THE INDEPENDENCE OF THE PROSECUTORIAL AUTHORITY: A COMPARATIVE STUDY OF ZIMBABWE, SOUTH AFRICA, AND NAMIBIA

by

LUCIE-ANNIE CHIPO MUNGWARI

Submitted in accordance with the requirements for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: DR NS SIPHUMA

09 July 2022

DECLARATION

By submitting this thesis, I declare that the entirety of the work therein is my own, original work, that I am the authorship owner thereof unless expressly stated otherwise and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Lucie-Annie Chipo Mungwari

09 July 2022

SUMMARY

CHAPTER 1

INTRODUCTION

1 1 Introduction

In 2014 in the case of *Telecel Zimbabwe(Private) Limited v Attorney-General of Zimbabwe*[1] the Prosecutor-General of Zimbabwe[2] challenged the issuing of private prosecution certificates to private parties on the basis that they were unlawful and grossly irrational.[3] The Prosecutor-General argued that private prosecutions would interfere with the authority and independence of the Prosecutor-General to prosecute criminal matters on behalf of the state.[4] However, the establishment of an independent prosecuting authority is an important or special feature of the Zimbabwean Constitution.[5]

The importance of the Independence of the prosecution authority is that it has the effect of promoting the separation of powers – a very important doctrine in a democratic state as it promotes accountability. In the *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.

---

[1] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1 (28 January 2014).
[2]Attorney General of Zimbabwe as was the office then but now the Prosecutor General. In this paper, Prosecutor General will be used to refer to the old and current office of the Attorney General of Zimbabwe.
[3]*Telecel Zimbabwe*.
[4] *Prosecutor General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd*. (Const. Application No.8 (2014) [2014] ZWCC 10(08 October 2015)
[5] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' (2011) 74 *Journal of Contemporary Roman-Dutch Law* 247 at 248
[6] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa* 1996 4 SA 744 (CC) paras 110–111

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 serves to prevent too much power vesting in one institution and so promotes the rule of law.[7] The court in the *Telecel* case held that private prosecutions do not interfere with the authority and independence of the Prosecutor-General as sufficient checks were provided in legislation.[8] Following this judgment, Zimbabwe saw its first successful private prosecution case when legislator, Munyaradzi Kereke, was convicted on rape charges.[9]

However, this did not put to rest the debate on the independence of the prosecuting authority and the Prosecutor-General. The debate on independence in prosecution does not centre on private prosecutions only, but goes further to cover the appointment of the Prosecutor-General, a quasi-judicial-political process in Zimbabwe.[10] This, together with private prosecutions, has raised a number of questions as to the independence of the prosecuting authority. This debate is not limited to Zimbabwe but has also been raging in South Africa and Namibia.

Zimbabwe and these jurisdictions share the same legal heritage rooted in Roman-Dutch and common-law principles. Apart from their shared legal history, these jurisdictions also share a political and cultural heritage . Then again, the approach to the challenges that surround independence in prosecution might differ due to the different approaches in these jurisdictions in their attempts to resolve existing challenges. As a result, there is a need for a comparative study of Zimbabwe, Namibia, and South Africa directed specifically at discussing and analysing the legal position concerning the independence of the prosecutorial authority.

[7] De Villiers (2011) 74 *Journal of Contemporary Roman-Dutch Law* 247
[8] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* N.o. (Civil Appeal No.SC 254/11) [2014] ZWSC1 (28 January 2014).
[9] Rupapa 'Updated: Kereke convicted, jailed for 10 years.' http://www.herald.co.zw/breaking-news-kereke-convicted-of-rape/, accessed 20 September 2016.
[10] Section 256 (3) The Constitution of the Republic of Zimbabwe, 2013 (hereinafter The Zimbabwean Constitution).

1 2 Research objectives

The main aim of this research is to discuss, analyse, and compare the prosecutorial authority and independence in Zimbabwe, South Africa, and Namibia in order to identify lacunae and suggest possible solutions to promote the administration of justice through the establishment of an independent and effective prosecutorial regime. To achieve this aim, the study focuses on the following sub-aims:

(i) To analyse and discuss the current prosecutorial regime in Zimbabwe to establish the provisions governing the independence of the prosecution authority in Zimbabwean law.

(ii) To investigate similarities and differences in the independence of the prosecutorial regimes of Namibia, South Africa and Zimbabwe. This investigation delves into how the other two regimes have used the doctrine of the separation of powers in both legislation and case law. The aim here is to establish where other regimes are doing better or worse than Zimbabwe and whether there are lessons for Zimbabwe to learn from these jurisdictions.

(iii) To examine the impact of private prosecutions on the independence of the prosecution authority. The aim is to expose limitations and or weaknesses in public prosecutions that lead to the adoption of private prosecutions and concurrently looking at its effects on the doctrine of separation of powers and public perception on prosecuting authority independence.

(iv) To proffer recommendations for the best practice to achieve prosecutorial independence in Zimbabwe based on identified weakness in legal instruments providing for the independence of the prosecutorial authority and or in its execution of its duties.

1 3 Hypothesis

An independent prosecutorial authority is a vital component for achieving effective administration and the delivery of justice. Independence of the prosecuting authority also fosters an adherence to the separation of powers which in turn promotes rule of

law. The supposition is that private prosecutions have the effect of limiting the independence of the prosecuting authority. This assumption is based on the following theories:

(i) There is contradiction between prosecution's authority independence and other provisions in the Constitution. These contradictions are found for example, in the provisions that provide for the appointment of the head of the prosecution's authority by a political figure who is the President. The contention becomes, whether they will still remain non- partisan after being appointed on political lines.

(ii) In the advent of a constitutional dispensation, various jurisdictions, Namibia, South Africa and Zimbabwe have had to deal with public accountability and the political question is at the center of it all. This question is how to establish an independent prosecution authority free from political figures influence.

(iii) Private prosecutions interfere with the independence of prosecuting authorities. However private prosecutions have delivered justice where public prosecutions could not as evidently noted Zimbabwe recently. How best therefore, can a balance be struck between the independence of the prosecutions and the deliverance of justice?

(iv) South African Jurisdictions and the Namibian jurisdictions have given substance to the meaning of the independence of the Prosecutions authority. In Namibian cases, the role of the prosecuting authority is held to be a quasi-judicial role.[11] However, in the South African jurisprudence the role of the prosecuting authority was held to be executive in nature. These differences in theory will help to form an analysis of the Zimbabwean position and give recommendations where necessary.

1 4 Methodology

This research entails an analytical literature study of the prosecutorial regime within the constitutional framework of Zimbabwe. The research further entails establishing the source of the prosecutorial authority's independence in Zimbabwe. Likewise, a

[11] *Exparte Attorney General, Namibia*: *Inre the Constitutional Relation between the Attorney General and the Prosecutor General* 1998 NR 282 (SC).

discussion of the various principles and doctrines – eg, the separation of powers and the rule of law – that influence the determination of the independence of the prosecution's authority is discussed. To achieve this in-depth investigation of Zimbabwe's legislation and policy position, regulations are also analysed in order to understand the nature of prosecutorial independence and the authority vested in the National Prosecutions Authority.

The research also seeks to compare and contrast Zimbabwe's legislation with that of Namibia and South Africa so as to establish similarities, lacunae, and areas of Zimbabwe's legislation in need of improvement. In order to fulfil this objective, a legal comparison of Zimbabwe, South Africa and Namibia has been evaluated taking into account international and regional standards. The comparison has been undertaken through a review of legislation, case law, international and regional instruments, journal articles, text books, and electronic material. This method seeks to formulate the best practice Zimbabwe can assume to address and balance the dynamic relationship between the independence of the prosecutorial authority and an effective justice delivery system.

Finally, a range of journal articles, internet sources, books, and chapters in books have been used to establish the different contentions by different authors on the same issues. Their views are analysed critically in comparison to case law and any relevant comments on these cases. This culminates in recommendations proffered in light of the various sources of law and critical reasoning.

1 5 Particulars of pre-study

Having worked as a magistrate since January 2004, the justice delivery system has evolved in plain sight. Interactions with fellow prosecutors, magistrates and the general public in and out of the courtroom, has consistently posed a challenge on the need for a proper delineation of the independence of the prosecutorial authority in the effective administration and delivery of justice in Zimbabwe. Seminars and workshops continue stoking the debate on prosecutorial independence and authority. Every case that goes through the criminal justice system carries unasked questions on the independence of the prosecution's authority. It is against this background that this

study was undertaken whilst setting aside all preconceived ideas in the hope of understanding what can be done to strengthen the independence of the prosecution authority in Zimbabwe.

1 6 Rational for study

The debate on the prosecutorial authority and its independence has raged in legal circles since the birth of Roman law and also English common law. Roman criminal law operated on the law of delict and what was referred then as the "criminal law proper".[12] This meant that the obligation of the state to prosecute criminal matters extended to delicts and also that many forms of conduct that would today be considered criminal, were in fact private prosecutions in that they were initiated by victims.[13]

Theft and *iniuria* could be handled in crime and in private delict.[14] The space of prosecutions was vaguely the terrain of the state but also of private individuals with the demarcation being the procedure prescribed for the nature of the tribunals hearing the cases.[15] Roman-Dutch law developed with time, and the distinction between what was criminal and what was delictual, emerged in both substance and procedure although it remained un-codified law that took considerable time to systemise.[16]

Private prosecutions were also predominant under English common law during the seventeenth and eighteenth centuries when victims or their relatives initiated criminal proceedings. It was the duty of private citizens to preserve peace and bring offenders to justice. This approach changed during the nineteenth century when the Prosecution of Offences Act[17]came into operation. The Act introduced the office of the Director of Public Prosecutions. Effective public prosecutions were only introduced in England in 1985, but a limited right of private prosecution was preserved and continues to this

[12]Burchell & Hunt *Principles of Criminal Law (*Juta 1991*)* 1.
[13]De Wet & Swanepoel *Die Suid-Afrikaanse Strafreg* 2-7; Burchell & Hunt *Principles of Criminal Law*4.
[14]*Burchell & Hunt Principles of Criminal Law(Juta 1991)* 7.
[15]Burchell & Hunt *Principles of Criminal Law* (Juta 1991) 6; *R v Ndaba*,149 at 153.
[16]*Burchell & Hunt Principles of Criminal Law* (Juta 1991) 7.
[17] Prosecution of Offences Act, 1985 (c. 23).

day.[18] This has remained the position on criminal prosecutions in the jurisdictions that have borrowed from the English common-law, with Zimbabwe being no exception.

1 7 Literature on Independence of the prosecutorial authority: Current position

1.7.1 Zimbabwean position

The Constitution of Zimbabwe, 2013, confers the "power to institute, undertake criminal proceedings and any functions that are necessary or incidental to such prosecutions on behalf of the State" on the National Prosecuting Authority (henceforth the NPA).[19] The NPA is headed by the Prosecutor-General[20] who is independent.[21]

However, the appointment of the Prosecutor-General is quasi-judicial-political, with recommendations being made by the Judicial Services Commission and the appointment by the President.[22] The Constitution, however, appears to curtail political influence by providing that the exercise of prosecutorial powers should be impartial and exercised without fear, favour, prejudice or bias.[23]

To buttress independence and accountability, the Prosecutor-General should "formulate and publicly disclose the general principles by which he or she decides whether to institute and conduct criminal proceedings".[24] This has not stopped questions being raised as to whether the prosecutorial authority is independent if the President, who is a political head, appoints the Prosecutor-General.[25] The Criminal Procedure and Evidence Act[26] provides an exception to who prosecutes when the Prosecutor-General declines to do so. Any person who can show substantial and peculiar interest in the trial, arising out of some injury he or she has personally suffered

[18] *Telecel Zimbabwe;* Prosecution of Offences Act 1985.
[19] Section 258 of the Constitution 2013.
[20] Section 259 of the Constitution.
[21] Section 260 of the Constitution.
[22] Section 259(3) of the Constitution.
[23] Section 260(1)(b) the Constitution.
[24] Section 261 of the Constitution.
[25] Magaisa *'Cutting-edge analysis and critical insights into Zimbabwe law and Politics'* http://alexmagaisa.com/2015/11/11/private-prosecutions-and-the-rule-of-law/ 2015.
[26] Criminal Procedure and Evidence Act [Chapter 9:07](hereinafter referred to as the CPEA).

as a result of the commission of the crime, may institute a private prosecution.[27] Although the Constitution provides that this exception should not limit or conflict with the public prosecution authority, the now dismissed Prosecutor-General of Zimbabwe has argued that the exception conflicts with the independence of the public prosecutorial authority.[28]

1.7.2 South African position

The South African Constitution[29] also provides for a National Prosecution Authority with the power to institute criminal proceedings on behalf of the state and to carry out of any functions incidental to instituting criminal proceedings.[30] Whereas prosecutorial authority in South Africa is also premised on it being exercised without fear, favour or prejudice, the Constitution invests the cabinet minister responsible for the administration of justice with the final responsibility over the prosecution authority.[31] In South Africa, therefore, the prosecuting authority is categorised as performing executive functions, while in Namibia his or her functions are quasi-judicial.[32]

The appointment of the Prosecutor-General in South Africa is also contentious in that the appointment is not upon recommendation,[33] whereas in Zimbabwe and Namibia the appointment is on the recommendation of the Judicial Service Commission. This procedure of appointing the head of the prosecuting authority questions as to the independence of the prosecuting authority regarding political interference.

However, the South African courts have recently moved to assert the independence of the prosecutorial authority through a series of decisions emphasising its independence.[34] In *Ex Parte Chairperson of the Constitutional Assembly* it was held that the mere fact that the appointment of the head of the National Prosecuting

---

[27] Section 13 of the CPEA.
[28] *Telecel Zimbabwe (Pvt) Ltd v AG of Zimbabwe* N.O. (Civil Appeal No. SC 254/11) [2014] ZWSC 1 (28 January 2014).
[29] The Constitution of the Republic of South Africa, 1996.
[30] Section 179(2) of the Constitution of the Republic of South Africa, 1996.
[31] Section 179(6) of the Constitution of the Republic of South Africa, 1996.
[32] Indongo & Horn 'The independence of the prosecutorial Authority' in horn & Bosl (eds), *The Independence of the Judiciary in Namibia* (Macmillan Education Namibia 2008) para 130.
[33] Section 179(1) (a) of the Constitution of the Republic of South Africa, 1996.
[34] *General Bar Council of South Africa v Jiba and Others* (23576/2015) [2016] ZAGPPHC 833

Authority is made by the President does not in itself contravene the doctrine of the separation of powers.[35] The argument is therefore that the prosecuting authority remains independent regardless of being led by a political appointee.

1.7.3 Namibian position

Namibia and Zimbabwe follow similar approaches on the appointment of the Prosecutor- General.[36] However, Namibia sets a clear precedent on the independence of the prosecutorial authority and of the Prosecutor-General.[37] In *Ex parte Attorney General*[38] case, the court held that the Prosecutor-General was not a political appointee. The court went further to state that fundamental human rights and freedoms would not be protected were a political appointee permitted to dictate which prosecutions were to be pursued or terminated.

The court, consequently, set boundaries for the political powers and limited political intervention of the executive in the functions of the prosecuting authority.[39] As such, the role of the prosecuting authority in Namibia has been held to be quasi-judicial in nature in that its decisions are not subject to judicial review. Neither does the prosecutions authority in Namibia report to any political leader – eg, the Minister of Justice – as is required in various other jurisdictions.[40]

1.7.4 Current jurisprudence on the independence of the prosecuting authority

Zimbabwe has a developing jurisprudence with regard to prosecutorial independence. This is the result of the relatively recent introduction of the Constitution of the Republic of Zimbabwe, 2013, which sets new prosecutorial regulations. The first successful case of private prosecution recently went before the courts and a successful conviction

---

[35] *Ex Parte Chairperson of the Constitutional Assembly* para 110.
[36] Article 81(a) of The Namibian Constitution.
[37] *Ex Parte: Attorney-General*, 1998 NR 282 (SC) (1); *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others* 1994 (1) SA 387 (C) at 393H–394H.
[38] *Ex Parte: Attorney-General.*
[39] *Ex Parte: Attorney-General*.
[40] Indongo & Horn 'The independence of the prosecutorial Authority' in horn & Bosl (eds), *The Independence of the Judiciary in Namibia* (Macmillan Education Namibia 2008) para 106.

was achieved. This, in turn, has led to questions regarding the implications of this decision on the independence of the public prosecuting authority.

South Africa and Namibia have a much more developed jurisprudence in this area from which Zimbabwe could draw in enriching its developing jurisprudence. In Namibia, the prosecuting authority is independent and not subject to any 'higher' intrusion or direction from any other governing body or organ.[41] On the other hand, in South Africa, the prosecuting authority reports to the Minister of Justice who is part of the executive and a political 'body'.[42] In both jurisdictions the separation of powers is the overarching doctrine determining the strengths and weaknesses of every position.

With reference to the separation of powers, a position can be reached that will not hinder the usurping of power from other state institutions and its concentration in a few powerful institutions like the political organs of state. Where there is respect for the separation of powers there is respect for the rule of law.

1 8 Conclusion

Effective prosecution of offenders is one of the principal pillars of an effective judicial system. The responsibility to prosecute lies with the state which is tasked to execute this without fear, favour, or prejudice. However, more often than not, prosecuting authorities have either failed or refused to prosecute, leading to private actors moving in to fill the gap left by the public prosecution authorities who are the constitutional bodies tasked with the responsibility.

This has raised a number of questions as to the independence of prosecution authorities. Certain cases that prosecuting authorities failed or refused to prosecute are mired in political connotations, and given how the controlling body of the prosecutorial authority is appointed; it leaves a perception of bias and lack of independence. In light of the above observations, this study seeks to compare prosecutorial authority and its independence in Zimbabwe, South Africa, and Namibia.

[41] *Ex Parte: Attorney-General.*
[42] *Ex Parte Chairperson of the Constitutional Assembly.*

The comparison will be qualified by how private prosecutions have had an impact on prosecutorial authority and independence in these three jurisdictions. Although, these jurisdictions share a legal, social, and political history, they have different approaches to the structuring and execution of their prosecutorial mandate.

1 9 Overview of chapters

The study has five chapters. The first chapter deals with introductory matters such as objective, methodology, and a literature survey. In the second chapter, discusses the historical background to prosecutorial independence. The third, fourth, and fifth chapters are devoted to analysing the position of Zimbabwe, South Africa, and Namibia respectively, with a view of providing a broad perspective on the practice in these three countries. The sixth chapter presents the conclusions reached in the study and, after identifying the major lessons to be drawn from the study, offers recommendations on how one may promote the independence of the prosecution authority in Zimbabwe.

CHAPTER 2

HISTORICAL BACKGROUND

2 1 Introduction

Zimbabwe has a hybrid legal system drawn from foreign jurisdictions and imposed on the country by settlers during the colonial era. Years after Zimbabwe's independence from British colonial rule, Zimbabwean law still contains residues of the colonial past.[43] The history of public prosecutions in Zimbabwe is also embedded in these legal dynamics and thus not sparing the criminal justice system. In a recent publication addressing the criminalisation of sexual conduct in colonial and post-colonial Southern African societies, Long scoffs at the laws imposed on Southern African countries. He posits that even though these laws may today be celebrated as laws enforcing liberty and independence, they are simply colonial impositions.[44]

There are several sources of law in Zimbabwe including the common law (non-statutory or unwritten Anglo Roman-Dutch law), legislation, case law (precedent), and customary law. The law in Zimbabwe is uncodified save for criminal law which has been codified in the Criminal Law and Reform Act (Criminal Code). All these laws must be interpreted in line with the 2013 Constitution of Zimbabwe which is the supreme law of the land. All law in Zimbabwe must be consistent with the Constitution and any provision which is inconsistent with the Constitution is unconstitutional to the extent of the inconsistency.[45]

[43] Saki & Chiware 'The Law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.
[44] Long, 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern african societies', available at https://www.hrw.org/reports/2003/safrica/safriglhrc0303-07.htm accessed on 28 April 2018.
[45] Section 2 of the Constitution of Zimbabwe, 2013. The 2013 Constitution of Zimbabwe is not the first Constitution. It was preceded by the first Constitution of 1980, which is also known as the Lancaster Constitution.

The greater chunk of Zimbabwean law is anchored in common law. In a discussion that focuses on common law, Saki explains the origin of Zimbabwean common law as follows:

> Common law of Zimbabwe refers to the unwritten law or non-statutory law. Common law excludes the African customary Law. The common law of Zimbabwe is primarily the Roman-Dutch Law as applied at the Cape of Good Hope on the10th of June 1891 as per the provisions of Section 89 of the Constitution of Zimbabwe. The Common Law was transplanted from the Cape and imposed on to Zimbabwe. However, the common law at the Cape in 1891 had been heavily influenced by English Law, hence the common law of Zimbabwe must be said to be Anglo-Roman-Dutch Law.[46]

Common law remains relevant to the Zimbabwean legal system. Even after Zimbabwe attained independence from British colonial rule, the framers of the first post-independence Constitution stated that Roman-Dutch law as applied at the Cape of Good Hope on 10 June 1891 applied in Zimbabwe.[47] This hybrid system of law was first brought to the Cape of Good Hope by settlers from the Netherlands and was reinforced when the British occupied the Cape, took over and carried it to most of Southern Africa through the expansion of British colonies and displacement of some of the Afrikaans communities.[48] Common law, therefore, has had a remarkable influence on the Zimbabwean law.[49]

The most relevant of the current laws regulating the prosecutorial authority in Zimbabwe today are the Constitution of Zimbabwe, 2013; the National Prosecuting Authority Act 5 of 2014 [Chapter 7:20]; and the Prosecutorial Authority (Ethics) Regulations, 2015.[50]

The criminal justice system of Zimbabwe has not been spared from the influences of a hybrid system of law in Zimbabwe.

---

[46] Saki & Chiware 'The law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018

[47] Section 89 Constitution of Zimbabwe, 1980.

[48] Long, 'Before the law: Criminalizing sexual conduct in colonial and post-colonial Southern African societies', Available at https://www.hrw.org/reports/2003/safrica/safriglhrc0303-07.htm accessed on 28 April 2018.

[48] Section 2 of the Constitution of Zimbabwe, 2013.

[49] Madhuku, *An introduction to Zimbabwean Law* (Weaver Press 2010) 19.

[50] See also the Statutory Instrument 83 of 2015.

> The justice system in Zimbabwe comprises of different elements including the System of the Courts from the Magistrates courts to the High Court the Supreme Court and recently to the Constitutional Court. It also consists of the specialist courts like the Administrative court. The system of the administration of the court and the office of the Attorney General and the associated public prosecutors and the legal profession is also part of the criminal justice system. The criminal justice system is important for the smooth functioning of the rule of law in Zimbabwe and it ensures that there is separation of powers with the judiciary offering checks and balances on the exercise of power by the other arms of government which are the Executive and the legislature.[51]

The current Zimbabwean criminal justice system retains many characteristics of the colonial system. The perseverance of the colonial characteristics was advanced further by the bad governance and meddling in politics by the judiciary, prosecution, and most other institutions during the Mugabe presidency, an era which extended for decades.[52]

There has not been a great deal of reform to the criminal justice system since 1980 when Zimbabwe achieved independence. The collapse of the legal system and compromising of the criminal justice system can be seen in the arrest of the prosecutor, General Tomana, for his failure to prosecute certain cases.[53] Issues like these show the extent of the rot and political infiltration and interference in the running of the state in general, and the prosecuting authority.

This 'legal paralysis' means that despite the new democratic Constitution of 2013, the majority of the laws have not yet been aligned with the new Constitution.[54] This is exacerbated by the dearth of critical writing and commentary on Zimbabwean law by contemporary academics. This chapter, therefore, serves to establish the historical, political, and legal context that has shaped principles applied within the criminal justice system and the development of law in Zimbabwe.

---

[51] Saki & Chiware 'The Law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.
[52] Chan Mug*abe rule: a life of power and violence* (I.B Tauris Co Ltd 2003).
[53] Rupapa, 'Tomana arrested' *Herald* 09 July 2016, available at https://www.herald.co.zw/tomana-arrested-at-court/ accessed on 5 May 2018.
[54] Ndlovu 'Demand urgent alignment of law' *NewsDay* 25 August 2016, available at https://www.newsday.co.zw/2017/05/demand-urgent-alignment-laws/ accessed on 11 May 2018.

This chapter reviews the history of Zimbabwe's criminal justice system in general, by examining the history and sources of the law governing public prosecutions in Zimbabwe. Attention is also directed to the general development of law in Zimbabwe during the colonial years. This includes an evaluation of developments in both the common and traditional law which led to the Constitutions of Zimbabwe and the various legal enactments dealing with issues surrounding public prosecution. Through this process, the chapter aims at establishing the sources and origins of principles regulating prosecutorial authority in Zimbabwe.

Against this backdrop, the chapter shifts to the development of law in Zimbabwe post-1980 when Zimbabwe gained independence from colonial rule and was established as an independent state. At this stage, the chapter will venture to discuss relevant post-independence legislation with specific attention to legislation regulating the prosecutorial authority.

In conclusion, the chapter examines the principles governing the independence of the prosecuting authority, including the separation of powers and the rule of law. The importance of this chapter to the study as a whole lies in the social and political context it provides within which the prosecutorial authority functions. The history of law has a bearing on the principles that apply and regulate the functioning of the prosecutorial authority and the degree of independence, if any, that exists. The chapter closes by highlighting its principal findings.

2 2 Colonial history of the law and criminal justice system

Zimbabwe gained its independence from Britain in 1980 after close on a century of British colonial rule.[55] In 1888 Cecil John Rhodes, a British settler, was granted a mining concession by local chiefs and today's Zimbabwe became part of Southern and Northern Rhodesia. The area was declared a British sphere of influence and in 1889 the British South Africa Company (BSA) was granted a Royal Charter. In 1890

[55] Wiseman & Taylor *From Rhodesia to Zimbabwe: The politics of Transition* (Pergamon Press 1981) 3.

the settlement of what is today Harare, was established. In 1895 the territory was formally named Rhodesia and operated under the British South Africa Company's administration.[56]

Over time political differences emerged and Rhodesia split into Southern Rhodesia and Northern Rhodesia. The now Zimbabwe became Southern Rhodesia (Rhodesia) and the now the now Zambia became the Northern Rhodesia and the British maintained influence and control of the activities of Rhodesia.[57] The Rhodesian government clashed with the United Kingdom administration which required that the Rhodesian government increase in democracy by increasing native Africans involvement in politics. The Rhodesian government was adamant to extend any freedoms and liberties to the indigenous Africans.

In 1965, Ian Smith, the Prime Minister of Rhodesia, won an election and he issued a unilateral declaration of independence of Rhodesia from the United Kingdom.[58] Pressure, both international and from the indigenous population, mounted against the Smith administration for the independence of Zimbabwe. This culminated in the Chimurenga War which resulted, in 1980, in victory for the indigenous population and the establishment of the Republic of Zimbabwe.[59]

Formal law had existed in Zimbabwe since 1889 under the Charter of the BSA Company. Article 10 of the Charter states that:

> [T]he company shall to the best of its ability preserve peace and order in such manners as it shall consider necessary and may with that object make ordinances to be approved by [the British] Secretary of State, must establish and maintain a force of Police.[60]

[56] Saki & Chiware, 'The Law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.
[57] Olson *Historical dictionary of European Imperialism* (Greenwood Press 1984) 213.
[58] Saki & Chiware 'The law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.
[59] Martin and Johnson *The struggle for Zimbabwe: the Chimurenga war* (Ravan Pres 2001).
[60] Saki & Chiware 'The Law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 8 July 2018.

The Charter represented the birth of legislative, administrative, and judicial powers in Zimbabwe and heralded introduction and enforcement of formal colonial law in the territory.

Before the imposition of colonial law by the British, the indigenous community in Zimbabwe was governed by customary laws which originated in the long-standing traditions customs, and practices of the people.[61] These laws – which aimed to ensure security and wellbeing – applied to everyone and were administered by the chiefs in the different communities. The chiefs held native courts and the crimes prosecuted in these open courts publicly pronounced punishment which was, at times, publicly executed.[62] Although the society was highly patriarchal, there were no sacred cows or discrimination since the laws were communal and a product of communal effort.

