be extrapolated that if the measures in section 33(2) were purposed at accountability, they would have been included under section 35 as part of accountability to parliament and not as some separate dubious duties owed to the minister. It would then be clear that it is parliament and not the minister, who plays an oversight role over the prosecuting authority. Such clarity of roles would surely be less intrusive on the prosecution terrain than the current supervisory role played by a member of the executive

Furthermore, the duties owed to the minister in terms of section 33(2) seem more of orders to the NDPP than mere administrative formalities. Unlike a simple administrative reporting format, they seem designed to ensure that the minister is able to rein in a potentially unruly NDPP at any given time and in any prosecutorial matter.⁵⁴ The NDPP can be requested to explain himself on any case, any matter, any prosecutorial decision and any policy directive the NDPP is involved with and at any time the minister so wishes. The question then becomes why the NDPP should face such close, constant and potentially daily supervision by the minister. Is the executive perhaps nostalgic of the pre-constitutional's iron grasp over the prosecuting authority?⁵⁵ Surely, an allegedly independent institution should not be subject to such close, constant, open-ended and elaborative supervision.

3.5 Does the Act safeguard prosecutorial independence?

Section 41 of the National Prosecuting statute creates offences for contraventions of the Act, including interference with prosecutorial duties. The prosecution of those who interfere with or obstruct

⁵⁴ Section 33(2) (a)-(b) refer to any matter, any case, any subject and decision as areas where the Minister can require reports.

⁵⁵ Section 3(5) of Criminal Procedure Act 51 of 1977.

prosecutors in the discharge of their duties goes a long way in entrenching prosecutorial independence. Such criminal prosecutions say to everyone that no one will be allowed to interfere with the independence of our prosecutors be it in direct contravention of this Act or through inducements on prosecutors in other statutory and common law offences.

In the light of the evidence before the Ginwala Inquiry, the Inquiry's findings and the revelations attendant to the decision of the Acting NDPP⁵⁶ to drop all charges against Mr. Jacob Zuma,⁵⁷ it remains to be seen whether anyone will be prosecuted for section 41 contraventions. As Professor Hughes⁵⁸ has remarked, it is very interesting to see who will be prosecuted for obstruction of justice in the marathon Zuma matter and the Mbeki-Pikoli-Selebi matters. If such prosecutions were to see the light of day, they would go a long way in entrenching our much-vaunted prosecutorial independence. Unless of course if it is then said that those who contravened section 41 acted pursuant to the section 179(6) of the Constitution, and section 33(2) of the Act and/or acted in good faith under the Act.⁵⁹

3.6 Prosecutorial independence: A Commonwealth comparative perspective

The principle that supremacy of the prosecutorial independence is foundation of constitutional democracy has been recognized within

⁵⁶ Advocate Mokotedi Mpshe, Pikoli's deputy, was appointed Acting NDPP after Pikoli's suspension. On 06th April 2009 he took a prosecutorial decision to withdraw all charges against Zuma.

⁵⁷ Jacob Zuma was subsequently elected President of the Republic of South Africa after elections won by his ruling ANC party.

⁵⁸ *Column "The watchword" The Star Newspaper* February 9 2009.

⁵⁹ Section 42 of the Act of 1998 provides for a limitation of liability for section 41 contraventions and states: "No person shall be liable in respect of anything done in good faith under this Act." 'Good faith' is conveniently not defined anywhere in the Act.

the Commonwealth.⁶⁰ Precisely how prosecutorial independence is achieved in practice varies from jurisdiction to jurisdiction. In England and Australia, for instance, statutorily independent Directors of Public Prosecution carry out prosecutions quite independent from extraneous political and public pressures.⁶¹

3.6.1 England

Since the pronouncement of Viscount Simon, Attorney General of England⁶² in asserting the absolute independence of the Attorney General both in deciding whether to prosecute and in the making of prosecution policy, the principle of prosecutorial independence has been accepted as a way of life. In England prosecutions are conducted or supervised by the Director of Public Prosecutions, who, statutorily, acts under the “superintendence”⁶³ of the Attorney General. The

⁶⁰ In 1977, the Commonwealth Law Ministers Conference issued an official Communiqué under the heading “Modern Role of the Attorney General”, as follows:

“In recent years, both outside and within the Commonwealth, public attention has frequently focused on the function of law enforcement. Ministers endorsed the principles already observed in their jurisdiction that the discretion in these matters should also be exercised in accordance with wide considerations of the public interest, and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of the office whatever the precise constitutional arrangement in the State concerned.

⁶¹ MacFarlane, BA ‘Sunlight and Disinfectants: prosecutorial independence and Accountability through the Law’ [2001] 45 *Criminal Law Quarterly* 272, 273

⁶² He made this clear in an oft-quoted statement:

“I understand the duty of the Attorney General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see to it that no one is prosecuted with all the majesty of the law unless the Attorney General, as head of the Bar, is satisfied that the case for prosecution lies against him. He should receive orders from nobody.” – cited in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 (HL) 70 at para b.

⁶³ Lord Havers explained the statutory oversight of the Attorney General over the DPP in England as follows:

“My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable to the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship is such that I require

director is politically independent, but answerable to Parliament for the decisions of the Crown Prosecution Service through the Attorney General.

3.6.2 Australia

In Australia, the State of Victoria took the lead in establishing an independent Director of Public Prosecutions. The incumbent was appointed by order-in-council and held office until the age of 65; salary was tied to that of a Supreme Court judge, and the Director could not be removed except by resolution of each of the Houses of Parliament of the State of Victoria. Despite being statutorily created, subsequent events have shown that the DPP role's can be susceptible to political pressure.⁶⁴

3.6.3 Canada

In terms of the nature of the independence of the Attorney General, McFarlane⁶⁵ asserts that the Canadian approach trades mechanism and structures for an open and accountable process - decisions are made in a detached, neutral way, and accountability falls where it should be: on the Attorney General, through a publicly transparent process that ensures, throughout, that he (or she) must account for all prosecution decisions to Cabinet colleagues, the Legislature and, ultimately, the public.

to be told in advance of the major, difficult, and from public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction.” - MacFarlane, BA ‘Sunlight and Disinfectants: prosecutorial independence and Accountability through the Law’ [2001] 45 *Criminal Law Quarterly* 272, 284-285.

⁶⁴ See generally Goddard ‘Explaining prosecution decisions publicly’ (1996) *New Zealand LJ* 355, 358; McKechnie, J ‘Directors of Public Prosecutions: Independent and accountable’ (1996-1997) 15 *Australian Bar Review* 122, 122.

⁶⁵ Sunlight and Disinfectants: prosecutorial independence and accountability through the Law’ [2001] 45 *Criminal Law Quarterly* 272, 297-298.

The Attorney General occupies a quasi-judicial role. In other words, in deciding whether to prosecute, or discontinue proceedings, or to appeal a decision, he or she is not under the authority of Cabinet, or even the First Minister.⁶⁶ In the institution and conduct of criminal prosecutions, the Attorney General is responsible to the Queen, not the government of the day.⁶⁷

However, the case of *R v Stone*⁶⁸ served to spark heated legal and political debate about the independence of the Attorney General's role and responsibilities. In *Stone* the defence had contended that the Attorney General sought to enhance his political position before a general election by directing that an appeal be taken for the purpose of demonstrating a "get tough" approach to spousal manslaughter. In response, Crown counsel argued that even if it could be shown that a public outcry had led to the Attorney General's direction, the connection between the two was not inappropriate.

In view of the Crown's submission, Huddart JA ruled as follows:⁶⁹

I agree with that proposition. The "public interest" that it is the duty of the Attorney General to consider requires him to make an overall assessment of the combined weight of all factors for and against prosecution. This filtering is usually done by the Criminal Justice Branch. But the Attorney General bears the ultimate responsibility for every decision to prosecute. Since 1991, the Attorney General has never before chosen to intervene to overrule a decision of the Assistant Deputy Attorney General responsible for that Branch as to whether to prosecute. Nor, it appears, has he done so with regard to a position being taken on a sentencing hearing. If such had happened, a direction would have been published in the Gazette.

