The independence of the prosecutorial authority of South Africa and Namibia: A comparative study

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Introduction

Prosecution and prosecutorial authority did not receive much attention in South African constitutional jurisprudence. In Namibia, on the other hand, it was one of the first constitutional questions that the Supreme Court had to deal with. The Namibian Supreme Court opted for a radical separation between the executive and the prosecutorial authority. South Africa had the opportunity to follow the Namibian example, but rejected it radically.

Prosecutorial independence is closely related to the independence of the judiciary. If controversial prosecutions can be stopped before they get to the courts, even the most independent tribunal cannot guarantee equal treatment for all. This paper compares the two authorities in the light of their common history.

The legal history of the independence of the prosecuting authorities in South Africa and Namibia

The histories of South Africa and Namibia have been interwoven for centuries. Long before the colonisation of Namibia by Germany in 1884, people from South Africa moved to and from Namibia. Nama leader Jan Jonker Afrikaner and his tribe moved from Winterhoek in the Cape Colony to central Namibia; the Basters moved from the northern Cape Colony to Namibia; and even a group of Calvinist Afrikaners, the Dorslandtrekkers, (or Boere, as they were known) traversed Namibia on their way to Angola.

2 Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC), par. 141 G.
3 I am indebted to the Heads of Argument on behalf of the Prosecutor-General by PJ van R Henning, SC and CHJ Badenhorst, Counsel for the Prosecutor-General in Ex Parte: Attorney-General, supra, 1998 NR 282 (SC) (1) for the structure of this section and some valuable information.
4 The Dorslandtrekkers were (white) Afrikaner Calvinists who left the Transvaal Republic in reaction to the political and theological liberalism of President Burgers. They approached
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When South Africa took over the administration of Deutsch-Südwestafrika (“German South West Africa”) during World War I in 1918, the prevailing South African common law was made applicable to the occupied territory. After WWI, the connection between the Union of South Africa and Deutsch-Südwestafrika became formal. On 17 December 1920, the Mandate Commission of the League of Nations approved the administration of the territory by South Africa under a so-called Class C mandate. The wording of the mandate was controversial from the outset. It mandated *His Britannic Majesty to be exercised on his behalf by the government of the Union of South Africa.*

Proclamation 1 of 1921 gave the Administrator legislative powers over what was then known as *South West Africa.* Act 42 of 1925 of the South African Parliament instituted a constitution for the territory.

From 1919 onwards, several South African laws were enforced in Namibia. In some cases, proclamations by the Administrator were brought in line with South African legislation, with minor adaptations. In practice, it meant that South Africa could implement its law in the territory. It had the effect that South West Africa was governed from Pretoria as an integral part of the Union of South Africa.

The mandate had very specific restrictions. General Jan Christiaan Smuts, the then prime minister of the Union of South Africa, was instrumental in including a section preventing the mandate holders from occupying the mandated areas. This was contrary to the wishes of Australia and New Zealand, who, in respect of Papua New Guinea, the German colony in the South Seas, saw occupation as the only solution. The mandate holders also had to exercise their mandates for the benefit of the indigenous people of the mandated countries.

Nevertheless, in *R v Christians,* the Appellate Division of the Supreme Court of South Africa ruled that South Africa held sovereign power over South West Africa. Wiechers (1972:450) points out that the court was not compelled to go

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8 1924 AD 101.
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into the issue of sovereignty since the much wider maiestas was an element of high treason, and not sovereignty. The South African government nevertheless accepted its status as the sovereign of South West Africa after the Christians case.\(^9\)

The United Nations Organisation (UN) was formed in 1945, after the end of WWII. Following this, the League of Nations was disbanded in 1946. The issue of the mandated territories was not resolved at the League of Nations’ final meeting. The League accepted a resolution that the mandate holders would administer the mandated territories in the same spirit as before, until a new arrangement was reached between such mandate holders and the UN.\(^10\)

A long and often bitter struggle soon developed between South Africa and the UN. It is not important for this paper to go into the detail of the legal battle between South Africa and the international community; suffice it to say here that, from a legal perspective, Namibia was governed as if it were part of South Africa’s sovereign territory. The government of the Union of South Africa was of the opinion that all obligations of the mandate holders lapsed when the League of Nations dissolved, and that South Africa had the right to integrate South West Africa into South Africa.

From then on, the greatest majority of South African Acts were also made applicable to South West Africa over a period of time until 1985. In 1919, South Africa established the High Court of South West Africa as the judicial authority for the territory, with the Appellate Division of the Supreme Court of South Africa as the final Court of Appeal.

Prior to the formation of the Union of South Africa in 1910, the prosecution authority, at least in the Transvaal, vested absolutely in the Attorney-General.\(^11\) With the formation of the Union of South Africa, section 139 of the South African Act of 1909 basically confirmed the independence of the prosecuting authorities.

