

Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models

WP de Villiers

Blur LLB LLD

*Associate Professor, Department of Procedural Law,
University of Pretoria*

OPSOMMING

Is die vervolgingsgesag ingevolge die Suid-Afrikaanse reg onafhanklik? 'n Ontleding van die Suid-Afrikaanse en analoë modelle

Die leerstuk van skeiding van magte is by implikasie 'n basiese beginsel in die Suid-Afrikaanse grondwetlike bestel. Die leerstuk vind sy beslag in die strukture en funksies van die verskillende staatsorgane en hul onderskeie interafhanklikheid. 'n Kenmerk van dié bestel is die skepping van 'n onafhanklike nasionale vervolgingsgesag ingevolge artikel 179 van die Grondwet. Maar dit is veral gebeur soos die afdanking van die Nasionale Direkteur van Openbare Vervolging, Advokaat Vusi Pikoli, wat vrae laat ontstaan het oor die vermeende politieke onafhanklikheid van die vervolgingsgesag. 'n Mens kan met reg vra of politieke oorwegings oor politieke onafhanklikheid geseëvier het. Ek bespreek die grondwetlike en statutêre bepalings wat die struktuur van die vervolgingsgesag in Suid-Afrika daarstel, ondersoek die institusionele modelle in Kanada en Australië ingevolge waarvan die vervolgingsgesag in dié lande funksioneer en verwys na 'n internasionale standaard vir vervolging. Ek vergelyk die modelle en kom tot die gevolgtrekking dat die Suid-Afrikaanse model goed met die ander modelle vergelyk, maar dat daar 'n belangrike verskil is wat ruimte vir die afdanking van Advokaat Pikoli geskep het. Ek bespeek die rol van 'n aanklaer en neem lesse in die Amerikaanse reg geleer in ag. Ek stel ten laaste 'n model voor wat die beste in ons huidige politieke klimaat sal kan funksioneer.

1 BACKGROUND AND INTRODUCTION

Constitutional Principle VI required the Constitution of the Republic of South Africa, 1996 to have “a separation of power between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”.

Although these principles are not expressly entrenched in the Constitution, the presence of the principles is inferred from the structure and provisions in the Constitution.¹ In terms of section 43, the legislative authority is vested in the

¹ Currie and De Waal *The Bill of Rights handbook* (2009) 7 1, 19; *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC).

national and provincial legislatures at their respective levels. Section 85 vests the executive authority of the Republic in the President to be exercised together with other members of the Cabinet. Section 125 vests the executive authority of the provinces in the premiers. Section 165 provides that the judicial authority is with the courts. The doctrine of separation of powers is therefore by implication a basic principle of the South African constitutional order.²

As far as the prosecuting authority is concerned, it was established to assist the executive in the application and the execution of criminal law. As such the prosecuting authority is associated with the executive branch rather than the judicial branch.³ However, the classical division of powers introduced by Montesquieu⁴ between the making of laws (legislature), the administration and execution of these laws (executive) and the judging of crimes or disputes between individuals or entities (judiciary) has evolved over time. The contemporary notion of the separation of powers is premised in organisational theory and is concerned with the bringing about of an ideal structure and institutional arrangements.⁵

In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996*,⁶ the Constitutional Court held that there was no fixed or rigid doctrine of separation of powers. The court held that what was important was the separation of powers created by the Constitutional text. The doctrine is to be found in the structure and functions of the different organs of state and their respective interdependence or dependence. The separation performs the service of preventing too much power being accumulated in one institution.

A special feature of the Constitution is the establishment of an independent national prosecuting authority in terms of section 179. Section 179 and the National Prosecuting Authority Act⁷ (NPA Act) passed by Parliament in order to give effect to section 179, direct all branches of government, and in particular the executive, to respect the domain of the prosecuting authority, and not to interfere in its decisions. For this reason, an accused has a constitutional right to a prosecutor that is independent from political influence.

Even though there are various institutional models that promote the independence of the prosecuting authority, there is little debate in the common law tradition that such independence should exist.⁸

A specific event in the not-too-distant South African past raised questions regarding the deemed political independence of the South African prosecuting

² See also *South African Association of Personal Injury Lawyers, ibid.*

³ Seedorf and Sibanda "Separation of powers" in Woolman *et al* (eds) *Constitutional law of South Africa* (loose-leaf updated to 1 July 2009) 12-32.

⁴ *The spirit of the laws* (1784, transl and ed by Cohler, Miller and Stone (1989)) bk XI ch 4 155.

⁵ Seedorf and Sibanda 12-10.

⁶ 1996 4 SA 744 (CC) paras 110–111 (first certification judgment).

⁷ 32 of 1998.

⁸ See eg Sterling and Mackay "The attorney general in the 21st century: A tribute to Ian Scott: The Independence of the attorney general in the civil law sphere" Spring 2009 *Queen's LJ* 891 para IIIA; Shrag "Symposium on 'The ICTY 10 years on: The view from inside' iii) The prosecution: lessons learned from ICTY experience" 2004 *J Int'l Crim Just* 427 para 3; and *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 28.

authority. Advocate Vusi Pikoli, who was the National Director of Public Prosecutions (NDPP) at the time, was suspended during September 2007 by President Thabo Mbeki and subsequently dismissed by President Kgalema Motlante based on the assertion that he was not fit for office. An *ad hoc* parliamentary review committee found that Advocate Pikoli was rightly dismissed. Khosi Mokoena, who co-chaired the *ad hoc* review committee, told the legislature that Pikoli was rightly dismissed for overruling President Thabo Mbeki's concern that arresting Commissioner Selebi could destabilise South Africa. The National Assembly and the National Council of Provinces voted in favour of the *ad hoc* committee. African National Congress members argued that Pikoli was not sensitive to national security issues. Pikoli maintains that he was suspended and later dismissed in a bid to stop the prosecution of the then national police commissioner Jackie Selebi and for prosecuting ANC leader Jacob Zuma.⁹ The dismissal of Pikoli was met by widespread scepticism amongst other South African political parties and the South African public in general. During 2008 Pikoli was honoured by the International Association of Prosecutors for his firm conviction to uphold the independence of prosecutors.¹⁰ During late 2008 the Ginwala Inquiry found that Pikoli was fit for office and that he should be reinstated in his earlier post.