Nevertheless, it is the Attorney General's responsibility to ensure that the courts charged with determining appropriate sentences under the *Criminal Code* are properly informed of the considerations to be taken into account in the sentencing of every person convicted of a crime.

⁶⁶ Layton, D 'The prosecutorial charging decision' (2002) 46 *Criminal Law Quarterly* 447.

⁶⁷ Carney, G 'The role of the Attorney general' (1997) 9 *Bond LR* 1; Scot, I 'Law policy and the role of the Attorney General: Constancy and change in the 1980's' (1989) *University of Toronto LJ* 109.

⁶⁸ [1999] 2 SCR 290.

⁶⁹ *R v Stone* at paras 11-13.

Sentences are punishment. They have significant symbolic value in our community. Parliament has fixed life imprisonment as the maximum penalty for the crime of manslaughter and no minimum term. In my view, public concern about the range of sentence habitually being imposed for the type of crime of which the respondent was convicted is one consideration of the range of sentence. Thus, I am of the view that the subjective opinions of the public as expressed in the media are a factor the Attorney general may take into account in determining whether to seek a review of the range for a particular type of crime.’

Given the constitutional responsibility for the conduct of prosecution described earlier, it is clear that Attorneys General in Canada unquestionably can direct individual prosecution decisions.⁷⁰ They can instruct that proceedings be discontinued, or that appeal be brought. In practice, Attorney’s General have refrained from providing direction in individual cases. Even where the evidence falls short of displaying an intervention for partisan political considerations, the facts may nonetheless sustain the claim that the direction expresses broad governmental policies that will be pursued even though they may result in outcomes that are different from normal prosecution decision making.⁷¹

3.6.4 Namibia

In the main, the legal history of Namibia is historically linked to that of South Africa.⁷² According to the Namibian constitution prosecutorial duties are exercised exclusively by a Prosecutor-General⁷³ who must exercise the said duties in accordance with the

⁷⁰ Roach, K “The Attorney General and the Charter revisited’ (2000) 50 *University of Toronto LJ* 1.

⁷¹ Sunlight and Disinfectants: prosecutorial independence and accountability through the Law’ [2001] 45 *Criminal Law Quarterly* 272, 297.

⁷² In *R v Christians* 1924 AD 1011, the South African Appellate Division of the High Court underlined South African sovereignty over S.W.A. Horn; “The independence of prosecutorial authority of South Africa and Namibia; A comparative study, 2008” (internet comm. /articles) states: ‘The Attorney-General of S.W.A lost his autonomy when Act 51 of 1977[section 3(5)] was made applicable in Namibia.’

⁷³ The office of the Prosecutor-General was created in terms of Article 88 of the Namibian Constitution.

constitution.⁷⁴ The Prosecutor-General is appointed by the president but upon recommendation by the Judicial Services Commission (JSC).⁷⁵ His appointment is, unlike ours, not the sole prerogative of the president as he is some sort of a quasi-judicial appointment. The composition of the JSC, which recommends on his appointment as well as suspension, is in such a manner that the Prosecutor-General's independence from executive control is assured.⁷⁶

The Namibian Constitution further provides for the appointment of an Attorney General by the president of the country.⁷⁷ The Attorney General who is the equivalent of our Justice Minister, is a political appointee who exercises final responsibility for (not over) the Prosecutor-General. Nico Horn gives a relational dichotomy of meaning between the prepositions 'for' and 'over' which should be instructional to the legislature, the judiciary and the executive in South Africa.⁷⁸ He concludes that since the South African Constitution was written after the Namibian one and after an instructional Namibian Supreme court case on the relationship between the executive and an independent prosecuting authority had already been decided, it can be assumed that the drafters of South Africa's constitution consciously decided to stay closer to the independence-restricting wording of section 3(5) of the Criminal Procedure Act because, although the words control and direction do not appear in section 179, the notorious element of political control is maintained in the South African Constitution.

⁷⁴ Article 141(2) of the Namibian Constitution.

⁷⁵ Article 88(1) of the Namibian Constitution. See also in Bukurura, SH 'The Namibian Constitution and the constitution of the judiciary' *The Constitution at work: Ten years of Namibian nationhood* (2002) 147.

⁷⁶ Horn; "The independence of prosecutorial authority of South Africa and Namibia; A comparative study, 2008" (internet comm./articles at par 5 p 21.

⁷⁷ Articles 86 and 87 of the Namibian Constitution.

⁷⁸ Horn; "The independence of prosecutorial authority of South Africa and Namibia; A comparative study, 2008" (internet comm./articles) at par 5 p 127.

In *Ex parte: Attorney General*⁷⁹ the facts were briefly as follows: there had been a tug of war between the Attorney General and the Prosecutor-General. This related to who had the power to withdraw charges and who had overall authority over prosecutorial staff. The Prosecutor-General complained that the Attorney General gave his staff instructions without the Prosecutor-General's consent and/or knowledge. He further indicated that he was not going to obey an instruction by the Attorney General to withdraw a specific criminal charge. He stood his ground against the Attorney General and suggested that the Attorney General's instruction amounted to defeating the ends of justice. The Attorney General, for his part, had laid a charge of insubordination against the Prosecutor-General saying that he had refused to obey a lawful instruction to withdraw a charge. Thus the Attorney General approached the Supreme Court to determine issues of who had authority over the other and whose turf prosecutorial discretions were. The Prosecutor-General argued that the case was really about whether, under the Namibian constitution, the prosecuting authority was truly independent or not.

In deciding the matter, Leon J noted that while the Attorney General's office was a political office with executive functions, the Prosecutor-General's office was quasi-judicial and non-political. Holding that there was nothing in the Namibian constitution which expressly placed the Prosecutor-General under the superintendence or direction of the Attorney General, he stated: ⁸⁰

'I do not believe that those rights and freedoms can be protected by allowing a political appointee to dictate what prosecution may be initiated, which should be terminated or how they should be conducted. Nor do I believe that that would be in accordance with the ideals and aspirations of the Namibian people or in any way represent an articulation of its values'.

⁷⁹ 1998 NR 283 (SC) (1) Nm.

⁸⁰ *Ex parte: Attorney-General* 1998 NR 283 (SC) (1) Nm.

Thus it can be said that the Namibian prosecuting authority is totally independent so far as its mandate to prosecute is concerned. And while South Africa's jurisprudence can afford to pay scant regard to prosecutorial models of France and Italy, the Namibian class on prosecutorial independence is one it dare not bunk.

3.6.5 Nigeria

At independence the 1960 constitution of Nigeria created the office of the Director of Public Prosecutions.⁸¹ The said director had exclusive control over the prosecuting services. Subsection (6) of Section 97 of the Federal Constitution expressly provided that in his prosecutorial duties the Director of Public Prosecutions was not subject to the control of any other person or authority. He was so independent that he could only be removed from office via an inquiry by a special tribunal and only in specified circumstances akin to those for the removal of the NDPP in South Africa⁸². This rationale of an independent prosecuting authority expressly said to be independent by the constitution was carried through in the subsequent Constitution of the Federal Republic of Nigeria in 1963.⁸³

Under the same early sixties constitutional dispensation was created the office of the Attorney-General, who was a cabinet member. As has been the case with other jurisdictions the notion of a truly free prosecuting authority was also seen in Nigeria to be too radical for a state in its infancy hence subsequently the Attorney-General, a member of the executive, was given powers to control the prosecuting authority.⁸⁴ As things stand right now in Nigeria, the Director of Public Prosecutions is a staff member of the Ministry of Justice and is

⁸¹ See section 97 of the 1960 Constitution of Nigeria.

⁸² Section 12(6) (a)-(e) of Act 32 of 1998.

⁸³ Section 104 of the Constitution of the Federal Republic of Nigeria of 1963.

⁸⁴ See Adekunle D, "Independent Prosecution systems in Nigeria: Challenges and Prospects, a draft paper presented at African Network of Constitutional Law Conference in Nairobi, April 2007.

therefore under the direct supervision of the Minister of Justice and the duplicator role player that is the Attorney General.

In terms of section 179 of the Federal Constitution, the Attorney General, a politically appointed cabinet member has the following powers:

- power to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial, in respect of any offence created by or under any Act of the National Assembly.
- power to take over and continue any such criminal proceedings that may have been instituted by any other authority or person, and
- power to discontinue, at any stage before judgement is delivered, any such criminal proceedings instituted or undertaken by him or any other authority or person.