When the British colonised Zimbabwe, they sought to replace the African traditional/customary law with the 'more civilised' British law which, for the indigenous population was the law of the coloniser. Long states that colonial law was neither universal nor impartial.[63] For the 'whites' or settlers, the law sought to regulate their communities. However, for the indigenous communities it sought to subjugate, control, stigmatise, and discriminate.[64] The application and enforcement of criminal law could, therefore, not escape the partiality of colonialism; colonial criminal laws were couched in terms that promoted the image of the settlers but stigmatised that of the natives.[65]

In 1969, when a new Republican Constitution was adopted, Rhodesia moved from a monarchical system to a republican state.[66] The Constitution introduced a non-

[61] Ndulo, 'African customary law, customs and women's rights' (2011) *Cornell Law Faculty Publications* 87 at 87.
[62] Ndulo, (2011) *Cornell Law Faculty Publications* 87 at 97.
[63] Long, 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern african societies', available at https://www.hrw.org/reports/2003/safrica/safriglhrc0303-07.htm accessed on 28 April 2018.
[63] Section 2 of the Constitution of Zimbabwe, 2013.
[64] Long, 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern african societies', Available at https://www.hrw.org/reports/2003/safrica/safriglhrc0303-07.htm accessed on 28 April 2018.
[64] Section 2 of the Constitution of Zimbabwe, 2013.
[65] The harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders 'South African Law Commission Discussion Paper 82' available at http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf accessed on 9 May 2018.
[66] Kirkman 'The Rhodesian referendum: the significance of June 20, 1969' (1969) (45) 4 *International Affairs (Royal Institute of International Affairs 1944-)* 648 at 648.

executive Presidency and a bicameral legislature which consisted of a House of Assembly and a Senate.[67] During this period, the settlers exercised a form of indirect rule over the indigenous people of Zimbabwe. The new Constitution allowed Africans to elect eight members to the 66-seat parliament.[68] The inclusion of Africans in parliament may have seemed to be a democratic move; in fact, however, it was merely an extension of British indirect rule exercised in the colonial years prior to 1969.

Indirect rule meant that the white settlers would set up systems in terms of which the indigenous people of Zimbabwe were directly ruled by their traditional leaders but under British control. An example of indirect rule was the fact that the British settlers maintained the idea of chiefs and kingdoms among the indigenous people although these kings, chiefs, and headmen reported to the British administrative bodies. In this way, the indigenous people did not feel the pressure of colonisation or the change in governance. They thus remained passive for a long time and allowed the settlers to settle without aggressively challenging their presence. This may be illustrated by the composition of the Senate under the 1969 Constitution which comprised of 23 members – ten whites, ten Africans, and three highly skilled and significant people appointed by the President - in practice, this, of course, skewed the vote in favour of the minority government.[69]

Sebba states that the divide and rule model was the British colonial model of choice. This is an approach whereby the colonisers would use the law to divide the indigenous population to exploit them and maintain their own interests.[70] The law was used in the process of dominion to create new systems for controlling and regulating the local inhabitants to further a capitalist agenda.[71] The colonial system of indirect rule adopted in Zimbabwe was a combination of the application of the formal English and customary legal systems.

---

[67] Saki & Chiware 'The law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.
[68] Harris,'The changing Rhodesian political culture: 1969' (1970)1 (2) *Zambezia* 5 at 5.
[69] Harris, (1970)1 (2) *Zambezia* 5-8 at 5.
[70] Sebba, 'Crime, history and societies, the creations and evolution of criminal law in colonial and post-colonial societies', (1999) 3 (1) available at https://journals.openedition.org/chs/936 at para 19 accessed on 23 June 2018.
[71] Sebba, 'Crime, history and societies, the creations and evolution of criminal law in colonial and post-colonial societies', (1999) 3 (1) available at https://journals.openedition.org/chs/936 at para 19 accessed on 23 June 2018.

Under the system of indirect rule, the chiefs and the traditional leadership would keep their subjects (indigenous people) under control and apply customary law.[72] The chiefs would accept directives from the British colonisers as they feared a clash between the better armed and sophisticated settlers. Through the chiefs, the settlers began to extend their control to the indigenous population of Zimbabwe. Slowly, systems of law and politics began to infiltrate the customary systems and a criminal justice system began to take root. British District Administrators (DAs) were set up to whom the chiefs would report. The chiefs would also take instructions from the settlers to their people and introduce the new systems and laws the settlers expected them to follow.[73]

Bennet points to the fact that indirect rule assisted the colonisers to reduce or economise on administrative costs. The Africans outnumbered the Europeans, governmental resources were depleted, and the colonisers were short on European manpower.[74] The chiefs, therefore, provided cheap administrative labor and the colonisers exercised greater control with minimum effort.. Besides administrative functions, the chiefs also exercised judicial functions by presiding over criminal and civil cases in the 'native' courts.

Traditionally, crime was dealt with by involving an entire community. The community served as both prosecutor and judge with a jury presided over by the village chief. The community prosecuted the crime as a collective and if the accused was found guilty, he or she would be sentenced immediately. On occasion the community carried out the punishment. Civil courts were set up by the British and, to gain favor with the settlers, the chiefs encouraged their people to attend these courts if summoned. In

[72] Earl, Goldin & Muchaidza, et al 'Indigenous and institutional profile Limpopo river basin', *Working paper 12* available at https://books.google.co.zw/books?id=RWMYBQAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false accessed on 29 June 2018.
[73] The harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders 'South African Law Commission Discussion Paper 82' available at http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf accessed on 9 May 2018.
[74] Bennet, 'Conflicts of law-The application of Customary law and the common law in Zimbabwe' (1981) 30(1) *The International and Comparative Law Quarterly* 59-108 at 59.

this was how the common law began to take root in Zimbabwe and British criminal law began to be enforced.[75]

Civil and criminal courts began to replace the traditional village courts. This brought with it the need for interpreters to interpret these new laws and new ways of prosecuting crime before a foreign presiding officer. Initially prosecutors were drawn from the white settler administration but in time prosecutors began to emerge from the ranks of the indigenous population who then prosecuted crime on behalf of the state.[76]

2 3 The Public Prosecutor under colonial law

As discussed in 2 2 above, the criminal justice system was established in the British colony of Zimbabwe as a way of controlling the natives by clamping down on dissent and upholding the political rule. The prosecutors were not only officers of the law, but also part of the machinery of state.[77] Under the colonial law prosecutors were neither impartial nor independent, particularly in matters involving political crimes.

As stated above, criminal prosecution depended on one's position in society–whether a white settler or a native Zimbabwean. The settlers aimed to protect the social structure they had imposed on the indigenous population; while for Zimbabweans, prosecution meant repression and control.[78] Bennet supports this position when he states that common law was directly applicable where the interests of the state were involved, while in private matters customary laws were applied.[79] This meant that all public law, including criminal law, was regulated by state machinery. Private law, eg, inheritance and family disputes, was left to indigenous/customary law.

The office of the prosecutor could be independent to the extent that it regulated white communities. However, when it came to regulating the behavior of the indigenous

[75] Myer *Indirect rule in South Africa: tradition, modernity, and the costuming of political power* 2008 (Boydell & Brewer, University of Rochester Press 156)
[76] Madhuku, *An introduction to law in Zimbabwe* (Weaver Press 2010).
[77] Hasson, 'Rhodesia- a police state?' 1966 (22) 5 *The World Today* 181 at 181.
[78] Harris, 1970 (1) 2 *Zambezia* 5-8 page 5
[79] Bennet, 'Conflicts of law-The application of customary law and the common law in Zimbabwe' (1981) 30(1) *The International and Comparative Law Quarterly* 59-108 at 59.

population, it was necessary to ensure the conviction and imprisonment of Zimbabweans who questioned the minority-led white government. It can therefore be said that only white people could reap the benefits of an independent prosecuting authority. The idea of an independent prosecuting authority is therefore a development that came with the introduction of a more democratic system of government on the independence of Zimbabwe and the introduction of a new Constitution.

At this point it should be noted that issues of human rights were not yet considered in the construction and application of law in Zimbabwe. The laws were discriminatory and not applied equally. The prosecuting authority was no exception – as part of the state machinery and was subject to executive direction, its independence was severely compromised.

The sentiment that the British colonial system had no interest in justice was shared by Brown who, writing to the *Sunday Telegraph* of 25 May 1969 observed: 'Mr. Smith's Government must be the first in modern history that actually proclaims a police state as the norm.'[80] The Rhodesian government turned Rhodesia into a police state in the sense that it got rid of any safeguards which protected the public from excessive use of state power – a power aimed primarily at those who challenged the government of the day.[81]

That government consisted, in the main, of a single white minority party which controlled all state institutions. Although indigenous Africans were included in the parliament, they held no real power. This led Harris, a prominent political commentator, to conclude that the Rhodesian government of 1969 was not a a democratic but rather a totalitarian state.[82]

The law and issues of justice started changing with the advent of the 1980 Constitution. Post- independence, the black majority came into power and began dismantling discriminatory laws. With the change in the political environment, the

[80] Brown in Harris, 'The changing Rhodesian political culture: 1969' (1970)1 (2) *Zambezia* 5-8 at 5 page 6.
[81] Hasson, 'Rhodesia- a police state?' 1966 (22) 5 *The World Today* 181 at 181.
[82] Harris, 'The changing Rhodesian political culture: 1969' (1970)1 (2) *Zambezia* 5-8 at 5.

criminal justice delivery system also changed and with it the functioning of prosecuting authority.

2 4 Independence of the public prosecutor and the prosecution authority under Zimbabwean Constitutions

2 4 1 Public prosecutor under the 1980 Constitution

After independence, the new1980 Constitution came into force. The 1980 Constitution is commonly known as the Lancaster House Constitution that re-enforced the supremacy of the law.[83] Under the 1980 Constitution new state institutions began to take shape and these included the constitutional establishment of a prosecuting authority. The Constitution provided for the office of the Attorney-General but did not provide for a separate office for the public prosecutor. The office of the Attorney-General was established by section 76 of the Constitution, which provided that:

> [T]here shall be an Attorney-General who shall be the principal legal adviser to the Government and whose office shall be a public office but shall not form part of the Public Service.

This section set out the procedure for the appointment of the Attorney-General and his or her place in government. It stated that the Attorney-General did not form part of the public service[84] (which was responsible for the administration of the country).[85] The Attorney-General could sit in the Senate, but he or she had no voting powers[86] and was not eligible for election or appointment to any office, post, or committee of Parliament.[87] The Constitution provided further that the Attorney-General was appointed by the President after consultation with the Judicial Service Commission.[88]

[83] S 3 of the Constitution of Zimbabwe, 1980.
[84] Section 76(1) of the Constitution of Zimbabwe, 1980
[85] Section 73(1) of the Constitution of Zimbabwe, 1980.
[86] Section 76(3b) *(a)* of the Constitution of Zimbabwe, 1980.
[87] Section 76 (3b) *(b) (ii)* of the Constitution of Zimbabwe.
[88] Section 76(2) of the Constitution of Zimbabwe, 1980.

The 1980 Constitution gave the Attorney-General an extra jacket – in the form of prosecutorial powers. Section 76(4) of the Constitution clearly set out the Attorney-General's powers to prosecute. The section read:

> The Attorney-General shall have power in any case in which he considers it desirable so to do –
>
> *(a)* to institute and undertake criminal proceedings before any court, not being a court established by a disciplinary law, and to prosecute or defend an appeal from any determination in such proceedings;
> *(b)* to take over and continue criminal proceedings that have been instituted by any other person or authority before any court, not being a court established by a disciplinary law, and to prosecute or defend an appeal from any determination in proceedings so taken over by him; and
> *(c)* To discontinue at any stage before judgment is delivered any criminal proceedings he has instituted under paragraph (*a*) or taken over under paragraph (*b*) or any appeal prosecuted or defended by him from any determination in such proceedings.

The Attorney-General consequently had the power to institute and undertake criminal proceedings – ie, the power to institute prosecutions and also take over a prosecution instituted by any other person or authority, including private prosecutions. The Constitution further permitted the Attorney-General to stop a prosecution at any stage.

The Attorney-General was therefore the sole institution vested with prosecutorial authority. In short: the Attorney General had the exclusive power to institute, continue, take over, and discontinue public prosecutions commenced either by him or her or by other persons.[89]

It can safely be concluded that the 1980 Lancaster House Constitution gave birth to the office of prosecutor without actually calling it the office of the public prosecutor. This office was thus included within the office of the Attorney-General. Section 76 of the 1980 Constitution provided that the President appointed the Attorney-General in consultation with the Judicial Services Commission (JSC). The drafters of the 1980 Constitution appear to have acknowledged the importance of the independence of the

[89] Saki & Chiware, 'The law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018

public prosecutor – who was also the Attorney-General – in that the power to appoint the Attorney-General was not solely at the whim of the President.

Under the Lancaster House Constitution, the Attorney- General had further powers in terms of which he or she could require the Commissioner of Police to investigate and report to him or her on any matter 'which, in the Attorney-General's opinion, relates to any criminal offence or alleged offence, and the Commissioner of Police would be mandated to comply with that requirement'.[90] The Attorney-General had no investigative powers but could direct the police to investigate on his or her behalf and report to him or her.

Section 76(7) of the 1980 Constitution provided that: 'In the exercise of his powers under subsection (4) or (4*a*), the Attorney-General shall not be subject to the direction or control of any person or authority.*'* This is the first section that pointed directly to the idea of the independence of the prosecuting authority in Zimbabwean law. By expressly freeing the Attorney-General from the 'direction or control of any person or authority', the framers of the Constitution clearly intended the Attorney-General to be independent in exercising his or her exclusive prosecutorial powers. However, one must ask whether the theoretical 'independence' set out above was in fact reflected in practice on the ground?

The twist in the 1980 Constitution concerning prosecutorial powers lies in the dual role accorded the Attorney-General. Section 76 of the Constitution stated that the Attorney-General was a member of cabinet. Considering that cabinet is the heart of the executive, there is an inevitable question regarding the true independence of the public prosecutor.[91] However, the section went on to state that the Attorney-General was a non-voting member of the cabinet.[92] Whether he voted or not, it was clear from the Constitution that the Attorney-General was a member of the cabinet and it should be

[90] S 764*(a)* of the Constitution of Zimbabwe 1980.
[91] This will be analysed and criticised in Chapter 3 that deals with the Position of prosecutorial Independence
[92] Section 76(3) of the Constitution of Zimbabwe 1980.

kept in mind that he was the head of the prosecuting authority which implies the prosecuting authority was in fact a part of the executive

2 4 2 Independence of prosecutorial authority pre-2013

The political and socio-economic difficulties that Zimbabwe has been facing for the last three decades has had a huge impact on the application of law in the country. Politics took an overriding role over many aspects of the law; politics and government overrode the law took the place of the law. There was political interference in all the non-political organs of states such as the legislature and the judiciary; the criminal justice system came under political control to an ever-increasing extent.[93] Zimbabwe was once again a police state with the executive and political branch of government controlling other organs of state by using the police unlawfully to detain members of the other independent organs of state in the bona fide performance of their constitutional duties, without valid charges being brought.[94]

In the year 2000, a Commission was set up to review the 'law in practice' in Zimbabwe. The Commission made astounding discoveries regarding how the 1980 Constitution was applied in Zimbabwe at that time. The then Attorney-General was one Patel. Amongst the concerns that he noted was the lack of independence of his office. He stated that independence was being undermined, first and foremost, by the fact that his office was under-resourced which placed considerable pressure on the office of the Attorney-General. More, concerning, however, was Patel's admission that there was a lot of political pressure on his office.[95]

Reports that the Attorney-General's Office was being underfunded were widespread.[96] This was the main cause cited for the rampant corruption in the functioning of the Attorney-General and his prosecutors. This included dockets which went missing at

[93] Hofisi & Feltoe 'Playing politics with the judiciary and the constitution'2017(1) *ZELJ* https://zimlii.org/system/files/journals/Playing%20Politics%20with%20the%20Judiciary%20and%20the%20Constitution.pdf accessed 23 June 2018.
[94] Kaseke, 'The police republic of zimbabwe: zimbabwe as a police state', *News day* 13 August 2016, available at *https://www.newsday.co.zw/2016/08/police-republic-zimbabwe-zimbabwe-police-state/* accessed on 3June 2018.
[95] Saki & Chiware 'The law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018
[96] Saller, *The judicial institution in Zimbabwe*, (Siber Ink, South Africa 2004) 20.

the Harare magistrates' courts, and many cases that were not being pursued at all. The independence of prosecution was therefore being undermined by underfunding, amongst other things.

The appointment and dismissal procedures of Attorney-Generals in Zimbabwe has widely been condemned for its political motives. In 2000, Patrick Chinamasa was the Attorney-General for Zimbabwe. He left the office to become the Minister of Justice and was succeeded by Chogovera who retired in 2003. Commenting on Chigovera's resignation, one commentator stated that:

> The move was generally interpreted as a capitulation to government pressure after repeated attacks by the government, which felt that his office was not prosecuting opposition members vigorously enough.[97]

During Mugabe's rule under the 1980 Constitution, there were reports that the Attorney-General was political as opposed to a-political; that he refused to prosecute ZANU-PF supporters for fear of violence and thuggery by party supporters; and that he, on occasion, discontinued ongoing prosecutions against the ZANU PF members and supporters. Inversely the prosecution of opposition party members was rampant and extreme. Whilst ZANU-PF members' prosecutions were largely ignored by the prosecutorial authority, those of the MDC – the main opposition party in Zimbabwe – generally ended in swift convictions. The office of the Attorney-General therefore was criticised for bowing to political pressure contrary to its Constitutional mandate to operate subject to no authority or individual in the exercise of its powers.[98]

The Attorney-General was also accused of failing to instruct the police to investigate matters as required by section 76(4*a*) of the Constitution. This section was inserted in the Constitution to enable the office of the Attorney-General to recommend, as an institution of lawyers, that a prosecution should follow from a charge so encouraging investigation. As lawyers, the office of the Attorney-General was better placed to weigh evidence and come to a substantiated conclusion that prosecution would have a high prospect of success.

---

[97] Saki & Chiware 'The law in Zimbabwe', available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.
[98] Saki & Chiware 'The law in Zimbabwe' available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.

The tenure of the Attorney-General, too, was marred by controversy. For example, during political violence in Chipinge, two men were murdered in full view of the public. The Attorney-General ordered investigation by the police but this never happened and no prosecution resulted – presumably because the perpetrators were ZAN-UPF activists.

Following reports that prosecutors were no longer independently-minded there widespread resignations around the year 2002. Levinson Chikafu, a senior prosecutor at the Mutare magistrates' court, reportedly complained that a group of politicians attacked him at his offices.[99] In addition to these allegations, police, backed up by the executive, could wilfully disobey court orders as evidenced by their denial of legal counsel for the leader of the opposition party notwithstanding a High Court order mandating access to legal counsel as his constitutional right.[100]

All these activities tainted the face and state of public prosecution in Zimbabwe. However, in 2013 a step closer to democracy and transformative justice with the coming into force of a more democratic Constitution with an express Declaration of Rights.

2 4 3 Independence of the public prosecutor under the 2013 Constitution

The 2013 Constitution brought many changes in the legal arena. Although it declared the supremacy of the Constitution, as had the 1980 Constitution, it went further to provide for founding values and principles and a Declaration of Rights.[101] Nyabeza states that the 2013 Constitution is transformative in the sense that it provides for essential rights that were not provided for in the previous constitutions. He goes further to comment that in so far as it was a legal response to years of wrongdoing and repressive laws by preceding political regimes, the 2013 Constitution sought to deliver

[99] Saller, (Siber Ink 2004) 20.
[100] Kaseke, 'The police republic of Zimbabwe: Zimbabwe as a police state', *News day* 13 August 2016, available at *https://www.newsday.co.zw/2016/08/police-republic-zimbabwe-zimbabwe-police-state/* accessed on 3June 2018.
[101] Section 2, 3 and Chapter 4 of the Constitution of Zimbabwe, 2013

transitional justice.[102] This means that this Constitution aims to better protect citizens of Zimbabwe against unlawfulness and abuse of political power by encouraging certain democratic principles and values in the drafting, interpretation, and enforcement of laws.

To promote the fight against rampant crime and improve the criminal justice delivery system, the new Constitution of Zimbabwe provided for a separate Office of the Public Prosecutor in the Office of the Prosecutor-General (PG). This took the form of the National Prosecution Authority (NPA) established by section 258 of the 2013 Constitution and headed by the Director of Public Prosecution (DPP).[103] Nyabeza calls this a huge step

> towards safeguarding against impunity and partiality. In the previous constitution the Attorney General was an ex-officio member of cabinet, principal legal advisor of the government, member of the Judicial Service Commission and the chief public prosecutor.[104]

The varying offices held by the Attorney-General cut across different institutions which exercised different forms of public power and so inevitably compromised prosecutorial independence.

Under the 2013 Constitution the function of the NPA is to institute and undertake the prosecution of crimes on behalf of the state and to oversee any other duty incidental to the institution and undertaking of criminal proceedings. The head of the NPA is the Prosecutor-General who holds public office but does not form part of the civil service.[105]

The Prosecutor-General is appointed by the President on the advice of the Judicial Services Commission following the procedure used for appointing judges. The appointed Prosecutor-General must be a person qualified for an appointment as a

[102] Nyabeza, 'Progressive reform in the new constitution of Zimbabwe: a balance between the preservative and transformative constitution making process' 2015 *Country Report* 3, available at http://www.kas.de/wf/doc/kas_40484-1522-2-30.pdf?150217083439 accessed on 17 June 2018
[103] Section 259 Constitution of Zimbabwe, 2013.
[104] Nyabeza, 'Progressive reform in the new constitution of Zimbabwe: a balance between the preservative and transformative constitution making process' 2015 *Country Report* 3, available at http://www.kas.de/wf/doc/kas_40484-1522-2-30.pdf?150217083439 accessed on 17 June 2018.
[105] Section 259(2) of the Constitution of Zimbabwe, 2013.

judge of the Supreme Court.[106] The term of office of the Prosecutor-General is six years renewable for one further six-year term. To hold office, the Prosecutor-General must take an oath of office before the President or a person authorised by the President.[107]

The removal of the Prosecutor-General takes place in accordance with the procedure for the removal of a judge.[108] In discharging his or her office the Prosecutor-General must adopt and make public the principles applied to decide whether or not to prosecute, and must adopt and make public the principles applied to institute and conduct criminal proceedings. The Constitution provides for how the Prosecutor-General and the officers that fall under the NPA should conduct their business and must adhere to the Constitution and constitutional principles when discharging their duties.[109]

The specific principles that the NPA and the Prosecutor-General must follow are summarised by Saki who states that

> …they should not act in a partisan manner, further the interests of any political party or cause, prejudice the lawful interests of any political party or cause, or violate the fundamental rights and freedoms of any person.[110]

This points to a construction of law that shows an appreciation for the independence of the prosecuting authority.

The 2013 Constitution expressly states that the prosecuting authority is independent. Section 260 provides:

> (1) Subject to this Constitution, the Prosecutor-General—
>
> *(a)* is independent and is not subject to the direction or control of anyone; and
>
> *(b)* must exercise his or her functions impartially and without fear, favour, prejudice or bias.

[106] Section 259(4) of the Constitution of Zimbabwe. 2013.
[107] Section 259 of the Constitution of Zimbabwe, 2013
[108] S 259 (3) of the Constitution of Zimbabwe, 2013.
[109] Section 260 (2) of the Constitution of Zimbabwe 2013.
[110] Saki & Chiware, 'The law in Zimbabwe', available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.

> (2) The Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings.
>
> ,

Section 260(4) provides further that Parliament may take any other measures it deems fit to allow for the political independence and political neutrality of the members of the NPA. This means that it is expected of the NPA to remain neutral in the discharge of its duties.

To ensure accountability, the Prosecutor-General reports to Parliament on the activities of the NPA. This is a check and balance on the exercise of power by the prosecuting authority which does not necessarily detract from its independence. This also means that under the 2013 Constitution, the Attorney-General no longer carries prosecutorial functions. Under the 2013 Constitution the powers of the Attorney-General are found in section 114 which provides that the functions of the Attorney-General are—

> (a) to act as the principal legal adviser to the Government;
> (b) to represent the Government in civil and constitutional proceedings;
> (c) to draft legislation on behalf of the Government;
> (d) to promote, protect and uphold the rule of law and to defend the public interest; and
> (e) to exercise any other functions that may be assigned to the Attorney-General by an Act of Parliament;

The Attorney-General acts on behalf of the government to promote and uphold the rule of law and defend public interests.[111] The Attorney-General can still attend parliament and cabinet but does not vote. He or she may also, with leave of the court, appear as a friend of the court in cases where the state is not a party.

2 4 4 Other sources of law regulating the prosecuting authority

It is important to point out that in terms of criminal law the common law no longer applies. In 2004 there was the codification of all law in the Criminal Law (Codification and Reform) Act [Chapter 9:23] 23 of 2004. In section 3(1) of the Act the Roman-Dutch

[111] Saki & Chiware, 'The law in Zimbabwe', available at *http://www.nyulawglobal.org/globalex/Zimbabwe1.html* accessed on 3 May 2018.

law is excluded as there are no longer any common law crimes and all laws are addressed in the Code.

Apart from the Constitution, certain other legal instruments regulate the independence of the prosecuting authority in Zimbabwe. Arising from the Constitution provision is made for the establishment of the office of the Prosecutor-General under the Prosecutions Authority Act 5 of 2014 (the Act). The Act states that the Prosecutor-General has the power to institute criminal proceedings on behalf of the state[112] and to issue certificates *nolle prosequi* to any person who wishes to institute a private prosecution where the Prosecutor-General chooses not to prosecute.[113]

The Act provides for the appointment of the National Director of Public Prosecutions; for the administration of the National Prosecuting Authority and the conditions of service of its members; for the transfer of persons from the Civil Service to the National Prosecuting Authority; and for matters connected with or incidental to the prosecution of crime.[114] The Act also provides for the removal from office of members of the prosecuting authority[115] and reinforces that the prosecuing authority does not fall under the civil service.

There is another Act that provides for the functions of the prosecuting authority in Zimbabwe, namely, the National Prosecutions Authority Act (Code of Ethics) (CAP 7:20) (the CEA). The CEA regulates the conduct of members of the prosecuting authority. It states that:

> [A] prosecutor shall uphold the independence of the Authority, the authority of the office and shall in keeping with his or her prosecutorial mandate, perform all duties without fear or favour.[116]

Section 5(2) the CEA states that:

[112] Section 12(a) of the Prosecutions Authority Act 5 of 2014
[113] Section 12(d) of the Prosecutions Authority Act 5 of 2014
[114] Section 259(10) of the Constitution of Zimbabwe, 2013.
[115] Section 22 of the Prosecutions Authority Act.
[116] Section 4(1) of the National Prosecutions Authority Act (code of Ethics) Regulations (CAP 7:20) 2015.

> [A] prosecutor shall not allow family, social, political, religious or other like relationships to influence his or her prosecutorial duties or Judgment.

Prosecutorial independence is also reinforced by section 6(4) of the CEA which states that the family or friends of the prosecutor may not solicit favours in relation to any activities that have a bearing on his or her activities. Section 7 states unequivocally that the prosecutor shall exercise his or her powers without fear or prejudice. The section clearly sets out that the public prosecutor shall be impartial in all his or her action and must not be partisan or show favour to any political party.[117] The CEA also prohibits a prosecutor from being an active member of any political organisation.[118]

In the section above, it was established that the Zimbabwean law provides for an independent prosecuting authority. It is therefore necessary to examine the role of the prosecutor. Accordingly, the next section deals with what independence entails and the principles governing the independence of the prosecuting authority.

2 5 Role of the prosecutor: Why is prosecutorial independence so important?

The object of having a prosecuting authority – in Zimbabwe, the NPA and the Office of the Prosecutor-General – is to ensure a high degree of independence in the making of decisions to prosecute and exercising prosecution discretions.[119] The role of the public prosecutor is not to win cases or secure the conviction of an accused but rather to assist the court to arrive at the truth, a duty he or she must pursue fairly. As such the Prosecutions Authority Act states in section 12 that the duty of the Prosecutor-General includes that he or she:

> (a) shall institute and conduct criminal proceedings on behalf of the State; and
> (b) shall carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

[117] Section 8(1) of the National Prosecutions Authority Act (code of Ethics) Regulations (CAP 7:20) 2015.
[118] Section 8(3) of the National Prosecutions Authority Act (code of Ethics) Regulations (CAP 7:20) 2015.
[119] Mckenzie, 'Directors of Public Prosecutions: Independent and Accountable', (1996) (26) *Western Australian Law Review* 268 at 273.

(c) may discontinue criminal proceedings; and
(d) shall issue certificates nolle prosequi in accordance with the Criminal Procedure and Evidence Act [Chapter 9:07], to persons intending to institute private prosecutions, where the Prosecutor-General chooses not to prosecute; and
(e) perform such other functions as are conferred or imposed upon him or her by or in terms of this Act or any other enactment.[120]

A prosecutor is an administrator of justice, an advocate and an officer of the court. The duties and functions of a prosecutor are not only to convict but also to seek justice.[121] Whether a prosecution continues or is terminated is in the discretion of the prosecutor who has the power to pursue or deny prosecution.