Pikoli filed papers in the Gauteng-North high court in a bid to be reinstated.¹¹ On 21 November 2009 the matter was settled out of court in terms of which Pikoli withdrew his action and in return received R7,5 million in full and final settlement.¹²

One might rightly ask whether political considerations were allowed to defeat the independence of the prosecution. Was this not just a method for the President and the ruling party to impose their views on the prosecuting authority? The discharge therefore served to punish a disobedient NDPP and served as a warning to other prosecutors in office and any new NDPP.

In this article I discuss the constitutional and legislative provisions that provide the structure of the South African national prosecuting authority and which has bearing on the independence or lack thereof of the prosecuting authority. I investigate the institutional models in terms of which the prosecuting authorities under Canadian and Australian law function. My investigation confirms that in one's quest to assess the structure of the national prosecuting authority under South African law it is of great theoretical and practical value to have regard to the structures under Canadian and Australian law. Canada and Australia are excellent examples of societies where state power is governed by democracy, accountability, the separation of powers and checks and balances. The values that underlie these societies are based on openness, human dignity, equality and freedom.

⁹ Ncana "Pikoli: Threats to judiciary a concern" <http://www.thetimes.co.za/News/Article.aspx?id=947386> (accessed 26 February 2009).

¹⁰ <http://www.google.co.za/search?sourceid=navclient&ie=UTF-8&rls=GGLR,GGLR:2006-23,GGLR:en&q=wereldliggaam+vereer+aanklaer> (accessed 17 September 2010).

¹¹ *Supra* fn 9.

¹² "Pikoli withdraws case over unfair dismissal, settles for R7.5m" (translation) *Rapport* 21 November 2009 p 1.

I am of the view that the fact that Canada and Australia are fully-fledged federations does not detract from their suitability as models to investigate, but rather enhances their suitability. There is an added dimension to the Canadian and Australian models in that they provide for a territorial separation of powers between the federal government and the different states and territories. This added dimension makes the provisions of the federal and state constitutions or legislation even more important for the effective distribution of authority and the provision of checks and balances. Crucially, the federal governments and each state or territory of Canada and Australia have been separated and divided into different branches of government based on the same notion of a separation of powers as a foundational concept. Much can therefore be learnt from these models.

I therefore compare the prosecuting authority in South Africa, Canada and Australia and also discuss an international standard for prosecutions. I refer to some lessons learnt under American law, a jurisdiction which is equally suitable for comparative purposes. I lastly suggest which model would be the best for South Africa in the political climate in which it functions.

2 SOUTH AFRICAN CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

Section 179 of the Constitution provides the framework in terms of which the prosecuting authority functions. Section 179 provides for a single national prosecuting authority structured in terms of an Act of Parliament, with a NDPP who is the head of the prosecuting authority and Directors of Public Prosecutions (DPP) and prosecutors as determined by an act of Parliament. The President, as head of the executive, appoints the NDPP.¹³

The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.¹⁴ National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.¹⁵

The NDPP must determine, with the concurrence of members of Cabinet responsible for the administration of justice, and after consulting the directors of public prosecutions, prosecution policy which must be observed in the prosecution process. The NDPP must issue policy directives which must be observed in the prosecution process. The NDPP may intervene in the prosecution process where policy directives are not complied with. The NDPP may also review a decision to prosecute or to decline prosecution after consulting the relevant director of public prosecutions and after taking representations from certain identified parties.¹⁶

The member of Cabinet responsible for the administration of justice must exercise final responsibility over the prosecuting authority.¹⁷ All other matters concerning the prosecuting authority must be determined by national legislation.¹⁸

13 S 197(1).

14 S 179(2).

15 S 179(4).

16 S 179(5)(a).

17 S 179(6).

18 S 179(7).

Parliament enacted the NPA Act to give effect to section 179. The NPA Act also regulates other matters concerning the prosecuting authority. In terms of the NPA Act the President must appoint a NDPP.¹⁹ The President may, after consultation with the Minister of Justice and the NDPP, appoint a maximum of four persons as Deputy National Directors of Public Prosecutions (DNDPP).²⁰ The President may also after consulting with the Minister of Justice and the NDPP appoint Directors of Public Prosecutions at the seat of each High Court in the Republic.²¹

The President may provisionally suspend the NDPP or a DNDPP or DPP pending an enquiry and may thereupon remove such Director from office for misconduct, on account of ill-health or incapacity to carry out his duties efficiently, or on account thereof that he is no longer a fit and proper person to hold such office.²²

The reasons for the removal and the representations of the director that has been removed (if any) shall be submitted to parliament.²³ Parliament shall pass a resolution as to whether the removal from office is recommended or not recommended.²⁴ The President shall reinstate the director if Parliament so resolves.²⁵ The President shall remove such director from office if each of the houses in Parliament in the same session asks for such removal on the grounds mentioned in section 12(6) above.