The formulation of section 139 was confirmed in the Criminal Procedure and Evidence Act of 1917, as follows:\(^12\)

\[\text{This right and duty of prosecution vested in and entrusted to such Attorneys-General or Solicitor-General (as the case may be) is absolutely under his management and control.}\]

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9 Wiechers (1972:452).
10 (ibid.:453).
11 Gillingham v Attorney-General and Others 1909 TS 572, at 573.
12 Section 7(2).
Prosecutions in South West Africa were in the hands of the Attorney-General of South West Africa. Like his South African counterpart, the South West African Attorney-General was independent and free from political oversight. The Administrator of South West Africa issued Proclamation 5 of 1918 to make the Criminal Procedure and Evidence Act of 1917 effective in the Protectorate of South West Africa, with minor special conditions. The special conditions of the Proclamation did not affect section 7(2) of the said Act.

The Administrator’s Proclamation 20 of 1919 repealed Proclamation 5 of 1918, but confirmed the independence of the Attorney-General. Only the title was changed to Crown Prosecutor. Section 7 of the Criminal Procedure and Evidence Act of 1917 was substituted by the following:

7. (1) The Crown Prosecutor of the Protectorate is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of His Majesty the King in respect of any offence which is alleged to have been committed within the jurisdiction of the High Court of South West Africa.

(2) That right and duty of prosecution vested in and entrusted to such Crown Prosecutor is absolutely under his own management and control.

Consequently, the position of the prosecutorial powers in South Africa and Namibia were practically the same: both prosecuting authorities had absolute autonomy and were free from political control. However, in 1926, their ways parted. The South African Criminal and Magistrates’ Courts Procedure Amendment Act, 1926 (No. 39 of 1926) amended section 139 of the South African Act and sections 7(1) and (2) of the Criminal Procedure and Evidence Act of 1917. Sections 1(3) and (4) placed the Attorney-Generals under the control and directions of the minister.

The 1926 Act was not made applicable in South West Africa, so the Crown Prosecutor of South West Africa remained independent and free of political control. In 1935, the Criminal Procedure and Evidence Proclamation 30 of 1935 repealed Proclamation 20 of 1919. The Crown Prosecutor was renamed Attorney-General. Section 7(2) of the Proclamation confirmed that –

... the right of prosecution vested and entrusted to such Attorney-General is absolutely under his own management and control.

The Criminal Procedure Ordinance 34 of 1963 repealed Proclamation 30 of 1935. Although the exclusive authority of the Attorney-General is not stated as explicitly as in the earlier proclamations, the South African practice of placing the Attorney-General under political control was not followed, as section 5(1) shows:
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The Administrator shall, subject to the laws relating to the public service, appoint an Attorney-General to the territory who is vested with the sole right and with the duty of prosecuting in the name of the State, in any court in respect of any offence which is alleged to have been committed within the jurisdiction of the Supreme Court.

In South Africa, the trend of political control was firmly established by the General Law Amendment Act, 1935 (No. 46 of 1935). In this vein, a new section 7(4) was added to Act 31 of 1917, and read as follows:

Every Attorney-General and Solicitor-General shall exercise their authority and perform their functions under this Act and under any other Act subject to the control and direction of the Minister who may, if he thinks fit, reverse any decision arrived at by an Attorney-General or a Solicitor-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function.

Thus, from 1935, the prosecuting authority became part of the authority and power of the minister of justice. The minister had the legal right to take over the role of the Attorney-General and solicitor-generals at his own discretion! The 1935 formulation also found its way into the Criminal Procedure Act, 1955 (No. 51 of 1955), which repealed Act 31 of 1917.

As a consequence of these different developments, the Attorney-General in South West Africa had greater authority and much wider powers than his counterparts in South Africa. However, in South West Africa, political intervention was complicated; and whenever it happened, it was subtle – unlike its blunt counterpart popular in South Africa during the apartheid years.

On 22 July 1977, the Attorney-General of South West Africa lost his autonomy when the new Criminal Procedure Act, 1977 (No. 51 of 1977), was made applicable in South West Africa. Section 3(5) of the said Act made political control mandatory.¹³

¹³ The sections read as follows:

(1) The State President shall, subject to the laws relating to the public service, appoint in respect of the area of jurisdiction of each provincial division an Attorney-General, who, on behalf of the State and subject to the provisions of this Act –
   (a) shall have authority to prosecute, in the name of the Republic in criminal proceedings in any court in the area in respect of which he has been appointed, any person in respect of any offence in regard to which any court in the said area has jurisdiction; and
   (b) may perform all functions relating to the exercise of such authority.

(2) The authority conferred upon an Attorney-General under subsection (1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings within the area of jurisdiction of the Attorney-General concerned.
Thus, from 22 July 1977, the Attorney-General of South West Africa was in the same subservient position as his South African counterparts. Although the integrity of South West Africa was anything but respected by the consecutive South African governments, the legislature acknowledged the integrity of the prosecuting authority until 1977.

The distinction between South Africa and South West Africa was the last vestige of judicial independence in and recognition of the Mandate C status of the latter territory. It confirmed, at least in principle, that South West Africa was not part of South Africa. As a Mandate C territory, a South African minister could not control the Attorney-General. With Act 51 of 1977, this last bastion of judicial independence was stripped from the people of South West Africa. The South African Supreme Court of Appeal executed final authority over the Supreme Court of South West Africa, and its minister of justice controlled prosecutions.