The reference to other authorities which may institute proceedings relates to the police, the Director of Public Prosecutions, any counsel engaged by the police to prosecute, private prosecutions, the Anti-corruption Commission, the Economic and Financial Crimes Commission (EFCC), and the Code of Conduct Bureau all of which are under the superintendence of the Attorney-General.

At first blush the section 179 references to the powers of the Attorney-General mentioned above appear valuable towards prosecutorial independence. That is so until one realizes that, like the Namibians, when Nigerians talk about an Attorney General they are not referring to a prosecutor per se but a politician and a cabinet member. Therefore instead of enhancing prosecutorial independence, section 179 actually suppresses independence by subjecting the whole spectrum of a multiplicity of prosecuting authorities and competencies to the whims, control and supervision of a politician. Therefore unlike the early nineties lessons on prosecutorial independence from Nigeria, it is submitted that the current lessons serve as a cautionary tale.

4. The Prosecution Service Guidelines

In accordance with mandatory constitutional prescripts, the National Director of Public Prosecutions must, with the concurrence of the cabinet member responsible for the administration of justice and after consulting the Directors of public prosecutions, determine prosecution policy which must be observed in the prosecution process.

4.1 Prosecuting without fear, favour or prejudice

Pursuant to subsection 5(a), a prosecution policy was indeed determined and signed into effect by the first NDPP on 1st October 1999. The policy underscores the mission of the NPA to prosecute fairly and effectively, according to the rule of law, acting in a principled manner without fear, favour or prejudice⁸⁵. In the foreword by the seminal NDPP it is stated that much reliance is placed on prosecutors' good judgment to ensure that the administration of justice is fair, effective and beyond reproach. Indeed the policy purports to promote greater consistency in prosecutorial practices nationally and expressly requires;⁸⁶

'Members of the prosecuting authority to act impartially and in good faith. They should not allow their judgment (discretion) to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender.'

4.2 Clause 4(c) of the policy

Clause 4(c) of the policy seems to emphasize the wide discretion that prosecutors have in stating:

There is no rule in law which states that all the provable cases brought to the attention of the prosecuting authority must be prosecuted. On the contrary, any such rule would be too harsh and

⁸⁵ Introduction to the policy manual at page A.1. Para 2.

⁸⁶ See the purpose of the policy at page A.2. of the NPA policy manual.

impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.’

Clearly clause 4(c) gives prosecutors wide discretionary powers and independence because it suggests that the prosecutorial decision to institute criminal proceedings or not does not only depend on an objective and sterile determination of whether there is a prima facie case against the accused or not. The policy calls for much more to be factored into a prosecutorial decision and emphasizes that prosecution priorities are not a stagnant predictable force but are rather determined from time to time with due regard being given to whether the decision to prosecute might not be counter-productive to national and public interests.

While clause 4(c) may be seen as far-reaching in underscoring prosecutorial independence, it is actually a double-edged sword which may actually militate against prosecutorial independence. This flows not only from the inceptive policy basis that the policy be determined with the concurrence of the minister,⁸⁷ a politician, but also from the obvious inference that a determination of what is counter productive to national, public and/or security interests is one which cannot be taken by the NDPP without resort to the views of the executive and its political apparatus. Moreover all three instruments, that is, the constitution, the NPAA and the policy,⁸⁸ enjoin the NDPP to respect the final authority exercised by the minister.

4.3 Accountability

In its very introduction, the policy states that the prosecuting authority is accountable to parliament and ultimately to the people it

⁸⁷ Section 21(1)(a) of Act 32 of 1998.

⁸⁸ *The Prosecution Policy Manual* at page A.1. para 7. It calls for a policy that must be in line with the Constitution (read section 179(6)) of the Constitution.)

serves.⁸⁹ While the issue of accounting to parliament is generally sweet music to prosecutorial independence within the rule of law and is clearly flowing from the prosecuting authority's accountability as per the Act,⁹⁰ the policy seems to be selectively overriding constitutional provision that the Minister exercises final responsibility over the National Prosecuting Authority⁹¹ and that therefore the National Prosecuting Authority is primarily accountable to the Minister, a politician and a member of the executive arm of government. Therefore the policy while generally based on noble intentions towards prosecutorial independence and while generally grounding adequate operational requirements for an independent prosecuting authority, conveniently and deftly sidesteps the key issue of a clear and present danger to prosecutorial independence in the form of the executive.

4.4 The prosecutorial code of conduct

It was framed by the NDPP in terms of section 22(6) (a). It provides that prosecutors should be individuals of integrity whose conduct should be honest and sincere and who should strive to be seen to be consistent, independent and impartial.⁹² How prosecutors are supposed to be consistent and predictable in their decisions and still satisfy the non-stagnant dynamism of considering national interests as called upon by clause 4(c) of the policy is not explained anywhere by anybody. Perhaps that is part of the final responsibility of the Minister.

Furthermore, the code of conduct states that the prosecutorial discretion to institute and/or to stop proceedings should be exercised independently in accordance with the prosecution policy and the

⁸⁹ *Policy Manual* at para 6.

⁹⁰ Section 35 of Act 32 of 1998.

⁹¹ Section 179(6) of the Constitution.

⁹² *Policy Manual*, The code of conduct at para C.2.

policy directives and be free from undue political and judicial interference.⁹³ While the qualification of interference by the adverb “undue” is unfortunately keeping the door of political interference slightly ajar, the code does at first blush seem to try and ensure prosecutorial independence. That is of course before one considers the overriding unqualified weight of the minister’s supervisory final responsibility⁹⁴ and before one realizes that while judicial interference in prosecutorial matters may at some stage be due;⁹⁵ there would never be a time when, in true prosecutorial independence fashion, political interference may be due.

5. Challenges to Constitutional edifice and independence of the Prosecution Authority

5.1. From Pikoli to Ginwala.

The extent to which the statutorily independent National Director of Prosecution is protected to carry out prosecutions independently from government and the endless stream of political and populist pressure in South Africa was brought to the fore by the dramatic events leading up to the suspension of Adv. Pikoli,⁹⁶ and the culmination of the

⁹³ Code of conduct p C.2. para 2.

⁹⁴ Section 179(6) of Act 108 of 1996.

⁹⁵ Prosecutorial duties, except those deemed not reviewable in terms of the Promotion of Administration of Justice Act, are, in the spirit of accountability and rule of law, judicially reviewable. However, the Constitutional Court left the question open in *Kaunda v President of RSA (2)* 2005 (4) SA 235 (CC) at para 84. The common law position outlined by Viscount Dilhorne in *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497 (HL) at 591:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.”

English law appears to be “that absent dishonesty or mala fides or an exceptional circumstance, the decision of the DPP to consent to prosecution of the respondents is not amenable to review”: *R v Director of Public Prosecutions* [1999] UKHL 43; [2000] 2 AC 326.

⁹⁶ Advocate Pikoli, the 2nd NDPP in the new South Africa, was suspended by President Mbeki on 23 September 2007.

marathon Zuma saga⁹⁷ which had opened the prosecutorial independence Pandora's box in 2003. Pikoli's suspension led to the Ginwala Inquiry⁹⁸ while at about the same watershed period in 2008-2009, the Zuma saga culminated in the Nicholson judgment⁹⁹ and the Mpshe decision.¹⁰⁰ Hereunder is a brief outline of the Ginwala Inquiry, its findings, the Nicholson judgement, the Mpshe decision and a plethora of views and commentaries in the media which followed in the wake of this South African soap opera as it unfolded and sought to shed clarity on prosecutorial independence or the lack thereof in this country.

On 23 September 2007 President Thabo Mbeki¹⁰¹ suspended the then National Director of Public Prosecutions, Adv. Pikoli. He appointed his deputy, Adv Mpshe, as Acting NDPP. The official reason for his suspension was given to the media as an irretrievable breakdown in the working relationship between Pikoli and the then Justice and Constitutional Development Minister, Brigitte Mabandla¹⁰². The

⁹⁷ The Zuma criminal prosecution and its aftermath represent early ominous signs of decay in the fragile political apparatus. See also *Pretoria News* February 19 2009 "Zuma ordered my dismissal, says Pikoli".