The salaries that the NDPP, a DNDPP and a DPP receive are linked to the salary of a judge of the High Court. The salary of the NDPP may not be less than that of a judge of the High Court and the salary of a DNDPP and a DPP may not be less than 85 per cent and 80 per cent of the salary of the NDPP respectively.²⁶ The salary of a judge of the High Court is determined from time to time by the President after taking into account the recommendations of the Independent Commission for the Remuneration of Public Office-bearers, and must be approved by Parliament.²⁷ Their salaries can therefore practically only be reduced by an act of Parliament.²⁸

The Minister of Justice may, after consultation with the NDPP, appoint Deputy Directors of Public Prosecutions (DDPP).²⁹ Prosecutors are appointed on the recommendation of the NDPP.³⁰

A DDPP or prosecutor is paid a salary in accordance with his rank and grade on a scale determined from time to time by the Minister of Justice after consulting the NDPP and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance by notice in the *Gazette*.³¹ The

19 S 10.

20 S 11.

21 S 13.

22 Ss 12(6)(a) and 14(3).

23 S 12(6)(b).

24 S 12(6)(c).

25 S 12(6)(d).

26 S 17.

27 S 2(1)(a) read together with s 2(4) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

28 Joubert (ed) *Criminal procedure handbook* (2009) 53.

29 S 15.

30 S 16.

31 S 18(1).

notice must be approved by Parliament.³² The salary payable to a DDPP or a prosecutor may not be reduced except by an Act of Parliament.³³ Other conditions of service of a DDPP and a prosecutor are determined by the Public Service Act.³⁴

Personnel of the prosecuting authority serve impartially and exercise, carry out or perform their powers, duties and functions in good faith and without fear, favour or prejudice subject only to the Constitution and the law.³⁵ As well, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its or his powers, duties and functions subject to the Constitution and the NPA Act.³⁶ The Minister of Justice, for purposes of any law regarding the prosecuting authority, exercises final responsibility over the prosecuting authority in accordance with the provisions of the NPA Act.³⁷ The prosecuting authority is accountable to Parliament in respect of its powers, functions and duties under the Act, including decisions regarding the institution of prosecutions.³⁸

Section 22(4)(f) of the NPA Act furthermore provides that the NDPP must bring the United Nations Guidelines on the Role of Prosecutors to the attention of directors and prosecutors and promote their respect for, and compliance with the principles contained therein.³⁹ Paragraph 4 of the guidelines provides that states should ensure that prosecutors are able to perform their professional duties without intimidation, hindrance, harassment or improper interference.

3 CANADIAN INSTITUTIONAL MODEL

In the Canadian state the federal government has the legislative authority for criminal law and procedure while provincial governments also legislate and prosecute “quasi-criminal” provincial legislation. The federal nature of the Canadian state disperses prosecutorial authority between the federal and provincial spheres.⁴⁰

While the rationale has varied from one jurisdiction to the other there has been a move from the end of the previous century towards a more decentralised balancing model of criminal justice functions. This decentralisation is worthy of mention as the separation of functions was an effort to ensure non-partisan prosecutorial operations. In terms of the separation, statutory independence was given to the DPP and limited the Attorney General’s (AG) control over prosecutorial functions to written and/or publicly-available directives and policies. In the traditional form most of the criminal justice system fell under the AG as a broadly empowered “minister of justice”.

32 S 18(5).

33 S 18(6).

34 Proc 103 of 1994; s 19.

35 S 32(1)(a).

36 S 32(1)(b).

37 S 33(1).

38 S 35.

39 Guidelines adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990.

40 Constitution Act, 1867 (UK) 30 & 31 Vict, c 3 (RSC 1985 App II No 5); s 91 and Constitution Act, 1867 s 92.

The movement in Canada towards decentralisation was based on the democratic societies of Australia and North America where federal systems and democratic notions of checks and balances have led to what one might refer to as coordinated balancing models.⁴¹ An example of such a decentralised provincial model is the Nova Scotia system which came into effect in 1990 when the Nova Scotia Legislative Assembly passed an act “to provide for an independent Director of Public Prosecutions”.⁴² In terms of this system the independence of the DPP is operationally reinforced but he is accountable for prosecutions policy to the Legislature through the provincial AG. The independence is reinforced by aspects such as a non-partisan consultation process prior to appointment, security of tenure and status as a deputy-minister with the power to hire and dismiss members of the prosecution service.⁴³

The DPP is mandated to conduct prosecutions independently of the AG.⁴⁴ The DPP is not bound by the AG’s advice unless it is in writing and subject to publication.⁴⁵ The DPP therefore remains free from partisan political considerations at the operational level. However, the AG is able to intervene in an individual matter or policy decision if he is willing to “go public”.⁴⁶

The Canadian federal model that came into effect in 2006 is another example of a decentralised system. I discuss this model in more detail. The Public Prosecution Service of Canada (PPSC) was brought to life by way of the Director of Public Prosecutions Act.⁴⁷ With this Act the branch of the Department of Justice known as the Federal Prosecution Service became a separate organisation called the Office of the Director of Public Prosecutions (widely referred to as the Public Prosecution Service of Canada). The core duties and responsibilities of the prosecution service stayed the same.⁴⁸

The DPP is appointed by the Governor in Council on the recommendation of the AG.⁴⁹ The DPP is a deputy head of department and is accountable to the AG.⁵⁰ As deputy head the DPP is responsible for the day-to-day running of the office.⁵¹ The DPP may be removed by the Governor in Council with the support of a resolution of the House of Commons for bad behaviour.⁵² The remuneration of the DPP is fixed by the AG and may not be changed once fixed.⁵³ The DPP shall report his activities to the AG and the report shall be laid before each house of Parliament by the AG.⁵⁴

41 Archibald “The politics of prosecutorial discretion: Institutional structures and the tensions between punitive and restorative paradigms of justice” 1998 *Can Crim LR* 69 para B.