The tight control of the prosecutorial authority was closely related to the political situation in South Africa. In the aftermath of the 1976 student revolt, the government of John Vorster was adamant they would control all spheres of society. The new Criminal Procedure Act was but one of a series of oppressive pieces of legislation emanating from that period.

The time of the implementation of political control over the South West African Attorney-General is likewise not without political significance. The South African-backed Turnhalle Conference in 1976 did not lead to an internationally accepted independence because SWAPO were not part of the talks. International pressure was mounting against South Africa and, in 1978, i.e. only a year later, the UN accepted Resolution 435, providing for UN-supervised elections that would lead to an independent Namibia.

(3) The Minister may, subject to the laws relating to the public service, in respect of each area for which an Attorney-General has been appointed, appoint one or more deputy attorneys-General, who may, subject to the control and directions of the Attorney-General concerned, do anything which may lawfully be done by the Attorney-General.

(4) Whenever it becomes necessary that an acting Attorney-General be appointed, the Minister may appoint any competent officer in the public service to act as Attorney-General for the period for which such appointment may be necessary.

(5) An Attorney-General shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister, who may reverse any decision arrived at by an Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.
Acting Supreme Court of Namibia Judge AJA Leon (as he then was) makes the following observation regarding the implementation of section 3 of Act 59 of 1977 in Namibia:\textsuperscript{14}

\begin{quote}
It was made applicable by an apartheid government bent on domination [\textendash] no doubt determined to enforce its political will on the independence of the prosecuting authority in South West Africa. I cannot for one moment believe that that would be in accordance with the ethos of the Namibian people.
\end{quote}

In the same tone, Henning, SC, and Badenhorst, Counsel for the Prosecutor-General in the mentioned case, point out that the government who implemented section 3 of the Criminal Procedure Act was not a \textit{Rechtsstaat} (a state governed by the rule of law), and the political control over the prosecuting authority was not a \textit{Grundnorm} (basic legal principle) of a constitutional dispensation.

In the period following the implementation of political authority and control from South Africa over the South West African Attorney-General, the minister of justice did not hesitate to use his authority when he deemed it necessary.

When the power and authority of the minister of justice over the Attorney-General were not adequate to manipulate prosecutions in the territory, the South African authorities used other laws. A case in point is the well-known brutal murder of SWAPO activist Immanuel Shi\textsubscript{fi}di.

Shi\textsubscript{fi}di was killed by five members of the South African Defence Force (SADF) at a political rally in Windhoek. The Attorney-General for South West Africa instituted criminal proceedings against the five members of the SADF. However, section 103 ter of the Defence Act, 1957 (No. 44 of 1957) gave the State President authority to issue a certificate to stop any prosecution against SADF members for acts committed in the operational area. The State President, acting on the recommendation of his minister of defence, issued such certificate, after which the Administrator-General of South West Africa issued a separate certificate to halt the prosecution.

The son of the deceased then applied for a court order declaring the Administrator-General’s certificate invalid,\textsuperscript{15} on the grounds that no operational action of the SADF had been involved, and the killing had taken place on a football field in Windhoek. The court held that neither the minister of defence nor the State President, or anyone else, had the discretion to decide where an operational area

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\textsuperscript{14} \textit{Ex Parte: Attorney-General}, supra, 1998 NR 282 (SC) (1), at 36f.
\textsuperscript{15} \textit{Shifidi v Administrator-General for South West Africa} 1989 (4) SA 631 SWA.
\end{flushright}
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was located for the purpose of section 103 ter. In this case, it could not be said objectively that a football field in Windhoek was indeed an operational area, so the application was granted.

To overcome the shortcomings of the certificate the President had issued, the Administrator-General issued a proclamation declaring Windhoek an operational area.

From 1977 until 1990, the judicial independence was compromised by political control over the prosecutorial authorities. The independence of Namibia and the democratisation of South Africa opened the door 13 years later to reconsider the independence of the prosecutorial authority.

The new dispensation

Namibia

The Namibian Constitution introduced a new dispensation. The prosecutorial authority is placed in the hands of a new office, that of the Prosecutor-General.\textsuperscript{16} Article 141(2) states that –

\ldots any reference to the Attorney-General in legislation in force immediately prior to the date of Independence shall be deemed to be a reference to the Prosecutor-General, who shall exercise his or her functions in accordance with this Constitution.