⁹⁸ Dr. Frene Ginwala, a former speaker of the National Assembly, was appointed by President Mbeki to conduct a one-person enquiry into Adv. Pikoli's fitness to hold office. That was shortly after Pikoli's suspension.

⁹⁹ *Zuma v NDPP* (2008) JOL 22416 (N).

¹⁰⁰ Advocate Mpshe, appointed Acting NDPP after Pikoli's suspension, decided to withdraw all charges against Zuma in a decision communicated on 6th April 2009.

¹⁰¹ The second democratically elected President of a united and free South Africa. He was recalled from that post in the wake of the Nicholson judgement, which cast aspersions on his political integrity.

¹⁰² *Sunday Times* 7 October 2007 feature "Tell us the truth Mr. president" by Mpumelelo Mkhabela, Buddy Naidoo and Brandon Boyle chronicles the sequences of events as well as executive interference:

"...Mpshe had failed to get Judge Mojapelo to cancel a search warrant. Following pressure from the Presidency and the Justice Ministry, Mpshe succeeded in convincing the Randburg Magistrate Court to cancel a warrant for the arrest of Selebi issued on September 10. The warrants sparked fallout between Mbeki and Pikoli, with Mbeki understood to be vehemently opposed to Selebi's arrest. Mbeki is understood to have told Pikoli that he preferred the matter to be handled 'in another way' but Pikoli was adamant Selebi must be brought to court. The following day, Mbeki met Mabandla and Pikoli separately. By that night Mbeki had already decided to suspend stubborn Pikoli. On September 24, 2007, Mbeki announced Pikoli's suspension, citing a breakdown in the working relationship between Pikoli and Mabandla. On September 25, Chikane told opposition party leaders that Pikoli's suspension

President then appointed a one person commission headed by Dr. Frene Ginwala to investigate suspended Pikoli's fitness to hold the office of NDPP.

5.1.1 The Inquiry

When government's evidence was led it became very clear that government was unsure as to which reason to advance for Pikoli's suspension.¹⁰³ While neither the president nor the minister testified at the inquiry, Dr. Frank Chikane¹⁰⁴, Menzi Simelane,¹⁰⁵ Johnny de Lange¹⁰⁶ and Manala Manzini¹⁰⁷ testified on behalf of the executive and gave variant reasons why they felt Pikoli was not fit to hold office.¹⁰⁸

Chikane submitted that Pikoli was suspended due to his insensitivity to political ramifications of some criminal cases. Simelane suggested that Pikoli was insubordinate to him as the main functionary in the ministry of justice. His reading of the role of the NDPP was that the NDPP reported to and accounted to him. De Lange suggested that

was not based on a relationship breakdown but was due to structural problems. This week Mbeki—who has been directly involved in attempts to quash Selebi's arrest—told reporters that he 'does not handle warrant.'"

¹⁰³Editorial, "Come clean, Mr. President." *The Sowetan Newspaper* 1st October 2007, 12 reads:

"No one believes the official line that Mbeki suspended chief prosecutor and scorpions boss Vusi Pikoli because of an 'irretrievable breakdown' in his relationship with his political masters...If recent reports are credible, Mbeki and his Justice Minister Brigitte Mabandla exerted ever more political interference to protect Comrade Selebi"

"Neither commissioner Selebi nor President Mbeki has legal qualifications. Yet, after learning that there was a warrant for Selebi's arrest, Mbeki intervened by suspending Pikoli...Mbeki's drastic intervention blurs the separation of powers." *The Citizen* Editorial September 29, 2007, 8.

See also Shameela Seedat "The strange crucifixion of Pikoli" *The Star Newspaper* 9th February 2009, 9.

¹⁰⁴ The Director-General in the office of the President.

¹⁰⁵ The Justice Ministry Director –General.

¹⁰⁶ The then Deputy Minister of Justice and Constitutional Development.

¹⁰⁷ The National Intelligence Chief.

¹⁰⁸ See in general the Report of the Enquiry into the fitness of Adv. Pikoli to hold the office of NDPP dated November 2008 and hereinafter referred to as the Ginwala Report.

Pikoli was suspended for entering into uncalled for plea-bargains with organized crime in a manner that compromised national security. In fact when cross-examined, he correctly observed that political control was an inbuilt element of section 179(6) of the Constitution. He actually underlined the superintendence of the minister over the prosecuting authority by referring to the minister as “the champion of the NDPP.” Manzini was of the view that Pikoli was unfit to hold office because he was incompetent to comprehend national security priorities. For his part Pikoli averred that he was suspended to stop him from initiating criminal proceedings against one Jackie Selebi, the then national police chief and a political bedfellow of the president and the minister.

5.1.2 The Findings¹⁰⁹

This paper has neither the mandate nor the space to fully interrogate all the findings of the Ginwala Inquiry. Its brief is to look at how the inquiry dealt with issues related to prosecutorial autonomy and how it generally pronounced itself on section 179(6) of the constitution. On the general variant issues alleged before it the inquiry found as follows¹¹⁰:

- the original allegation of an irretrievable breakdown in relations between Pikoli and Mabandla was found to not have been proven.
- the allegation that Pikoli had contravened policy on plea-bargaining issues was found to be unsubstantiated.
- on the allegation that Pikoli was insubordinate to Simelane it was found that nothing obligates the NDPP to account to the Director-General in the Department of Justice and constitutional development.
- on the allegation that Pikoli had failed to keep the minister in the know regarding information gathered by the prosecuting authority the inquiry found that the NDPP has an obligation to keep the minister informed.
- on the allegation that Pikoli should have informed the minister about search and seizure warrants at state buildings and regarding Selebi, it was found that Pikoli had indeed failed in his duty to inform not only the minister but the president as well. He was thus found to be wanting regarding sensitivity to national security concerns.

¹⁰⁹ The Executive Summary to the Ginwala Report.

¹¹⁰ The Executive Summary to the Ginwala Report.

- on the allegation by Pikoli that he had been suspended to put a spanner in prosecution intentions against Selebi, the inquiry found that that allegation was not supported by evidence.

Ultimately, the inquiry found that although he lacked an appreciation of the sensitivities of the political environment in which the prosecuting authority needs to operate, he was nonetheless fit and proper to hold office. The inquiry further opined that for National Director of Public Prosecutions to have an appreciation of political sensitivities is not incompatible with prosecutorial independence. This was clear political mastery at play reminiscent of clause 4(c) of the prosecution policy.

5.1.3 The Inquiry's views on section 179(6)

In a largely laconic discussion under the sub-heading, "Prosecutorial Independence and Ministerial Oversight",¹¹¹ the inquiry made a gallant but futile effort to try and project section 179(6) as a provision compatible with prosecutorial independence. It made a number of startling and unmitigated statements to suggest that prosecutors were insulated from interference by the very section 179(6). For an example, the inquiry declared that although the prosecuting authority is part of the executive, it is designed to be protected from outside influence. It is not clear whether the outside influence referred to includes the executive itself or not and whether if influence by the executive is seen as inside, it is condoned or not. It is further declared that the president does not have absolute powers of removal is sufficient proof of the insulation of the NDPP from interference. The suspension powers and the wide prerogative of the President in the appointment of the NDPP are conveniently sidestepped. For some unfathomable reasoning the fact that the NDPP earns as much as judges and has his salary determined by the president is seen as ensuring his independence. However, the inquiry argues, quite

¹¹¹ The Ginwala Report 36-50 at paras 45- 66.

correctly that the fact that Promotion of the Administrative of Justice Act expressly excludes prosecutorial discretions from judicially reviewable administrative action insulates the prosecuting authority from interference.

Admittedly, the inquiry did not find any resistance from all role-players to the notion that the prosecuting authority is independent.¹¹² The inquiry went on to laconically state that scholars, jurists and the media have focused only on prosecutorial independence from political interference and conflated freedom from control with freedom from accountability¹¹³. The inquiry seems to suggest that the control, which the minister has over the NDPP, is a small matter of a means of ensuring prosecutorial accountability. This flies in the face of express prosecutorial accountability measures provided for in the Act and distinct from control measures exercised by the minister over the NDPP.