42 Public Prosecutions Act, SNS, 1990, c 21 s 2.

43 Ss 5 and 13.

44 Archibald 1998 *Can Crim LR* 69 para B.

45 S 6 of the Public Prosecutions Act.

46 Archibald 1998 *Can Crim LR* 69 para B.

47 2006 c 9, s 121.

48 Proulx “Practice Note: The Public Prosecution Service of Canada” May 2009 *J Parliamentary & Pol L* 521.

49 S 3(1) of the Public Prosecutions Act.

50 S 3(2).

51 Proulx *supra* fn 48.

52 S 5(1) of the Public Prosecutions Act.

53 S 5(5).

54 Ss 16 and 17.

The DPP is responsible for initiating and conducting prosecutions under federal statutes falling within the jurisdiction of AG of Canada.⁵⁵ The DPP issues guidelines to federal prosecutors with regard to prosecutions.⁵⁶ The Act provides that the DPP executes his functions “under and on behalf of the Attorney General”.⁵⁷ The AG therefore remains the ultimate source of prosecutorial guidelines and discretion and is accountable to Parliament for this function. However, the DPP is given the power to make binding and final decisions to prosecute offences unless the AG issues a written directive with regard to any prosecution or the AG assumes conduct of any prosecution and in both instances it is published in the *Canada Gazette*.⁵⁸

The DPP must inform the AG of any planned prosecution or intervention that raises important questions of general interest.⁵⁹ The AG may intervene when he is of the opinion that any prosecution raises questions of public interest.⁶⁰

4 AUSTRALIAN INSTITUTIONAL MODEL

Chapter III of the Australian Constitution⁶¹ under the heading “The Judicature” provides for the judicial branch of the Commonwealth of Australia. The chapter establishes the High Court of Australia and gives the Commonwealth Parliament authority to create other federal courts and to vest federal judicial power in state and territory courts.⁶²

The Commonwealth of Australia (or federal government) has its own criminal jurisdiction and criminal code for federal crimes.⁶³ Australian state and territory courts decide cases brought under state or territory laws.⁶⁴ Five of the eight Australian states in the Commonwealth have adopted criminal codes.⁶⁵ The other three states are common law jurisdictions that passed crimes acts listing offences and punishments.⁶⁶ Where jurisdiction is conferred on the states and territories by the Commonwealth Parliament they also decide cases arising out of federal laws.⁶⁷ Most criminal matters - whether arising under Commonwealth, state or territory laws - are dealt with by the state or territory courts.⁶⁸ All states and

55 S 3(3) read together with the definition of prosecution in s 2.

56 S 3(3)(c).

57 S 3(3)(a).

58 S 5 read together with ss 10 and 15.

59 S 13.

60 S 14.

61 Ss 71–80.

62 Website of the Attorney-General’s Department of the Australian Government: [http://www.comlaw.gov.au/comlaw/comlaw.nsf/o/19541afd497bc2e4ca256f99008/e2cf/\\$FILE/Constitution.pdf](http://www.comlaw.gov.au/comlaw/comlaw.nsf/o/19541afd497bc2e4ca256f99008/e2cf/$FILE/Constitution.pdf) (accessed 10 September 2010).

63 Crimes Act, 1914 (Austl) and Commonwealth Criminal Code Act, 1995 (Austl). See Wauhop “Mindblindness: Three nations approach the special case of the criminally accused individual with Asperger’s Syndrome” Spring 2009 *Penn St Int’l LR* 959 part III(A)(2).

64 See fn 62 *supra*.

65 See eg Criminal Code Act, 1899 (Queensl) (Austl) and Criminal Code Act, 1902 (W Australia).

66 Eg Crimes Act, 1995 (Austl); Wauhop *supra* fn 63.

67 See fn 62 *supra*. See also s 68 of the Judiciary Act 6 of 1903 as amended and *Re Grinter; Ex parte Hall* 20 Aug 2003, 22 Apr 2004 180 FLR 433.

68 See fn 62 *supra*. See also Rose “1995 Australian Criminal Code Act: Corporate criminal provisions” 1995 *Crim LF* 129 fn 6.

territories have Directors of Public Prosecutions and prosecution policies.⁶⁹ In the next section I discuss the role and functions of the DPP in the Commonwealth model for purposes of comparison.

The Commonwealth Director of Public Prosecutions (CDPP) was established in terms of the Directors of Public Prosecutions Act.⁷⁰ The Act effected significant changes to the prosecution process of which the most significant was the removal of the prosecution process from the political arena. The Attorney-General as the First Law Officer remained responsible for the criminal justice system and is accountable to Parliament for decisions made in the criminal justice process. However, the decisions have since then in fact been made by the CDPP.⁷¹ The Act provides for a Director and Associate-Director of Public Prosecutions who are both appointed by the Governor-General.⁷² The Director controls the office.⁷³ The Governor-General determines the terms and conditions of office for the Director and Associate-Director not provided for in the Act.⁷⁴

The CDPP has the authority to institute prosecutions for indictable offences against the laws of the Commonwealth.⁷⁵ The CDPP must, when requested by the Commonwealth Attorney-General (CAG), consult with the CAG with respect to the performance of the CDPP's functions or the exercise of his duties.⁷⁶ The CAG may, after consulting with the CDPP, issue directions or guidelines in writing with regard to the functions or powers of the CDPP.⁷⁷ The general authority of the CAG to issue directions or guidelines include the authority to issue directions or guidelines with regard to the circumstances in which the DPP should institute or carry on prosecutions and may be given with regard to specific cases.⁷⁸ The directions or guidelines must as soon as possible be published in the *Gazette* and must within 15 sitting days be laid before each house of Parliament.⁷⁹ However, experience has shown that directions under section 8 are issued very rarely and never have been provided with regard to a particular case.⁸⁰ Nothing in the Act affects the power of the CAG to prosecute indictable offence against the Commonwealth in his own name.⁸¹

The Director and Associate-Director's remuneration is determined by the Remuneration Tribunal. If no determination is in place, the prescribed remuneration shall be paid.⁸² The Director receives the prescribed allowances. The Associate-Director receives the same allowances as the Director.⁸³

69 "Prosecution Policy of the Commonwealth" <http://www.cdpp.gov.au/Publications/ProsecutionPolicy> (accessed 10 September 2010).