Independence is a crucial attribute for a prosecutor who must ensure that the decision he or she makes is guided by the law, the available evidence, and nothing else. The International Association of Prosecutors has declared that 'the use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference'.[122]

Once the police have completed their work, it is the duty of the prosecutor to continue with the justice process through prosecution. The prosecutor has the onerous duty of deciding whether or not to prosecute depending on the evidence gathered by the police, the weight of that evidence, and public interest.[123]

Where the prosecutor has sufficient information, he or she has a duty to institute prosecution. Grieve states that there are two prerequisites without which prosecution should not be instituted.[124] The first is whether there is sufficient evidence to justify a

[120] Section 12 of the of the Prosecutions Authority Act 5 of 2014
[121]'Prosecution function general standards' https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html accessed 4 May 2018.
[122]'International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted on 23 April 1999', available on http://www.odpp.nsw.gov.au/docs/default-source/guidelines/appendix-a---standards-of-professional-responsibility-and-the-statement-of-the-essential-duties-and-rights-of-prosecutors.pdf?sfvrsn=8 accessed 14 May 2018.
[123] Impartial Prosecutors vital for true justice, 'Corruption watch', available at http://www.corruptionwatch.org.za/impartial-prosecutors-vital-for-true-justice/ accessed on 4 May 2018.
[124] Grieve, 'The scope of the rule of law and the prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-

realistic prospect of conviction. If so, the second question is whether the prosecution is in the public interest. Grieve goes on to state that without these requirements being met there will be no prosecution and no one, not even the highest Ministers of state, should attempt to convince the prosecutor to prosecute.[125] This has led Baughman to conclude that in the criminal justice system the most important decision maker is the prosecutor.[126]

Where a decision by the prosecutor is predetermined by politics, bias, fear, or prejudice there is no justice, no prosecutorial independence, and no adherence to the rule of law.[127] The duty of the prosecutor is not only to convict the guilty but also to keep the innocent free. The prosecutor him- or herself must therefore act as a defender of fairness, impartiality, and independence. This fairness and independence apply not only to any presentations he or she makes in the court but also to the process before and around the prosecutions.[128] These include the analysis of the evidence and any form of external influence on the case. As an example, in the presence of sufficient evidence to prosecute the prosecutor may decline to prosecute so as to promote the agenda of a specific political party. Furthermore, in the absence of sufficient evidence the prosecutor cannot prosecute with the requisite diligence if he or she has accepted a bribe to drive or to promote a specific agenda.[129] Accepting bribes and gifts may lead the prosecutor to be biased thereby affecting his independence.

conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018.

[125] Grieve, 'The Scope of the Rule of Law and the Prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018

[126] Baughman, Robertson & Sah '3 professors have a radical idea for how to remove bias from the criminal justice system' http://www.businessinsider.com/how-to-remove-bias-criminal-justice-system-2016-10 accessed 14 May 2018.

[127] Grieve, 'The scope of the rule of law and the prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018

[128] Grieve, 'The scope of the rule of law and the prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018

[129] Impartial Prosecutors vital for true justice 'Corruption watch', available at http://www.corruptionwatch.org.za/impartial-prosecutors-vital-for-true-justice/ accessed 4 May 2018.

2 6 The concept of the independence of the prosecuting authority

As discussed above, the sources of law emphasise the need for an independent prosecuting authority. In the phrasing it has been stated that prosecution should be impartial, the prosecutor acting without favour or prejudice, and should not be biased in his or her function. Further, it has been stated that prosecution should be exercised without interference from any person or body.

The discretion of the prosecutor and his or her independence in the performance of his or her duties is a vital part of the justice delivery system.[130] Prosecution and subsequent conviction have grave consequences for the families, communities, work, and life of the accused. The state should, therefore, only pursue a prosecution where there is sufficient evidence to establish a case.[131]

Many issues arise in the decision to prosecute or not to prosecute there are inevitably borderline cases between sufficient evidence to establish a case and insufficient evidence to halt a prosecution. In the end there may be external influences, for example, corruption, pressure from family members, and at times pressure from the work itself. That the prosecutor should be impartial means that he or she should act without favouring any party in the case.

The prosecutor plays a vital role in the criminal justice system to protect human rights, promote the rule of law, ensure fairness, and combat crime.[132] The independence of the prosecutor is not limited to independence from the influence of other arms of

[130]Impartial prosecutors vital for true justice, 'Corruption Watch', available at http://www.corruptionwatch.org.za/impartial-prosecutors-vital-for-true-justice/ accessed on 3 May 1980.
[131] Impartial Prosecutors vital for true justice, 'Corruption Watch', available at http://www.corruptionwatch.org.za/impartial-prosecutors-vital-for-true-justice/ accessed on 3 May 1980.
[132] Grieve, 'The scope of the rule of law and the prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018.

government, but also means that the prosecutor should determine the prosecution on the merits of the law and available evidence free from bias.[133]

Fear, prejudice, or favour are the factors stated in the law (CEA above) which can influence the independence of the prosecutorial authority. This is generally on an individual level of prosecution, but for the prosecuting authority (ie, on the institutional level) the Constitution demands more. The Constitution introduces a further factor where it provides that the prosecuting authority should be free from the control of any person or body.[134] This means that no other power, authority, office, or individual may interfere with the powers of the prosecuting authority – as part of an organ of state, the prosecuting authority should not be influenced by other more powerful organs of state.

In discussing the independence of the prosecuting authority there are certain basic elements of independence that framers of the Constitution and the drafters of legislation had in mind. These include that:

- The personnel who work for the prosecuting authority must be independent.[135] This means that the staff or the people working for the prosecuting authority should not at the same time be employed by other organs of state.

  There should be functional independence. This element entails that the duties or functions of the prosecutor – eg, the decisions to prosecute or not to prosecute – should be performed only by the prosecutors and not by some other person who is not designated to do so. The functions or the powers of the prosecutor should not be abrogated by or be given to any functionary outside the NPA. It also means that the personnel employed by the prosecuting authority should not perform any functions or duties other than their designated prosecutorial functions.

[133] Grieve, 'The scope of the rule of law and the prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018.
[134] S 260 (1) (a) of the Constitution 2013.
[135] S 76(7) of the Constitution of Zimbabwe 2013.

- The NPA must be financially independent. The payment of the salaries of staff employed by NPA, issues of salary increments, salary reductions, and benefits should not depend on the discretion of individuals or the other organs of state as this may result in interference in the functioning of the prosecuting authority.
- There should be independence in the appointment and the removal of prosecutors in the NPA. The prosecuting authority should be independent from influence from any other organ of state.
- There should be no political influence in the running of the affairs of the prosecuting authority.
- There must be freedom from bias and prejudice. As an element of prosecutorial independence, a prosecutor must act impartially. He or she must be free from undue influence and should exercise his or her duties without fear, favour, or prejudice.

Looking at these elements, it is clear that the NPA must enjoy institutional independence, and that these whom it employs must enjoy individual independence. The institutional freedom of the prosecuting authority is central to the theme of this dissertation and, as we discuss below, is influenced, and guided by the principle of the separation of powers.

2 7 Prosecutorial independence and the separation of powers

The prosecutor must not be subjected to political influence or the influence of other organs of state such as the judiciary, parliament, and the executive. Fears regarding salary adjustments and institutional pressures such as promotion or demotion, or any other factor which may influence the prosecutor's decisions should be excluded.[136] In the end it stands to reason that there is a possibility that, if it depends on another more powerful authority or organs of state, the proper function of the prosecution system may be influenced.

[136] Grieve, 'The scope of the rule of law and the prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018.

One of the principles that promotes the independence of the prosecuting authority is the separation of powers. This principle is listed in section 3 of the Constitution as one of the founding values and principles of the Constitution.[137] The values in the Constitution are important in that they inform the interpretation of law and set positive standards with which the law should comply.[138] The separation of powers emphasises that there should be a distinction between and a separation in the exercise of power by the executive, the judiciary, and the legislature. It also means that any law or conduct that is not in line with the values is invalid and must be struck down.[139]

The importance of the separation of powers is that it limits the exercise of the powers of government and its functionaries.[140] Zimbabwe's NPA does not exist in isolation; it is established by the Constitution which also establishes other state organs and institutions. It stands to reason that in its functioning the NPA is not free from interaction with other institutions and organs. In such interactions, the independence of the NPA is vital as there is a clear danger of potential of interference.

The independence of the prosecutor is therefore also affected or threatened by the existence of other organs of state such as executive, the judiciary, and the legislature. Interference in the functioning of the prosecuting authority is determined by the nature of prosecutorial powers – ie, whether they are judicial, legislative, or executive in nature.

Interactions are inevitable, however, as the Constitution itself contains provisions that promote interaction – eg, the Prosecutor-General is appointed by President[141] and reports to Parliament.[142] From the outset these provisions put the prosecuting authority in interaction with other organs of state in the exercise of their powers and functions. There is, therefore, room for a working relationship, but it is the arbitrary and unlawful interference in the exercise of prosecutorial powers that upsets the separation of powers principle. The independence of the prosecuting authority is also

[137] Section 3 of the Constitution of Zimbabwe, 2013.
[138] *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC).
[139] *United Democratic Movement* para 19.
[140] Mavhinga, 'Why respect for separation of powers principle is vital', *Daily News* 11 April 2015.
[141] Section 259(3) of the Constitution of Zimbabwe, 2013.
[142] Section 262 of the Constitution of Zimbabwe, 2013.

dependent under which organ of government the NPA can be said to resort – ie, whether the powers or functions of the NPA are judicial, quasi-judicial, legislative, or executive in nature. This is however discussed later.

The principle of the separation of powers can be traced back to the French philosopher Montesquieu who viewed the principle as a mechanism to protect the liberties and freedoms of the citizens. To avoid the abuse of power, Montesque suggested that the branch that made the law (the legislature) should be separate or distinct from the branch which enforces and implements the law and policy (the executive), and the branch which interprets the law, applies it and resolves disputes (the judiciary).[143] For him, where there is no separation of powers there is bound to be abuse of power and despotism. Separation of powers thus ensures the independence of every arm of government and organ of state and that no arm of government may acquire excess powers or usurp or even abuse the powers of other arms of government.

If an individual or an organ of state has the power to make laws, implement and interpret these laws, it stands to reason that there will no longer be any checks and balances on the exercise of the power that they hold and this power can be abused to the detriment of whole countries and societies. Societies that existed in such dispensations experienced great horrors as shown by Nazi Germany where Hitler controlled almost all powers in the state to the extent that he had:

> …license to do almost anything he wanted, in direct contravention of a democratic state. Ten thousand German lawyers and judges thereupon took an oath of personal loyalty to him, not to the constitution — the very antithesis of the Rule of Law.[144]

Separation of powers entails three things:[145]

1. 'the same person cannot belong to more than one of the three arms of government;

[143] Mavhinga, 'Why respect for separation of powers principle is vital' *Daily News* 11 April 2015.
[144] Sciolino, *The Holocaust, the Church, and the Law of Unintended Consequences* (Thomas Nelson Publishers 1990) 87.
[145]'Separation of Powers and Protection of Human Rights in the Context of the New Constitution in Zimbabwe' *Human right Bulleting* 47 available at http://www.hrforumzim.org/wp-content/uploads/2010/06/HR1-Separation-of-Powers-Zimbabwean-Experience.pdf accessed on 16 May 2018.

2. one organ of state should not usurp or infringe on the powers of the other arms of government;
3. a person in office in one organ of government cannot owe his term of office to a person in a different organ of state

There is, however, no absolute separation of powers as discussed above. This is evident in that the executive can be part of parliament as Cabinet Ministers report to parliament and sit in parliament. When it comes to judicial appointment, the President, who is the head of the executive, has the power under the Constitution to appoint judges. At least in theory, however, parliament, the judiciary, and the executive should be separated. Separation is clearer between the judiciary and the other arms of government as the judiciary plays an oversight role.

The judiciary through its powers of judicial review, ensures that the exercise of all power is in accordance with the law and that all power is derived from the law. Where the exercise of any power by any public functionary, parliament, or the executive is not in accordance with the law, the judiciary has the power to declare the exercise of such power unlawful or unconstitutional and to impose a penalty.[146] It can be noted, therefore, that in the exercise of its judicial powers of review, the judiciary inevitably interacts with the other organs of state in a way that interferes with the exercise of their powers. The separation should work towards limited interference not outright or absolute separation – some measure of interaction is inevitable.[147]

In the same breath, the separation of powers doctrine applies to the institution of the prosecuting authority in that the powers of the prosecutor should not be usurped by any arm of government or be subject to any other person's control. This is reinforced by the Constitution of Zimbabwe. At the 18th Annual Conference and General Meeting of the International Association of Prosecutors (IAP), Grieve, speaking as the Attorney-General of England and Wales, stated that a prosecuting authority that defends its independence is a 'bulwark for freedom and liberty'.[148]

---

[146] Feltoe, *A guide to administrative and local government law in Zimbabwe* (Legal Resources Foundation 2006) 48). See also Van de Schyff, *Judicial review of legislation: A comparative study of the United Kingdom, the Netherlands and Southen Africa* (Springer 2010) 10.
[147] Barendt, 'Separation of powers and constitutional government' (1995) *Public Law* 599 at 601.
[148] Grieve, 'The scope of the rule of law and the prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018.

In line with Grieve's comments, Zimbabwe is a constitutional democratic state with values and principles that seek to promote the rule of law, freedom, and equality for all. The Constitution provides for the protection of human rights and the promotion of the independence of the prosecuting authority and the judiciary so as to enhance the rule of law. This is because to a certain extent both play an oversight role regarding the exercise of public power and holding individuals and state institutions accountable for violation of human rights. Zimbabwe is a country protected against the abuse of power by the separation of powers.[149]

Separation of powers determines how the government should exercise its powers and the limitations of those powers in the interests of its citizens.[150] In Zimbabwe, this principle is woven into the fabric of the 2013 Constitution ensuring equality before the law and that every person enjoys equal protection before the law.[151] The separation of powers therefore ensures that the prosecuting authority can prosecute anyone free from any external influence.

There is another important principle linked to the separation of powers and the independence of the NPA in Zimbabwe namely, the doctrine of the rule of law.

2 8 The doctrine of the rule of law

The separation of powers is also linked to the doctrine of the rule of law. This doctrine states that no power may be exercised beyond that which is authorised by the law.[152] Lord Bingham gave a concise description of the rule of law where he stated

[149] 'Separation of Powers and Protection of Human Rights in the Context of the New Constitution in Zimbabwe' *Human right Bulleting* 47 available at http://www.hrforumzim.org/wp-content/uploads/2010/06/HR1-Separation-of-Powers-Zimbabwean-Experience.pdf accessed on 16 May 2018.
[150] Mavhinga, 'Why respect for separation of powers principle is vital' *Daily News* 11 April 2015.
[151] Mavhinga, 'Why respect for separation of powers principle is vital' *Daily News* 11 April 2015.
[152] Mavhinga, 'Why respect for separation of powers principle is vital' *Daily News* 11 April 2015

> that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.[153]

This means that the law should be applied and enforced in accordance with the power it confers and no powers should be exercised that are outside the law.

As we have seen, prosecutorial independence plays a part in the protection of the rule of law in the sense that it protects fundamental values and principles of law. The rule of law has been termed the most important development of the 20th Century[154] and has been hailed as a term that brings development.[155] Where there is the rule of law, the rule of man is reduced, and there is bound to be consistency and certainty, and abuse of power is reduced.

The rule of law was formulated by the British constitutional law scholar, Albert Venn Dicey (1835–1922) in his study entitled *An Introduction to the Study of the Law of the Constitution* (1895). He argued that the rule of law encompasses the principle of the supremacy of the law and the principle of equality under the law. Supremacy under the law means that in every decision or exercise of power, the law should be the determining factor and no power should be above the power of law.[156] It also means that no one can be deprived of his or her rights and freedoms through the use of arbitrary power.[157] The principle of equality means that no one is above the law and that every person is subject to the law and enjoys its protection.[158] Under the rule of law no person is above the law and the law should be applied equally and without discrimination.

In his formulation of the meaning of the rule of law, Lord Bingham took a wider approach listing eight principles inherent in the rule of law. These principles are, in summary, that the law must be clear just and predictable; all decisions must be made

---

[153] Bingham *The Rule of Law* (Allen Lane 2010) 66-67).
[154] Johnson 'Laying down the law: Britain and American lead the way in establishing legal regimes based on universal principles' (1999) *Wall Street Journal* 22.
[155] Tamanaha, *On the rule of law, history and politics, theory* (Tamanaha, *On the Rule of Law, History and Politics, Theory* (Cambridge University Press 2004).
2004) 2.
[156] Van Dicey (1895) 202).
[157] J de Ville 'The rule of law and judicial review: rereading Dicey' (2006) *The Acta Juridica* 79
[158] Van Dicey 10ed (1895) 193).

according to law and not to discretion; laws must be applied equally; the exercise of powers by public officials must be exercised fairly without fear, favour, or prejudice; the laws must adequately protect human rights; there must be an adequate dispute-resolution mechanism by the state; the adjudicative role of the state must be fair; and there must be compliance by the state with international law and obligation.[159]

The area of contention in the formulation of what the rule of law entails lies in whether laws should protect human rights. This formulation of the rule of law took a very formulaic approach by stating that as long as there was law that was clear and unambiguous, then if this law was followed and applied by the latter without the protection of human rights, this could pass as compliance with the rule of law.[160]

This approach can be questioned on many levels – again Nazi Germany is a textbook example. However, in terms of Lord Bingham's formulation there can be no compliance with the rule of law when fundamental human rights are not protected. Grieve reinforces this by stating that:

> Absent protection for human rights, courts and legal system may deprive citizens of their freedom, property and ultimately their very existence. In such circumstances, the claim that the rule of law is actually being observed actually a mockery of the truth.[161]

Of the eight principles listed by Lord Bingham, the most relevant to prosecutorial independence, is that the adjudicative procedures must be fair. In the absence of a fair adjudicator (and this includes the prosecutor) the rule of law is violated.[162] The form of the rule of law that is violated is the substantive rule of law. Substantive rule of law provides that all exercise of authority should protect

[159] Bingham, *The Rule of Law* (Allen Lane 2010) 66-67.
[160] Street *Judicial review and the rule of law. Who is in Control*? (Constitutional Society 2013) 13.
[161] Grieve, 'The Scope of the Rule of Law and the Prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018
[162] Grieve, 'The Scope of the Rule of Law and the Prosecutor – some general principles and challenges', available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx accessed on 18 May 2018

fundamental human rights. Thus, in terms of the substantive rule of law the law is a mechanism to promote a just society.[163]

The separation of powers provides for the mechanism of checks and balances which was described in article XXX of the Massachusetts Constitution of 1780, that:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[164]

The rule of law is linked to the principle of legality in terms of which the courts have the power of judicial review to set a standard that every exercise of power must be within the bounds of law. Where the exercise of power by the prosecuting authority is unlawful on any ground, the courts should have the power to set the decision aside so reinforcing the supremacy of the rule of law to avoid an exercise of power that is unlawful. It stands to reason that the court has the power to investigate the exercise of power by the prosecuting authority. The extent of this scrutiny can also have an effect on the independence of the prosecuting authority. A discussion of the courts' powers of review of decisions taken by the NPA is discussed in Chapter 3.

2 9 Conclusion

This chapter sought to establish the historical background of the law in Zimbabwe from pre-colonial Zimbabwe to colonial and independent Zimbabwe. It sought to set out the legal principles of law that have influenced the criminal justice system and ultimately the institution of the prosecuting authority.

[163] Medécigo, *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States Germany and Mexico* (Springer 2015) 15).
[164] Marshall 'The separation of powers: An American perspective' (2006) 22 *SAJHR* 10 at 11.

It was found that common law has had a strong impact and influence on the law in Zimbabwe. As a former British colony, Zimbabwe was influenced by English and the Roman-Dutch law. This combination of the Roman-Dutch and the English law is what is commonly referred to as the common law. Other sources of law in Zimbabwe include the Constitution, statutes, case law, and customary/traditional law. It was further established that although common law still applies in Zimbabwe, common-law crimes no longer exist as all crimes have been codified in the Criminal Code.

Pre-colonial Zimbabwe was embedded in the customary laws which were in the main communal laws applied and administered by the chiefs. On the coming of the British and the colonisation of the indigenous population, colonial law or the law of the colonisers began to replace customary law. Systems began to be established that fed the colonial systems and the traditional systems and laws were overshadowed by colonial systems.

It emerged from this chapter that the common law applicable in colonial Zimbabwe did not protect society equally. The criminal justice system was created and designed to serve only the colonial rulers rather than the interests of justice. Ideas of the independence of prosecutors were therefore unheard of in colonial Zimbabwe save to the extent that it protected the interests of the coloniser. The English systems of law were adopted in the formal administration of justice maintaining the customary law only to the extent that it served the interests of the coloniser.

In time the indigenous Zimbabweans sought independence which resulted in the Chimurenga War. In 1980 Zimbabwe achieved independence from Britain and the Lancaster House Constitution was adopted. This was the beginning of the transformation of Zimbabwean law especially that regulating the prosecuting authority. The Attorney-General's office was created by this 1980 Constitution.

The post of Attorney-General was created as the institution that handled civil matters on behalf of the state. It was noted that this same institution was responsible for the prosecution of crime. Although this Constitution spoke of the independence of the prosecuting authority, this proved problematic. The specific constitutional provision provided that whilst the prosecuting authority – the Attorney-General's office – was

responsible for prosecution, the Attorney- General was under the same Constitution part of the Cabinet – albeit with no voting power. The Attorney-General's presence in the Cabinet implied the possibility of executive interference in prosecutions.

The advent of the 2013 Constitution brought fundamental change as regards the institution of state empowered to deal with public prosecutions. It removed the prosecuting authority from the shadow of the Attorney-General and positioned it as a separate and independent institution. The 2013 Constitution created the office of the Prosecutor-General to deal with public prosecutions, stating interestingly that this office was not part of the public service. It was during this period that the independence of the prosecuting authority in Zimbabwe became topical starting with the first step in emancipating it from the office of the Attorney-General.

It further emerged in this chapter that after the 2013 Constitution other statutes were enacted which provided for the independence of the prosecuting authority. Notable in this regard are the Prosecutions Authority Act 5 of 2014 (the Act), and the the National Prosecutions Authority Act (Code of Ethics) (CAP 7:20). This legislation prescribed how prosecutors should deal with cases, including that they should be free from undue influence from any other person. The statutes state that the prosecutors must be impartial and act without fear, favour, or prejudice. The 2013 Constitution also pointed to the more topical issue of institutional independence by stating that the prosecuting authority must act independently of the influence of any other organ of state, including political interference.

The chapter also considered the principles regulating the institutional independence of the Zimbabwean NPA. These principles are the rule of law and the doctrine of the separation of powers. The separation of powers is important in that it provides for the separation of functions between the various organs of state and provides for checks and balances over the exercise of power. It was noted that the separation of powers facilitates and promotes the protection of citizens against the abuse of public power. Separation was found not only to apply in the separation of powers, but also to the personnel and their functions including their appointment, removal from office, and payment of their salaries.

Another important area identified is the rule of law which provides that the exercise of all power must take place within the bounds of the law. By way of judicial review, the courts have the power to measure every exercise of power for constitutional compliance. This raises a question of whether a court has the power to review the prosecuting authority's decisions. The discussion is not within the scope of this and is discussed in chapter 3.

In the following chapter we consequently consider whether prosecutorial independence in fact exists in Zimbabwe, and the impact of private prosecution on the independence of Zimbabwe's NPA. The central questions in Chapter 3 is to what extent private prosecution is permitted. Considering that in Zimbabwe prosecution has always been the prerogative of the state, the chapter looks at the extent of independence enjoyed by the prosecuting authority over the years. The chapter also discusses the case of *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe*[165] which paved the way for private prosecution to establish whether it conflicts with any of the principles discussed in this chapter which regulate the independence of the prosecuting authority, namely, the separation of powers and the rule of law. Chapter 3, therefore, offers a critical analysis of the provisions in the Constitution and in legislation dealing with the independence of the prosecuting authority to establish whether these provisions prohibit or enable private prosecutions.

[165] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1 (28 January 2014).

CHAPTER 3

THE ZIMBABWEAN POSITION

3 1 Introduction

The previous chapter examined the law governing criminal prosecution in Zimbabwe in historical context. It found that criminal prosecution is the responsibility of the NPA established in terms of section 258 of the Constitution of Zimbabwe. The Zimbabwean NPA is responsible for 'instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions.'[166] Furthermore, it was noted that the NPA is led by the Prosecutor-General, as provided in section 259 of the Constitution.

Furthermore, it was established that the Zimbabwe Constitution provides for the independence of the Prosecutor-General and mandates Parliament to enact legislation to regulate the functioning of the NPA. The enabling legislation is the National Prosecutions Authority Act[167] supplemented by a set of rules called the National Prosecuting Authority (Code of Ethics) Regulations, 2015. The Constitution, the legislation, and the Regulations together with case law (including the common law) are the sources of law that regulate the exercise of prosecutorial power and functions in the Zimbabwean legal system. It was also observed that there are several legal principles that influence the independence of the prosecutorial authority include, the rule of law, the principle of legality, and the separation of powers.

This chapter takes a deeper look at the position in Zimbabwe with regard to the independence of its prosecuting authority. This is approached by a consideration of the various provisions in the Constitution, the relevant statutes providing for or regulating the independence of the NPA, and case law that address issues impacting on the independence of the NPA.

[166] Section 258 of the Constitution of Zimbabwe, 2013.
[167] National Prosecutions Authority Act [Chapter 7:20].

The chapter also considers at concepts such as financial and institutional independence as determinants of the independence of the NPA in Zimbabwe. This requires an examination of which state organs, in particular, should be avoided if the independence of the NPA is to be ensured. The powers granted to the organs under the Constitution and the other statutes and their functions, relations, cooperation, and interference id discussed in relation with the independence of the NPA. The chapter further highlights the independence of the NPA from political organs of state such as the executive and parliament, and its accountability including its independence from the judiciary.

The accountability of the NPA involves mechanisms in place by which the NPA can exercise its powers within the scope of the law and also ensure that that there is no arbitrary use of its powers. Among these mechanisms is judicial review in the context of the power of the courts to interfere in decisions of the NPA. The chapter also considers whether, as an independent prosecuting authority, the NPA's functions are reviewable as administrative actions and if not, whether there are other mechanisms to check its power. At this juncture judicial review under the rule of law principle of legality is discussed as an alternative to judicial review under administrative law.

Finally, the chapter tackles the topical issue of the private prosecutions and the independence of the NPA. This involves consideration of the separation of powers in the context of whether or not a court is justified in interfering in the powers of the NPA to prosecute and whether the law in Zimbabwe allows for such interference, thereby infringing on the independence of the NPA.

3 2 Independence of the National Prosecutions Authority

In section 260(1) of the Zimbabwe Constitution, it is stated that the Prosecutor-General:

> a. is independent and is not subject to the direction or control of anyone; and
> b. must exercise his or her functions impartially and without fear, favour, prejudice, or bias.

Since the Prosecutor-General is the Head of the NPA, this section expresses the intention of the legislators to establish the independence of the NPA. The NPA should be free from control by anyone and should not receive instructions from anyone in the exercise of its powers or functions. The independence of the NPA is also linked to the independence of its head, who should act impartially without fear, favour, prejudice, or bias. The Prosecutor-General is under considerable external and political pressure and the independence of the entire prosecuting authority rests on his or her independence.[168]

Pursuant to such institutional independence, section 259(10) of the Constitution provides for an Act of Parliament to provide for the appointment of a board to employ persons to assist the Prosecutor-General in the exercise of his or her functions. This board was established through the enactment of the National Prosecutions Authority Act. The Act provides for the establishment of National Prosecutions Authority Board and its functions in section 5 and 6 respectively. The Board is responsible for:

(a) administering and supervising the Authority; and
(b) appointing persons to the Authority, whether as permanent members on pensionable conditions of service, or on contract or otherwise, and assigning and promoting them to offices, posts, and grades in the Authority, and fixing their conditions of service; and
(c) inquiring into and dealing with complaints and grievances made by or against members of the Authority; and
(d) exercising disciplinary powers in relation to members of the Authority, other than the Prosecutor-General; and
(e) exercising any other functions that may be imposed or conferred upon it in terms of this Act or any other enactment.

Furthermore, the Act provides that the Board must ensure efficiency of the NPA and that the exercise of its functions is not subject to the control or direction of any person or authority other than the Auditor-General for the purposes of audit.[169] Moreover, the Act states in section 8, that there shall be a Director of Public Prosecutions who shall be the head of the prosecuting members of the NPA. The director reports directly to the Prosecutor-General. This means that the exercise of prosecutorial power is subject

[168] Dessart, 'Legislative Reform of the Crown Prosecution service in Belgium' *What Public Prosecution in Europe in the 21st Century Proceedings Pan European Conference* (Council of Europe Publishing 2000) 105.
[169] National Prosecutions Authority Act Section 6 (2 and 3).

to internal organs and personnel established solely in terms of the Act and who are members of the NPA. The provisions in the Prosecutions Act appear to point to a prosecuting authority that is stirred from within the institution itself. Therefore, this chapter examines the Constitution to establish who is excluded from controlling the NPA.