In further trying to explain the minister's "final responsibility" (from an unblushingly pro-executive control point of view) over the NDPP, the inquiry acknowledges that from its location in the constitution, the prosecuting authority is not an independent institution like the chapter 9 institutions are. It posits that the prosecuting authority's independence is limited to deciding whether to institute criminal proceedings or not. Since decisions to institute criminal proceedings or not is the crux of prosecutorial duties, it is unclear which areas of prosecutorial duties are the subject of this limited prosecutorial authorities. But the inquiry bluntly states and emphasizes:¹¹⁴ 'One cannot be independent of an arm of government of which one is part and under whose political authority one falls.'

¹¹² The Ginwala Report 38 at para 49.

¹¹³ The Ginwala Report 39 at para 51.

¹¹⁴ The Ginwala Report 40 at para 52.

And going further on this line of thought, the inquiry observes (quite correctly) that the word ‘independence’ does not appear anywhere in the constitution or in the Act in reference to the prosecuting authority. We agree with this observation and go on to submit that this absence of the word ‘independence’ speaks volumes about where South Africa stands on issues of prosecutorial independence.

To further underline our constitutional and statutory approval of executive interference in prosecutorial affairs the inquiry approvingly quoted at length from an affidavit submitted by De Lange at the inquiry as follows:¹¹⁵

‘Whilst recognizing that the NPA constituted part of the Executive, the model adopted guaranteed a measure of autonomy for the NPA. However, this does not accord the NPA the independence the constitution guarantees the judiciary and other chapter 9 institutions. Hence section 179 of the constitution provides that national legislation must ensure that the prosecuting authority exercises its functions ‘without fear, favour or prejudice’. This distinction is of paramount importance and must not be overlooked. It is on this basis that the relationship between the Minister and the NDPP must be understood. The same applies to the context, the nature and extent of the concept of prosecutorial independence within the South African constitutional framework. The Minister is given overall constitutional and political responsibilities to account to the executive, legislature and public on the activities of the prosecuting authority. This constitutional scheme envisages that the NPA and Executive will work hand in hand.’

Since policy is a guide to institutional behaviour and day-to-day decisions are derived from policy, it is a logical impossibility for daily decisions not to be affected by veto powers over policy. He who calls the policy tune is the master conductor at implementation level.

At the end of its discussion of the relationship between the minister and the prosecuting authority and having failed to convincingly polish section 179(6) into conformity with prosecutorial independence, the inquiry leaves itself and everyone else less the wiser as it controversially concludes:

¹¹⁵The Ginwala Report 41 at para 54.

“It is not my understanding that the duty on the NDPP to inform the Minister with regard to any significant case, matter or subject in the performance of the functions of the prosecutorial authority is to be done purely for information-passing sake. The legislature must have intended that the Minister would bring to the consideration of the NDPP such matters as government may find to be relevant in respect of such case, matter or subject. I should not be understood to mean that the NDPP would be bound by any input made by the Minister with regard to the exercise of his or her powers, the carrying out of his duties and the performance of his or her functions. The powers, *functions and duties* are those of the NDPP and should be exercised without fear, favour or prejudice...”¹¹⁶

It is odd to argue that the NDPP ‘s duty to report to the minister on any aspect of his work is simply aimed at enabling the minister to make inconsequential inputs, that is inputs which do not have any binding, compelling or persuasive force on the NDPP’s work. How could the Act impose a duty on the NDPP if that duty ultimately results in the NDPP taking decisions unaffected by the after-effects of that duty? What would be the whole point of the duty imposed by the Act? Can the legislature impose a duty aimed at an ineffectual intellectual exercise? Surely that would make a mockery of the legislature and effectively mean that section 35(2) (a) is not even worth the paper it appears on. And if that was the case, the Ginwala inquiry itself would not have found it necessary for the NDPP to report to and inform the minister. Clearly, the inquiry’s gallant effort at either imagining or wishing synergy between section 179 (6) and prosecutorial independence and/or passing off some degree of executive interference as compatible with prosecutorial independence was not successful.

5.2 The Nicholson judgment

The key issue when the matter started was the interpretation of section 179(5) of the constitution. After the marathon case against him was struck off by Justice Msimang, the NPA decided to recharge

¹¹⁶ The Ginwala Report 49 at para 66.

Zuma in December 2007. Zuma was now submitting that in terms of section 179(5) he had been entitled to make representations to the NPA before he could be re-charged. The NPA countered his submission with a view that there was no duty on it to source representations before re-charging Zuma.

But it was not the said key issue, which made this, case a watershed both jurisprudentially and politically. It was rather a peripheral issue which took centre stage as the key issue of the interpretation of section 179(5) was relegated to the periphery such that even the overruling of Nicholson by Harms *et al*¹¹⁷ has not subtracted from this case's topicality and relevance to any discourse on prosecutorial independence. The peripheral issue took centre stage flowing from an application by the NPA that some parts of the applicant's affidavit be struck out by virtue of their being scandalous, vexatious and irrelevant. Chief amongst the disputed issues was the allegation that Zuma's court cases had since 2003 been politically managed and been part of a wide political conspiracy.

In order to decide or rule on the strike-out application before dealing with the main issue, Nicholson J felt that he had to first look at the allegations (of political meddling in Zuma's case) in great detail in the light of available evidence, probabilities and inferences.

In the main, Nicholson J decided that there had been a duty on the NPA to source representations from Zuma in terms of section 179(5) (d) of the Constitution.¹¹⁸ In contradistinction, Harms JA observed:¹¹⁹

'Mr Kemp also relied on the equal protection clause in the constitution. The argument amounts to this: all accused persons should be treated equally, and the right to be invited to make representations in the case of a review of a prosecutorial decision should accordingly be so interpreted as to accrue to all reviews and not only of those of the NDPP's subordinates. The presumption of

¹¹⁷ *NDPP v Zuma* (573/08) (2009) ZASCA.

¹¹⁸ *Zuma v NDPP* (2008) JOL 23416(N) at paras 77-118.

¹¹⁹ *NDPP v Zuma* (573/08) (2009) ZASCA at 67.

equal treatment in statutory interpretation has always been with us and now has special status by virtue of the Bill of Rights. The question is whether it is ousted by other considerations in the circumstances of this section of the Constitution. I am of the view that it is. The underlying purpose of the provision is not to protect the accused or the complainant. It would be strange to find such an important right, which is not known in comparable jurisdictions or in our common law, in a chapter of the Constitution that deals basically with structures concerned with the administration of justice and not rights. The Bill of Rights deals in great detail with rights of accused persons, and is silent about the right to be invited to make representations concerning prosecutorial decisions. The main problem though is that s 179 on any interpretation “discriminates” in the sense that the right to be invited does not extend to most prosecutorial review like those by a DPP or a prosecutor. These considerations trump in my view the presumption and Mr Kemp’s reliance on the equal protection clause of the Bill of Rights is, accordingly, misplaced.

On the issue of Zuma’s legitimate expectation to be given opportunity to make representations, Harms held:¹²⁰

‘An expectation can be legitimate only if it is based on a practice or a clear and unambiguous representation by an administrator. Instead of relying on any representation, Mr Zuma relies on self-created expectations based on his own perceptions of the law and the facts, which have always been in dispute. As to practice, the best Mr Kemp could do was to quote at length from the NPA’s prosecution policy without pointing to any provision that established any practice or contained a representation on which Mr Zuma relied.’

South African courts have also interfered with decisions to prosecute in circumstances where the prosecution authorities had given an undertaking not to prosecute or had made a representation to that effect in exchange for a plea or for co-operation.¹²¹ The prosecuting authority has been held to its bargain.

The issue of representation arose in the *Kolbatschenko v King NO & another*¹²² case. One of the issues that fell to be decided in *Kolbatschenko* was whether the applicant against whom an order of

¹²⁰ *NDPP v Zuma* (573/08) (2009) ZASCA at para 80.

¹²¹ *North Western Dense Concrete CC v DPP, Western Cape* 2000 (2) SA 78 (C); *Van Eeden v DPP, Cape of Good Hope* 2005 (2) SACR 22 (C); *R v Croydon Justices, ex parte Dean* [1993] 3 All ER 129 (QBD).