70 113 of 1983.

71 Introduction to *Prosecution Policy supra* fn 69.

72 S 5(2) read together with ss 18(1) and 18A(1).

73 S 5(4).

74 Ss 18(5) and 18A(5) – if any.

75 Ss 6 and 9 – see also the other functions of the CDPP in s 6 and 9.

76 S 7(1).

77 S 8(1).

78 S 8(2).

79 S 8(3). See also s 8(4) and s 8(5) with regard to the relevant time in s 8(3).

80 Introduction to *Prosecution Policy supra* fn 69.

81 S 10. See also the additional prosecuting powers of the CAG in own name – s 10).

82 S 19(1).

83 Ss 19(2) and 19(2B).

The Governor-General may terminate the appointment of the Director or Associate-Director for misbehaviour or physical or mental incapacity.⁸⁴ The Governor-General must terminate the services of the Director or Associate Director if he

- becomes bankrupt, applies for relief available to bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit;
- is absent from duty without leave for 14 consecutive days or for 28 days in any 12 months;
- engages in private legal practice;
- engages in paid employment outside the duties of his office without the consent of the AG; or
- fails to give written notice to the AG of all direct or indirect pecuniary interests he has or acquires in any business in Australia or elsewhere, without reasonable excuse.⁸⁵

The staff of the office is appointed under the Public Service Act, 1999.⁸⁶ The Director may on behalf of the Commonwealth in addition employ such persons as the Director thinks necessary for the performance of the functions of the office as well as persons with suitable qualifications and experience as consultants.⁸⁷

5 DISCUSSION

The gatekeepers of the criminal justice system in its common law tradition are its prosecutors. The role of the prosecutor comes with great responsibility as he is vested with the power to charge and try accused. They must seek justice, do justice, protect the innocent and charge the guilty. Prosecutors therefore bring, or ought to bring, professional standards of a non-partisan nature to their prosecutorial discretion.

The NDPP must be able to make prosecutorial decisions without regard to political considerations and his prosecutorial discretion must not be subject to the authority of government.⁸⁸ The political implications of the decision on the government of the day, or on individual members of government, cannot be part of the decision-making process. The underlying rationale for this independence in prosecutorial discretion stems from the fact that the decision should be made based on pure legal criteria. Only then will the law be applied fairly and equally to all.⁸⁹ In contrast to this the goal of the legislator is to implement government policy-making it a political rather than a legal matter.

Even though the South African, Australian and Canadian prosecuting authorities may take the public interest into account in their decisions whether to prosecute, the factors that may be taken into account in determining whether the public interest requires a prosecution are not political considerations.⁹⁰

⁸⁴ S 23(1).

⁸⁵ Of 1999 S 23(2) read together with s 24.

⁸⁶ S 27.

⁸⁷ Ss 27(3) and 28(1).

⁸⁸ National Director of Public Prosecutions v Zuma *supra* fn 8 para 28.

⁸⁹ See also Roach "Not just the Government's lawyer: The Attorney General as defender of the rule of law" 2006 *Queen's LJ* 598 para I.

⁹⁰ See South African *Prosecuting policy* para 4(c); Australian *Prosecution policy of the Commonwealth* para 2.10 *supra* fn 69; and *Federal prosecution service deskbook* continued on next page

The courts in South Africa, Canada and Australia may in principle not interfere with a decision by the prosecuting authority.⁹¹ However, the discretion of the prosecutor to charge and try accused does not fall beyond the jurisdiction of the courts. South African courts may intervene where the discretion is not *bona fide* or is exercised improperly.⁹²

Under Canadian law the court in *R v Jewitt*⁹³ effectively reversed a long line of authority and established judicial review of prosecutorial misconduct at common law. The Supreme Court of Canada in *Krieger v Law Society of Alberta*⁹⁴ held that courts may interfere in circumstances of flagrant impropriety or malicious prosecution.

Under Australian law the High Court of Appeal in *Island Maritime Ltd*⁹⁵ held that there may be place in the modern age to reconsider the reluctance of the courts to interfere with the exercise of prosecutorial discretion but cautioned that a court may only intervene in exceptional circumstances.

This convention of independent decision making is underscored by the Standards of professional responsibility and statement of the essential duties and rights of prosecutors (the Standards) adopted by the International Association of Prosecutors on 23 April 1999.⁹⁶ The Standards provide that prosecutorial discretion, when permitted in a particular jurisdiction, is to be exercised independently and must be free from political interference.⁹⁷ If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be transparent, consistent with lawful authority and subject to established guidelines to safeguard perceived and actual prosecutorial independence.⁹⁸ The right of non-prosecutorial authorities to command the institution or termination of legally instituted proceedings must be exercised in similar fashion.⁹⁹

Prosecutors must perform their duties without fear, favour or prejudice (section 3). Prosecutors are to be protected against arbitrary action by governments in order to ensure that they are able to carry out their professional responsibilities independently (section 6). Prosecutors should in general be entitled to perform their professional functions without intimidation, hindrance, harassment or improper interference.¹⁰⁰

para 15.3.2 under Canadian law <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch15.html> (accessed 10 September 2010).