3 3 Functional independence

Functional independence entails unfettered power in the discharge of prosecutorial duties.[170] This means that the prosecutors must discharge their duties independently. This functional independence is provided for in the Constitution and provides that the NPA is responsible for instituting and undertaking criminal prosecutions on behalf of the state and for discharging any functions necessary or incidental to such prosecutions.[171] The functions of the NPA are clearly outlined in section 258 the Constitution. It follows that none of the institutions have the power to seize the functions of another.

Furthermore, the Constitution outlines the functions of the NPA and distinguishes them from those of the police by stating that the Prosecutor-General:

> [M]may direct the Commissioner-General of Police to investigate and report to him on anything which, in the Prosecutor-General's opinion, relates to an offence or alleged or suspected offence, and the Commissioner-General of Police must comply with that direction.[172]

This clearly shows that while the functions of the public prosecutor are directly linked to those of the police, the NPA can never conduct investigations but must rather refer investigations to the institution vested with the power to conduct them. This means that in Zimbabwe the public prosecutor may not conduct investigations so supporting the view that his functions are independent of the functions of the police. Functional independence is also asserted by the Act which provides that members to be appointed as prosecutors may not be affiliated to any other state institution.

---

[170] Pikis, *Constitutionalism - Human Rights - Separation of Powers: The Cyprus Precedent (*Martinus Nijhoff Publishers 2006) 72.
[171] Section 258 of the Constitution of Zimbabwe, 2013.
[172] Section 259(11) of the Constitution of Zimbabwe, 2013.

However, over the years it has been reported that the military, police, air force, and prison authorities have seconded their members to the NPA. It was reported that the members of the security forces were responsible and in charge of 'administration, human resources, information technology systems, secretarial work, and procurement at the NPA'.[173] This impacts on the functional and individual independence of the prosecuting authority.

Seventy-five per cent of the total number of the prosecuting officers was reported to be non-civilians serving in a civilian institution. [174] This occurred despite section 213 of the Constitution which provides that as commander-in-chief, the President of Zimbabwe may only deploy soldiers 'in defence of Zimbabwe; in support of the police service in the maintenance of public order; or in support of the police service and other civilian authorities in the event of an emergency or disaster.' This deployment of security forces to the NPA not only affects independence of the NPA but is also unlawful. It would mean that the military and other state agents – including the President himself – have a strong overbearing power over the way in which public prosecutions are conducted.[175]

According to the 2015 Annual Report of the NPA, the Authority had

> 145 seconded prosecutors from Zimbabwe Police Service, Zimbabwe Defence Forces and Zimbabwe Prisons and Correctional Services to assist in the courts. The seconded prosecutors constitute 47% of the total number of the professional staff.[176]

The authority went further to show in the Report that there was considerable unhappiness with the seconded personnel and imploring the Treasury to adhere to section 9(2) of the Constitution and improve the resource-base by providing for permanent staff. This clearly implies that the seconded personnel are not regarded as

[173] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.
[174] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.
[175] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.
[176] Tomana, 'National Prosecuting Authority Annual Report,' available at http://www.veritaszim.net/sites/veritas_d/files/National%20Prosecuting%20Authority%202015%20Annual%20Report_0.pdf accessed on 26 June 2018.

permanent and that there is a high likelihood that they are permanently employed elsewhere in the security sector.[177] It cannot be dismissed that their loyalty lies with the authorities employing them rather than with the NPA.

3 4 Independence from Parliament and the Executive

There are several state actors or bodies that can compromise the independence of the NPA through interference and interdependence. These include the judiciary, the executive, and parliament. Individuals and other institutions – eg, the police and the Auditor-General – may also have an influence on the independence of the NPA.

Parliament's influence arises from its legislative role (s 118 of the Constitution), while the executive (s 88 of the Constitution) vests power in the President[178] who exercises this power with the Cabinet (s 110 of the Constitution); the judiciary (s 162 of the Constitution) where authority vests in the courts. While parliament has the power to make the law, the executive has the power to implement the law, and the judiciary has the power to interpret the law.[179]

In performing his or her duties, the prosecutor should enjoy independence from all state institutions, including parliament. However, there are instances in which the relationship and continual interaction between the two bodies appears unavoidable. Section 262 of the Constitution mandates the Prosecutor-General to submit an annual report on the operations and activities of the NPA for the previous year to parliament.[180] This should be done within six months after the beginning of each year. The section provides that the report must be submitted to parliament through the appropriate Ministry – pointing to the subservience of the NPA to the executive. The first annual report was submitted in 2015 by then Prosecutor-General Tomana, through the Ministry of Justice, Legal and Parliamentary Affairs.[181] Provisions such as

[177] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.
[178] S88 (2) of the Constitution of Zimbabwe 2013.
[179] S117 (b), S110 & S162 of the Constitution of Zimbabwe, 2013.
[180] S 262 of the Constitution of Zimbabwe 2013.
[181] Tomana, 'National Prosecuting Authority Annual Report,' available at http://www.veritaszim.net/sites/veritas_d/files/National%20Prosecuting%20Authority%202015%20Annual%20Report_0.pdf accessed on 26 June 2018.

these subject the Prosecutor-General to parliamentary scrutiny and submission through the Ministry of Justice Legal and Parliamentary Affairs implies that the Prosecutor-General is subordinate to the executive.

Section 263 of the Constitution states that parliament can 'confer powers of prosecution on persons other than the National Prosecuting Authority, but those powers must not limit or conflict with the authority's powers.'[182] As parliament is responsible for enacting statutes to regulate prosecutorial powers, it has the potential to interfere in the independence of the prosecutorial authority, or to dispense with the NPA altogether, and confer the power to prosecute on any other person or body.

The executive's potential to affect the independence of the prosecuting authority can be seen in the provisions which allow for the involvement of the President in the appointment and the dismissal of the Prosecutor-General. Section 259(7) of the Constitution states that the appointment of the Prosecutor-General follows the appointment process applicable to judges which, under section 180, provide for appointment of candidates after various processes.

The Judicial Service Commission (JSC) presents a shortlist to the President to make his nomination. Ultimately, it is the duty of the President to make the final pick. Section 180(3) provides that if the President is not happy with the list presented by the JSC, he can require the JSC to provide a further list of three qualified persons. Therefore, it stands that the President has the ultimate discretion to choose who to appoint as the head of the NPA.

3 5 Financial independence of the NPA

Alongside functional independence is the issue of the funding of NPA programmes. Commenting on the independence of the Independent Electoral Commission, Fombad states that financial independence implies that the institution should be given enough money to discharge its duties adequately.[183] It may be noted that complete financial

[182] Section 263 of the Constitution of Zimbabwe 2013.
[183] Fombad, *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 338.

independence may not be possible in that all the branches of government must be involved in matters relating to the allocation of national resources. Such interactions should not interfere with the functioning of the NPA.

The Act provides for an NPA fund drawn from all available sources for the NPA.[184] These sources include:

> (*a*) moneys appropriated by Act of Parliament for the salaries and allowances payable to and in
> respect of members of the Authority and the recurrent administrative expenses of the Authority; and
> (*b*) any other moneys that may be payable to the Authority from monies appropriated for the purpose
> by Act of Parliament; and
> (*c*) any donations, grants, bequests or loans made by any person or organisation or any government
> of any country to the Authority and accepted by the Board in consultation with the Minister; and
> (*d*) any other moneys that may vest in or accrue to the Authority, whether in terms of this Act or otherwise.

As can be noted, these moneys include moneys that are due to the NPA as per an Act of parliament as well as donations and grants from any other person, organisation, or government. To maintain financial independence the sources of income should not go beyond giving money to the NPA. The institutions, organisations, or individuals should not on the basis of having donated funds, attempt to use their financial muscle to influence the functioning of the NPA.

Financial independence includes the financial security of individual members of the NPA. Prosecutors in the NPA are not well paid – according to the 2015 Annual Report they are the least compensated compared to their counterparts in other independent institutions – and the significant service they provide can only be justified by professionalism and patriotism.[185] The report also points to instances of corruption

[184] S 24 of the National Prosecuting Authority Act (*Chapter7:20*).
[185] Tomana, 'National Prosecuting Authority Annual Report,' available at http://www.veritaszim.net/sites/veritas_d/files/National%20Prosecuting%20Authority%202015%20Annual%20Report_0.pdf accessed on 26 June 2018.

instigated by the low wages which threatens their independence and impartiality.[186] It can thus be concluded that low salaries for prosecutors affect the independence of the individual prosecutor and the NPA as a whole. To improve financial independence, the NPA should be more closely involved in drafting its own budget. The 2015 report included a recommendation that the NPA be granted the right to vote so that it could finance its activities directly from Treasury disbursements. This means that for so long as this voting status is not granted, the NPA lacks financial independence. The NPA's corporate affairs manager, Chifokoyo, alluded to the lack of financial independence. He stated that:

> The NPA has not been capacitated since it became an independent authority. We have become a laughing stock at all the courts as the people compare us to our better equipped counterparts in the judiciary. Prosecutors are now being viewed as subordinates to magistrates while housed in squalid conditions.[187]

The lack of financial capacity has led the NPA to rely in the main on section 32(9) of the Act which provides for the distribution of monies in accordance with the Courts Administration Fund, a fund under the direct control of the JSC making the NPA subject to JSC determination. Section 32(9) deals with how revenue collected from the courts is shared. The JSC is a branch dominantly run by the judiciary which could compromise its independence if it is allowed to determine how much to allocate to the NPA. This is because that the head of the judiciary – the Chief Justice – is also the chairperson of the JSC.[188]

The financial independence of the head of the prosecuting authority is also guaranteed by the provision that his or her remuneration corresponds to that of the judges; it is charged to the Consolidated Revenue Fund, governed by an Act of Parliament, and cannot be reduced during his or her term of office.[189]

---

[186] Tomana, 'National Prosecuting Authority Annual Report,' available at http://www.veritaszim.net/sites/veritas_d/files/National%20Prosecuting%20Authority%202015%20Annual%20Report_0.pdf accessed on 26 June 2018.
[187] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.
[188] Section 189 of the Constitution of Zimbabwe 2013
[189] S259 (9) of the Constitution of Zimbabwe, 2013.

1.7.5 3 6 1 Accountability of the NPA

Prosecutors play a mediating role between society, the police, and the courts in the criminal justice system. The prosecutor's functions straddle the lines of inquisitorial and adversarial justice.[190] According to Skylansy, as prosecutors act largely as intermediaries, controlling and curtailing prosecutorial powers is very tricky.[191] Although there is need to hold the NPA accountable, care should be taken not to infringe on the wider discretionary powers given to the prosecutors by the law.

However, a balance should be struck between accountability and independence. Accountability is a form of control or restraint on the exercise of powers by the prosecuting authority. The NPA is accountable to itself, to the public, and to the law. Without accountability, prosecutions can be conducted arbitrarily. Hodzi supports this by stating that the hallmark of weak institutions is impunity.[192] Accountability has the capacity to strengthen the exercise of the powers by the NPA.

Hodzi states further that lack of public accountability breeds corruption. Zimbabwe is a case in point where direct or indirect control of state institutions such as the police, attorney-general's office, and threats to the judiciary's independence and impartiality may be attributed to a lack of accountability to democratic principles.[193] The accountability of the prosecutor can be ensured if prosecutors are compelled to provide reasons for their decisions on whether or not to prosecute, follow the principles of fair procedure, and do not exercise their powers arbitrarily.

The accountability of the NPA is reflected in the higher ethical and moral standards expected of public prosecutors. The National Prosecuting Authority (Code of Ethics) Regulations, 2015 provide that members of the NPA – including prosecutors – should

---

[190] Skylansy, 'The nature and function of prosecutorial power,' 2016 *THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY* 106 (3) 474-520.
[191] Skylansy, 'The nature and function of prosecutorial power,' 2016 *THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY* 106 (3) 474-520 at 474.
[192] Hodzi, 'Reforming the Criminal Justice System in Zimbabwe: Lessons from Kenya' 2011 *Kenya Justice Sector and the Rule of Law DISCUSSION PAPER* at 3 available at https://www.researchgate.net/publication/282268213_Reforming_the_Criminal_Justice_System_in_Zimbabwe_Lessons_from_Kenya accessed on 13 July 2018.
[193] Hodzi, 'Reforming the Criminal Justice System in Zimbabwe: Lessons from Kenya' 2011 *Kenya Justice Sector and the Rule of Law DISCUSSION PAPER* at 3 available at https://www.researchgate.net/publication/282268213_Reforming_the_Criminal_Justice_System_in_Zimbabwe_Lessons_from_Kenya accessed on 13 July 2018.

be independent, accountable, and credible. Furthermore, they should be people of integrity who act professionally and render excellent services.[194] The Code calls these the standards and values of the NPA. The NPA code of ethics further includes under accountability that the decision to prosecute or not should be made independently by the prosecutor free from political, public, or judicial interference.[195]

Accountability of the NPA is mainly seen in the ability by individual prosecutors to conduct their affairs professionally and in terms of law without fear, favour, or prejudice. If public prosecutors are not accountable, corruption and abuse of power will follow. In pursuing accountability the prosecutor should be impartial. Impartiality alludes to the rules of natural justice which are encapsulated in two Latin maxims, namely *audi alteram partem* (hear the other side) and *nemo iudex in sua causa esse debet* (no one should be a judge in his or her own case).[196] The first maxim entails that the party facing an adverse finding must be heard. In its narrowest form, natural justice can be seen to mean that if these two principles are satisfied, a decision will be fair.[197]

Although the law does not require the prosecutor to hear both sides before deciding whether or not to prosecute, he or shebears a level of accountability under section 16 of the Criminal Procedure and Evidence Act in that he or she must issue a certificate of *nolle prosqui* in instances where prosecution is declined to prosecute. Procedural fairness has intrinsic value in that even where a system's result is not preferable, its effectiveness can be measured by how fair its processes are.[198] This means that in certain instances the fairness of the outcome can be measured by the fairness of the process.[199]

---

[194] Part II of the National Prosecuting Authority (Code of Ethics) Regulations, 2015.
[195] NPA code of Conduct available at https://www.npa.gov.za/sites/default/files/Library/Code%20of%20Conduct%20published%2029%20December%202010.pdf accessed 19 July 2018.
[196] De Ville *Judicial Review of Administrative Law in South Africa* (Lexis Nexis Butterworts 2003) 218.
[197]Groves 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285.
[198] Summers 'Evaluating and Improving Legal Processes: A Plea for Process Values' (1974) 60 *Cornell Law Review* 1 2.
[199] Thibaut & L Walker *Procedural Justice* (L. Erlbaum Associates: 1975) 117 to 224.

Fair procedure has the capacity to legitimise governments.[200] Baxter states that even where government powers appear extravagant, where there is fair procedure the radical powers of state may be tolerable.[201] The NPA in Zimbabwe, whilst exercising its powers and determining whether or not to prosecute does not have to adhere absolutely to the principles of natural justice, also variously termed principles of universal justice[202] or requirements of substantial justice.[203] The *audi audi alteram partem* principle requires that whenever a decision affecting any party is to be made, that party should be consulted before the decision is made. However, this is not so when it comes to the exercise of prosecutorial powers in Zimbabwe – the prosecutor has an absolute right to decide whether or not to prosecute without engaging with any of the parties affected.

There is another principle of natural justice that may limit the independence of the NPA. This is the duty of the NPA to act fairly and impartially in the exercise of its powers. This principle is also known as the rule against bias. The prosecutor is expected as a matter of constitutional duty, principle, and ethics to act inpartially in the exercise of his or her powers. Impartiality is linked to independence – Negandra terms it an 'ethno-legal concept, which prevents the miscarriage of justice.[204]

Under the principles of natural justice, the prosecutor has a duty to act fairly.[205] This is true even of the Zimbabwean legal system where this duty is a constitutional duty enshrined in section 69 which provides that everyone has a right to a fair hearing.[206] In the NPA's mission statement, it is stated that the authority is committed to upholding the rule of law through efficient prosecution of crime without fear, favour, prejudice, or

[200] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 11May 2018 at 15.
[201] Baxter *Administrative law* (Juta 1984) at 540.
[202] *Drew V. Drew and Lebura* (1855 (2) Macg. 1.8.
[203] *James Dunber Smith v. Her Majesty the Queen* (1877-78 (3) App Case 614, 623 JC).
[204] Nagendra, 'Quasi-Judicial and Judicial Functions available,' at http://www.atimysore.gov.in/trg_sch/2014-15/w_calendar/August/GV/DAy%201%20GV.pdf accessed on 04 July 2018
[205] *Re R.N*. (An Infaot) (1967 (2) B. 617, 530P,
[206] Section 69 of the Constitution of Zimbabwe, 2013

bias and acting without bias is a commitment to impartiality. Commitment to impartiality is ensured by the rule against bias.[207]

Whilst acting judicially the duty to act fairly that lies with the prosecutor depends on the provisions of statute and the rules that are set out in that statute.[208] The government has gazetted Statutory Instrument 83 of 2015 and through this the National Prosecuting Authority Code of Ethics came into existence.[209] Amongst the values emphasised in the code of Ethics is independence and impartiality. This is where the issue of the secondments to the NPA comes in. Prosecutors should have a right to association and cooperation, but whenever they do they must do it in line with the law and in a manner that maintains the ethics and independence of the profession.[210]

The rule against bias entails that 'the decision maker is impartial or is seen to be impartial in the case he is to decide.'[211] This means that the decision maker ought to act free from favour, fear or prejudice. He is supposed to be neutral. Naturally, the prosecutor is a person exposed to a political and social background and it is difficult to divorce any functionary of these.[212] However, the law still demands that the prosecutor should account for his actions and act without fear, favour or prejudice. In other words, he should divorce himself of any bias. He should not be influenced by anything external that is not related to the decision that he is making,[213]

Section 259 (10) of the Constitution of Zimbabwe provides for the individual independence for the individual prosecutors. The section [rovides that an Act of Parliament must provide for a board to employ suitable qualified personnel to assist the Prosecutor-General in the exercise of his or her functions. It goes on to state, 'that

[207] Hoexter *Administrative Law in South Africa* 2ed (Juta 2012) at 451
[208] Nagendra, 'Quasi-Judicial and Judicial Functions available,' at http://www.atimysore.gov.in/trg_sch/2014-15/w_calendar/August/GV/DAy%201%20GV.pdf accessed on 04 July 2018
[209] Statutory Instrument 83 of 2015.
[210] Guideline 8 of the United Nations Human Right Office of the High Commission Guidelines on the role of the Prosecutor 1980.
[211] De Ville *Judicial Review of Administrative Law in South Africa* (Lexis Nexis Butterworts 2003) 268.
[212] De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants 2000) at 3-8.
[213] Hoexter *The New Constitutional and Administrative Law: Volume Two Administrative Law* (2002) 191.

in exercising their functions, those persons must be independent and impartial and subject only to the law and to the direction and control of the Prosecutor-General.' The independence of the individual prosecutor is therefore provided for in his appointment.

Furthermore, it is provides the way disciplinary hearings are proceeded against him. Concerning the exercise of the prosecutor's powers, the prosecutor accounts only to the Prosecutor General. In the *A-G v Mudisi & Others,*[214] the court found that foras long as the prosecutors are employed by the NPA they are answerable only to the Prosecutor General, who cannot delegate these powers to any other body unless the prosecutor's certificate to prosecute was withdrawn and that they could be referred to the Public Services Commissioner, who was their employer, for disciplinary inquiry. [215] What came out of this case was that in the exercise of their powers to prosecute, the prosecutors were answerable only to the Prosecutor-General and not to the Public Service Commission, which is now the Civil Service Commission and the prosecutors' employers.

The fact that prosecutors should be answerable only to the Prosecutor General in the exercise of their prosecuting functions means that they shall be free from any external influence in the exercise of their prosecuting functions.

During criminal proceedings, the role of the prosecutor should strictly be separate from that of the judiciary.[216] This means that the prosecutor's role in the proceedings should be to prosecute crime on behalf of the state. Prosecutors should not, at any point be called upon to adjudicate or assume the role of any other law officer, like the police, as supported by section 259 (11) of the Constitution. This section provides that the prosecutor can direct investigations but cannot do the investigations himself.

Furthermore, the Prosecutor General, as the head of the NPA, is no longer a political appointee in Zimbabwe. He is appointed through the same process that is used for

[214] *A-G v Mudisi & Ors* S-48-15.
[215] *A-G v Mudisi & Ors* S-48-15.
[216] Guideline 10 of the United Nations Human Right Office of the High Commission Guidelines on the role of the Prosecutor 1980.

the appointment of judges according to the Constitution.[217] Under the 2013 Constitution, the post of Prosecutor General is advertised when there is a vacancy, interviews are conducted, and the Judicial Service Commission recommends three names to the President. Therefore, the judiciary is involved in the appointment of the Prosecutor General, the executive, and the holding of interviews points to accountability of the public.

The court held in the *Gula-Ndebele v Bhunu NO* case, that where the Constitution states that the President appoints on the recommendation of another body, it does not mean that the President appoints the person into that office.[218] According to the Constitution, the President cannot make the decision to appoint the Prosecutor-General *mero muto*, which means that the President cannot appoint a Prosecutor General without the Judicial Service Commissions recommendations. There seems to be a balance that the Constitution seeks to strike so that the decision of appointment is not influenced solely by one branch of government. When the recommendations meet the choice by President, the decision stands as one that is neither judicial nor executive. None of these organs of the State, can claim a monopoly in the appointment of the Prosecutor General therefore, promoting independence of the NPA.

Independence of the NPA can also be measured by how members of the NPA can be dismissed. According to the Constitution the Prosecutor General can be removed from office for three reasons:

i) Inability to perform the functions of his or her office, due to mental or physical incapacity;
ii) Gross incompetence; or
iii) Gross misconduct.

According to the Constitution, the President sets up a tribunal, this tribunal conducts an investigation as to whether the Prosecutor General should be removed from office, and they report the findings back to the President. The President has the final say in the removal of the Prosecutor General, depending on the findings of the report. The

[217] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.
[218] *Gula-Ndebele* v *Bhunu NO* 2010 (1) ZLR 78 (H)

President is required by law to follow the recommendations by the tribunal and cannot resort to extra constitutional ways.[219]

1.7.6 3 6 2 Judicial review of prosecutorial functions

Another aspect of the accountability of the NPA is accountability to the law and this means that the NPA is not permitted to exercise unfettered power. The power to provide for checks and balances on the exercise of power, be it public or otherwise is vested in the court's power of judicial review. The court's power of judicial review is dependent on the classification that can be given to the exercise of that power or the nature of that power which is the power that is administrative, parliamentary, or executive.[220]

The interference of the judiciary with the independence of the NPA is topical and will be discussed in this chapter due to the court's findings and ruling in the *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* case, authorising private prosecutions, and setting the parameters of the court's power of judicial review with regard to the NPA's decision to prosecute or not to prosecute.[221]

There have been a number of arguments that the power to prosecute is quasi-judicial in nature. In the European Network Council for the Judiciary (ENCJ) Report of 2014-16, it was stated that the authority that prosecutors have, must initiate the application of law in criminal justice, on behalf of the state and that public independence requires a certain level of independence, like that of judges.[222] The ENCJ also stated that the judiciary in its broader sense other than the judges also includes the prosecutors and when talking about the independence of the judiciary, the independence of the prosecutors should be taken into consideration.[223]

---

[219] Section 187(3) as read with section 259(7) of the Constitution of Zimbabwe, 2013.
[220] Hoexter *Administrative Law in South Africa* 2ed (2012) 391-92.
[221] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.
[222] Independence and Accountability of the Prosecution *ENCJ report* 2014-2016.
[223] Independence and Accountability of the Prosecution *ENCJ report* 2014-2016.

The degree of independence afforded to the exercise of prosecuting powers may also depend on the nature of prosecutorial power. This could either be administrative, executive, judiciary, or legislative powers. Administrative action is said to be the point where three government organs meet.[224] Nagendra states that administrative action could be the exercise of a variety of powers including legislative, judicial, or discretionary, non-judicial orders or merely a ministerial act.

In the exercise of their prosecuting powers, prosecutors are said to exercise quasi-judicial powers. These are prosecutorial functions that have the trappings of judicial functions, and these include:

i. Presentation of a case
ii. Ascertainment of the fact by means of evidence
iii. Dealing with disputes involving the question of law
iv. Decisions involve the application of law to facts
v. Such act would prejudicially affect the parties

In *Gula-Ndebele* v *Bhunu NO* the court stated that if the proceedings of any other quasi-judicial body are tainted by procedural irregularities recognisable at law as vitiating such proceedings, the court could set aside such proceedings before they are concluded or any recommendation is made.[225] In summary if prosecuting powers in Zimbabwe assume the nature of the exercise of judicial functions they should adhere to procedural fairness and they can be set aside solely on this ground alone. However, the exercise of prosecutorial powers in Zimbabwe takes the form of administrative exercise of power than it does judicial as seen in the *Telecel* case. The next section will discuss the functions of the NPA in relation to administrative law.

1.7.7 3 6 3 Reviewability of the NPA decisions as administrative decisions

Section 68 of the Constitution provides for the right to just administrative action.[226] The inclusion of the right to administrative action in the Bill of rights means that this right is justiciable. Providing further for the review of administrative actions, it means that if

[224] Nagendra, 'Quasi-Judicial and Judicial Functions available,' at http://www.atimysore.gov.in/trg_sch/2014-15/w_calendar/August/GV/DAy%201%20GV.pdf accessed on 04 July 2018.
[225] In *Gula-Ndebele* v *Bhunu NO* 2010 (1) ZLR 78 (H).
[226] Section 68 of the constitution of Zimbabwe, 2013.

prosecutorial powers are administrative in nature, they are reviewable by any competent court on the grounds and principles listed under administrative law.[227]

One of the main functions of administrative law is to exert reasonable control over the exercise of power by administrative authorities so that they do not exceed or abuse their powers..[228] Whether we find the exercise of prosecuting powers to be administrative in nature or not, it has a bearing on the independence of the NPA as a prosecuting authority in Zimbabwe. This is because if the NPA is an administrative body, it would mean that its decisions to prosecute or not are reviewable on administr grounds as administrative actions and that its powers are limited to the extent that they adhere to administrative principles.

The right to just administrative action is not only provided for in the Constitution. It is also provided for in the Administrative Justice Act (AJA).[229] Although this Act has not yet been aligned with the new Constitution, it remains the primary legislation that gives effect to the right provided for in the Constitution. The Act was enacted to

> 'provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; to provide for the entitlement to written reasons for administrative action or decision.'[230]

The AJA consists of principles that are useful in a constitutional democracy that seeks to promote the respect for human rights. Any administrative action that does not comply with the principles found in the AJA can be set aside as a decision outside law. It provides that public administrators in the exercise of their functions should give the other side an opportunity to be heard before a decision that is adversely against them is made.[231] Therefore, administrative law calls for adherence to the rules of natural justice.

---

[227] Mavedzenge 'Administrative Justice and the Constitution' *The Herald* 18 August 2018.
[228] Administrative law guide available at http://tsime.uz.ac.zw/claroline/backends/download.php?url=L0FkbWluaXN0cmF0aXZlX0xhd19fR3VpZGVfMjAxMy5kb2N4&cidReset=true&cidReq=AD211 accessed on 14 August 2018.
[229] Administrative Justice Act [Chapter 10:28].
[230] Schedule of the Administrative Justice Act [Chapter 10:28].
[231] Mavedzenge 'Administrative Justice and the Constitution', *The Herald* 18 August 2018.

Administrative law in Zimbabwe also provides for the *ultra vires* principle, which is a mirror image of the principle of legality. According to this principle, the public administrator is not allowed to exercise his powers outside the law.[232] This means that under administrative law, all actions and the exercise of power should stem from the law. Another principle that is protected under the right to just administrative actions is the principle against bias or the *nemo iudex* principle. Under this principle the administrator should be free of bias whether institutional pecuniary or otherwise.[233] Administrative law provides that the other side should be heard but that the hearing should be conducted by a free, impartial and unbiased adjudicator.

These principles are summarised under section 3 of the Administrative Justice Act that states that administrative authorities must:

I. act lawfully, reasonably and in a fair manner; and
II. act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
III. where it has taken the action, to supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

Coupling these with the ones provided for in the Constitution, administrative action must be 'lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.'[234] These are the principles that protect a person's right to just administrative action and aide in the promotion of good governance. In a democratic state, good governance takes the form of accountability, responsiveness, transparency and justice.[235] Failure to adhere to these principles in making an administrative decision would mean that the decision can be reviewed by the courts.