However, it is not merely a change of name. The Constitution also makes provision for an Attorney-General.\textsuperscript{17} The Attorney-General follows the pattern of England and Wales, where s/he is to “\ldots exercise the final responsibility for the office of the Prosecutor-General”\textsuperscript{18} and be “\ldots the principal legal adviser to the President and Government”.\textsuperscript{19} S/he is also responsible “\ldots for the protection and upholding of the Constitution”\textsuperscript{20}

There is also a difference between the appointment of the Prosecutor-General and the Attorney-General. Article 86 of the Constitution states that the Attorney-General is appointed by the President in accordance with the provisions of Article 32. In particular, Article 32(3)(i) provides for the appointment of –

\begin{itemize}
  \item Article 88, Namibian Constitution.
  \item Articles 86 and 87, Namibian Constitution.
  \item Article 87(a).
  \item Article 87(b).
  \item Article 87(c).
\end{itemize}
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(a) the Prime Minister;
(b) Ministers and Deputy-Ministers;
(c) the Attorney-General;
(d) the Director-General of Planning;
(e) any other person or persons who are required by any other provision of this Constitution or any other law to be appointed by the President.

Thus, although the Constitution states nowhere that the Attorney-General is part of the Cabinet, his/her appointment is provided for in the same manner and under the same Article as that of prominent members of Cabinet.

The Prosecutor-General, however, is appointed by the President on the recommendation of the Judicial Service Commission.21 Other offices appointed in the same way are judges22 and the Ombudsman.23

From the above it is clear that the Prosecutor-General is a quasi-judicial appointment, while the Attorney-General is a political appointment. By creating the two posts, the mothers and fathers of the Namibian Constitution already made a distinction between the political official and the Prosecutor-General as a free agent.

The composition of the Judicial Service Commission has a ring of independence around it. It consists of the Chief Justice, a judge appointed by the President, two members of the legal profession, and the Attorney-General. Since judges are also appointed by the President upon recommendation of the Judicial Service Commission, one can assume that the judges on the Commission will be independent in their thinking and conduct. And since the representatives of the profession are appointed by the Law Society in terms of the Constitution,24 they have no direct relationship with political powers and, thus, are not accountable to political officials. Consequently, the only political appointee on the Commission is the Attorney-General. In terms of this composition, political manipulation will be extremely difficult.25

21 Article 88(1).
22 Article 82(1).
23 Article 90(1).
24 Article 85(1).
25 This does not mean that the government has no power to determine the composition of the Judicial Service Commission. The second judge does not have to be a Supreme Court judge or the Judge-President. The President has the discretion to appoint any serving judge. Since judges are independent, this does not really constitute a threat to judicial independence. A more serious threat to the Commission’s independence is the way in which the members of the profession are appointed. In terms of the Legal Practitioners Act, the Law Society
Nico Steytler (1991) has criticised the influence and role of a small minority of unelected and, at independence, predominantly middle-aged white men in the judiciary and on the Judicial Service Commission. Referring to the powerful role of the judiciary in terms of the Constitution, he has the following to say:

The result is that a small, unrepresentative elite, dominated by whites who have traditionally had little sympathy with SWAPO, will be able to wield a considerable amount of power. Moreover, their professional interests link them further to this propertied elite; the legal profession – its form, objectives and sources of income – is predicated on the continuance of the status quo. In the “specialized third legislative chamber” the minority parties have thus achieved a limited but effective veto over the legislature and the executive through an “independent” judiciary interpreting a rigidly entrenched bill of rights.

Steytler’s criticism of unrepresentative white males undoubtedly had some merit at independence, and may have some merit today in the majoritarian/contermajoritarian debate. It falls outside the scope of this paper to go into that debate; but as far as the composition of the bench and Law Society is concerned, it has been overtaken by time. By 1999, there were only three white judges on the bench.27 By 2004, both the Chief Justice and Judge-President were black Namibians.

The meaning of the words “on the recommendation of the Judicial Service Commission” has not yet been tested in a competent court. However, the principle was tested in 1997 after the death of the first Ombudsman. The President appointed the then acting Ombudsman, Adv. Kasutu, as Ombudsman of Namibia is the only legally recognised body representing legal practitioners. Initially after independence, the Law Society appointed a practising lawyer and a member of the Bar Association to represent the profession on the Judicial Service Commission. Even after the fusion of the legal profession removed the separate roles of lawyers and advocates, the de facto operational division between lawyers (practising with a fidelity certificate) and advocates (receiving briefs from lawyers rather than clients) remained intact. Soon after the enactment of the said Act, the then Minister of Justice, Dr N Tjiriange, replaced the representative of the Bar Association with a member of the Namibian Lawyers’ Association. The NLA is a predominantly black lawyers’ association without a legal foundation in the Legal Practitioners Act. The Minister’s intention was possibly to replace the representative of a small elite body with a person who represented a bigger constituency. However, it opens the door for political manipulation. While the Bar Association is small and unrepresentative of the broader legal fraternity, it never appointed its own representative on the Commission: the appointment was done by the Law Society.

without waiting for the Commission’s recommendation. After a massive uproar from both the public and the judicial profession, the President withdrew the appointment. The Commission forwarded a priority list with three names to the President with Adv. Gawanas being at the top of it, and Adv. Kasutu being on the list. The President appointed Adv. Bienece Gawanas, creating a strong precedent for future appointments made upon the Commission’s recommendation.