91 *S v Dubayi* 1976 3 SA 110 (Tk); *R v Power* (1994) 89 CCC 3d 1 14 (SCC); *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 para 81 HCA; *R v Petroulias (No 1)* 217 FLR 242 para 65 NSWSC).

92 *Dubayi supra*, *Highstead Entertainment (Pty Ltd t/a 'The Club' v Minister of Law and Order* 1994 1 SA 387 (C); *Wilson v Director of Public Prosecutions* [2002] 1 All SA 73 (NC).

93 [1985] 2 SCR 128 (SCC).

94 (2002) 217 DLR 4th 513 paras 46 47 49.

95 Fn 91 *supra* paras 81–82.

96 The association was established under the auspices of the UN. The association produced a set of standards that serve as an international benchmark for individual prosecutors and prosecution services. See the “Foreword” of the statement. It serves to develop and reinforce the UN guidelines on the role of prosecutors that had been adopted earlier.

97 S 2.1.

98 S 2.2.

99 S 2.3.

100 S 6.

Prosecutors should be entitled to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience decided upon in accordance with fair and impartial procedures.¹⁰¹

It is evident from my discussion of the constitutional and organisational structures governing prosecutors, as well as the values and paradigms suffusing the exercise of independent prosecutorial discretion in Canada and Australia that the South African structure is not unlike that of other modern democracies. The South African structure is also in line with the standards adopted by the International Association of Prosecutors.

In many respects the South African structure better protects the independence of the prosecuting authority than the Canadian or Australian models. Section 179(4) of the Constitution guarantees independence and any legislation or executive action that infringes this guarantee is subject to control by the courts.¹⁰²

Neither section 179 of the Constitution nor section 33, nor any other section in the NPA Act, provides for executive control or intervention in the decisions of the prosecuting authority. Section 33 provides for ministerial responsibility. There is a difference between *responsibility* and ministerial *control or intervention*.¹⁰³

In terms of section 179(5) of the Constitution and section 21 of the NPA Act, prosecution policy must be formulated by the NDPP and approved by the Minister of Justice. The Minister of Justice may intervene when prosecution policy is not complied with. In terms of section 33(2) of the NPA Act the Minister may instruct the NDPP to -

- (a) furnish [him] with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
- (b) provide [him] with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
- (c) furnish [him] with information with regard to the prosecution policy referred to in section 21(1)(a);
- (d) furnish [him] with information with regard to the policy directives referred to in section 21(1)(b);
- (e) submit the reports contemplated in section 34 to [him]; and
- (f) arrange meetings between [himself] and members of the *prosecuting authority*.

Although the NDPP must comply with prosecution policy approved by the Minister, must provide the information required by the Minister, and must arrange meetings requested by the Minister, it does not affect prosecutorial discretion. Neither the Constitution nor the NPA Act provides the Minister with any discretionary powers regarding the prosecution of individual cases. The Minister therefore does not control or intervene in the exercise of prosecutorial

101 *Ibid.*

102 *Joubert supra* para 4.1.

103 *Idem* para 4.5.8.

discretion but rather ensures that the prosecution process is conducted responsibly. In *National Director of Public Prosecutions v Zuma*¹⁰⁴ it was held that the Minister may not interfere with decisions whether to prosecute but is entitled to be kept informed where an important aspect of legal or prosecutorial authority or public interest is involved.

The prosecuting authority is furthermore only *accountable* to Parliament in respect of its powers, functions and duties.¹⁰⁵ In terms of section 35(2) the NDPP must annually submit a comprehensive report referred to in section 22(4) in respect of the operations of the prosecuting authority to the Minister of Justice. Section 35 provides that the prosecuting authority must report to the Minister with regard to its functions in order to keep the Minister adequately informed so as to enable the latter to report to Parliament. It does not provide the power to interfere in the prosecution process. Section 32(1)(b) of the Act rather provides that no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its or his powers, duties and functions.

In the Nova Scotia model the DPP is bound by the AG's "advice" if it is in writing and published. The AG is able to intervene in a specific matter if he is willing to go public. In the Canadian Federal model the DPP executes his functions "under and on behalf of the Attorney-General". The AG therefore remains the ultimate source of prosecutorial discretion. The DPP has the power to make final decisions unless the AG issues a written directive with regard to any prosecution or the AG assumes conduct of any prosecution and goes public. The AG may also intervene when he is of the opinion that any prosecution raises questions of public interest.

In the Australian Commonwealth model the CAG is responsible for the decisions in the criminal justice process and is accountable to Parliament for decisions made in the criminal justice process. However, in practice the decisions are made by the CDPP. The CAG may, after consulting with the CDPP, issue directions or guidelines with regard to the circumstances in which the DPP should institute or carry on prosecutions. These directions or guidelines may be given with regard to specific cases as long as he goes public. The CAG retains the authority to prosecute indictable offence against the Commonwealth in his own name. The DPP must inform the AG of any planned prosecution or intervention that raises important questions of general interest. The AG may intervene when he is of the opinion that any prosecution raises questions of public interest.

It seems that the Nova Scotia, the Canadian Federal and Australian models are still subject to the control and supervision of a political appointee even if there is a smaller risk due to the fact that the political office bearer must go public. This creates the potential danger that decision-making will be influenced by illegitimate political considerations.