If the exercise of prosecuting power is administrative and there is no adherence to the administrative principles, there are certain remedies that the court can give and these

[232] Mavedzenge 'Administrative Justice and the Constitution', *The Herald* 18 August 2018.
[233] Mavedzenge 'Administrative Justice and the Constitution', *The Herald* 18 August 2018.
[234] Section 68(1) of the Constitution of Zimbabwe, 2013.
[235] Mavedzenge 'Administrative Justice and the Constitution', *The Herald* 18 August 2018.

have a bearing on the independence of prosecuting powers. According to section 4 of the AJA, the court can:

I. set aside the decision concerned;
II. refer the matter back to the administrative authority concerned for consideration or reconsideration;
III. direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
IV. direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
V. give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with its obligation to render administrative justice.

The nature of these remedies imply that the court can interfere with the decision to prosecute or not to prosecute. It should be noted that the AJA does not allow the court to substitute the decision of the administrative body with that of its own. Thus, the AJA respects the separation of powers and does not allow the court to usurp the power of the administrator.

For the above administrative law principles to apply, it is trite to establish whether the exercise of these powers is administrative in nature. Administrative action is defined by the Act as 'any action taken or decision made by an administrative authority.'[236] According to the Act, an administrative authority includes 'any other person or body authorised by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned.'[237] Under such a broad definition, the functions of the NPA can easily be classified as administrative function since the NPA is a body authorised by an enactment to exercise power or a duty and has the authority to carry out the function of prosecution.

The AJA is not clear in defining what administrative action is and according to the definition, prosecution could fit as an administrative action since prosecutors are

[236] Section 2 of the Administrative Justice Act [Chapter 10:28].
[237] Section 2(d) of the Administrative Justice Act [Chapter 10:28].

authorised by an enactment to perform their functions.[238] According to the *U-Tow Trailers (Pvt) Ltd v City of Harare & Anor* case, the definition of administrative action in the Act is wide and could fit the exercise of any power if the AJA does not expressly exclude it.[239]

It should also be noted that the *Telecel* case did not delve into the question of whether the powers to prosecute were administrative. However, the court went on to measure the conduct of the Prosutor General against the principles in the AJA. Implicitly, the court found it to be a moot point that the exercise of prosecutorial powers could not be administrative in nature. The court simply proceeded as if it was uncontested that the power was administrative in nature. If the exercise of prosecuting functions is administrative it would mean that where the exercise of their powers are short of adhering to the *audi alteram paterm* rule of reasonableness and rationality, they can be reviewed under administrative law and a competent remedy could be given against that decision, as listed above including amongst other remedies, the setting aside of that decision.

The Act is strict on stating that the right to provide reasons is excluded as a ground for the reviewability of a decision to prosecute or not to prosecute.[240] The Act specifically states that section 3 (1) (c), 3(2) and 6 do not apply to 'decisions to institute or continue or discontinue criminal proceedings and prosecutions.'[241] Sections 3(1) (c), 3(2) and 6 relate to factors that need to be considered when making administrative decisions. These sections could mean the inclusion of prosecuting powers as administrative actions just that the failure to adhere to principles in the listed sections does not give rise to unlawfulness. The listing of the powers to prosecute or not with the exercise of executive and judicial powers in Part II of the Schedule, but gives rise to more questions since these functions lie exclusively outside the purview of administrative action.[242]

---

[238] Administrative law guide available at http://tsime.uz.ac.zw/claroline/backends/download.php?url=L0FkbWluaXN0cmF0aXZlX0xhd19fR3VpZGVfMjAxMy5kb2N4&cidReset=true&cidReq=AD211 accessed on 14 August 2018.
[239] *U-Tow Trailers (Pvt) Ltd* v *City of Harare & Anor* 2009 (2) ZLR 259 (H).
[240] Section 11c of the Administrative Justice Act [Chapter 10:28] read with Part I of the Schedule.
[241] Part I of the schedule of the Administrative Justice Act [Chapter 10:28].
[242] Part I of the schedule of the Administrative Justice Act [Chapter 10:28].

3 7 The Principle of the Rule of Law

As stated in the previous section, it should be noted that the AJA has not yet been aligned with the 2013 Constitution and if ever the lawmaker undertakes this task most of the provisions could be changed materially. It should be noted further that the Constitution in section 69 provides that 'every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.' This right means that any party aggrieved by the decision made by the public prosecutor has a right to access the court for the resolution of this dispute regardless of whether the conduct infringed their right to administration or not.

The principle of legality should not be ignored as a mechanism to review decisions of state authorities, whose exercise of power lies outside administrative law. This principle provides for judicial review under the rule of law. It reinforces the supremacy of the law and provides that every exercise of power should be sanctioned by the law and that no act or conduct should be above the law, meaning that the law should provide parameters for the exercise of power.[243]

The rule of law ensures that the law is supreme, and it can be enforced by judicial review, a mechanism which no exercise of power should be able to escape. Justice Gubbay commenting on the rule of law principle stated that;

> 'The rule of law is the antithesis of the existence of wide, arbitrary and discretionary powers in the hands of the executive. It is a celebration of individual rights and liberties, and all the values of a constitutional democracy, characterized by the absence of unregulated executive or legislative power. It is a society in which the rule of law is observed, through the mechanism of judicial review. Executive decisions and legislative enactments, outside the framework of the law, are declared invalid, thereby compelling both the executive and the legislature to submit to enjoyment, by the individual, of all rights and liberties guaranteed by the constitution.'[244]

[243] Section 2 of the Constitution of Zimbabwe, 2013.
[244] Gubbay, 'The progressive erosion of the rule of law in independent Zimbabwe', *Third International Rule of Law Lecture: Bar of England and Wales Inner Temple Hall, London* 2009 available at http://www.cfuzim.org/index.php/legal-cases/335-the-progressive-erosion-of-the-rule-of-law-in-independent-zimbabwe accessed on 22 July 2018.

It can be said that if executive functions and legislative functions are not beyond the reach of the scrutiny of law under the rule of law then prosecuting functions cannot be excused either.

It should be applied with caution when reviewing decisions under the rule of law or the principle of legality, as there is a need to administer the extent of the court's interference so as not to usurp the powers from the NPA. Therefore, conduct that infringes on constitutionally protected rights can be found to be unlawful under the rule of law if they are not permitted by any law. The permissible infringement of a person's rights under the Constitution is with regards to section 86 of the Constitution which provides for the limitation of rights and only a court of law can make this determination.

Having established that there should not be any exercise of power falling outside judicial review, it is important to look at the wide discretionary powers given to the NPA to decide whether to prosecute or not. Moreover, it is important to delve into whether the decisions not to prosecute can be reviewed in Zimbabwe paying attention to the reviewability of the decision to issue a certificate *nolle prosequi* and the kind of remedy that the court is competent to make.

1.7.8 3 7 1 The reviewability of the wide discretion to prosecute or not to prosecute

Vorenburg has stated that prosecutors have unreviewable discretion, especially regarding charging and plea bargaining.[245] In addition to this power, is the power to select which matter to prosecute and which not to. Prosecutors enjoy a wide discretion of powers in Zimbabwe. Wade commenting on the limitless discretion afforded to prosecutors, states that this is 'virtually absolute power'.[246]

The problems associated with judicial review of decisions by prosecution were highlighted in the American case of *R (Barons Pub Company) –v- Staines Magistrates Court* whereby the court was not comfortable with reviewing the decision stating that:

[245] Vorenburg, 'Decent Restraint of Prosecutorial Power', 1981 (94) 7 *Havard law Review* 1521-1573 at 1521.
[246] Erik Luna & Marianne Wade, *Prosecutors as Judges*, (2010) 67 *WASH. & LEE L. REV.* 1413, 1427.

> 'any challenge to such a decision should not be made outside of the criminal proceedings and only as an abuse of process application which, could only be determined by the (criminal) trial court.' [247]

The court put a caveat to the exercise of its review powers, pointing to a challenge that the court was not generally authorised to review prosecutorial decisions except in the criminal court. The argument by the State was to prevent the accused from challenging the decision by the prosecutor to prosecute or not whilst allowing the citizens to approach the court only where the decision of the prosecutor was arbitrary or oppressive.[248]

It can be noted that even the English jurisdiction has problems with the judicial review of prosecutorial powers. They are the guardians of common law and their stance seems also to inform the Zimbabwean position. The position is that there is a need to avoid rushing into the review of prosecuting powers, considering that the decision is placed upon them by the Constitution and not to anyone else.[249] The decision to interrupt the decisions of an independent prosecutor should be considered in exceptional circumstances. Corker states that the courts have put their faith in prosecutors to make justifiable and rational decisions, although the faith is not blind since the court can review where the decision is manifestly unjust .[250]

It is usually the decision not to prosecute rather than to prosecute that is problematic since the decision to prosecute, if wrong, can be challenged in court during a trial, if or when the state fails to put up a material case an application for discharge can be made.[251]Although a caveat needs to be thrown into the argument, there is a need for decent restraint of prosecuting powers in any democratic state,[252] of which Zimbabwe is one.[253]

---

[247] R (Barons Pub Company) –v- Staines Magistrates Court (2013]) EWHC 898.
[248] R (Barons Pub Company) v Staines Magistrates Court (2013) EWHC 898 para 47.
[249] *R (Corner House Research and another) v Director of the Serious Fraud Office* [2008] UKHL 60
[250] Coker The judicial review of decisions to prosecute *The Barrister* available at https://www.corkerbinning.com/files/news/DC%20The%20Barrister%2024.05.13%20PDF.pdf accessed on 13 August 2018.
[251] Higgins. 'Reviewing Prosecution Decisions', *9th Annual National Prosecutors' Conference* 2008 Dublin castle conference centre available at https://www.dppireland.ie/filestore/documents/PAPER_-_Micheal_OHiggins_BL.pdf accessed on 13 August 2018.
[252] Vorenburg, 'Decent Restraint of Prosecutorial Power', 1981 (94) 7 *Havard law Review* 1521-1573.
[253] Section of the Constitution of Zimbabwe, 2013.

In *R v Director of Public Prosecutions exp* C1995 (1) Cr App 1 36, the Divisional court in England set aside a decision by the director of public prosecutions not to prosecute because the decision was unreasonable, in that it failed to take into consideration material aspects.

The decision to prosecute or not has far-reaching consequences. Even where there is an acquittal, the simple arraignment before the court leads to the soiling of one's reputation, a compromise in employment, stress in the family, the loss of earnings and other incurred expenses during the trial and there is also trauma involved by the mere fact that one is charged with a criminal offence.[254] The exercise of such power should be exercised with a measure of restraint to avoid abuse of power. The prosecuting authority should enjoy a certain level of immunity from judicial review, but this is the exception and not the general rule .[255]

According to Hoexter, reviewability of decisions on grounds of failure to adhere to rules of natural justice could only be limited to judicial or quasi-judicial functions and cannot be extend to executive, legislative or purely administrative functions, without a statutory provision that provides for the hearing.[256] A decision could be qualified as quasi-judicial if the decision has the effect of prejudicing the rights of the applicant. An applicant who does not have a right to claim what he is asking for cannot demand procedural fairness.[257]

[254] Keniry, 'Judicial review of the decisions of the Director of Public Prosecutions', 2016 *Trinity C. L .Rev 196*

[255] Higgins, 9th 'Annual national prosecutors' conference' 2008 available at https://www.dppireland.ie/filestore/documents/PAPER_-_Micheal_OHiggins_BL.pdf accessed on 12 July 2018
r.

[256] Hoexter *Administrative Law in South Africa* 2ed (2012) 391. See also Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dessertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 11May 2018 at 15.

[257] Hoexter *Administrative Law in South Africa* 2ed (2012) 391-92.

1.7.9 3 7 2 Two important cases on the reviewability of the Prosecutor-General's decision to prosecute

There are two cases in which the Prosecutor General was ordered by the Constitutional Court to issue certificates of *nolle prosequi*. These are *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe*[258] and the *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).[259] The first was the case of *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control.*[260] In this case, the applicant to the Constitutional Court was the Prosecutor General who had brought an application against the order of the High Court and the Supreme Court, which had ordered him to issue certificates of *nolle prosequi* in two cases where he opted not to prosecute.

In the *In Re: Prosecutor General of Zimbabwe* case, Mr Maramwidze was the guardian of a minor child who was alleged to have been raped by one Mr Kereke. The Prosecutor General refused to prosecute and in the same breath refused to issue a certificate of *nolle prosequi* to Mr Maramwidze who wanted to pursue private prosecution. Mr Maramwidze approached the High Court applying for an order to compel the Prosecutor-General to issue the certificate and the order was granted. The prosecutor General still did not release the certificate and Mr Maramwidze brought another application against the Prosecutor-General for contempt of court.

The Prosecutor-General opposed the application claiming that the decision by the High Court was unconstitutional. The Prosecutor-General argued that section 260 of the Constitution made his decision not to prosecute autonomous and that such exercise is not susceptible to judicial review. Various attempts were made by the Prosecutor-General to set aside the order to the High Court to no avail.

---

[258] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.
[259] *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).
[260] *In re Prosecutor General* (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).

The second case involved the *Telecel Zimbabwe (Pvt) Ltd*, a company named Telecel. The Prosecutor-General had declined to prosecute and refused to issue a certificate *nolle prosequi*. This prompted Telecel to request for a certificate *nolle prosequi* which was declined, and the matter went for review at the High Court. The High Court dismissed the matter claiming that a company had no right to institute private prosecution. Telecel appealed this decision to the Supreme Court,[261] which overturned the decision of the High Court, thereby, ordering the Prosecutor-General to issue a certificate *nolle prosqui* to the company. Aggrieved, the Prosecutor-General brought an application to the Constitutional Court in terms ofsection 167 and 176 of the Constitution and this was dismissed with costs.[262]

In the application he lodged with the Constitutional Court, the Prosecutor General sought to challenge the constitutionality of the orders of the High Court and the Supreme Court's decisions to order the release of certificates *nolle prosequi* to the litigants as juxtaposed in s 260 of the Constitution. This application was an *ex parte* application and the court did not understand why the applicant (Prosecutor General) did not refer to the two cases of the High Court and the Supreme Court which were the root of the constitutional challenge.

It was stated in the case that the applicant's constitutional mandate is to head the National Prosecuting Authority, as provided for in s 259 (1) of the Constitution which states that

> 'There is a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions.'

The argument by the Applicant was that both the orders of the High Court and the Supreme Court are unconstitutional as he should not be forced to issue certificates *nolle prosequi* and such an order will be tantamount to the court making the decision

[261] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1 (28 January 2014).
[262] *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control (CCZ 13/2017 Const.* Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).

not to prosecute. The applicant stated that s 260 provided for absolute independence in the exercise of his mandate or power. s 260 states that:

> '(1) Subject to this Constitution, the Prosecutor-General—
> (a) is independent and is not subject to the direction or control of anyone; and
> (b) must exercise his or her functions impartially and without fear, favour, prejudice or bias.
> (2) The Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings.'

The court stated that the applicant's understating of the constitutional provisions is that he is independent and not subject to the control of anyone else in the exercise of his powers. The Prosecutor General stated that he is independent from victims of crime, the police and the courts, furthermore that the decision to prosecute lies in his discretion .[263] The applicant further contended that judicial interference with his decision to prosecute would be against the separation of powers doctrine and the autonomy granted to him by the Constitution. He went on to state that his decision to prosecute could only be reviewed on the grounds of rationality per the *Wednesbury* case.[264] The issuing of the *nolle prosequi* certificate, he argued, was not susceptible to judicial review since it fell within his prosecutorial discretion.

The matter was not opposed but there was the intervention of two *amicus curie* who contended that the application should be dismissed both on procedural and substantive grounds. The *amicus* were Mr Mafukidze and Mr Warara who argued that if the application was found to be procedurally unfair the court would not have to deal with the substantive law. On procedural irregularities they argued that the *ex parte* application was abuse of process; the applicant had made no mention of the two court orders of the High Court and the Supreme Court. They had not complied with these orders which is unlawful as the Constitution states that an order or decision of a court binds not only the state but all persons, institutions and agencies to whom it applies and must be obeyed by them.[265] The *amicus* scorned the applicant as the head of the

[263] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.
[264] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.
[265] S164 (3) of the Constitution of Zimbabwe 2013.

NPA that a higher standard was expected of him in society as he was expected to be dedicated to the achievement of justice, to act impartially and to be law abiding.

If the court was to decide on the merits of the case, the *amicus* stated, the issue of prosecutorial independence had to be determined. They stated that the applicant's case had to fail because prosecutorial independence is subject to the Constitution and the law. As such, they went on to argue that it was not the duty of the applicant to interpret the law but of the courts. The *amicus* argued that s16 of the Criminal Procedure and Evidence Act put a positive duty on the Prosecutor General to issue certificate *nolle prosequi* and he had no discretion.[266] They argued further that the relief sought by the applicant had the effect of outlawing private prosecutions if it were granted.

1.7.10 3 7 2 1 Judgement of the Constitutional Court

The first question that the court had to deal with was whether there was any law that could compel the Prosecutor General to issue a certificate *nolle prosequi*. In answering this question, the court stated that 'it is important to acknowledge the well-known canons that the Constitution is the supreme law and that the rule of law is a founding principle of our nation.' the simple conclusion being that where there is a law it must be complied with. The Court made reference to the case of *National Director of Public Prosecutions and Others* v *Freedom Under Law* the court cited the *dictum* of Ngcobo J in *Affordable Medicines Trust & Others* v *Minister of Health & Others*[267] Which stated that:

> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'

[266] S16 Criminal Procedure and Evidence Act.
[267] *National Director of Public Prosecutions and Others* v *Freedom Under Law* 2018 (1) SACR 436 (GP)
the court cited the *dictum* of Ngcobo J in *Affordable Medicines Trust & Others* v *Minister of Health & Others* 2006 (3) SA 247 (CC) para 49.

The court went on to state that the Constitution itself puts restrictions on the exercise of prosecuting powers when it stated that, 'the Prosecutor-General and officers of the NPA must act in accordance with this Constitution and the law.'[268] Furthermore, s 260 makes the independence and the autonomy of the Prosecutor General subject to the Constitution. It was obligatory before the 2016 amendment of s 13 and 16 of the Criminal Procedure and Evidence Act for the Prosecutor General to issue the certificate where the party showed substantial and peculiar interest.[269]

It seems that the Constitutional court had already concluded that the exercise of prosecutorial powers is an administrative function. The court, in the *Telecel* case, without delving into the question of whether the exercise of prosecutorial powers was administrative or not, seems to have applied the administrative law principles of the reviewability of the Prosecutor General's decision not to issue the *nolle prosequi* certificates. However, the Criminal Procedure and Evidence Act is explicit in stating that the grounds of review in the Act do not apply to decisions whether to prosecute or not. The recourse for any party aggrieved with a decision not prosecute therefore seems to lie in the doctrine of the rule of law or specifically the principle of legality.[270]

Gubbay JA, in a separate commentary, found that the judiciary is the watchdog of the Constitution and cannot sit idle and allow the exercise of any power, constitutional, administrative, or otherwise be abused to the detriment of the citizens' right.[271] It meant that the nature of the power exercised is not as important as its conformity with the law. The court found in the *Telecel* case that the illegality of the decision was in that the Prosecutor-General acted on an error of law where he exercised power that he erroneously thought he had.

[268] S 261(1) of the Constitution of Zimbabwe, 2013.
[269] *Norman Sengeredo* v *The State* CCZ 11-14.
[270] *Affordable Medicines Trust & Others* v *Minister of Health & Others 2* 006 (3) SA 247 (CC) para 49.
[271] Gubbay, 'The progressive erosion of the rule of law in independent Zimbabwe'*, Third International Rule of Law Lecture: Bar of England and Wales Inner Temple Hall,* 2009 available at http://www.cfuzim.org/index.php/legal-cases/335-the-progressive-erosion-of-the-rule-of-law-in-independent-zimbabwe accessed on 22 July 2018.

The decision of the High Court in the *Telecel* case has a bearing on the independence of the prosecuting authority in the exercise of its functions, be it they are administrative or not. In its judgement, the court ordered the setting aside of the decision of the Prosecutor General not to issue a certificate *nolle prosqui*. The court went further to order that the Prosecutor-General should issue the certificate within 5 days. The decision made by the court had the effect of replacing the Prosecutor-General's decision not to issue the certificate and could be equivalent to usurping the decision-making powers of the NPA and this is against the principle of the separation of powers. Whether administrative action or not, the decision to prosecute is the prosecutor's and not the court's. To order the AGto issue the certificate would amount to the court replacing the prosecutor's decision.

There are some arguments that support the position that prosecutorial powers are not administrative. One side opines that that the decisions by the NPA in the exercise of its prosecutorial functions do not fall into the realm of administrative law since section 259 of the Constitution states that the office of the Prosecutor-General does not form part of the Civil Service Commission. [272] The Civil Service Commission is the administrative branch of Government, according to section 199 of the Constitution.[273] Having established that the exercise of prosecutorial powers is not reviewable under administrative law, the next discussion will venture to look at the reviewability of prosecutorial powers under the principle of legality.

3 8 Nature of review under the principle of legality

There are some founding values and principles that are listed in the Constitution of Zimbabwe. These founding values include the supremacy of the Constitution, rule of law and fundamental human rights and freedoms.[274] These founding values are the pillars on which the nation stands. To protect fundamental human

[272] Section 259 of the Constitution of the Constitution of Zimbabwe 2018.
[273] Section 199 of the Constitution of Zimbabwe
[274] Section 3a, b and c of the Constitution

rights and the supremacy of the Constitution, it is important that the rule of law be supreme. Under the rule of law there should not be any exercise of power that is beyond constitutional scrutiny.

Where prosecutorial powers cannot be reviewed under the administrative law, they should at least be reviewable in terms of the Constitution. In terms of the Constitution, under the principle of legality wide discretionary powers include executive powers that should be brought to check. Legality under criminal law ensures that neither the prosecutor nor the accused should suffer any undue prejudice.[275]

The independence of the judiciary and the criminal justice system including the judges and the prosecutors play an important role in the strengthening of the rule of law.[276] The principle provides against the abuse or arbitrary use of power or an oppressive government.[277] To avoid abuse of power, the law must be couched in terms that are so clear that any person would understand what they should or should not do. This means that the law must not give unfettered discretion. In criminal law, the principle of legality provides for the primacy of the law in criminal procedure. This ensures that neither the state prosecution nor the accused are exposed to arbitrary bias.[278] Further legality holds that no person is above the law.[279] It means that ignorance of the law is not a defence.[280]

Legality comes into play with regard to prosecutorial powers because of the wide discretion that the prosecutors have regarding making a decision to prosecute. If their powers are not subject to any checks and balances, they can easily abuse their powers to the detriment of citizens' rights. Such checks and balances are conducted through judicial review.

---

[275] Principle of Legality in Criminal Law available at https://www.lectlaw.com/mjl/cl015.htm accessed 21 August 2018.
[276] Independence and Accountability of the Prosecution *ENCJ report* 2014-2016
[277] Rautenbach & Malherbe *Constitutional Law* (LexisNexis Butterworths 1996) 68.
[278] Principle of Legality in Criminal Law available at https://www.lectlaw.com/mjl/cl015.htm accessed 21 August 2018.
[279] Principle of Legality in Criminal Law available at https://www.lectlaw.com/mjl/cl015.htm accessed 21 August 2018.
[280] Principle of Legality in Criminal Law available at https://www.lectlaw.com/mjl/cl015.htm accessed 21 August 2018.

In the *Telecel* case, the court found that the decision not to issue a certificate *nolle prosequi* was wanting of legality. The court's decision was based on the fact that since the Prosecutor General had refused to prosecute, he should have gone further to establish whether the private person met the other requirements in s 13 of the Criminal Procedure and Evidence Act. However, the Prosecutor General went on to refuse to prosecute without making such an assessment. This amounted to abuse of his power to refuse prosectution. Commenting on the importance of legality, the court looked at the *Affordable Medicines Trust & Others* v *Minister of Health & Others* casewhich stated that:

> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.' [281]

Making reference to the principle of legality, the court interpreted that the use of the word 'shall' in section 16 of the Criminal Procedure and Evidence Act means that the provision is peremptory, and that the Prosecutor General is compelled to issue the certificate. The court also found the same peremptory provision in section 12 (1) (d) of the National Prosecuting Authority Act which states that the Prosecutor General 'shall issue certificates *nolle prosequi* in accordance with the Criminal Procedure and Evidence Act [*Chapter 9:07*], to persons intending to institute private prosecutions, where the Prosecutor-General chooses not to prosecute.'[282] Considering that there was, a law couched in mandatory terms, the prosecutor was entitled to follow this route.

The Prosecutor-General in the *Telecel* case was refusing to comply with the law that he had not challenged. However, all laws are in effect until abrogated.[283] There is a presumption that all laws and administrative acts are valid until an order of a

[281] *National Director of Public Prosecutions and Others* v *Freedom Under Law* 2018 (1) SACR 436 (GP)
the court cited the *dictum* of Ngcobo J in *Affordable Medicines Trust & Others* v *Minister of Health & Others 2* 006 (3) SA 247 (CC) para 49.
[282] Section 12 (1)(d) of the National Prosecuting Authority Act [*Chapter7:20*].
[283] *Econet Wireless (Pvt) Ltd* v *The Minister of Public Service Labour and Social Welfare & Others [Civil Appeal (SC 31-16).*

competent court declares them otherwise.[284] The court came to the conclusion that the Prosecutor General has discretion in deciding whether to prosecute and not to prosecute and once he makes that decision, the discretions ends and he has to comply with the law and issue the certificates *nolle prosqui* once the intended private prosecutor has satisfied the criterion of substantial and peculiar interest.

It is interesting to note that there are limits to the powers of judicial review under the principle of legality. This is highlighted in the *Telecel case* where the court mentioned reviewability on the grounds of illegality and rationality. The next question then to what extentcan the court replace the decision of the Prosecutor-General?

3 9 The parameters of judicial review under the principle of legality

The Court in the *Telecel* case referred to the *Council for Civil Service Unions* v *Minister for the Civil Service* case, which it called the *locus classicus* on judicial review.[285] In this case the court listed the grounds of judicial review as procedural impropriety, irrationality, and illegality. Illegality means that 'the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it.' By irrationality the case mentions the ground of review that the decision was:

> 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

By procedural impropriety the court mentioned that it meant 'failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'[286] These same principles were also highlighted in the *Tsvangirai & Anor* v *Registrar-General & Ors* case, where the court stated that the court cannot interefer with the decisions of public officials who serve in the absence of legality, rationality or procedural impropriety.[287]

---

[284] Black *Handbook on the Construction and Interpretation of the Laws* (West Publishing Company1911) 10.
[285] *Council for Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL).
[286] *Council for Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL) 950-951.
[287] *Tsvangirai & Anor* v *Registrar-General & Ors* 2002 (1) ZLR 251 (H).

Under the principle of legality, there is a minimum principle that is called rationality. This means that all decisions falling outside administrative law must at least be rational. The court in the *Telecel* case refused to use the rationality test in establishing whether the Prosecutor General was correct in his assessment of whether to prosecute or not. The court stated that 'dealing with the irrationality ground invoked by the appellant, I do not think that the respondent's assessment of the evidence against the accused persons in question can properly be subjected to review.'[288]

This test was used in the *Patriotic Front-Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs,* where the question that fell for resolution was whether the courts could test the validity of anything done by the President.[289] Dumbutshena CJ analysed the English jurisprudence on the reviewability of prerogative powers and came to a conclusion that the test for rationality is intrusive on the wide discretion of the President.[290]

The same was held in the *Telecel* case, where the court held that the assessment of the evidence by the Prosecutor General against the accused could not properly be subjected to judicial review. The reasoning was that the function and the wide discretion given to the Prosecutor-General forms 'part of his constitutional prerogative and cannot ordinarily be questioned by the courts'[291]

For the test of rationality, Zimbabwe has adopted the *Wednesbury* approach and this is that that the decision will be reviewable if the decision is so outrageous in its defiance of logic or accepted standards that no reasonable person who has applied his mind to the question to be decided would have arrived at that decision.[292] This formulation of rationality seems to take the form of reasonableness as a ground of

[288] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.
[289] *Patriotic Front-Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC).
[290] *Patriotic Front-Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC) 325-326.
[291] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.
[292] *PF (ZAPU) v Minister of Justice* 1985 (1) ZLR 305 (S). See also *Rushwaya* v *Minister of Local Government* S-6-87 and *Affretair* v *MK Airlines* 1996 (2) ZLR 15 (S).

review. The problem that arises is that reasonableness is concerned with the correctness of the decision; it goes into the merits of the decision and can have the effect of unjustifiable intrusion by the court.[293]

3 10 Independence of the NPA and the separation of powers

The overriding principle determining the extent of judicial review of prosecuting powers is the separation of powers. The court's decision to order that the Prosecutor-General to issue the certificate *nolle prosqui* is often challenged by scholars, as a decision that upsets the separation of powers by some authors. In a constitutional state, the idea of institutional independence is based on the theory of the separation of powers, which provides checks and balances for the rule of law. Judicial review of the exercise of power by state authorities and public authorities raises the question of judicial interference in the running of independent state bodies.