¹²² 2001 (4) SA 336 (CPD).

court was made in terms of section 2(2) of the International Co-operation in Criminal Matters Act 75 of 1996 requesting the Government of Liechtenstein for its assistance in obtaining information to be used in the investigation of certain offences allegedly committed by certain entities, companies and a trust in which the applicant had criminal links, lacked *locus standi* to seek a number of declarations,¹²³ including a declaration that the application for international mutual assistance be declared unlawful. It was contended, in terms not totally dissimilar to that often encountered in preliminary objections and traditional arguments about *locus standi*, that the government's requests to foreign authorities in furtherance of those investigations did not, and do not, in themselves prejudicially affect or threaten any of the applicant's rights or legal interests. It was contended that the action taken by foreign authorities in response to the requests for assistance might have prejudicially affected the applicant's legal interests, but, it was argued, it was for the applicant to seek redress against those authorities accordingly. In support of the contention that the applicant lacked standing in the circumstances of this case, it submitted that the Director of Public Prosecution may not decide to prosecute the applicant and that even if he would be prosecuted in South Africa, he would be entitled to the constitutional fair hearing rights of an accused person. It was argued that the investigation was at a preliminary stage hence the applicant had no right to be heard nor could he claim such right before the DPP decides whether a prima facie case exists to warrant his prosecution.¹²⁴

The Cape Provincial Division analysed the facts of this case and made the following findings:

- The South African prosecuting authorities were not merely engaged in making preliminary and investigative enquiries and gathering

¹²³ For extensive reading on standing: Okpaluba, C 'Justiciability and constitutional adjudication in the Commonwealth: the problem of definition I' (2003) 66 *THRHR* 65.

¹²⁴ See to this effect, *Park-Ross v Director: Office for Serious Economic Offences* 1998 (1) SA 108 (C) at 122F-I.

evidence from persons or bodies not directly connected to the applicant. Rather, they were not content with mere enquiries for requests clearly envisaged searches, seizures and subpoenas by the authorities in Liechtenstein and these were to be backed up where necessary by court orders.

- The three entities under investigation were far from being unconnected with the applicant. One of the entities was a family trust established by the applicant; one of the other two was a company that belonged to the trust; and the third, a company to which the applicant was closely connected.

Having so found, the Court held that the applicant was sufficiently affected in his rights and legal interests by the seizure of the books, documents and records in question to establish the required *locus standi* to challenge their validity. These items were not only the property of entities established by the applicant or of which he was closely connected with, but also their seizure and the subpoena of witnesses took place with the avowed object of their possibly being used by the South African prosecuting authorities in a criminal prosecution of the applicant. The Court further held that even if the applicant's interests in the entities were insufficient to constitute a "direct and substantial interest" to clothe him with the requisite *locus standi* the fact that the applicant was at risk of being prosecuted was "sufficient to elevate his interest to what is required in this regard, viz a direct interest in the subject-matter of this litigation which is current and actual, and is not abstract, academic, hypothetical or too far removed."¹²⁵ In the view of the Court: "it cannot be contended ... that a person whose interest will be sufficiently affected by the issue and execution of a search warrant lacks locus standi to challenge the validity of the warrant and to apply to a Court to have it set aside ..."¹²⁶

¹²⁵ *Kolbatschenko v King NO & another* at 349D-F.

¹²⁶ *Kolbatschenko v King NO & another* at 34G-H.

In rejecting this preliminary objection to the application on the ground that the applicant lacked *locus standi* as unfounded, the Court further held, firstly, that the fact that between the granting of the letter of request and the seizure of the items was interposed a discretionary decision by the Liechtenstein court did not remove the applicant's *locus standi* to attack the validity of the letter of request because a causal link existed between the letter of request and the seizure and a foreign court was unlikely to go behind the solemn finding of a South African Judge.¹²⁷ Secondly, in respect of the applicant's *locus standi* to claim relief in relation to the South African prosecuting authorities' non-statutory 'application for international mutual legal assistance' addressed to the Liechtenstein authorities, that the considerations mentioned in relation to the letter of request subsequently issued by the Judge in Chambers applied equally to this request.¹²⁸ Thirdly, the respondent's arguments that the fact that section 3(2) of the International Co-operation in Criminal Matters Act of 1996 conferred procedural rights only on the person in charge of the investigation, while section 3(1) and (6) conferred such rights on all the parties to the existing proceedings, showed that the Legislature intended to deny *locus standi* to a person in the position of the applicant to challenge the validity of a letter of request issued in terms of section 2(2), could not be upheld. The mere fact that section 3(2) did not afford persons affected by a letter of request issued under section 2(2) with the same procedural rights as those afforded by section 3(1) to parties to existing procedures during which a letter of request was issued in terms of section 2(1), did not deprive the first-mentioned persons of the right to approach a Court to have the relevant letter of request set aside on the ground that it was irregular or had been unlawfully issued.¹²⁹

¹²⁷ *Kolbatschenko v King NO & another* at 349F-350A/B.

¹²⁸ *Kolbatschenko v King NO & another* at 3450H-J.

¹²⁹ *Kolbatschenko v King NO & another* at 351G/H-352C-D/E.

Reverting to the Durban High Court litigation, the Court set aside set aside the December 2007 NPA decision to re-charge Zuma. Nicholson found that the allegations that Zuma's prosecution was all the while (since 2003)¹³⁰ politically manipulated and/or used for political purposes was on a balance of probabilities not without merit and that therefore the contents of Zuma's affidavit to that effect were not to be struck-out. Nicholson outlined the variables comprising prosecutorial independence as follows:¹³¹

'From time immemorial the executive has cherished the notion of usurping the independent function of the prosecuting authority and directing criminal prosecutions at its political opponents...Many activists, fighting against the apartheid system, languished for many years behind bars, as a result of prosecutions at the instance of the executive.'

In elaborating on prosecutorial independence, His Lordship observed:¹³²

'I would say that in South Africa it goes far beyond being 'a grave violation of their professional and legal duty[for prosecutors] to allow their judgment to be swayed by extraneous considerations such as political pressure' as it is a very serious offence for which the legislature has put a maximum sentence of 10 years imprisonment for any breach.'

Later he found that:¹³³

'The presence of the Minister [Maduna] at the press conference seems to indicate a total lack of appreciation of the independence of the NPA. I must conclude that the Minister gave generous amounts of his time and energy to the NDPP [Ngcuka] and political leadership in the long period leading up to the press conference. Laconic as these comments may be, they certainly are not consonant with 'the fearless and unfettered independent exercise of extensive powers' referred to by the learned judges in the *Yengeni* matter.'

¹³⁰ *Zuma v NDPP* (2008) JOL 23416(N) at para 175.

¹³¹ *Zuma v NDPP* (2008) JOL 23416(N) at para 78.

¹³² *Zuma v NDPP* (2008) JOL 23416(N) at para 180.

¹³³ *Zuma v NDPP* (2008) JOL 23416(N) at paras 190-191.

Bertelsmann J echoed similar sentiments in *S v Yengeni* 2006 (1) SACR 405 (T) at para 5:

"It was indubitably ill-advised for the former National Director of Public Prosecutions [Mr. Ngcuka] to be seen to participate in a discussion with the Minister[Mr. Maduna] and the appellant[Mr. Yengeni].The independence of the office that he held, and the fearless and unfettered exercise of the extensive powers that this office confers, are incompatible with any hint or suggestion that he might have lent an ear to politicians who might wish to advance the best interests of a crony rather than the search for the truth and the proper functioning of the criminal and penal process."