A comparison of the models furthermore reveals that under South African law the NDPP determines prosecution policy which is only to be issued with the concurrence of the cabinet minister responsible for the administration of justice,

104 *Supra* fn 8 para 32.

105 See s 35 of the NPA Act.

and after consulting the directors of public prosecutions. The NDPP also issues policy directives which must be observed in the prosecution process. In the Nova Scotia model the DPP also issues prosecutorial guidelines but he is accountable for the policy to the legislature through the provincial AG. In the Canadian federal model the DPP issues guidelines under and on behalf of the AG. The AG remains the ultimate source of the guidelines and is accountable to Parliament for this function. In the Commonwealth model under Australian law, the CAG, a political appointee, issues directions or guidelines with regard to the powers and functions of the CDPP, even though it must be after consulting the CDPP, it must be in writing and must be published in the *Gazette* and laid before each house of Parliament.

Under South African law prosecutors do not have to fear that their salaries may be reduced if they do not toe the line. The salaries of the NDPP, a DNDPP and a DPP are linked to the salary of a judge of the High Court and their salaries can practically only be reduced by an act of Parliament. The salaries of a DDPP and a prosecutor may furthermore in terms of national legislation only be reduced by an act of Parliament. Although the members of the executive are generally members of the legislature, and the governing political party has the majority of members in the legislature, it provides that the executive is answerable to the elected legislature which includes members of the opposition political parties who are not part of the executive. As in other matters, the opposition in Parliament can control the political power of the executive by way of public criticism which may bring a loss of support for the governing party. The executive will not be able to make, amend or repeal an act of Parliament with regard to the remuneration of prosecutors as this will infringe upon the doctrine of separation of powers.¹⁰⁶

In the Canadian Federal model the remuneration of the DPP is determined by the AG and may not be changed once fixed. In the Commonwealth model under Australian law the Director and Associate-Director's remuneration is determined by the Remuneration Tribunal. If no determination is in place the prescribed remuneration is paid. The Director and Associate-Director receive the same prescribed allowances.

Comparing these issues it might seem that the South African structure provides better independence overall. Yet, this does not mean that there are no concerns. Under South African law the senior prosecuting officials are all political appointees. I have indicated that the NDPP is appointed by the President. The President appoints a maximum of four persons as DNDPP as well as DPPs after consultation with the Minister of Justice, who is a politician, and the NDPP, who is a political appointee. The Minister of Justice – a politician – may after consulting the NDPP, who is a political appointee, appoint DDPPs. To make matters worse, lower-ranking prosecutors are appointed on the advice of the NDPP who of course is a political appointee.

In the Nova Scotia system the DPP is appointed after a non-partisan consultation process. The DPP has security of tenure, the status of a deputy-minister and has the power to hire and dismiss members of the prosecution service. However, in the Canadian federal model the DPP is appointed by the Governor in Council on the recommendation of the Attorney-General who are both members of government.

¹⁰⁶ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 62, Currie and De Waal 20.

Under Australian law the commonwealth model also provides that the DPP and Associate-Director of Prosecutions are appointed by the Governor-General who is a political appointee. The Governor-General also determines their terms and conditions of office. The staff of the Australian commonwealth model office is appointed under the Public Service Act 1999 and the DPP may employ such persons as the DPP thinks necessary for the performance of the functions of the office.

These models furthermore differ in an important way, a difference that played a pivotal role in the Vusi Pikoli saga and which might change the perception that the South African structure provides greater independence. The South African NPA Act, the DPP Act regulating the federal model under Canadian law and the DPP Act regulating the federal model under Australian law provide that the DPP may be removed from office due to bad behaviour or misconduct. The South African NPA Act and the DPP Act under Australian law also provide that the DPP may be removed due to physical or mental incapacity. The DPP Act under Australian law provides for additional grounds when the DPP has to be removed, which do not merit further discussion here. The South African NPA Act is the only act that provides for removal from office on account thereof that the DPP is no longer a fit and proper person to hold such office. This is the ground in terms of which Pikoli was removed from office.

An analysis of the Pikoli saga reveals that the governing party complied with the other requirements for dismissal in the NPA Act, and that this difference was crucial in the axing of Pikoli. The ruling political party was able to dismiss Pikoli irrespective of the fact that the real and unlawful purpose of the dismissal was evident to the other political parties in Parliament, other interested parties and the public in general. It also did not make a difference that the Ginwala Inquiry, constituted due to pressure by political opponents and the media, later found Pikoli to be a fit and proper person to act as NDPP. In a sure sign of their disapproval the International Organization of Prosecutors in 2008 honoured Pikoli for his firm conviction to uphold the independence of prosecutors. Lastly, when Pikoli filed papers in the High Court to be reinstated, the government not surprisingly elected to settle the matter out of court for R7.5 million.

My concern is therefore the absence of appropriate and objective criteria by which it could be determined whether the NDPP was no longer a fit and proper person for office. No assistance can be gained in this regard from the long title or the preamble to the NPA Act.