If a system is to succeed in the promotion of the rule of law, it has to have an independent prosecution that is impartial and ready to prosecute any crime no matter who has committed it and do so without fear of their decision being overturned.[294] This is because where prosecutors are biased or are impartial, the criminal justice system becomes biased too and the delivery of justice is affected, leading the public to lose confidence in the justice system and can take matters into their own hands leading to further outbursts of violence.[295] Separation of powers also means that the court in its exercise of judicial review should not infringe on the powers given to the NPA.

Institutional independence means that the NPA must be independent of the other branches of tate like the legislative, the judiciary and the executive. This means that the NPA should be able to control its own administration and matters that relate to its operations independently. Other aspects of institutional independence that promote

[293] *African Tribune Newspapers (Pvt) Ltd & Ors* v *Media & Information Commission & Anor* 2004 (2) ZLR 7 (H)
[294] Independence and impartiality of judges, prosecutors and lawyers *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* available at https://www.ohchr.org/Documents/Publications/training9Titleen.pdf accessed on 28 August 2018.
[295] UN doc. E/CN.4/2000/3, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*, para. 87.

the separation of powers have been alluded to above. These include the independence of individual prosecutors, financial independence and freedom from the appointment and dismissal by the executive officials.

In cases of disputes between any state parties however, the Judiciary, is endowed with to determine what the law is and how it should be applied in the dispute.[296] Whilst interpreting the law it was undertaking its duty as established in the *R* v *Home Secretary, Ex Parte Fine Brigades Union* case which defined the doctrine of the separation of powers, stating that:

> 'It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.'[297]

The question to be answered now is whether there is interference with the separation of powers when a court orders an independent institution like the NPA to follow a certain course. The court in *R* v *Home Secretary, Ex Parte Fine Brigades Union* seems to have answered this question when it stated that when the court interprets a law that compels someone to do something it is not the court that compels them but the law thus fulfilling the rule of law.[298]

In his functions both the leader of the NPA and the other prosecutor's independence is provided for, "the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well-connected the rich and the peddlers of political influence".[299] It stands to reason that the NPA is entitled to professional independence and the courts are not allowed under the separation of powers to interfere intrusively with prosecutorial decisions or seize these powers or overtake the NPA in exercising its discretion to prosecute or not to prosecute.

---

[296] Rautenbach: *Constitutional Law* 4th edition (LexisNexis Butterworths 2003) at p. 78.
[297] *R* v *Home Secretary, Ex parte Fine Brigades Union* [1995] 2 AC 513.
[298] *R* v *Home Secretary, Ex parte Fine Brigades Union* [1995] 2 AC 513.
[299] *S v Yengeni* (A1079/03) [2005] ZAGPHC 117 (11 November 2005).

3 11 Private Prosecutions and the independence of the NPA

Although the Prosecutor General has the right to prosecute in Zimbabwe, he has a duty also to issue a certificate of *nolle prosequi* to an individual who has a substantial interest in the matter whereby they wish to pursue private prosecutions. There has already been a successful case of private prosecution in Zimbabwe. This was the case in the *Telecel Zimbabwe v Attorney General.*

Section 13 of the Criminal Procedure and Evidence Act states that any party may institute private prosecution. In order for a party to successfully pursue private prosecutions certain requirements should be met and these include that, the Prosecutor General must have issued a certificate stating that he has refused to prosecute and this is called the certificate *nolle prosequi*.[300] The use of the term 'shall' in the Act means that the Prosecutor General is obliged to issue the certificate to the private party who requests for it.

Gubbay J in *Levy* v *Benatar* summarised the requirements in section 13 of the Criminal Procedure and Evidence Act stating that the private party concerned must show the following;[301]

(i) some substantial and peculiar interest,
(ii) in the issue of the trial,
(iii) arising out of some injury,
(iv) which he individually has suffered,
(v) in consequence of the commission of the offence

The case of *Barclays Zimbabwe Nominees (Pvt) Ltd* v *Black* involved the question of whether the term "private prosecution" would include private prosecution by a company[302]. The question was whether a juristic person could pursue private prosecution. The court found that the term private could only mean a natural person. 'Private' denotes personal or natural rather than artificial according to the 2nd Edition of the Oxford dictionary.[303] This was after reading section 7(1) (a) of the Criminal

[300] Section 16(1) of the Criminal Procedura and Evidence Act Criminal Procedure and Evidence Act (Chapter 9:07).
[301] *Levy* v *Benatar* 1987 (1) ZLR 120 (S) at 126F.
[302] *Barclays Zimbabwe Nominees (Pvt) Ltd* v *Black* 1990 (4) SA 720 (AD).
[303] *Oxford Dictionary 2nd* (Oxford University Press 1989).

Procedure Act No. 51 of 1977 which is the equivalence of section 13 in the Criminal Procedure and Evidence Act.

The position that private bodies can also pursue private prosecutions was followed in the *Telecel case.* The court took a broad interpretation of the term party used in section 13. Using section 3 (3) of the Interpretation Act, the court found that the law maker did not intend to limit private prosecutions to natural persons. It stated that the substantial interests required in section 13 for private prosecutions could be purely economic and these were interests recognisable in law.

The Prosecutor General has a wide discretion in making his decision. It means that where a party fails to show these then a certificate may not be issued for none-prosecution. To force the Prosecutor-General to do so gives rise to issues of his independence. It should be noted that according to section 20 of the Criminal Procedure and Evidence Act, the Proscutor General can still apply for the proceedings to stop for him to take over the proceedings or institute them and public instance or stop them completely.

The issue still stands of his independence whereby he is approached by a party who has a substantial interest, the discretion of the Prosecutor General is forfeited, and he has no choice but to issue a certificate *nolle prosqui*. The court found the decision not to prosecute to be reviewable and the court looked at case law with regard to the reviewability of administrative actions on grounds of reasonableness and rationality.[304] The Criminal Procedure and Evidence Act has now been amended and excluded juristic persons from applying for a certificate *nolle prosqui*.[305]

[304] Mujuzi, 'Private prosecutions in Zimbabwe Victim participation in the criminal justice system', 2016 (56) *South African Crime Quarterly* at 42.
[305] Section 16 of the Criminal Procedure and Evidence Act Criminal Procedure and Evidence Act (Chapter 9:07).

3 12 Conclusion

The chapter sought to establish the position of Zimbabwean law with regard to the independence of the NPA as the prosecutorial authority of Zimbabwe. It sought further to establish the forms of independence of the NPA that can be found in Zimbabwean law. The chapter also sought to bring out the key players from whom the NPA ought to be independent from. Further the chapter sought to bring out the accountability of the NPA. Whilst the NPA should be independent, it is established by law and as such there are mechanisms established to ensure that the NPA exercises its powers within the confines of the law. The chapter sought to discuss judicial review as a mechanism for the accountability of the NPA.

As one of the objectives of the chapters, the chapter sought to discuss the nature of judicial review of prosecutorial powers. Under this, the chapter sought to answer whether prosecutorial powers are reviewable under administrative law and if not whether review under the principle of legality will suffice. At this juncture, the chapter sought to establish whether judicial interference under the rule of law in the form of judicial review is justified and does not infringe on the independence of the NPA. Finally, the chapter sought to establish the concept of private prosecutions in relation to prosecutorial independence paying particular attention to the separation of powers doctrine.

The chapter managed to illustrate that there are provisions in the Constitution, the Act and other statutes that promote the establishment of an independent NPA. It was pointed out that the NPA should be institutionally independent, financially independent, and politically independent and that the individual members of the NPA should be independent. For institutional independence, it was discovered that it encapsulates functional independence for example that the functionaries of the NPA should not perform any other duties except those of prosecution. It was discovered that the Constitution of Zimbabwe states that the power to prosecute lies in the NPA and that no other organ or institution should assume this function.

To further strengthen functional independence, it was found that only the prosecutors in the NPA are able to conduct public prosecutions and these are supposed to be liable and accountable only to the NPA. It was discovered under the subheading 3(3) that as a means of functional independence the individual members of the NPA is subject to disciplinary hearing structures provided for in the NPA. No-one outside the NPA can dismiss the individual members or interfere with their daily work.

Also, functional independence was found that the independence of the Prosecutor-General's office was important for the independence of the NPA, as a leader of the NPA, if he was not independent it translated that the NPA was not independent. The chapter found the independence of the Prosecutor general entrenched in the provisions that provided for a fixed term of office and a salary that could not be reduced during his term of office. Independence of the Prosecutor General was found to be threatened by the much power given to the President on the appointment of the Prosecutor-General. Where the President was not satisfied with the list provided to him by the JSC recommending appointment for the position of Prosecutor-General it was found that he could request for a new list.

Looking at the independence of the individual prosecutors, it was observed that the prosecutors owe a duty to account to the public and to the law. It was found that prosecutors are expected to show high levels of professionalism and conduct themselves ethically. It was found that there is a duty on the prosecutors to act fairly in the exercise of their powers. Further, it is provided for in the Constituent and the Act that the prosecutors should act impartially, without fear, favour or prejudice. Prosecutors in the NPA are supposed to conduct their duties free from political influence or any bias or impartiality.

The chapter went on to discuss political independence of the NPA which also supports institutional independence. The chapter outlined that the NPA is at the risk of interference by the more political organs of the state like the parliament and the executive. It was discovered that that the NPA reports to parliament through the ministry of justice, and this could be a form of interference. Further interference of the Parliament was seen in the provisions that provided that parliament through a legislative enactment can authorise any other body or organ to conduct public

prosecutions and this was also seen as a weakness in the promotion and the protection the independence of the NPA.

Touching on the interference of the executive, it was seen more to be in the way that the Prosecutor-General is appointed. It was discord that the President appoints the Prosecutor- General on the strength of the recommendations from the JSC and where the president is not happy with the list provided by the JSC he can request the provision of another list. Ultimately it means that the President will choose from a list of his choice enhancing interference of the president with the helm of prosecutions thus infringing on the independence of the NPA.

Interference by the judiciary in the affairs of the NPA became a huge part of this chapter. Whilst the judiciary is a non-political organ of state, it has a duty at law to ensure that all power is exercised within law. It was discovered in this chapter that whist the NPA is independence, it has to be accountable. As a mechanism of keeping the NPA accountable, judicial review of the decision of the NPA was found to be a function of the judiciary that has a bearing on the independence of the state.

Judicial review is a mechanism that is used to review the exercise of administrative power. As such, the chapter delved into the question of whether the power to prosecute can be classified as administrative power. Some arguments indicated that prosecutorial power was quasi-judicial in nature some stated that the power was administrative. Had he powers to prosecute been found to be quasi-judicial in nature then then it would be justifiable to review the exercise of the powers for adherence with procedural fairness.

The Administrative Justice Act was explored, only to find that it does not clearly define administrative functions and its wide discretion of administrative functions leaves enough room to slot in prosecutorial functions as administrative functions. The chapter then looked at two Constitutional Court cases that dealt with the reviewability of the prosecutorial powers to prosecute or not to prosecute which are, *Telecel Zimbabwe (Private) Limited* and the *In Re: Prosecutor General of Zimbabwe*. The two Constitutional Court judgements first instance never looked at the question of whether the power to prosecute or not to prosecute was administrative in nature.

Both cases in the *Telecel Zimbabwe (Private) Limited* and the *In Re: Prosecutor General of Zimbabwe*, applied the principles of the AJA and used the grounds of judicial review stated in the AJA without hesitation and as if it was not contested whether the decision to prosecute or not to prosecute was administrative or not. In conclusion it seemed the constitutional court is certain that the power is administrative in nature.

The two cases also brought interesting discussions on the justifiability of judicial review of the decision to prosecute or not to prosecute highlighting on the wide discretion of the members of the NPA in making these decisions. The cases looked at whether the Prosecutor-General had unfettered discretion to prosecute. The prosecutor in both cases argued that s260 of the Constitution gave him unfettered discretion in matters concerning public prosecutions and judicial review was unjustified.

In the two cases the court ordered that the Prosecutor-General should have issued certificate of *nolle prosequi* indicating that he had denied prosecution. It was found that the court in the two cases made a decision that had the effect of replacing the decision of the Prosecutor- General with that of the court. However, it was found that the approach of the court was correct in finding that although the Prosecutor-General had wide discretionary powers, these powers were given by the law and were owed to the law that they had to be exercised within the parameters of the law.

The issue of the justifiability of the review of prosecutorial powers gave rise to the idea that even if it was to be found that the exercise of prosecutorial functions was not administrative in nature and the power that the NPA was unfettered, it could still be reviewed under the principle of legality. The chapter concluded that although the two cases mentioned above did not dwell on the issue of whether prosecutorial powers are administrative or not, there was evidence which showed that they were not. This evidence is in the Constitution itself which states in section 259 that prosecutorial powers are not part of the Public service Commission which is an administrative arm of government. It was found that under the principle of legality, the decision to prosecute or not to prosecute would be reviewed on ground of rationality, procedural fairness but not on grounds of reasonableness.

The chapter found that judicial review for reasonableness would have the result of getting into the merits of the decision made by the prosecutor thereby replacing the decision of the NPA by that of the court. In these circumstances it will be the court which will be infringing on the exercise of the prosecutorial powers thus interfering with the independence of the NPA. To this end, it can be concluded that judicial review of the decision to prosecute under the principle of legality needs to be limited only to the extent that the review does not have the effect of the courts usurping the powers of prosecution.

Lastly the court looked at the issue of private prosecutions that after the NPA has declined prosecutions they have to give a certificate of non-prosecution to a party who meets certain criteria so that they may conduct private prosecutions. It was identified that private prosecution has the effect of limiting the independence of the NPA. The subject was discussed in line with the principle of the separation of powers. The NPA is an institution duly endowed with the powers to prosecute, it was found that to authorise a private individual to prosecute will serve as dilute that power or promoting interference with the wide discretion to prosecute or not to prosecute.

CHAPTER 4

THE SOUTH AFRICAN POSITION

4 1 Introduction

Chapter three focused on the independence of the National Prosecutions Authority (NPA) in Zimbabwe. The chapter analysed various Constitutional and legislative provisions that provide for such independence. Furthermore, the chapter also analyses the position of judicial review in relation to the decision not to prosecute. Judicial review was discussed both under the administrative law and under the principle of legality. At the conclusion of the chapter, the issue of private prosecutions, in relation to the independence of the national prosecutorial authority of Zimbabwe, was considered. At the end of the chapter, we looked at the issue of private prosecutions. The separation of powers doctrine formed part of this discussion as it came across in the general ambiance regulating the relationship of the NPA and the other organs of state.

In this chapter, at similar approach is followed as in the previous chapter. This chapter will look at the institution responsible for prosecutions in South Africa. Before delving deep into the state of the current prosecutorial authority, the chapter will provide a historical overview concerning the prosecutorial authority before the advent of the post-colonial Constitution of South Africa. A brief look at the politics and law before the advent of the Constitution is analysed, paying particular attention to the nature of the prosecuting authority during this period and its relationship with other organs of state and how it influenced the independence of the prosecutorial authority.

Thereafter, the chapter will consider the institution responsible for prosecutions, as provided for in the constitutional era and the laws that govern the prosecutorial authority. It will focus on the law that provides for prosecutorial independence in South Africa, especially independence from the other organs of state and branches of government. A special consideration is given to the independence of the NPA from the executive, which is a powerful and politically inclined organ of state. In the same

manner, the chapter will also take into account how the Constitution and relevant laws provide for the independence of individual prosecutors.

This chapter will also look the accountability of the NPA as provided in the Constitution and other sources of law including judicial precedence. Accountability will be discussed in relation to the NPA's responsibility to Parliament and to the Executive. Since the principle of separation of powers demarcates between the executive, parliament and the judiciary, accountability to the judiciary will also be discussed. This form of accountability is accountability to the law since the courts are the custodians of the Constitution. At that stage, the courts' oversight role over the exercise of all public power will be discussed and this oversight role will be discussed in the form of the power of judicial review.

The chapter will then look at the reviewability of the prosecutorial powers to prosecute. It will look at whether the powers to continue or discontinue prosecution are reviewable under administrative law or under the Constitution and as such, review under administrative law is analysed. The review under the principle of legality is one of the aspects that are discussed with the purpose to establish the South African position with regards the reviewability of the NPA's powers to either continue or discontinue with prosecution. Accordingly, the chapter will analyse relevant case law that dealt with the courts power to review a prosecutor's decision to not prosecute. The discussion of case law will also cover the superior courts' understanding on whether such review should be done under administrative law or under the rule of law.

4 2 The history and background of the South African criminal justice system

South Africa has a mixed legal system meaning that it derives its origins from English common law systems and the civil systems of Europe.[306] Therefore, the law is comprised of the common law, statutory law and the Constitution of the Republic of

[306] History and back ground 'Supreme court of Appeal' available at http://www.justice.gov.za/sca/historysca.htm accessed on 3 January 2019.

South Africa,1996.[307] The latter being the supreme source of law. The Constitution of the Republic of South Africa came into force in 1996 and it emphasises the supremacy of the Constitution and any law that is inconsistent with the Constitution is invalid to the extent of such inconsistency.[308]

The South African common law is derived from the Roman-Dutch law as applied in the Cape during the 17th and the 18th centuries. The common law foundations are developed through judicial precedent.[309] In South Africa, the decisions of superior courts are binding on the lower courts meaning judicial precedence is in itself a source of law. The Constitution of the Republic of South Africa is explicit in its statement that the courts have a role to develop the common law. [310]

Before looking at the prosecutorial authority as an institution, it is important to provide context by briefly considering the history and the development of the prosecuting power in South Africa. Before 1926, the responsibility to prosecute rested in the Attorney-General, who was free from any political control due to strict autonomy.[311] The office of the Attorney-General was introduced in 1928 with the responsibility of handling prosecutions.[312] At that time, there had been no notable interference or intervention in the exercise of prosecutorial powers by individuals or the state.

The Attorney-General acted as a public official and could hold other offices such as Chief of Police or Prisons and was at times allowed to practice privately.[313] However, through the 1935 Amendment, the office of the Attorney-General was placed under the control of the minister who was given the power to reverse their decisions. It is significant to note that during this period there was no separation of powers between

[307] Constitution of the Republic of South Africa, 1996.
[308] Section 2 of the Constitution of South Africa, 1996.
[309] History and back ground 'Supreme court of Appeal' available at http://www.justice.gov.za/sca/historysca.htm accessed on 3 January 2019.
[310] History and back ground 'Supreme court of Appeal' available at http://www.justice.gov.za/sca/historysca.htm accessed on 3 January 2019.
[311] Redpath 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa' 2012 (186) *ISS Monograph* at 9.
[312] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 5.
[313][313] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 5.

the Attorney-General and the executive.[314] They were appointed according to province and this resulted in many systems of prosecutions with one Attorney-General in charge of every province.[315]

It is important to note that Ministerial control over the office of the Attorney-General increased as a result of the General Law Amendment Act of 1957 and Section 3(5) of the Criminal Procedure Act 51 of 1977. These provisions permitted the minister to not only reverse the decision by the Attorney-Generals, but he could at times '(himself) in general or in any specific matter, exercise any part of such authority and perform any of such functions' of the Attorney-General.[316] This was the introduction of strict control of public prosecutions by the executive.

The President of South Africa could appoint the Attorney-General(s) for the provincial divisions and the minister appointed the deputies and coordinated the functions of the Attorney-General.[317] An Attorney-General could be removed from office by the President, only on agreement with the two houses of Parliament.[318] During this period South Africa had parliamentary supremacy and this translated to the supremacy of politics, because many of the members of the parliament were from a single political party.

Since South Africa was under the oppressive rule of the apartheid government until 1994, laws were not applied equally to the citizens. There was no democracy, general freedoms or rights, especially, for the coloured and black citizens of South Africa primarily because the apartheid government served the interests of the white minority. After a prolonged war, the apartheid government gave in to the demands of the African National Congress (ANC), which was and remains the leading political party for the

[314] Du Plessis, Redpath & Schönteich, M. (2008) 'Report on the South African National Prosecuting Authority' in Promoting Prosecutorial Accountability, Independence and Effectiveness, Sofia: Open Society Institute, p. 344.
[315] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 6.
[316] General Law Amendment Act of 1957 and Section 3(5) of the Criminal Procedure Act 51 of 1977
[317] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 6.
[318] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 6.

majority of coloured and black South Africans. The demands during the liberation struggle were for a new South Africa that was democratic and all inclusive.

In 1992 the apartheid government, sensing their demise, attempted to remove political control over the executive by removing the power of the minister to control prosecuting powers. This was due to the fear that the new government of the ANC would have control over the prosecutorial authority through the minister in the new South Africa. The ANC government, however, overturned this decision by re-establishing the control of the minister over the prosecutions authority by including provisions in the final Constitution that provided for a single prosecutorial authority elected by the executive.[319] This position was retained where the Minister of Justice controls the prosecutorial authority. It is appreciated that at this early stage of democracy the prosecutorial authority was a cause for contention for political power, showing inherent susceptibility to political abuse, which could affect its independence.

Under the interim Constitution, that was a transitional between apartheid and the new Constitution, the power to prosecute was vested with the Attorney-General office.[320] The Attorney-General had power to 'institute criminal proceedings on behalf of the state.'[321] According to the interim Constitution the 'powers and functions of an attorney-general,' prescribed by law and the Criminal Procedure Act 51 of 1977 were still in force read together with its section 3(5) which allowed the minister to reverse or take over public prosecutions.

The courts had respect for these offices during the transitional period and rarely interfered and praised the prosecutorial authority.[322] It is commended that the Attorney-General(s) were independent during this period and that they could argue the constitutionality of legislation against government, resulting in the government appointing lawyers to argue against the Attorney-General(s) where they differed in

[319] Redpath 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa' 2012 (186) *ISS Monograph* at 10.
[320] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 6.
[321] S108 of the Constitution of the Republic of South Arica Act 200 of 1993.
[322] *S v Hassin* 1972 (1) SA 200(N).

opinion.[323] The work of the Attorney-General (s) under the interim Constitution was highly praised, especially in their involvement in capital punishment cases.[324]

A lengthy process was conducted to come up with the Constitution of the Republic of South Africa, 1996. The 1996 Constitution provides for the prosecutorial authority. The new Constitution came with a lot more new freedoms and principles for South Africa that had never been enjoyed before. It contained an extensive Bill of Rights, it enforced democracy and amongst its founding values were the supremacy of the Constitution and the rule of law.

The Constitution of the Republic of South Africa is transformative and it includes political rights, socio- economic and environmental rights. The Bill of Rights aim to promote values such as openness, dignity, equality and freedom. The Constitution and its values are based on the protection of rights of the people mainly because of the history of apartheid that was rife with abuses of fundamental human rights.[325] Horn commended that the prosecutorial power was one of the oppressive instruments that the apartheid government used through the Criminal Procedure Act that gave the minister direct control.[326] South Africa has become a champion of democratic governance through its laws as it attempted to undo the effects of apartheid rule.

It is noteworthy that under the new Constitution, section 35 of the Criminal procedure Act was declared unconstitutional in the case of *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* because it allowed the Minister to exercise some of the powers of the prosecution authority.[327] The Constitution also emphasises the importance of International law in South Africa,that becomes enforceable once it has been domesticated.[328] Customary international law is also recognised as law unless if it is

[323] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 6.
[324] See *S v Makwanyane and Another* 1995 (3) SA 391.
[325] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672.
[326] Horn The independence of the prosecutorial authority of South Africa and Namibia: A comparative study
[327] *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC) at 301.
[328] History and back ground 'Supreme court of Appeal' available at http://www.justice.gov.za/sca/historysca.htm accessed on 3 January 2019.

inconsistent with the Constitution or an Act of parliament to that extent that the courts in the interpretation of the law must prefer the interpretation that is consistent with the international law over that which is not.[329]

In the case of *Glenister v President of the Republic of South Africa and Others,* [330] the Constitutional Court of South Africa highlighted that:

> 'Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.'[331]

Section 39(1) (b) of the Constitution supports the above position as it notes that the courts, in their interpretation of the law, are required to consider international law. As such South Africa has an affinity to adhere to international standards of law.

4 3 The National Prosecuting Authority of South Africa

A single independent prosecution authority replaced the former Attorney-General (s) in the new Constitution. Section 179 of the Constitution provides for an independent national prosecution authority, creating a single prosecutorial authority and dispensing with the previous multiplicity of prosecutorial authorities based in the various provinces. To give effect to section 179, the legislature enacted the National Prosecutions Authority Act 32 of 1998 (NPA Act), which establishes the National Prosecution Authority (NPA). The National Prosecuting Authority (NPA) is responsible for prosecuting criminal offences in South Africa.[332] Therefore, it is the Constitution together with national legislation, which gives the NPA the power to prosecute.

There was a debate during the Constitution making process on whether the prosecuting authority should be single administering the whole country or appointed according to provinces, more like the old system. Some who took part in the process

[329] History and back ground 'Supreme court of Appeal' available at http://www.justice.gov.za/sca/historysca.htm accessed on 3 January 2019.
[330] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)
[331] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 97
[332] Powell 'Court fixes some of the flaws in South Africa's prosecuting authority' *The Conversation* August 2018.

argued that a single independent prosecutions authority had the effect of eroding Principle VI of the Interim Constitution[333] that provided for 'separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'[334] This contention rose from the provision allowing the President as the head of the Executive to appoint the National Director of Public Prosecutions (NDPP).

The Constitutional Court dealt with this matter at conception of the Constitution by stating that:

> '[t]here is no substance in this contention. The prosecuting authority is not part of the judiciary and CP [Constitutional Principle] 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.'[335]

Moreover, the court cited the guarantees of independence in the Constitution that provided for the enactment of legislation that ensures the NPA to exercises its powers without fear, favour or prejudice and the constitutional guarantee that 'any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.'[336] As a result, through the Certification judgement and many other deliberations by the team of constitutional law experts, resulted in South Africa having a single prosecuting authority.

Section 179 (1) of the Constitution provides for a single national prosecuting authority that is comprises of the National Director of Public Prosecutions (NDPP) as the head of the NPA, Directors of Public Prosecutions (DPP) and the ordinary prosecutors.[337] The NPA has the power to 'institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.'[338]

---

[333] Principle IV of the Interim Constitution of South Africa. 1993.
[334] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
[335] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
[336] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
[337] Section 179(1) of the Constitution of the Republic of South Africa 108 of 1996.
[338] Section 197(2) of the Constitution of the Republic of South Africa 108 of 1996.

Section 179(4) of the Constitution is particularly important as it provides that there must be national legislation that 'ensures that the prosecuting authority exercises its functions without fear, favour or prejudice.'[339] This section highlights the fundamental importance of prosecuting independence, as found in the Constitution and national legislation. The national legislation enacted to provide for such an independent NPA is the National Prosecuting Authority Act 32 of 1998 (NPA Act).

Section 24 of the NPA Act outlines functions of the NPA like the power to institute and conduct criminal proceedings. Although section 24 does not expressly indicate the power to discontinue criminal proceedings, the NDPP and DPP are authorised by virtue of section 20 (3) of the NPA Act to exercise the powers in section 20 (1), including the power to discontinue proceedings in terms of section 20 (1) (c). Furthermore, section 6 of the Criminal Procedure and evidence Act gives the DPP the power to stop criminal proceedings or withdraw charges.[340] The NDPP also has the power to review the decisions not to prosecute once these have been made.[341]

4 4 Independence of the NPA

In response to section 179 (4) of the Constitution that mandates that there must be national legislation that ensures that the national prosecuting authority acts without fear, favour or prejudice, the National Prosecutions Authority Act (NPA Act) was enacted.[342] The NPA Act reinforces that there is a single prosecuting authority according to section 179 of the Constitution.[343] There are many provisions both in the Constitution and the NPA Act that point to the independence of the NPA and some point to the risk of infringement of this independence. First and foremost section 179 (4) points out that it was the intention of the framers of the Constitution to have an independent NPA that would act without fear, favour or prejudice.

[339] Section 179(4) of the Constitution of the Republic of South Africa 108 of 1996.
[340] Criminal Procedure Act 56 of 1955.
[341] Section 179(50)(b) of the Constitution of the Republic of South Africa108 of 1996.
[342] Section 179(4) of the Constitution of the Republic of South Africa. 108 of 1996.
[343] Section 2 of the National Prosecuting Authority Act 32 of 1998.

To have an effective NPA, there is a need to have two things in place: structural independence and personnel with expertise and integrity. Structural independence is the way that an institution is designed including the legislation that governs it to prevent external influence especially from those in power. It means that the institution of the NPA needs to be independent from both within and external forces.