The division of powers between the Attorney-General and the Prosecutor-General seems to be based on a relationship of equals: one with a political mandate, and one with a quasi-judicial mandate. However, the Constitution leaves some doubt as to this relationship. One of the functions of the Attorney-General, according to Sub-Article 87(a) of the Constitution, is “to exercise the final responsibility for the office of the Prosecutor-General”. This Sub-Article was the ground of a bitter conflict between the Attorney-General and the Prosecutor-General shortly after independence.

The independence of the Prosecutor-General

The fact that the positions of Attorney-General and Prosecutor-General were vaguely based on the English/Welsh system, without the specific boundaries of the two positions being spelled out, soon led to an intense conflict between them that was eventually settled by the Supreme Court.

The conflict centred on the function of the Attorney-General “to exercise the final responsibility for the office of the Prosecutor-General”.28 In the Heads of Argument on behalf of the Prosecutor-General,29 counsel quotes a letter dated 27 March 1992 from the Prosecutor-General to the Judicial Service Commission, after the Attorney-General had laid a complaint of insubordination against the Prosecutor-General.

In the letter, the Prosecutor-General complained, inter alia, that his staff received instructions from the office of the Attorney-General without his knowledge, that advocates in his office were appointed as investigators – which he considered to be undesirable, and that he considered an instruction from the Attorney-General to withdraw a specific case as an attempt to defeat the ends of justice. The Prosecutor-General referred to a dragged-out case of racial discrimination

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28 Article 87(a), Namibian Constitution.
against the public broadcaster, the Namibian Broadcasting Corporation (nbc). The conflict reached a climax when the Attorney-General informed the Prosecutor-General that he had decided that prosecution should be withdrawn, and instructed the Prosecutor-General to inform the High Court and counsel for the defendant accordingly. The Prosecutor-General informed the Attorney-General on the same day that he did not regard himself bound by the instruction.30

Thereupon, the Attorney-General brought a petition to the Supreme Court in terms of section 15(1) of the Supreme Court Act, 1990 (No. 15 of 1990) to determine the following questions:

*Whether the Attorney-General, in pursuance of Article 87 of the Constitution and in the exercise of the final responsibility for the Office of the Prosecutor-General, has the authority:
  (i) to instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter;
  (ii) to instruct the Prosecutor-General to take on or to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution;
  (iii) to require that the Prosecutor-General keeps the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial policy.*

The Attorney-General based his case on three points:

- He conceded that final responsibility meant that the *ultimate prosecuting discretion or ultimate superintendence* vested in the Attorney-General.
- The Attorney-General also submitted that section 3(5) of the Criminal Procedure Act, 1977 (No. 59 of 1977) was still Namibian law and that the Prosecutor-General was obliged to exercise his authority and perform his duties under the Act, subject to the control and directions of the Attorney-General (as the previous Attorneys-General since 1977 had done under the control and direction of the South African minister of justice), and
- The Attorney-General alleged that Article 87(a) accorded with the situation in the United Kingdom and the Commonwealth, where the prosecuting authority was generally known as the *Director of Public Prosecutions*.

The Prosecutor-General adopted the stance that the real question that needed to be answered was this: Is the Prosecutor-General truly independent under the Constitution? Counsel’s arguments for the Prosecutor-General were all attempts

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30  (ibid.:127).
31  Petition of the Attorney-General in the Ex Parte case, p 2ff. 

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to point to the inherent independence underlying the constitutional position of the Prosecutor-General.

The reliance on England, Wales and the Commonwealth did not assist the Attorney-General, however. After a thorough discussion of the position in England and Wales, the court concluded that while the phrase used in the 1879 Act, namely “under the superintendence of the Attorney-General”, was strong in its implication that the Director of Public Prosecutions was a subordinate position, and even allowed the Attorney-General to intervene in prosecutorial decisions, it seldom if ever happened in practice. The court also noted that there was no common practice in the Commonwealth to rely on.

The Court then made the following observation:32

Unless s 3(5) of Act 51 of 1977 applies, the position of the Prosecutor-General is an a fortiori one in the sense that there is nothing in the constitution which expressly places his office under the superintendence or direction of the Attorney-General.

The court observed with reference to Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order and Others33 that one of the fundamental functions in the duty to prosecute was the discretion to proceed with a prosecution or to withdraw it. The court also confirmed the general notion that the Attorney-General was a political office with executive functions, while the Prosecutor-General was quasi-judicial and his/her appointment non-political.34

Instead of looking for foreign guidance, the by then standard practice adopted by the Namibian courts to deal with the Constitution was followed by considering the presumptions of the Attorney-General (i.e. that section 3 of the Criminal Procedure Act still applies to Namibia, and that the words final responsibility also implied “final authority”) in the light of the spirit of the Namibian Constitution. The court affirmatively quotes State v Van Wyk35:

I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity; ...

– and State v Acheson36 in its decision:

33 1994 (1) SA 387 (c) at 393H–394H.
35 1992 (1) SACR 147 (NmSC), p 174.
36 1991 (2) SA 805 NmHC, p 4.
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The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the governed. It is a “mirror reflecting the national soul”, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside over and permeate the process of the judicial interpretation and judicial direction.