By so arguing, the Nicholson judgment continues to be relevant to the debate on prosecutorial independence, that is, despite being overturned by the Supreme Court of Appeal. Robin Palmer best captures the judgment's relevance in the following summary:¹³⁴

'However, the court did not confine itself to a minimalist consideration of the narrow, technical area of law contained in the section, as the nature of other issues required the court to deal with many of the most contentious legal and constitutional flashpoints of the recent past. The court dealt with the crucial need to safeguard and entrench the independence of the NPA and to protect it from political interference. The court stated that the courts had a duty to prevent political meddling in the prosecution process as such behaviour '...strikes at the heart of our democracy'. The court stated that the independence of the NDPP was vital to the independence of the whole legal process and suggested that consideration be given to constitutionally entrenching this office to give it the same protection against dismissal that judges enjoy. He also suggested that the NPA Act be applied to prosecute those who meddle in or attempt to influence prosecutorial decisions, as the applicable offence in this law carries a substantial maximum period of 10 years imprisonment. Significantly, the judgment's contents provide strong *prima facie* evidence that a number of high-ranking officials and politicians, including President Mbeki and former justice minister Penuell Maduna, had contravened this statutory offence...The court's judgment is permeated by a sense that our legal system, and by extension, the country, has reached a constitutional crossroad. The numerous examples of political interference in the legal process by the Mbeki government which have now received judicial recognition has systematically eroded the public respect enjoyed by the NPA and the judiciary...'

On appeal the Supreme Court of Appeal reversed the findings of Nicholson J, which effectively halted Zuma's prosecution.¹³⁵ The Supreme Court of Appeal chastised Nicholson J for reference to political meddling in the decision re-charge Zuma, stating that he overstepped his mark in making those findings and failed to confine his judgement to the issues before the court.¹³⁶ Harms JA reasoned that:¹³⁷

¹³⁴ *The Star Newspaper* 17 September 2008, p35 "A constitutional crossroad".

¹³⁵ *NDPP v Zuma* (573/08) (2009) ZASCA at paras 40-54.

¹³⁶ *NDPP v Zuma* (573/08) (2009) ZASCA at paras 40-54.

¹³⁷ *NDPP v Zuma* (573/08) (2009) ZASCA at para 37. See *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A); *Reylant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA); *Thompson v Minister of Police* 1971 (1) SA 371 (E) at 375A-D; *Tsose v Minister of Justice* 1951 (3) SA 10 (A) at 17.

‘A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.’

However this does not mean that the prosecution can use its power for ‘ulterior purposes’ as that would breach the principle of legality. Thus in *Highstead Entertainment (Pty) Ltd t/a ‘The Club’ v Minister of Law & Order*¹³⁸ for example, the police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibit – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had nothing to do with intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what ‘ulterior purpose’ in this context means. Unlike the overriding ulterior motive for confiscation in Highstead, there was absence of evidence that the prosecution of Zuma was not intended to obtain a conviction.

It is submitted that despite the Supreme Court of Appeal’ decision overturning Nicholson’s verdict, Nicholson’s arguments on prosecutorial independence remain germane and cannot be wished away particularly in the light of reasons subsequently given by Adv. Mpshe when he finally withdrew all charges against Zuma.

5.3 The Mpshe decision

¹³⁸ 1994 (1) SA 387 (C).

On 6th April 2009 Adv. Mokoatedi Mpshe stood up to announce what he called “*the most difficult decision I ever made in my life.*”¹³⁹ He announced that the NPA had decided to drop all charges against Mr. Zuma. It was not so much the decision that was important for the purposes of this paper, but rather the reasons given by Adv. Mpshe as a basis for that decision. He indicated that for a number of weeks they had been engaged in the process of dealing with allegations that the case of Mr. Zuma was manipulated.¹⁴⁰

Adv. Mpshe went on to catalogue a series of discussions between Ngcuka, Leonard McCarthy and a number of other characters the common factor amongst which was that the prosecution of Mr. Zuma was to be timed for certain political benefits and to suit particular political affiliations.¹⁴¹ Adv. Mpshe concluded as follows:¹⁴²

“Mr. McCarthy used the legal process for a purpose outside and extraneous to the prosecution itself. Even if the prosecution itself as conducted by the prosecution team is not tainted the fact is that Mr. McCarthy, who was Head of DSO, and was in charge of the matter at all times and managed it almost on a daily basis, manipulated the legal process for purposes outside and extraneous to the prosecution itself. It is not so much the prosecution itself that is tainted, but the legal process itself...What Mr. McCarthy did was not simply being over-diligent in his pursuit of a case, it was pure abuse of process.”

Thus in a brief statement of about twelve pages Adv. Mpshe admitted that the prosecuting authority of South Africa was manipulated and that its independence was subject to a lot of questions. The decision to drop charges against Zuma on the eve of the 2009 national elections has been viewed in some quarters as “a tipping point in the slippery slope to the erosion of the rule law”.¹⁴³ In the context of

¹³⁹ *The Statement by NDPP on S v Zuma and others*, delivered on 6th April 2009 at para 1(emphasis added).

¹⁴⁰ *The Statement by NDPP on S v Zuma and others*, delivered on 6th April 2009 1 at para 4.

¹⁴¹ *The Statement by NDPP on S v Zuma and others*, delivered on 6th April 2009, 6-10.

¹⁴² *The Statement by NDPP on S v Zuma and others*, delivered on 6th April 2009 11 at para 7.

¹⁴³ *Mail & Guardian online* “Tregrove: Zuma decision ‘tipping point’ April 6 2009. For critique of Mpshe’s reliance on doubtful authority: *Mail & Guardian online* “NPA’s Zuma ruling resembles Hong Kong judgement’ April 15 2009.

unbearable pressure of Acting Director of Public Prosecution to drop the charges, the decision of the Indian High Court in *Nagrik Upbhokta Manch, Petitioner v State M.P. & others*¹⁴⁴ are apposite:

The public prosecutor has a sacrosanct duty to apply his mind to the documents and to see that no prosecution is withdrawn merely because a letter has been issued, until he is satisfied. The Court also has a duty. The Court cannot afford to abdicate its obligation and grant permission as if it is routine duty. It should not act in a mechanical routine and deskilled manner. The gravity of the offence, service to the public interest, social concinnity and collective good are to be kept as paramount consideration. The collective cannot be allowed to suffer.'

5.4 Sundry issues: Abuse of process and selective prosecution

In pith and substance, the reasoning by Mpshe for discontinuing the criminal prosecution is predicated on the doctrine of abuse of process and selective prosecution. In cases of abuse of process and selective prosecution we are dealing with allegations of misuse and abuse of criminal process and of the office of the prosecuting authority.¹⁴⁵ Put simply, deliberate and malicious use of the office that is improper and incompatible with traditional prosecutorial function.

Abuse of process is notoriously difficult to establish, and frequently requires showing that the conduct of the prosecution make a fair trial impossible.¹⁴⁶ It is only in limited circumstances that courts will be inclined to intervene for purposes of overturning an impugned prosecutorial charging decision where there exists abuse of process. For instance, where compelling an accused to stand trial would violate those fundamental principles of the community's sense of fair play

¹⁴⁴ 2002 *Criminal. LJ* 4215.

¹⁴⁵ See generally, Smith, A 'Can you be a good person and a good prosecutor' (2001) 14 *Georgetown Journal of Legal Ethics* 355; Gershman, B 'The prosecutor's duty to truth' (2001) 14 *Georgetown Journal of Legal Ethics* 309; Uviller, HR 'The virtuous prosecutor in quest of an ethical standard: Guidelines from the BA' (1973) 71 *Michigan LR* 1145.

¹⁴⁶ See generally *Jago v District Court of New South Wales* [1989] 168 CLR 23, at 30; *Connelly v DPP* 1964 AC 1254; *R v Latif* 1996 1 WLR 104; *R v Martin* [1998] 1 All ER 193 at 216; *R v Hui-Ching-Ming* [1992] 1 AC 34 at 57B.

and decency and to prevent the abuse of a court process through vexatiousness or oppressive proceedings.¹⁴⁷

In Canada, courts have held that a judicial stay as a remedy for an abuse of process will only be granted in the “clearest of cases”, apparently requiring a higher standard of proof than is used for other Charter remedies.¹⁴⁸

Where a prosecutor decides to proceed with a case against an accused, though not a similarly situated individual, based on impermissible criterion, a defence of selective prosecution may arise. Such prosecution may constitute an abuse of process justifying a judicial stay. The doctrine of selective prosecution serves to prohibit the prosecution of individuals who have been prosecuted on the basis of some improper or oblique motive. The point has been made that:¹⁴⁹

‘The doctrine does not act a defence to a criminal charge in that it does not affect the *mens rea* or *actus reus* required for a criminal offence. Nor does the doctrine attempt to excuse or justify the actions of the accused. Rather, a successful claim of selective prosecution will disentitle the state to a conviction on the basis that to allow the matter to proceed would bring the administration of justice into disrepute. The remedy in such a case is a stay of proceedings.’