There are provisions in the NPA Act that seek to protect and to promote the independence of the NPA. As a starting point, section 32 (1) (a) of the NPA Act requires of every member of the NPA to serve impartially, in good faith, without fear, favour or prejudice subject only to the Constitution and the law. This ensures that individual prosecutors act independently and impartially ensuring their independence.

Furthermore, section 32 (1) (b) of the Act highlights that no person, organ of state, or employee of an organ of state may improperly interfere, hinder or obstruct the functions and the duties of the NPA. This refers or highlights the fear of interference with prosecutorial functions by other state organs like the executive. Moreover, according to section 22 (4) (f) of the NPA Act the NDPP must bring to the attention of the prosecutors the United Nations Guidelines on the Role of Prosecutors. Of importance is paragraph 4 of the guidelines indicating that it is the duty of the States to ensure that prosecutors exercise their duties without intimidation, hindrance, harassment or improper interference. All these sections in the NPA Act show that the legislature attempted to adhere to the Constitution that required national legislation to protect the independent of the national prosecutorial authority.

At an institutional level, the leader of the NPA has a 10 year term of office.[344] This promotes independence since a lengthy term of office reduces the fear of unemployment and offers job security. Other areas of importance that ensure the independence of the NPA are the financial independence in the Act. If any other individual or organ of State is directly responsible for the finances of the NPA, the risk of interference becomes high. To cater for financial independence, only an Act of Parliament can reduce the salaries of the NDPP.[345] This is because the NDPP's salary

[344] Section 12(1) of the National Prosecuting Authority Act 32 of 1998.
[345] Joubert (9th ed) *Criminal procedure handbook* (2009) 53.

is equal to that of a judge, determined by the President after recommendations from the Independent Commission for the Remuneration of Public Office-bearers and these must be approved by Parliament.[346]

Deputy Directors (DPP) are paid according to their grades and scales as determined by the Minister of Justice and the NDPP is only consulted.[347] A deputy director's salary may also not be reduced unless by an Act of Parliament.[348] The greatest threat to the independence of the NPA in South Africa is the power that the Executive has been given over the NPA, both through the Constitution and the NPA Act. Real independence of the NPA can only be possible if the NPA has political independence, whether from the executive or parliament but it is usually the executive that wields the most political power.

Independence of individual prosecutors in South Africa is not questionable. As mentioned earlier, provisions that enable for their remuneration are well structured, the salary of the NDPP cannot be reduced whilst in office and an Act of Parliament can only reduce the salaries of the other prosecutors. De Villiers indicates that the decision of the prosecutor should be made free from any political influence on any individual, the reason being that the decision must be made purely on legal grounds or criteria.[349] The submission is that only where a decision is made purely on legal criteria does it become non-partisan, impartial, fair and equal to all.[350] There is a contrast in this reasoning because the legislators have a duty to implement government policy making this decision more political than legal.[351]

Therefore, each prosecutor is held to high standards of ethical conduct and values like honesty and confidentiality. They are implored to diligently exercise their prosecutorial functions without any fear or favour. The utmost responsibility of the prosecutor is to

[346] S 2(1)*(a)* of the National Prosecuting Authority Act 32 of 1998 as read with s 2(4) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.
[347] Section 18(1) of the National Prosecuting Authority Act 32 of 1998.
[348] Section 18(6). National Prosecuting Authority Act 32 of 1998.
[349] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 256
[350] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 258
[351] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 258

ensure that procedural justice is extended to the accused.[352] The need for individual independence is the reason section 3 of the NPA Act states that every individual prosecutor:

> 'shall serve impartially and exercise, carry out or perform his or her duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.'

De Villiers calls prosecutors the gatekeepers of the criminal justice system as they must seek and do justice by protecting the innocent and charging the guilty.[353] Prosecutors must hold themselves with high regard, integrity and to act professionally at all times as an indication of accountability.

4 5 The NPA's independence from the Executive

The Constitution provides that every individual has 'a constitutional right to a prosecution that is independent from political influence.'[354] The Supreme Court of Appeal of South Africa has made it clear that the NDPP must be able to make decisions free from any political influence, as it should also be free from the influence of government.[355] The Constitutional Court has also made it clear that prosecutors are not supposed to be under the control of any organ of State.[356] However, from its inception, the Constitution states that 'the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.'[357] It means that the Minister of Justice exercises final responsibility over the NPA. This effectively places the NPA under the control of the Minister.

Section 33 of the NPA Act enforces ministerial control over the NPA by stating that at the request of the Minister the NDPP shall:

---

[352] American Bar Association *Model rules of professional conduct* 2007 Rule 3.8
[353] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 259.
[354] De Villiers 'Is the Prosecuting Authority under South African law politically independent? An investigation into the South African and analogous models', 2011 (74) *THRHR* 247 at 248.
[355] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 28.
[356] *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)* para 227.
[357] Section 179(6) of the Constitution of the Republic of South Africa 108 of 1996.

> '(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
> (b) provide the Minister with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
> (c) furnish the Minister with information with regard to the prosecution policy referred to in section 21(1)(a);
> (d) furnish Minister 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'[358]

The Act uses the term 'shall' which means that it is mandatory that the NDPP must furnish the minister with the required information and that the NDPP has no discretion to decline the provision of this information. This is a worrying provision as it places the NDPP under the direct control of the minister.

The minister is not the only member of the executive authority with excessive potential to erode the independence of the NPA. The President is also empowered to be directly involved in the business of the NPA. According to the NPA Act, the President must appoint the National Director of Public Prosecutions (NDPP) in accordance with section 179 of the Constitution.[359] Whilst the Constitution does not state who can qualify as the NDPP, the NPA Act states that the person must;

> *'(a)* possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and
> *(b)* be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
> (2) Any person to be appointed as the *National Director* must be a South African citizen.'[360]

After consulting with the Minister of Justice and the NDPP, the President may also appoint the Directors of Public Prosecutions (DPP).[361] After consulting with the Minister of Justice and the NDPP, the President may also appoint the various DPPs

[358] Section 33(2) of the National Prosecuting Authority Act 32 of 1998.
[359] Section 10 of the National Prosecuting Authority Act 32 of 1998.
[360] Section 9 of the National Prosecuting Authority Act 32 of 1998.
[361] Section 11 of the National Prosecuting Authority Act 32 of 1998.

at the various High Courts.[362] The President does not only have the power to appoint the NDPP, he also has the power to suspend and or remove the NDPP or any director if there are any investigations against him or her.

The President can also remove the NDPP and director from office if they are no longer fit to hold office, if they are incapacitated or if they suffer ill health.[363] After removal, the reasons for removal are sent to Parliament, which deliberates on them and make a recommendation whether the removal was justified or not.[364] On the appointment of the directors, Minister of Justice makes the appointments, while the NDPP is merely consulted.

It is apparent that there is a lot of accountability to political organs of State by the NPA in the form of control by the Minister and the President through the selection of the most senior officials in the NPA. The selection process and accountability to these political organs of state has led to some writers concluding that the NDPP has a high political status.[365]

All senior prosecutors are political appointees, the President appoints the NDPP and he appoints four people as Deputy Directors of Public Prosecution. The President also appoints the Directors of Public Prosecutions after consultations with the minister who is a politician and NDPP who is a political appointee.[366] The nature of South African politics is such that both the President and the minister are members of one political party bolstering political control over the NPA.

Succinctly put, it is always assumed that independence of the prosecution authority is independent from the executive since the executive government is the most powerful force that may feel less powerful if they cannot control criminal prosecutions.[367] There is a general fear of undue influence on prosecution in South

[362] Section 13 of the National Prosecuting Authority Act 32 of 1998.
[363] Section 12(6)*(a)* and 14(3) of the National Prosecuting Authority Act 32 of 1998.
[364] Section 12(6)*(c)* and S 12(6)*(d)* of the National Prosecuting Authority Act 32 of 1998.
[365] Du Plessis, Redpath & Schönteich 'Report on the South African National Prosecuting Authority' in *Promoting Prosecutorial Accountability, Independence and Effectiveness* (2008) (Sofia: Open Society Institute) 343 at 353.
[366] De Vlliers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) THRHR 247at 260.
[367] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 28.

Africa especially looking at the history of apartheid and political prosecutions.[368] Political prosecutions have always been the most critical they highlight the extent of independence the prosecuting authority has. Where more political prosecutions are pursued greater independence of the prosecuting authority is assumed.

Muntingh *et al* note that the fear of an independent NPA by the politicians in South Africa is worsened by the 'presidential presumptive', where seemingly criminal prosecutions for serious offences can now be instigated against a sitting President.[369] In such circumstances, it is clear why the highest power might want to exercise its control on the only one institution empowered to initiate a process that can send them to the gallows for breaking the law.

Besides these sentiments, Muntingh *et al* mention that prosecutorial independence should be understood more broadly as one that 'entails independence from inappropriate influence of any kind, including that by the government, a political party, the media or public opinion.'[370] It stands that independence refers to both internal independence of the individual prosecutors and external independence, for example from other organs of State.[371] Such independence should be understood in the context of the law and other principles ancillary to the exercise of power by the NPA.

Executive influence on the functions and the duties of the NPA worsen as the NDPP must determine policy to be observed in the prosecution process with the concurrence of the minister.[372] Although independence especially from the executive translates to independence of the NPA, there seems to be more provisions that bring the NPA into the proximity of executive manipulation.[373]

[368] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 9.
[369] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 10
[370] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 9
[371] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 10
[372] Section 179(5)*(a)* and *(b)*.
[373] De Vlliers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247at 260 at 248

The Ginwala Commission found that although the Minister of Justice did not control decisions around prosecution, the Minister had a veto over prosecution policy.[374] The veto is embedded in the fact that it is the Minister who tables the Annual Report of the NPA in parliament and he or she is responsible for formulating policy. Also, the NDPP has a duty to inform the minister in respect 'of any material case, matter or subject that is dealt with by the NPA in the exercise of its powers, duties or functions.'[375] Furthermore, much of the accounting responsibility of the NPA is vested in the Director-General of Justice and Constitutional Development.[376]

There has been a school of thought that ministerial responsibility does not translate to control. De Villiers indicates that there is difference between responsibility and control as the activities listed in section 33 (2) of the NPA Act, like arranging meetings, it does not affect political discretion. Furthermore, he indicates that none of the provisions in the Constitution and the Act provide the minister with prosecutorial discretion with regard to the prosecution of individuals.[377] De Villiers concludes that the minister does not interfere with prosecutorial discretion but rather ensures that it is exercised responsibly.[378] A similar sentiment was highlighted in *National Director of Public Prosecutions v Zuma*[379] that the Minister is entitled to be kept informed although he may not interfere with the prosecutorial decisions.

If this conclusion is unchallenged, the only problem to the independence of the NPA becomes executive influence of the President and his power to appoint and to dismiss the NDPP. The power to appoint the NDPP creates a risk that the President may choose a NDPP who is loyal politically and if he is not; with the concurrence of the largely ruling party Parliament, the President may remove the NDPP who is not

[374] 'Report of the inquriy into the fitness of advocate VP Pikoli to hold office,' 2008 available at http://www.justice.gov.za/commissions/2008_ginwala.pdf accessed on 6 January 2019 para 63.
[375] 'Report of the inquriy into the fitness of advocate VP Pikoli to hold office,' 2008 available at http://www.justice.gov.za/commissions/2008_ginwala.pdf accessed on 6 January 2019 para 65.
[376] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 21.
[377] De Vlliers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) THRHR 247at 260 at 258
[378] De Vlliers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) THRHR 247at 260 at 258
[379] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 32.

loyal.[380] A question arises, whether there is no real risk that the President will use his power to arbitrarily interfere with the functioning of the NPA, thereby infringing on its independence.

Muntingh *et al* notes that the entire top echelon of the NPA consisting of at least 14 positions appointed by the President and Minister of Justice without any input from other key stakeholders such as parliament, professional bodies or the public in general, posing a serious risk to independence of the NPA.[381] However, the challenge has somewhat been dealt with by the Supreme Court of Appeal. It has been found that the President's power to appoint the NDPP is not insulated from judicial scrutiny.

In *DA v President of South Africa*,[382] there had been an inquiry by the Ginwala Commission that looked into the fitness of Menzi Simelane's predecessor, Vusumzi Patrick Pikoli. This inquiry made a finding that MR Menzi Simelane was not a man of integrity. Regardless of this, the DA argued that the President only looked at Menzi Simelane's Curriculum Vitae and did not consider the findings of the Commission.[383] The court held that the appointment by the President of Menzi Semelane as NDPP was irrational as he failed to take the findings of the Ginwala Commission into consideration: findings which were negative against Menzi Simelane.[384]The decision to appoint Menzi was challenged and the question was whether the President had acted in accordance to section 9 (1) (b) of the NPA Act.
Section 9 (1) states that

> 'Any person to be appointed as National Director, Deputy National Director or Director must-
> *(a)* possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and

[380] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 12.
[381] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 15.
[382] *Democratic Alliance v President of the Republic of South Africa and others* 2012 (1) SA 417 (SCA).
[383] *Democratic Alliance v President of the Republic of South Africa and others* 2012 (1) SA 417 (SCA) para 5
[384] *Democratic Alliance v President of the Republic of South Africa and others* 2012 (1) SA 417 (SCA).

> *(b)* be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.'

The argument by the Democratic Alliance, the political party that challenged this decision was that Mr Menzi Simelane was not a fit and proper person in line with section 9 (1) (b). The contention was that the President was supposed to properly investigate whether Menzi Simelane was a fit and proper person although he met the other requirements in section 9 (1).

The legal challenge by the DA had three legal basis;

> '(a) The statutory requirement that the appointee to the position must be 'a fit and proper person' has to be objectively assessed, taking into account that he or she must discharge professional duties without fear or favour. Whether the President's power is classified as executive or administrative or otherwise, it must be exercised lawfully, which it is submitted was not done in the present case, in that the President failed to make a proper objective assessment of Mr Simelane's fitness for office;
> (b) The decision by the President to appoint an NDPP constitutes administrative action, subject to review in terms of the Promotion of Administrative Justice Act 3 of 2000, and because the President did not make an objective assessment of Mr Simelane's fitness for office, his decision falls to be reviewed and set aside;
> (c) To the extent that the President's decision constituted executive action as contemplated by s 85(2)(e) of the Constitution, it falls to be set aside on the basis that it was unlawful, irrational, arbitrary, biased, based on a ulterior motive and inconsistent with the Constitution.'

The court *a quo* dismissed the DA's case indicating that there was no basis on which the court would interfere with the President's power to appoint the NDPP.[385] However, on appeal the Supreme Court of Appeal found the independence of the NPA is very important as highlighted in the *Pikoli v The President*[386]and emphasised that:

> 'As the head of the [NPA] the NDPP has a duty to ensure that this prosecutorial independence is maintained. It follows that a person who is fit and proper to be the NDPP will be able to live out, and will live out in practice, the requirements of

[385] Democratic Alliance v President of the Republic of South Africa and others 2012 (1) SA 417 (SCA) para14.
[386] *Pikoli v The President* 2010 (1) SA 400 (GNP).

prosecutorial independence. That he or she must do without fear, favour or prejudice.'[387]

As such, the Supreme Court of Appeal overturned the decision to appoint a NDPP indicating that the President does not have unfettered discretion. Accordingly, the President is accountable to the law in the appointment of the NDPP. Therefore, it stands that the appointment of the NDPP by the President is not an absolute discretion, as the appointee must be a fit and proper person to hold office. The Constitution does designate that the person must be fit and proper in the President's mind, but this is supposed to be an objective assessment.[388]

The court in the DA case expressed the difficulty in assessing one's integrity without bringing objective qualities into bear like their professional life, stating further that whether consistence in honesty is there or not in one's history, that has to be assessed objectively.[389] As such, the court concluded that the decision to appoint a fit and proper person was subject to objective scrutiny.[390] Conclusively the risk of interference with the prosecutorial authority when appointing its head is curtailed by the power of judicial scrutiny.

4.6 Accountability of the NPA

The NPA has the discretion to decide whether to prosecute or not. This discretion is to the exclusion of any other individual or organ; as such it is susceptible to abuse. In order to avoid arbitrary use of this power there is a need to ensure that the NPA is also accountable in a democratic State since accountability is one of the founding values of the Constitution of South Africa.[391]

[387] *Pikoli v The President* 2010 (1) SA 400 (GNP).
[388] *Democratic Alliance v President of the Republic of South Africa and others* 2012 (1) SA 417 (SCA) para 102
[389] Democratic Alliance v President of the Republic of South Africa and others 2012 (1) SA 417 (SCA) para. 116.
[390] *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) para. 23.
[391] Section 1*(d)* of the Constitution of the Republic of South Arica Act 200 of 1993.

Muntingh points out that after 20 years into democracy; the issue of prosecutorial independence is a highly contested and politicised issue.[392] He mentions that soon after independence it was feared that the NDPP would be influenced by politics and target to prosecute members of the opposition parties but the current concern has shifted where there is fear that the members of the ruling party are not being prosecuted enough and there is apparent mythological and litigious hindrances to the review of the decisions not to prosecute.[393] Due to the potential of exercising prosecutorial powers arbitrarily accountability for the exercise of such power becomes paramount in a constitutional democracy.

Accountability requires:

> 'a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.'[394]

Muntingh indicates that the office of the NDPP has minimal oversight in South Africa and this causes a risk of abuse of this power.[395] Independence without accountability 'poses an obvious danger to the public interest, which requires the fair and just administration of the criminal justice system'.[396]

Schönteich points out that there is no real constructive oversight of the NPA in South Africa, which scrutinises the activities of the prosecution.[397] Whilst ensuring that there is independence, accountability is important as it establishes a delicate balance of power.[398] Without accountability the NPA can exercise its powers arbitrarily and this is as much a problem as interfering with the independence of the NPA is.

---

[392] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 8.
[393] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 8.
[394] Corder , Jagwanth and others, 'Report on Parliamentary Oversight and Accountability Faculty of Law '1999 available at http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf accessed on 11 January 2019.
[395] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 7.
[396] Flatman, 'The Independence of the Prosecutor, Prosecuting Justice Conference, Melbourne 18 and 19 April 1996,' 1996 available at http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf accessed on 29 December 2018.
[397] Schönteich 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January at 3.
[398] Schönteich 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3.

Accountability guards against the making of 'arbitrary, capricious, and unjust decisions'.[399] Schönteich underscores the need for the NPA to be accountable to the people it serves just like the first NDPP implored the prosecutors just after the founding of the NPA that they were 'lawyers of the people'.[400] He argues that whilst the NPA accounts to various institutions like parliament and the executive, 'the NPA's policies and performance are not subject to review or scrutiny by any independent and dedicated entity' like in the case of the police or the prison services.[401]

4 6 Accountability to parliament and the executive

The NPA is accountable to Parliament through various Parliamentary portfolio Committees. The most relevant being the Portfolio Committee on Justice and Correctional Services (formerly the Portfolio Committee on Justice and Constitutional Development). Over the years, 2012 and 2016 the Portfolio Committee is recorded to have summoned the NPA to report to it on 9 occasions.[402] The Parliamentary Portfolio Committee is recorded to have ordered the then NDPP, Shaun Abrahams, to explain why there had been charges against the then Minister of Finance, which were dropped a few days later. Mutingh *et al* indicates that such an act set a bad precedent on the independence of the NPA.[403]

The NPA is accountable to Parliament in respect of its duties, powers and functions.[404] According to section 35 (2) of the NPA Act, the NDPP should prepare yearly reports on the operations of the NPA as referred to under section 22 (4) of the NPA Act and

[399] Flatman, 'The Independence of the Prosecutor, Prosecuting Justice Conference, Melbourne 18 and 19 April 1996,' 1996 available at http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf accessed on 29 December 2018.
18 and 19 April 1996 http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf
[400] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3.
[401] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3.
[402] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1at 24.
[403] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 24.
[404] S 35 of the National Prosecuting Authority Act 32 of 1998.

submit it to the Minister of Justice. Section 35 provides this so that the Minister is able to report from an informed point of view to parliament. The exercise of final responsibility over the NPA as discussed above in a way translates to accountability to the executive since the minister is a member of the cabinet.

4 7 Accountability to the law

The core issue when the question of accountability of the NPA is raised is that of balancing between independence and oversight.[405] There is an apparent tension between the constitutional imperatives and the discretion of the NDPP. Whilst there is a need for accountability of the NPA there is also need to enhance its independence.[406] Therefore, the question is how to promote the two without depreciating the other. Accountability is central to good governance and the rule of law.[407]

Accountability of the NPA to the law is derived from the rule of law and the supremacy of the Constitution and as such, much of the oversight over the NPA is done by the court which is the custodian of the Constitution. The court has the power to hold the NPA accountable through its powers of judicial review, interpretation and application of the law. Mataungh *et al* highlight that accountability to the courts entails that, a court may strike off the roll matters that are being handled tardily and hold the prosecution in contempt for failure to follow judicial directives. [408] Therefore, this accountability is not of the whole organisation, but the individual prosecutors in certain cases.

Moreover, at an institutional level Mataungh *et al* note that the policy and directives of the NPA are subject to judicial review as exposed by the High Court of Pretoria, which struck them off in 2005, policies that had the effect of granting amnesty where the Truth and Reconciliation Commission had denied amnesty.[409] By granting this

[405] Muntingh, Redpath & Petersen, 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 8.
[406] Muntingh, Redpath & Petersen, 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 8.
[407] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 2019 at 5.
[408] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 22.
[409] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 22.

amnesty the court concluded that the NPA was overstretching its bounds and exceeding its mandate. Where the NPA exceeds its constitutional parameters, the courts have a duty to keep the NPA in check, consequently the courts provide these checks and balances. Similarly, whilst there seems to be unfettered discretion in the NPA's decision to prosecute or not, the court has power to review such a decision.

4 8 Judicial review by the court

The principle of checks and balances forms a fundamental part of the doctrine of the separation of powers in South Africa.[410] The Constitution explicitly protects the independence of the prosecutorial authority through section 179 (4). The Constitution guarantees that any legislative or executive action that infringes on the independence of the prosecutorial authority is subject to judicial control.[411] Nothing in the Constitution or the Act provides for control or interference by the executive but there is an opening for judicial control.[412]

The source of the review of public power in South Africa is that every person in South Africa has a right to 'administrative action that is lawful, reasonable and procedurally fair.'[413] This right is encapsulated in section 33 of the Constitution and is given effect to by the Promotion of Administrative Justice Act[414] (PAJA), which provides for the review of all administrative decisions as long as these fall within the definition of 'administrative action' in the PAJA. It stands to reason that if the decision not to prosecute is to be reviewed, an inquiry has to be made of whether the decision falls under the definition of administrative action under the PAJA. If it does, then it can be reviewed on any of the grounds listed in the PAJA.

[410] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 11May 2018 at 74.
[411] Joubert (9th ed) *Criminal procedure handbook* (2009) 41.
[412] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 258.
[413] Section 33 of the Constitution of the Republic of South Africa NO. 108 of 1996.
[414] Promotion of Administrative Justice Act 3 of 2000.

Administrative action in South Africa refers to the exercise of public power to the exclusion of the exercise of executive, legislative power.[415] Therefore, the PAJA to apply to an exercise of power, the exercise of power has to first be classified. There has been a classification of power doctrine in South Africa to establish whether an exercise of power can be reviewed by the courts. The reason behind the classification of these powers was to enforce the separation of powers and protect the interference of the courts with the exercise of power by the other organs of state. [416]

De Villiers submits that the prosecutorial authority was established to assist the executive in the application and execution of criminal law.[417] Following this reasoning, the prosecutorial powers should be seen to be more executive than judicial.[418] The NPA in South Africa is termed more executive than judiciary because it reports to the Minister of Justice.

However, some scholars submit that this power is judicial. The supporting argument is that the duty of the prosecutor is not to secure a conviction but to assist the court in arriving at a verdict.[419] It is submitted that the prosecutor stands in special relation to the court in assisting the court to ascertain the truth.[420] All these attempts have been to classify the powers of prosecution. However, over time, the classical structuring according to the separation of powers between legislative, judiciary and the executive has evolved in South Africa.[421]

The classification of functions was highly regarded in the pre-Constitutional South Africa but it is very unpopular in the present Constitutional era. The case that was decisive on abandoning the classification of powers is the administrator of the *Transvaal v Traub*.[422] In this case, it was held that the classification of powers into

[415] Section 1(cc), (bb) and (ee) of the Promotion of Administrative Justice Act 3 of 2000.
[416] E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 286.
[417] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 248.
[418] Seedorf & Sibanda *Separation of powers* in, Woolman & Bishop 'Constitutional law of South Africa' (2nd ed) (Juta and Co 2013) 12-32.
[419] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 22.
[420] *S v Jija and Others* 1991 (2) SA 52 (E).
[421] Seedorf & Sibanda *Separation of powers* in, Woolman & Bishop 'Constitutional law of South Africa' (2nd ed) (Juta and Co 2013)12-10.
[422] *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A).

judicial and quasi-judicial, executive and purely administrative 'adds nothing to the process of reasoning: the Court could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned.'[423]

The classification doctrine was abandoned.[424] As such, South African courts can go beyond the PAJA to scrutinise the exercise of public power.[425] It has been held that the decision not to prosecute is subject to judicial review under the rule of law.[426] It means that the question of whether the decision not to prosecute is administrative or no longer important as there is another principle under which exercise of power can be reviewed and this is the principle of legality, which is a part of the rule of law.[427]

The Supreme Court of Appeal correctly held that the NDPP is integral to the rule of law.[428] The emphasis was that the exercise of all public power, be it administrative or not, was subject to Constitutional review.

4 9 Reviewability of the decision not to prosecute

In principle, the court may not interfere with the decision made by the prosecuting authority on prosecution.[429] The reason is that judicial review may interfere with the discretion of the prosecuting authority thereby infringing on its independence. However, in South Africa the courts have interfered where the discretion of prosecutors is exercised *mala fide* or improperly.[430] The reviewing of the decisions by

[423] *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A) 763H-I.
[424] Joubert (ed) *The Law of South Africa* (Lexis Nexis South Africa 1997) 59-73.
[425] *Democratic Alliance v The Acting National Director of Public Prosecutions* (2012) ZASCA 15 para 37.
[426] *Democratic Alliance v The Acting National Director of Public Prosecutions* (2012) ZASCA 15 para 27.
[427] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019 at 1.
[428] *Democratic Alliance v President of the Republic of South Africa & others* 2012 (1) SA 417 (SCA)
[429] *S v Dubayi* 1976 3 SA 110 (TK).
[430] *Wilson v Director of Public Prosecutions* (2002) 1 All SA 73 NC.

the NPA has also been listed as one of the interference with the NPA that affects its independence.[431]

In South Africa, the courts have hesitated to review the decision of the NPA not to prosecute. There is no problem where the NPA refuses to prosecute in cases where there is no *prima facie* case, but controversy arises where there is a *prima facie* case and the NPA refuses to prosecute. The prosecutor's discretion to decline prosecution is wide and has unchecked limits. In this way, the courts provide the last line of defence against abuse of power with a duty to check whether the power to discontinue prosecution does not amount to abuse of power. Where an accused has been prosecuted unfairly or on insufficient evidence, the court acquits, thus exercising control over the decision to prosecute.[432]

4 10 Review under the PAJA

The question whether the exercise of power is administrative in nature is an ancillary question that needs to be answered since the decision not to prosecute may be reviewable in terms of the PAJA. It has been held that the question of whether the PAJA applies to the exercise of public power is one that cannot be avoided to prevent the development of two parallel systems of judicial review.[433] The PAJA explicitly excuses the decision to prosecute from judicial review.[434]

Administrative action is defined in section 1 of the PAJA and the DA's case highlighted the important parts of section 1 as follows.

> 'Administrative action means any decision taken, or any failure to take a decision, by –
> (*a*) an organ of state, when –
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or

[431] Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others (2012) ZASCA 15
[432] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 2019 at 11
[433] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 para 19
[434] Section 1(ff) of the Promotion of Administrative Justice Act 3 of 2000.