The position on the ground seemed to dictate a strong Attorney-General to introduce a human rights philosophy of prosecution. The Attorney-General was a direct presidential appointee and a defender of human rights during the struggle for independence, while the Prosecutor-General was a middle-aged white male who had spent most of his professional career operating under the apartheid system. However, the court would not consider practical politics in determining the question of an independent prosecutorial authority. In affirming the independence of the Prosecutor-General, Judge Leon made the following statement:

I do not believe that those rights and freedoms can be protected by allowing a political appointee to dictate what prosecutions 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.

The court also concludes that there need not be a conflict between an independent Prosecutor-General and an Attorney-General that has final responsibility. Final responsibility then means more than financial responsibility, and includes the Attorney-General’s duty to account to the President, the executive and the legislature.

The judgment of the Supreme Court of Namibia cleared up any uncertainty on the relationship between the Attorney-General and the Prosecutor-General, as well as on the independence of the Prosecutor-General. In terms of the Namibian Constitution, the Prosecutor-General is totally independent as far as his/her mandate to prosecute is concerned.

In its judgment, the court made a strong point that the basic difference between the two offices lay in their functions within the three branches of government. The Attorney-General, the Court pointed out, carried an executive function.37 If prosecution were also an executive function, this reference would make no sense. However, if the court’s argument is that the Prosecutor-General is better placed as part of the judicial function of government, the arguments fall in place.

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The old theory of an Attorney-General controlling the entire machinery of criminal proceedings, namely the initiation and the withdrawal of criminal proceedings, is no longer accepted uncritically. In its judgement, the court relied on a paper presented at a meeting of Commonwealth Law Ministers in August 1977, stating that the trend was towards an independent non-political Director of Public Prosecutions.

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

By the time of the certification of the final Constitution of South Africa, the Namibian position had been settled.

**The independence of the South African prosecutorial authority**

**The South African Constitution**

The final Constitution is somewhat ambiguous. On the one hand, it dictates that “[n]ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”, while on the other, it regulates that the “Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority”.

There is a subtle yet important difference between the wording in section 179(6) of the South African Constitution and Article 87(a) of the Namibian Constitution. The South African minister executes final responsibility over the prosecuting authority, while the Namibian Attorney-General exercises the final responsibility for the office of the Prosecutor-General. The synonyms of the authoritative preposition over do not include the preposition for. Instead, the Thesaurus uses phrases such as in excess of and on top of, and more than, greater than, larger than, above, more and on. Synonyms of the preposition for include intended for, in favour of, in behalf of, in lieu of, in place of, instead of, representing, in support of and pro. None of the synonyms for for carry the authoritative, commanding meaning of the preposition over.

41 Section 179(6), South African Constitution.
Since the South African Constitution was written after the Namibian Supreme Court case, one can assume that the drafters considered the Namibian option, but decided to stay closer to the wording of the notorious section 3(5) of the Criminal Procedure Act, 1977 (No. 59 of 1977):

An Attorney-General shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister, who may reverse any decision arrived at by an Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.

While section 3(5) was repealed in South Africa, and although the words control and direction do not appear in the Constitution, the element of political control was maintained in the Constitution. The Constitution did away with the minister’s right to take over the functions of the National Director of Public Prosecutions (NDPP), but the minister maintained strong control over the prosecutorial authority.

When Adv. Wim Trengrove, advocate for suspended National Director of Public Prosecutions Adv. Vusi Pikoli, cross-examined the then Deputy Minister of Justice, Johnny de Lange, the latter stated that political control was indeed built into subsection 179(6). De Lange called the South African minister of justice and constitutional development the “champion” of the NDPP, adding that –

[w]e tried to create a structure where the NPA and the executive work closely together, with, of course, a degree of autonomy.

The independence of the NDPP is further undermined by the fact that s/he is appointed by the President. In the Ex Parte: Attorney-General case, the Namibian Supreme Court pointed out that direct presidential appointments were an indication of executive functionality. This is also true of the South African Constitution. The deputy president, ministers and deputy ministers are appointed by the South African president without consultation or recommendation from any constitutional body.

42 The cross-examination took place on 8 May 2008, after the testimony of Adv. De Lange before the Ginwala Commission of Inquiry into the National Prosecuting Authority boss Vusi Pikoli’s fitness to hold office.
44 Ex Parte: Attorney-General, supra, 1998 NR 282 (SC) (1).
45 Sections 91–93, South African Constitution.
Judges in South Africa, however, are appointed by the president after consultation, upon recommendation, or on the advice of the Judicial Service Commission or the political parties represented in the National Assembly, depending on the specific court.46 Even the Public Protector and Auditor-General as well as members of the South African Human Rights Commission, the Commission for Gender Equality, and the Electoral Commission are appointed by the South African president at the recommendation of the National Assembly.47 Thus, in the South African Constitution, the NDPP finds him-/herself categorised with the cabinet and deputy ministers, rather than with the judges and the section 193 constitutional bodies.