The classic case where an improper selective prosecution occurred was in *Yick Wo v Hopkins*¹⁵⁰ in which prosecutions for by-laws infractions were only brought against Chinese-run laundries. Of the 320 laundries operated in San Francisco area subject to the ordinance, 310 were constructed of wood and 240 of the laundries were operated by Chinese subjects. Only Chinese operators of

¹⁴⁷ See *R v T (V)* [1992] 1 SCR 749; *R v Regan* 209 DLR (4th) 41 (SCC). For a review of leading Supreme Court of Canada decisions, see Roach, K ‘The evolving test for stays of proceedings’ (1998) 40 *Criminal Law Quarterly* 400; Layton, D ‘The prosecutorial charging decision’ (2002) 46 *Criminal Law Quarterly* 447.

¹⁴⁸ See eg. *R v O’Connor* (1995) 103 CC (3d) 1, 44 CR (4th), [1995] CR 411 at 37-38.

¹⁴⁹ Hubbard, R, Brauti, P & Welsch, C ‘Selective prosecutions and the *Stinchcombe* model for disclosure’ (1999) 42 *Criminal Law Quarterly* 338, 339.

¹⁵⁰ 118 US 356 (1886). For discussion of the doctrine of selective prosecution in Canada, see Allen, R ‘Selective prosecution: A viable defence in Canada?’ (1992) 34 *Criminal Law Quarterly* 424.

laundries were charged and arrested under the ordinance. Thus, 150 Chinese persons had been charged but 80 non-Chinese, who were similarly situated, had not been charged under the ordinance. In allowing the petitioners' appeal, the court held¹⁵¹

'The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong and which, in the eye of the law, is not justified. The discrimination is therefore illegal ... and violation of the fourteenth amendment of the constitution.'

Since the seminal case of *Yick Wo* countless other American cases involving claims of selective prosecution have been successful.¹⁵² This low success rate can, at least in part, be attributed to the relatively high threshold which must be met by the defence at a selective prosecution hearing. It must be stressed; however, that deciding to prosecute only selected offenders is not *prima facie* improper.¹⁵³ The basis for differentiation is the key, and courts are unlikely to intervene absent unconscionable circumstances, such as where the impetus for prosecution lies in a constitutionally prohibited ground of discrimination.

The Canadian case of *R v Miles*¹⁵⁴ is illustrative of the difficult path to a successful claim based on selective prosecution. In the present case a stay of prosecution had been granted by the trial judge on the basis that a disk jockey charged with copyright violations had been unfairly singled out, among many doing the same thing, for prosecution as a test case. In relation to the abuse argument, the court found that the onus on the accused to lay unfairness at the foot of the executive, on the balance of probabilities, had not been made out. The court

¹⁵¹ *Yick Wo v Hopkins* at 373-374.

¹⁵² See *Wayte v US* 470 US 598 (1985); *US v Armstrong* 116 S. Ct 1480 (1996); *US v Hastings* 126 F.3d 310 (4th Cir. 1997); *US v Turner* 104 F.3d 1180 (9th Cir. 1997). See further Poulin, AB 'Prosecutorial discretion and selective prosecution: enforcing protection after *United States v Armstrong*' (1997) 34 *American Criminal LR* 1129; Gail MA 'Prosecutorial discretion' (1997) 85 *Georgetown LJ* 983.

¹⁵³ See eg *R v Paul Magder Furs Ltd* (1989) 49 CCC (3d) 267, 69 OR (2d) 172 (CA); *R v Smith* (1993) 84 CC (3d) 221, 23 CR (4th) 164 (NSCA).

¹⁵⁴ (1989) 48 CC (3d) 96, 69 CR (3d) 361, 74 OR (2d) 518 (CA).

expressly rejected the accusation that the accused had been singled out in the following words:¹⁵⁵

‘Nor does the fact that, despite the widespread practice of making compilation tapes, only the respondents were charged, assists them. There is no suggestion in the evidence that the police or the Crown had, on any other occasion, reasonable grounds for prosecuting, and it cannot be the law that a first prosecution for an offence under any given statute is, itself, unfair and oppressive.’

After rejecting the accused’s claim that the proceedings violated section 7 of the Charter, the court considered the applicability of section 15 of the Charter:¹⁵⁶

‘Section of the Charter, the “equality rights” provision, which neither judge found it necessary to deal with because of the grounds on which they thought the prosecution should be stayed, is equally unavailable to the respondents. Section 15 is an inappropriate bar to a first prosecution under a statute unless it can be shown that the accused has been singled out as a target despite the existence of reasonable grounds for prosecuting others as well. Even then the interference with the exercise of prosecutorial discretion must be exercised with caution. It cannot be a defence to a speeding driver that the police did not prosecute all drivers who were speeding on the same highway at the same time. In any event, the absence of any evidence that, however prevalent the offensive practice may be, the police had reasonable grounds for prosecuting some other alleged offender, makes it impossible to say that the respondents were selected for prosecution on the basis of grounds relating to personal characteristics.’

A thumbnail sketch of abuse of process and selective prosecution permits a few conclusions. Most importantly, abuse of process and selective prosecution sanction a light level of review by courts, weeding out only indisputably appalling examples of prosecutorial impropriety but not mere error. A related point is that the overriding focus for abuse of process review, and more so still for selective prosecution, is usually upon the mala fides of the public prosecutor. A bad decision made in good faith may well not justify judicial intervention. Finally, both doctrines seek chiefly to protect the individual who is wrongfully charged, and are less directly concerned

¹⁵⁵ *R v Miles* at 107.

¹⁵⁶ *R v Miles* at 109-110.

with the broader public interest in ensuring proper charging decisions.

A thorny question that lingers in the wake of Mpshe's decision to discontinue Zuma's criminal prosecution is the defence's intended application for permanent stay of prosecution. This application would have at least given the South African Courts an opportunity to make authoritative pronouncement on the stay of prosecution in the context of fundamental rights implicated in the Zuma prosecution. Moreover, the Constitutional Court would provide us with analytical framework in which the doctrine can be fully discussed.

7. Conclusion

Enough has been said to demonstrate that the prosecution of a criminal offence is replete with instances of discretion, prime among these being the DPP's decision to proceed or continue with a charge. South African prosecutors make charging decisions on a daily basis, determinations that have a significant impact on both the suspect/accused and the community at large. The individuals facing a criminal charge may suffer a loss of liberty and considerable financial and psychological stress. For its part, the community has an interest in bringing perpetrators of crime to justice, a process that necessarily involves the laying and prosecuting of charges.

It has been said before but perhaps it should be repeated that the role of the National Prosecuting Authority is of critical importance to the courts and to the community. The National Director of Public Prosecution must proceed courageously in the face of threats and attempts at intimidation. He or she must ensure that all matters deserving of prosecution are brought to trial and prosecuted with diligence and dispatch. Based on South African developments since

2003 to date, it is submitted that irrespective of laws or structures in place in a jurisdiction, principles of prosecutorial independence ultimately depend upon the integrity of the person occupying the office of Director of Public Prosecutions. Given the controversy surrounding the appointment of Adv Simelane as the National Director of Public Prosecutions¹⁵⁷ it remains to be seen whether bedrock constitutional principles of prosecutorial independence and accountability will be honoured.

¹⁵⁷ *Mail & Guardian* December 4 to 10 2009 article 'The case against Simelane' report that the General Council of the bar is investigating 17 complaints against newly appointed prosecution boss Menzi Simelane' The article also refers to 14 complaints against Simelane, flowing from the Ginwala Report. They include:

- As National Director of Department of Justice & Constitutional development Simelane had a misconception of his authority over the NPA;
- His testimony before the Ginwala inquiry was "contradictory and without basis in fact or law";
- Several of Simelane's allegations against his predecessor, Vusi Pikoli were "baseless" and
- Simelane "deliberately withheld from Pikoli and the inquiry a legal opinion of his powers over the NPA.

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