Unfortunately the appointment of Adv Menzi Simelane as Pikoli's successor has been extremely controversial. Before his appointment Simelane was severely criticised by Frene Ginwala who led the enquiry into Pikoli's fitness for office.¹⁰⁷ In her report Ginwala denounced Simelane as an unreliable and arrogant witness. Ginwala also found that Simelane (the then Director-General of Justice) may have acted unlawfully when he drafted a letter for Brigitte Mabandla (the former Minister of Justice) which instructed Pikoli to cease the investigation into Selebi until she was satisfied about the merits of the case. On top of this the Public Service Commission investigated Simelane's conduct at the investigation and recommended that he should face a formal hearing. However, Mr Radebe, the Minister of Justice overruled this and recommended to President Zuma that he be appointed which was subsequently done. The General Council of the Bar is

107 http://en.wikipedia.org/wiki/Menzi_Simelane (accessed 21 September 2010).

presently investigating whether Simelane is fit to be a member of the Bar. If the High Court finds that Simelane is not fit to be a member of the Bar it would mean that Simelane is also not a fit and proper person to be appointed as NDPP. Section 9(1)(b) of the NPA Act provides that one can only be appointed as NDPP if one is a “fit and proper person”.¹⁰⁸

Our political landscape is fraught with infighting and accusations and perceptions of political involvement in criminal prosecutions. It has even been found by a High Court (set aside on appeal) that the prosecution of President Jacob Zuma (now withdrawn) was the product of a political conspiracy. It may be argued that in this political landscape it should not be left to the executive to undertake a value judgment as to whether the NDPP is a fit and proper person to hold office. Ultimately public confidence in the independence of the prosecuting authority may be undermined.

Yet, there may be potential danger if the prosecution service is given unbridled powers. Jackson told his audience of United States (US) attorneys that under American law a prosecutor “has more control over life, liberty and reputation than any other person in America”.¹⁰⁹ In the US and South African systems the prosecution has absolute authority over critical decisions.¹¹⁰ The prosecution cannot be forced to prosecute and it cannot be forced to terminate a prosecution. Only the prosecution decides what charges to bring, whether a plea agreement will be entered into or whether diversion will be allowed in lieu of charges. In many instances the prosecutor must decide whom to prosecute. Here the danger is that he may pick whom he thinks should be prosecuted. The prosecutor may be afraid of becoming unpopular with the largest ethical or governing group or to be seen as having the wrong political views.¹¹¹ Some may accordingly argue that some measure of centralised control is necessary.

6 FINAL REMARKS

If the dismissal of Pikoli was a way for the President and the ruling party to impose their views on the prosecuting authority it is certainly not the first time that this has happened in a modern democratic society and it will not be the last. On 7 December 2006 seven US attorneys were ordered by phone on the same day to resign. It later became known that two more US attorneys had been ordered to resign. None was given any explanation for their dismissal and all were led to believe that they alone were being dismissed, raising the spectre of wrongdoing and encouraging silent departures. All the dismissed US attorneys indicated that they “served at the pleasure” of the President and most refrained from publicly criticising the White House.¹¹² This is a good example of too little independence and too much centralised control.

108 <http://constitutionallyspeaking.co.za/what-now-for-menzi-simelane> (accessed 21 September 2010).

109 Jackson “The Federal Prosecutor” 1940–1941 *J Am Inst Crim L & Criminology* 3.

110 See Gershman “The most dangerous power of the prosecutor” 2008 *Pace LR* 1 part III for the position under American law.

111 *Ibid.*

112 McKay “Train wreck at the justice department: An eyewitness account” 2008 *Seattle U LR* 265.

Bearing in mind that all the directors in the South African prosecution authority are appointed by the executive, one may ask whether lower-level prosecutors should not be given greater independence from these higher ranking officials. The problem is that prosecutorial misconduct has traditionally been considered the product of too much independence.¹¹³ A more contemporary view is that even the best prosecutors have biases that must be kept in check.¹¹⁴

What is then the best constitutional structure within which to exercise prosecutorial discretion? The manner in which decisions to prosecute or not are reached is crucial to the criminal justice system. This requires that the manner in reaching such decisions must be impartial and fair. Prosecutorial decisions should only be made with due attention to the requirements of the law, while not forgetting the public interest implications of legal decisions. I accordingly suggest that senior prosecuting officials must as far as possible be appointed by a panel or committee representing all the major political parties and on the recommendation of the Judicial Services Commission. The system must afford prosecutorial independence in the day-to-day operating terms with ultimate accountability to Parliament directly, or through an official. The NDPP must be truly independent, subject only to keep Parliament or the official properly informed. However, while respect for the independence of the prosecuting authority is maintained, the parties are not deterred from consultation on important matters of general interest. This is the only construction consistent with the spirit, norms and values of the Constitution. In practice the NDPP will be a member of the public service.

The authority to remove the NDPP from office on account thereof that the he or she no longer is a fit and proper person is a concern and is open to abuse. Many interested parties have held, and still hold, the view that this authority was indeed abused in the Pikoli matter. This authority should therefore be removed.

This is most likely to provide the best prospects for the pursuit of justice in the South Africa's political context. If it is deemed too dangerous to vest the exclusive power to prosecute in the hands of one person under all conditions, the Minister of Justice should be given the authority to intervene in any prosecution for reasons of national security, on condition that a written directive is issued, and that the directive is published in the *Government Gazette*. That said, "national security" must not be used to overlook the corruption of political allies (President Mbeki was accused of this), or for targeting the corruption of opponents.

As a last remark, Professor John Edwards has wisely warned that, even though one may create structures and clarify functions and responsibilities, the success and failure of such institutional arrangements often rest with the calibre, judgment and personal integrity of these people who occupy critical posts. If the best people are not put in critical posts, the best institutional arrangements may fail.¹¹⁵

113 See eg Mellon *et al* "The prosecutor constrained by his environment: A new look at discretionary justice in the United States" 1981 *J Crim L & Criminology* 52 54 and Dash "The office of the independent counsel and the fatal law: They are left to twist in the wind" 2001 *Md LR* 26 30–31.

114 See eg Bandes "Loyalty to one's convictions: The prosecutor and tunnel vision" 2006 *How LJ* 475 479 and Burke "Improving prosecutorial decision making: Some lessons of cognitive science" 2006 *Wm & Mary LR* 1587 1593.

115 Archibald *supra* fn 41 para D.