The South African position is not exceptional. In the Commonwealth, the Attorney-General often wears two hats. It is not exceptional for the Attorney-General to have the final say in prosecutions and to serve in cabinet as well.48

When the Constitution of the Republic of South Africa was certified, someone complained that the Director of Public Prosecutions was not independent since s/he was appointed by the president as head of the national executive.49 It was argued that...

... the provisions of NT 179 do not comply with CP VI, which requires a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

The Constitutional Court was not impressed with the argument, however:51

There is no substance in this contention. The prosecuting authority is not part of the Judiciary and CP VI has no application to it. In any event, even if it were part of the Judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers.

46 See section 174, South African Constitution.
47 See section 193(4). Since the ruling ANC holds an overwhelming majority in the National Assembly, this recommendation does not ensure independent appointments; nevertheless, it places them on a different level to political appointments.
48 See the court’s comments in Ex parte Attorney-General, supra, 1998 NR 282 (SC) (1), p 287ff.
49 Section 179(1)(a), South African Constitution.
50 Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC), par. 141 G.
51 (ibid.).
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The position of the Constitutional Court on this point is clear: public prosecutions are not a judicial function. If the prosecutorial function of the state is not part of the judicial functions, and the NDPP is appointed by the South African president as head of the national executive, there can be no doubt where the prosecutorial function of the state fits into the puzzle of the three powers of the state: prosecution is part of the executive functions.

This contention is further strengthened by the fact that the NDPP is obliged to determine prosecution policy “with the concurrence of the Cabinet member responsible for the administration of justice”,52 and the minister of justice and constitutional development “must exercise final responsibility over the prosecuting authority”.53

The Pikoli saga and the Zuma case

The Pikoli saga is a good example of the vulnerability of the South African NDPP. His/her Namibian counterpart can only be suspended on the recommendation of the Judicial Service Commission. The NDPP, however, may be provisionally suspended by the South African president, pending a final decision by that country’s Parliament.54

The then South African President Thabo Mbeki suspended NDPP Adv. Vusi Pikoli on 23 September 2007 and appointed his deputy, Mokotedi Mpshe, as acting NDPP. According to the official communiqué of the President’s office, Pikoli was suspended because of “an irretrievable breakdown in the working relationship” between the National Prosecuting Authority chief and the Minister of Justice and Constitutional Development, Brigitte Mabandla.

Since neither the Constitution nor the National Prosecuting Authority Act, 1998 (No. 32 of 1998) mention a prerequisite relationship of trust between the minister of justice and constitutional development and the NDPP for the functioning of the National Prosecuting Authority, and since a breakdown of relationships is not listed in the said Act as a ground for suspension, the government submitted new allegations and reasons to the Ginwala Commission appointed to decide on the matter of the National Director’s suspension.

52 Section 179(5)(a).
53 Section 179(6).
54 Section 6 of the National Prosecuting Authority Act, 1998 (No. 32 of 1998). The Pikoli case was never referred to Parliament in terms of section 6(b), but to a one-person commission constituted by Dr Frene Ginwala, a former Speaker of Parliament.
Dr Frank Chikane, Director-General in the presidency, alleged that Pikoli’s bad management of politically sensitive cases was the reason for his suspension.\textsuperscript{55} This was followed by the Justice Department’s Director-General Menzi Simelane alleging that the NDPP had failed to report to him. In a strange interpretation of the National Prosecuting Authority Act and the Constitution, Simelane believed that the final responsibility for the National Prosecuting Authority lay with the Director-General. He maintained this view before the Ginwala Commission, despite having received a legal opinion to the effect that his responsibility was restricted to financial matters.\textsuperscript{56} Deputy Minister De Lange raised the issue of plea bargains as the reason for the suspension,\textsuperscript{57} while the National Intelligence Agency Director-General Manala Manzini maintained it was Pikoli’s handling of the intelligence clearance of his staff and other aspects of national security that made the incumbent National Director incompetent and, therefore, unsuitable for the position.\textsuperscript{58}

Pikoli believed that the real reason for his suspension was to protect the Police Commissioner, Jackie Selebi. During the Ginwala inquiry, it transpired that the Minister of Justice and Constitutional Development had written a letter to Pikoli only four days before his suspension. In the letter, the Minister had instructed the NDPP not to arrest Selebi until she had seen all the evidence against the latter and was satisfied with it. Pikoli’s lawyers, however, said he could not obey an unlawful and unconstitutional instruction: only the NDPP could decide on prosecutions, Pikoli maintained.\textsuperscript{59}

At the time of the writing of this article in August 2008, the Ginwala Commission had not yet presented its findings to the president. However, 11 months after the suspension of the NDPP, the dispute had still not been solved, and the political questions had not stopped. The reasons given by the president at the time of Adv. Pikoli’s suspension were suspect; and the evidence given before the Ginwala Commission seems to be an afterthought to justify the president’s actions.

\textsuperscript{55} Maughan & Webb (2008).
\textsuperscript{58} Anonymous. 2008a. “Scorpions ‘didn’t have clearance’”. Available at http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2349491,00.html; last accessed 17 July 2008.
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The judgment of the Constitutional Court, stating that the presidential appointment of the NDPP did not undermine the independence of the judiciary and that the NDPP did not have to be independent since prosecution was an executive function, is the underlying reason for the confusion in the Pikoli case. It was clear the Minister of Justice and even the Director-General of the Justice Department believed they should control the National Prosecuting Authority.

The vague linking of prosecution with the judicial functions of government rather than the executive in the Ex Parte: Attorney-General case laid the foundation for further development of the constitutional position of the prosecutorial authority in a liberal democracy.

Even more dramatic was the obiter dictum of Justice Nicholson to an application by ANC President Jacob Zuma in the High Court of Kwazulu-Natal. Zuma stood accused of corruption in a case that was about to start. In an application before the said court, Zuma asked the court to declare the decisions by the NDPP to prosecute him and the indictment against him invalid, and to set the indictment aside.

Zuma’s application was based on technical errors by the prosecution, particularly their failure to comply with a provision in the Constitution to give the suspect an opportunity to make submissions before a decision is taken to prosecute. Zuma nevertheless submitted that there was a conspiracy in government to prevent him from becoming the next president of South Africa and, consequently, irregular political pressure on three successive National Directors to prosecute him.

The NDPP requested the High Court to strike out the allegations of political interference in the case. Referring to the questionable role of the Minister of Justice and Constitutional Development throughout the Zuma case and in the suspension of Pikoli, the court found that there was indeed political interference. In this regard, the court made the following comment:

There is a distressing pattern in the behaviour which I have set out above, that is indicative of political interference, pressure or influence.

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60 Ex Parte: Attorney-General, supra, 1998 NR 282 (SC) (1).
61 Jacob Gedleyihlekisa Zuma v National Director of Public Prosecutions; unreported case of the High Court of South Africa, Natal Provincial Division, Case No. 8652/08, delivered on 18 September 2008; coram Justice Nicholson.
62 Section 179(5)(d), South African Constitution; see also the almost identical wording in section 22(2)(c) of the National Prosecuting Authority Act, 1998 (No. 32 of 1998).
63 (ibid.:74ff).
64 (ibid.:103).
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Thus, the court is clearly extremely suspicious of the role played by the Minister of Justice and Constitutional Development in the whole process. Nonetheless, while quoting the Constitutional Court’s reference to Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General,65 the court does not go into different approaches as regards the Constitutional Court’s statement, but finds the presidential appointment of the NDPP unacceptable. Neither does the court comment on the Constitutional Court’s assertion that prosecution is an executive function of government.

However, the criticism of the role played by the executive in the Pikoli and Zuma cases is a clear and unequivocal indictment of the relationship between the president and the NDPP, created by the Constitution and approved by the Constitutional Court of South Africa.

In a dramatic turn of events, the ANC leadership forced President Mbeki to resign as a result of the judgment.66

Conclusion

Two aspects seem clear from the discussion of the provisions of the South African NDPP:

- While the South African Constitution repealed the notorious section 3(5) of the Criminal Procedure Act, the influence of politicians – both the president and the minister of justice and constitutional development – have not been removed. The Constitution stated that the prosecutorial function had to be executed without prejudice, fear or favour; so Deputy Minister Johnny de Lange was correct that the emphasis was on cooperation between the NDPP and the Ministry of Justice and Constitutional Development with a degree of autonomy given to the NDPP.67 Prosecution, according to the Constitutional Court, remains an executive function.


65 1995(8) BCLR 1070 (Nms).

66 The President offered his resignation on 21 September 2008, and a new State President was elected on 25 September 2008. The finding of the court that former President Mbeki influenced the National Prosecuting Authority in its decision was a crucial reason for the ANC leadership to ‘redeploy’ him – a soft expression for pressurising him to resign. The former president denies the allegation and has appealed against the specific finding of Judge Nicholson. However, even if a subsequent appeal by former President Mbeki succeeds, it will not undo the legal and political damage done to South Africa’s image as a justice state where the separation between the executive and the judiciary is respected.

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The Namibian Constitution provides for a fully independent functionary. The responsibility that the Attorney-General exercises expects nothing more of the Prosecutor-General than to inform the Attorney-General of sensitive cases and assign the financial and administrative duties of the office to the political administration of the Attorney-General.

The strong emphasis in Namibia on the independence of the judiciary since the *Ex Parte: Attorney-General* case will make it highly impossible for the President or the executive to interfere in prosecutorial decisions. This is not to say that government has attempted to influence the Prosecutor-General’s decisions, or that no such attempts will be made in future. It also does not guarantee politically free, objective legal decisions by the Office of the Prosecutor-General in future: even the best system is dependent on people – and people are fallible.

However, the Namibian Constitution and the Supreme Court jurisprudence have given the Prosecutor-General the power and authority to operate independently from executive interference. In this regard the independence of the judiciary to make the final decision in all matters of law is guaranteed.