(*b*) …which adversely affects the rights of any person and which has a direct, external legal effect but does not include –
(*f*) a decision to institute or continue a prosecution.' (My emphasis)[435]

On one hand, it is argued that that because the PAJA excludes the decision to prosecute from the ambit of administrative action, the converse is also correct that is the exclusion of the decision not to prosecute.[436] Hoexter is of the opinion that the two decisions are different as there is likelihood the review a decision not to prosecute than there is need to review a decision to prosecute since the one to prosecute usually ends up at trial.[437] This was supported in the case of *Kaunda & others v President of the Republic of South Africa & others*[438] which indicated that there could be circumstances in which a decision not to prosecute may need to be challenged. The argument is strengthened by the argument that the two decisions are different in that whilst the decision to prosecute is not final the decision not to prosecute is in effect, final.[439]

In the *Freedom Under Law v National Director of Public Prosecutions and Others* case, it was held that the offices of the NDPP and the DPP, which are endowed with this power are public offices and their exercise of such power involves the exercise of power in terms of the NPA Act which has external legal effects. Lastly, it 'adversely affects the rights of the public, and at least the complainants, who are entitled to be protected against crime through, amongst other measures, the effective prosecution thereof.'[440]

4 11 Review under legality

In the DA case, Ranchod J held that a decision could be reviewed either on grounds of the PAJA as an Administrative action or under the Constitutional principle of

[435] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15 para 10
[436] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 at 20
[437] Hoexter *Administrative Law in South Africa* (2 ed, 2012) at 241-242
[438] Kaunda and Others v President of the Republic of South Africa 2005 (4) SA 235 (CC)
[439] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 para 23
[440] Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP) para 131

legality.[441] The NPA has the discretion not to prosecute does not oust the underlying constitutional foundation for legality as a ground for review. In *Affordable Medicines Trust & others v Minister of Health & others*,[442] Ngcobo J emphasized that review under legality implies that;

> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'

The principle serves as a safety net for the reviewability of decisions that fall outside the PAJA but involve the exercise of public power.[443] In addition, its source is section 1 (c) of the Constitution. Section 1 (c) of the Constitution states that the Republic of South Africa is one, sovereign, democratic state founded on the following values supremacy of the constitution and the rule of law.' The source of judicial review under the principle of legality is the supremacy of the Constitution and the rule of law. The case relevant to the reviewability of the decision by the NPA not to prosecute under the principle of legality is the *Democratic Alliance v The Acting National Director of Public Prosecutions* case.[444]

The brief facts of the case are that in 2009 the Democratic Alliance (DA) approached the Northern Gauteng High Court with an application to review, correct and or set aside the decision by the NPA not to prosecute the then President of the Republic of South Africa, Mr Jacob Zuma. The contention was that the decision was inconsistent with the Constitution.[445] The DA required a record of the reasons why the prosecution had been discontinued. The NPA refused to do so, indicating that the submissions had been made confidentially and without prejudice. The NPA also objected to the application of the DA raising *points in limine*, which included that the DA had no standing and that the decision not to prosecute was not reviewable.

---

[441] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15para 13
[442] *Affordable Medicines Trust & others v Minister of Health & others 2*006 (3) SA 247 (CC) para 49
[443] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 para 29
[444] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15
[445] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15

In the Court *aquo*, Ranchod J held that the DA had no substantial public interest in the discontinuation according as required by section 389 (d) of the Constitution in order to have *locus standi*.[446] Furthermore, he found that the DA could not have standing under administrative law since they could not prove a material infringement of right as required by the PAJA. However, the learned Judge found that the DA had a chance under section 1 (c) of the Constitution.[447] The alternative grounds of review are the supremacy of the Constitution and the rule of law.[448] Arising from this section, the Court found it proper to hear the issue on the reviewability of the decision by the NPA not to prosecute.[449] The court utilised the pronouncement that was made in the *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others*[450] that:

> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'[451]

The conclusion is that the courts have power, given to them by the Constitution, to control public power without having to shift or push boundaries.[452] In the *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa,* it was held that every decision has to abide by the constitutional requirement of rationality as a prerequisite for constitutional

---

[446] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15 para 9
[447] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15 para 14
[448] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15 para 15
[449] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15 para 22
[450] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC).
[451] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 49.
[452] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 15.
[452] *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15 para 29

validity.[453] Therefore, rationality is the minimum mandatory requirement for any exercise of public power.[454] By demanding these standards there is assurance for the equal application of the law and a general public confidence that no one is above the law, including the NPA.[455]

In *National Director of Public Prosecutions v Freedom Under Law,*[456] the court made an order that the NPA should reinstitute charges that it had previously dropped. This decision was then challenged in the Supreme Court of appeal. A decision that had been made not to prosecute Richard Mdluli for corruption charges was also set aside.[457] The NDPP argued that the power to review decisions to prosecute or not to in 179 (5) (d) ousted the power of the court to review non-prosecution.[458] However, the court held that the excessive discretion granted to the NDPP in section 179 (5) to review the decision not to prosecute does not oust constitutional obligation of the courts to review grounds of legality, rationality and administrative reasonableness.[459] The court held it is inconceivable in our constitutional order the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants having access justice.[460]

In view of the judgments discussed so far, it can be concluded that review under the principle of legality includes the review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute.[461] 'legality is an evolving concept in our jurisprudence, whose full creative potential will be

[453] *Pharmaceutical Manufacturers: In re Ex parte Application of the President of the RSA* 2000 (2) SA 674 (CC) para
[454] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019.
[455] *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA 15 para 29.
[456] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58.
[457] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58
[458] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 GNP para 117.
[459] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 GNP para 117.
[460] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 GNP para 117.
[461] (see *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA).

developed in a context-driven and incremental manner.'[462] Schondeit warns that if the trend to review the decision of the NPA not prosecute is left unattended, it has the potential of handicapping the NPA and it would have to engage in time consuming litigation to justify the decision not to prosecute.[463]

4 12 Principles governing judicial review

Whilst awarding the courts the power to review the decisions by the NPA, it is important to keep in mind that the courts' powers should also be in check to prevent rule by the courts instead of the rule law. There are many principles applicable to ensure that the courts do not go beyond their given powers when reviewing the exercise of public power. The use of excessive power by the courts may also lead to the infringement of the separation of powers doctrine and consistently infringe on the rule of law. Some jurisdictions use the non-justifiability approach which states that the duty of the courts is to decide on the rights of the individuals and not:

> 'to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.'[464]

The principle is linked to the political question, a doctrine which states that the courts should not interfere in political questions but rather of law. The principle that the South African court system attempts to curb powers of judicial review is called the judicial self-restraint approach. South Africa has not developed a doctrine that excuses the exercise of political power from judicial review since it impliedly puts all power under judicial review through section 2 of the Constitution. Section 2 provides that the Constitution is the supreme law of the Republic and any conduct inconsistent with it is invalid.

[462] *Minister of Health NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) para 614;
[463] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3
[464] *Marbury v. Madison* 1803 (5) U.S 1 Cr para 165-166

It does not mean that the courts' powers to review has no limit in South African law. In order to maintain relationships with the more political powers, the courts have developed some strategies.[465] Manyika lists three strategies namely,

> '(a) exploiting doctrinal gaps;
> (b) adopting different standards of review; and
> (c) designing different remedies.'[466]

These are important as they are applied to maintain an oversight over the NPA whilst affording the NPA the necessary independence afforded to it by the Constitution. In relation to (a) exploiting doctrinal gaps, it is argued that the constitutional democracy of South Africa is still young and the courts are still defining some terms and developing them. As such, the courts use these gaps in interpreting flexibly to manage relations with other organs of state.[467]

Concerning (b) the adoption of different standards of review, it is argued that some standards of review are more infringing on the discretion of the decision maker than some and depending on the nature of the power; the court decides which standard is less intrusive. For example, the standard of rationality is less intrusive as compared to reasonableness which is a standard that it can have the effect of substituting the decision of the public official with that of the court.[468]

As such, adopting a less intrusive standard of review becomes a strategy to maintain the independence of the decision maker whilst keeping oversight. The last strategy (c)

---

[465] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN',* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019 at 77

[466] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019 at 78.

[467] T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.

[468] T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.

is the designing of different remedies. To avoid conflict, the courts choose remedies that are justifiable when making their orders. For example, instead of declaring a certain action by parliament or the executive to be invalid, the court can order that the matter be referred back to the official who made the decision for reconsideration. In addition, instead of ordering the decision maker to follow a particular course the court can recommend a course and not necessarily supervise the order.[469]

All these strategies are a bid to maintain and respect the separation of the powers and have been discussed in a number of cases in relation to the reviewability of the exercise of prosecutorial powers. The court in the *Feedom Under Law*[470] looked at the exclusion of the decision to prosecute from the PAJA, the silence on the decision not to prosecute and indicated that the answer lies in the policy considerations that are relevant in the making of either of the decisions.[471] These policy grounds need to be taken into account when reviewing the decision not to prosecute.

The issue of policy considerations has also been alluded to in the *Director of Public Prosecutions v Zuma*[472] and the *Sharma v Brown-Antoine and others*[473] cases where the indication is that, whilst the decision not to prosecute is not immune from judicial review, the courts should exercise its powers sparingly. The courts, through their policy, limit their own power and they do so to ensure 'safeguarding the independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought.' [474]

The support for judicial self-restraint is emphasised by the court in the *Freedom Under Law*. The court quoted *R v Director of Public Prosecutions, Ex Parte Manning*,[475] specifically that:

[469] T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.
[470] (2014) ZASCA 58
[471] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 para 25
[472] *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)
[473] *Sharma v Brown-Antoine and others* [2007] 1 WLR 780 (PC)
[474] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 para 25
[475] (2001) QB 330 para 23

> '[T]he power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the [prosecutor] as head of an independent, professional prosecuting service, answerable to the [National Director of Public Prosecutions] in his role as guardian of the public interest, and to no-one else.'[476]

It was held that it would be great nativity of the court to pretend to be oblivious to the political context of a matter before it.[477] The restraint of the courts does not mean that they should abdicate their powers.[478]

Adopting the strategy of different standards of review, the courts have indicated that review under legality requires standards of legality and rationality.[479] First legality demands that all power must be authorised by law and rationality demands that every decision should meet an ends means test, whereby the means employed are rationally related to the purpose for which the power was conferred.[480]

As such, the courts have approved a minimalist standard of review for rationality which is called the minimum threshold for review, thus justifying review of even the most political decisions.[481] In some cases, the review under legality has been held to include a procedural element. An example is in *Albutt v Centre for the Study of Violence and Reconciliation and Others*,[482] where the court dismissed the President's decision to release political prisoners without hearing the views of the victims of the crimes or their relatives. Thus, the decision did not meet the objective that was nation building.[483]

The restraint of the court is in the understanding that the Constitution does not allow for the courts to infringe on the powers of the other organs of state according to the

---

[476] *R v Director of Public Prosecutions, Ex Parte Manning* (2001) QB 330 para 23
[477] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 8.
[478] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) 123
[479] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC).
[480] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) 126
[481] *Democratic Alliance v President of the Republic of South Africa and Other*
[482] 2010 (3) SA 293 (CC) at paras 65-68.
[483] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paras 65 68.

separation of powers. The courts are cautious not to break the law, as held in *South African Association of Personal Injury Lawyers v Heath* that:[484]

> 'the provisions of our Constitution are structured in a way that makes provision for a separation of powers. ... There can be no doubt that our Constitution provides for such a separation (of powers), and that laws inconsistent with what the Constitution requires in that regard are invalid'[485]

Some call judicial self-restraint, judicial deference and it has been put aptly in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[486] that:

> 'The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature'[487]

This statement by the Constitutional Court shows that the courts are under obligation and owe it to the Constitution to follow the law and be subject to the rule of law.

4 13 Separation of powers in the South African Constitution

The separation of powers doctrine seems to influence the process of law when it comes to accountability and independence of important institutions and organs of state. This section will discuss the meaning of separation of powers in the South Africa context. De Villiers points out that there is little debate, even at common law, on whether separation of powers should exist.[488] The Interim Constitution was very explicit in the separation of powers. First, Principle VI, stated that the Constitution was to have 'a separation of powers between the legislature, the executive and the

[484] 2001 (1) BCLR 77 (CC).
[485] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) P86 at par 22.
[486] 2000 (2) SA 1 (CC) 38 par 66.
[487] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).
[488] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 248

judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' Furthermore, it stated in schedule 4 that:

> 'There shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'

The Interim Constitution was elaborate in prohibiting one branch of government from usurping the power of the other and at the same time, recognising the functional interdependence of the branches of government all in Schedule 4. Although the principle is not explicit in the current Constitution, it is implicit wherein the Constitution provides for the specific organs of state responsible with specific powers.[489]

The Constitution, in section 85 states that the executive powers are vested in the Presidency and the cabinet. In section 43, the Constitution provides that the legislative authority is vested in the legislatures, at both provincial and national levels, and lastly, the judicial authority is the courts according to section 165. Accountability is central to good governance; the rule of law and the separation of powers ensures both the independence of institutions and their accountability.[490]

The Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996* (Certification Judgment), held that there was no fixed or rigid doctrine of separation of powers in South Africa.[491] The court referred to the importance of the doctrine as found in the text of the Constitution that is the structure and the functions of the state including their dependence and interdependence.[492] What the separation of powers seeks to prevent is the accumulation of too much power by one institution.[493] Therefore, the judicial precedent supports the separation of powers in the South African Constitutional era.

---

[489] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247
[490] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3. at 5
[491] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa,* 1996 (4) SA 744 (CC) paras 110–111.
[492] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 248.
[493] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 248.

Furthermore, it is not an academic separation of powers but a functional one that assents that interdependence is inevitable and may have to lead to compromise.[494]

Following the separation of powers, the executive will not be able to amend an Act of parliament to reduce the salaries of members of the NPA because it will be an infringement upon the doctrine of the separation powers.[495] South Africa is not entirely in support of the notion of complete prosecutorial independence, pointing that intervention in matters involving national security may be legally justified.

This reasoning led the SCA to come to the decision that:

> 'Far from trespassing into the executive domain, any judge in the South African constitutional order who declines deferentially to review a decision not to prosecute, in the mistaken belief that he or she is mandated by the doctrine of the separation of powers to do so, will ironically be acting in violation of the doctrine of the separation of powers.'[496]

As a result of the acceptance of this functional separation of power, the courts have adopted the strategies cited above to keep an oversight role while respecting the independence and the autonomy of the various organs of state. The adoption of rationality review for political decision is the acceptance of the court that it needs to hold the organs of State accountable whilst seeking to respect their constitutional domain. That led the court in the DA case to note that "[i]t is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry.' [497]

4 14 Separation of powers and private prosecutions

The NPA has a power to discontinue prosecution or to decline to prosecute in terms of section 20 (1) (c) of the NPA Act. This provision gives effect to section 179 (2) of the Constitution, which gives the NPA the power to carry out any functions incidental to carrying out criminal proceedings. Section 7 of the Criminal Procedure Act states

[494] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa,* 1996 (4) SA 744 (CC) para 108.
[495] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 62.
[496] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 para 137
[497] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58.

that if a Director of Public Prosecutions (DPP) has declined to prosecute; a private prosecutor may institute the prosecution.

Accordingly, the persons who may institute private prosecutions are:

> '(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
> (b) a husband, if the said offence was committed in respect of his wife;
> (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
> (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward.'[498]

There had been contention that the section is unconstitutional as it excludes juristic persons. The South African courts have shown that there is nothing unconstitutional in excluding juristic persons from pursuing private prosecutions. This same notion was shared *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*,[499] where the Supreme Court of Appeal held that a juristic person could not institute private prosecutions. The exact words of the court were:

> 'private prosecutions in terms of s 7 of the CPA are only permitted on grounds of direct infringement of human dignity. This is the reason for s 7(1)(a) of the CPA and for the exclusion of juristic persons other than those mentioned in s 8 from instituting private prosecutions.'[500]

From as far back as 1990, the court has not shifted from the position held in *Barclays Zimbabwe Nominees (Pvt) Ltd v Black*,[501] which held that:

> 'there may well be sound reasons of policy for confining the right of private prosecution to natural persons as opposed to companies, close corporations and voluntary associations such as, for example, political parties or clubs.'

[498] Section 7(1) of the Criminal Procedure Act 56 of 1955.
[499] *Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 1 SACR 308 (SCA).
[500] *Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 1 SACR 308 (SCA) para 28
[501] *Barclays Zimbabwe Nominees* (Pvt) Ltd v Black 1990 (4) SA 720 (A).

When the NPA decides not to prosecute, the DPP issues a certificate indicating that they have seen the evidence against the accused and they have declined to prosecute. Only after this certificate has been issued can a private prosecutor take over and institute prosecution.[502]

The problem that arises is that the separation of powers in South Africa provides for separation between the executive, parliament and the judiciary and the doctrine of the checks and balances governs the relationships between these organs of State. It becomes difficult to place in the circumstances who should check the exercise of the power to prosecute by the private prosecutor. The power to private prosecution neither lies within administrative law nor does it qualify as public power.

The mechanisms provided for in the Constitution relate to the exercise of public power. The right to administrative action, as defined in the PAJA, means that where a person's rights are affected by the exercise of public power, they can seek recourse. The same principle of legality seeks to ensure that the exercise of political power is not exercised arbitrarily. Private prosecutions are not considered anywhere whether in the PAJA or the principle of legality as such they are open to abuse. They are conducted by individuals who owe a duty to no institution and are not guided by the principles that guide the NPA to Act without fear, favour or prejudice. Therefore, private prosecutors are susceptible to influence and abuse by individuals or organs of state and they have no code of ethics that binds them. They are not bound by the separation of powers and can infringe on the exercise of power by the other organs of state.

4 15 Conclusion

In conclusion, the courts have found that the history of South African politics has had a great influence on the laws of South Africa. Concerning the prosecutorial authority, the chapter makes it clear that South Africa has a Constitution which came into effect in 1996 and that prior to it, the South African National Prosecution had not been free politically. A repressive government was in power, and it did not respect the

[502] Section 7(2)*(a)* of the National Prosecuting Authority Act 32 of 1998.

fundamental human rights of the majority of South Africa, who were black and coloured.

It is recorded that during this time, prosecutorial powers lay in a number of chosen people appointed to be Attorney-General(s) in the various districts of South Africa. At first, they had been free from any political control until the Minister of Justice was given control over prosecutorial powers. It is also became apparent, in this chapter, that the control of the Minister was so wide that he could reverse decisions made by the Attorney-General(s) and at times would take the prosecution.

Furthermore, it is apparent from the discussion in this chapter that the apartheid regime used the control of the minister over the prosecutorial authority as a mechanism to represses descent. They feared that such power could be used by the new government to the extent that they attempted to remove ministerial control when they were losing political power. As such, the chapter reached the conclusion that the prosecutorial authority in South Africa inherently attracts political interference. As a result the ANC government, which took over from the apartheid government, retained the ministerial oversight over the prosecutorial authority.

Arguments against a single prosecuting authority because it infringed on the separation of powers, the position of a single prosecuting authority was adopted in section 179 of the Constitution. The NPA comprises of the NDPP, the DPP and other individual prosecutors. It is apparent from the chapter that the Constitution provides for an independent prosecutorial authority that exercises its functions without fear, favour or prejudice. The National Prosecution Authority Act, which promotes the independence of the NPA, supplements the independence of the prosecuting authority.

Moreover, it was noted that there are many provisions in the NPA Act that give the executive control over the NPA. First and foremost there are provisions that give the President the power to appoint and to dismiss the NDPP. On one hand, there are scholars who argue that these powers could be abused and on the other, are those who disagree, arguing that the fact that the President acts in consultation ensures that the powers to appoint and dismiss is not subject to abuse. However, the discussion

concludes that the President does not have absolute discretion since the court can scrutinise the President's decision to appoint the NDPP. Analysis of case law indicates that the court has in the past set aside the President's decision on the NDPP on the ground that the appointee was not fit and proper.

Another provision that opens the NPA to executive interference, thereby compromising the independence of the NPA, is the Constitutional provision that states that the Minister of Justice had final responsibility over the NPA. Furthermore, the Minster is directly involved in the making of prosecutorial policy. Whilst scholars argued that ministerial responsibility does not equal to control, section 33 of the NPA demands on a mandatory level that the NDPP responds to and provides information requested by the minister. If the provision is couched in mandatory terms it means that the NDPP does not have discretion to deny the requests.

It is also clear from the chapter that there are other provisions that provide for the individual independence of the NPA in the form of their remuneration terms of offices and their freedom to exercise their powers, freely and impartially. Strict ethical obligations are part of the measures that ensure the independence of the individual prosecutors. The conclusion is that there is provision for the protection of the independence of the individual prosecutors.

The chapter also focused on the issues surrounding the accountability of the NPA to other organs of state like parliament, the executive and the judiciary. It is apparent that the NPA is accountable to parliament through the portfolio committees and indirectly through the minister. Furthermore, reporting to the Minister inherently indicates accountability to the executive since the minister is a member of cabinet.

Accountability of the NPA to the law was examined, and it was found that the judiciary, as the custodians of the Constitution have a duty to hold the NPA accountable to the law. As such through the powers of judicial review the courts held the NPA accountable. The power is granted to the court to review the exercise of power by section 33 of the Constitution, which calls for just administrative action and the empowering legislation is the PAJA.

Of the powers of the NPA, the power to discontinue prosecutions seemed to raise considerable contention. The power to instigate prosecutions was not contentious as it was not reviewable and was tacitly excluded by the PAJA. The PAJA does not say anything about the exercise of the power to discontinue prosecution and different schools of thought arose, some pointing that the exercise of the power to discontinue prosecutions could be reviewed under administrative law and others arguing it could not. The pivotal point is alluded by the Supreme Court of Appeal that the silence by the PAJA on the reviewability of the decision not to prosecute showed the sensitivity of the area and the policy considerations that informed the silence should be taken into seriously and the court should shy from reviewing.

Although there is no clear agreement as to whether the exercise of the power not to prosecute is administrative or not, a different ground of review outside the PAJA has been adopted by the court which is judicial review for legality. The courts' decisions show that there is consensus that legality is a very minimal ground of review at the very least demanding that each exercise of power be authorised by law. The courts have adopted review for the NPA's power to review on limited grounds like rationality, which demands that the means used in making the decision must meet the end sought to be adopted by that decision. Rationality is held to be the minimum threshold for legality.

Where there is power, there is need for accountability and the chapter discussed how the courts are held accountable in the exercise of their power of judicial review. The chapter highlighted that the courts in South Africa follow a principle called judicial self-restraint whereby the courts adopt different strategies to respect the autonomy and independence of the other organs of state whilst maintaining an oversight.

These strategies include flexible interpretation by exploiting doctrinal gaps, adopting different standards of review like rationality which are less intrusive and neglecting intrusive once like the standard of reasonableness. The last strategy was the adoption of different remedies that do not handicap the other organs like referring the matter back to the decision maker for deliberation.

Finally, the chapter discussed the separation of powers in South Africa. An analysis of issues surrounding the separation of powers shows that there is a functional separation of powers in South Africa, which is not ignorant of the interdependence between organs of State. cooperation is unavoidable but strategies have to be developed to limit interference. Moreover, the possibility for private prosecutions is discussed and it seems that it falls outside the institutions that are bound by the separation of powers and it is not conclusive on how private prosecutors can be held accountable for the exercise of the powers to prosecute.

CHAPTER 5

THE NAMIBIAN POSITION

5 1 Introduction

Chapter 4 above looked at the position of the prosecuting authority in South Africa. It found that the repressive South African history had an incredible influence on the prosecutorial authority. The South African prosecutorial authority as an institution provided for in the Constitution and is called the National Prosecutions Authority (NPA). Before the 1996 Constitution, the repressive government abused the office of the Prosecutor-General (PG) who was then called the Attorney General (AG) to advance the objectives of the oppressive, apartheid government. This was done by enacting legislation that ensured that the executive had direct control over prosecutions.

There were laws that put the minister of justice in charge of public prosecutions to the extent that he could reverse decisions made by the prosecuting authority. At the inception of the Constitution, the African National Congress (ANC), retained the same position giving the Minister of Justice the final responsibility over prosecutions. The main discussions therefore hinged around the independence of the prosecutorial authority in South Africa and their independence from political control.

This Chapter will follow the same line as in the previous chapter with special focus on Namibia bearing in mind that much of Namibian laws are informed by the same legal history as South Africa with minor differences. The major differences are in the provisions of laws enacted by Namibia after the advent of its Constitution. This commences by looking at the legal and relevant history of Namibia with regard to its prosecutorial authority. Thereafter the chapter will look at the Constitution of Namibia and how it provides for the Independence of the prosecuting authority. The similarities and differences in the legal history of Namibia and South Africa will be underlined.

The legal history will be discussed until the Namibian Constitution of 1990 where emphasis will shift to the particular law in relation to the prosecuting authority in Namibia. The chapter will discuss the laws that pertain to the prosecutorial authority paying particular attention to the independence of the prosecutorial authority of Namibia. This will include a discussion on the independence of the individual prosecutors and the independence of the prosecutorial authority as a whole.

Emphasis will be given to the independence of the prosecuting authority in relation to the more political organs of state which are the executive and parliament. In the same breath, political independence of the institution of the prosecuting authority will be discussed relative to the Constitution and any other laws that either promote the independence or present a threat to such independence.

This chapter undertakes to deliberate on the issue of accountability of the prosecuting authority. Accountability will be pondered in relation to accountability of the law, the public and other organs of state. Considering the high level of discretion bestowed on prosecutions accountability, it is a necessary precautionary measure to curb this discretion which could be abused. The chapter therefore will examine how the Namibian laws provide for the accountability in the exercise of prosecuting powers to ensure that they are exercised responsibly. Bearing in mind that prosecution is a reserve for the state, the chapter will take a look into whether the Namibia legal framework provides for private prosecutions and if so to what extent. This chapter will discuss fairly adjacent to the doctrine of the separation of powers on whether private prosecutions upset the separation of powers in Namibia.

5 2 The legal history and background of the Namibian criminal justice system

The History of South Africa and that of Namibia are interwoven telling the greater legal history of Southern Africa's Roman Dutch law. [503] Namibia was a territory of the Union

[503] Horn, ''The unique constitutional position of the Prosecutor-General of Namibia and the effect of the independence of the office on the functioning of the prosecuting authority in relationship with the Ministry of Justice and the Attorney-General.' 2000 *Unpublished Thesis, UNISA* at page 1.

of South Africa until Proclamation 1 of 1921 which gave the Administrator of South West Africa legislative powers and Act 42 of 1925 of the South African parliament which instituted a Constitution for the territory.[504] At the time Namibia was called South West Africa and the laws of South Africa were applicable in South West Africa and Proclamation 21 of 1919 provided that Roman-Dutch law was to be applied in the territory 'as existing and applied in the Province of the Cape of Good Hope'. Roman-Dutch law through this proclamation became the common law of the territory.[505]

It was not only a matter of law, but South Africa held sovereign power over the South West Africa as was stated in *R v. Christians*[506]. In 1948 when the National Party won the elections in South Africa, Namibia was administered as the fifth province of South Africa, and this included the implementation of the policy of apartheid in South West Africa.[507] A struggle for independence of the South West Africa from the rule of South Africa emerged and at the forefront was the political party called the South West African Peoples Organisation (SWAPO).[508]

In 1966, the United Nations revoked the mandate of South Africa to rule over the West Africa in line with the intentions of SWAPO.[509] Although the UN had direct responsibility over South West Africa it was merely in terms of law but in fact South Africa ruled South West Africa.[510] There was a struggle for the independence of South West Africa from South Africa to which Namibia eventually got independent after a UN supervised an election in 1990.[511] In this election, SWAPO got the majority of the votes but this was short of the two thirds majority required to exclude other political parties

[504] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019
[505] Amoo The structure of the Namibian judicial system and its relevance for an independent judiciary available at https://www.kas.de/c/document_library/get_file?uuid=6f5df420-fdb8-499c-ee80-c1516dce114e&groupId=252038 accessed on 1 June 2019.
[506] 1924 AD 101.
[507] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019
[508] Dowell *Swapo's Struggle for Namibia, 1960-1991: War by Other Means* 1998(3) at 24.
[509] Carpenter *Introduction to South African constitutional Law* (1987) 22.
[510] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019 at 3.
[511] Wallace, Marion & Kinahan. *A history of Namibia: from the beginning to 1990* (2011).

from engaging in the constitution making process.[512] A constituent assembly was set up and this became responsible for drafting the Constitution.

The Constitution that the Constituent Assembly drafted was a :

> 'Constitution [that] bears all the hallmarks of a constitutional democracy. It provides for the recognition and enforcement of fundamental human rights and freedoms, the separation of powers, judicial independence, a multiparty system, and regular elections. At the time of its adoption, the Constitution enjoyed the highest degree of legitimacy since it contained the promise of a future state conforming to all the tenets of constitutionalism'[513]

It was a document that looked to the future to ensure peace and the protection of fundamental human rights.[514] The Constitution was somewhat a reaction just like the South African one to the pre-independence oppressive government. Before this Constitution, the laws that applied in South Africa applied to South West Africa which meant that the laws in relation to the prosecuting authority applicable in South Africa were applicable in Namibia before the advent of its Constitution. Just as in South Africa the prosecution authority vested in the Attorney-General (AG). Section 139 of the South African Act of 1909 basically confirmed the independence of the prosecuting authorities. Such a position was confirmed in the Criminal Procedure and Evidence Act of 1917, which stated that;

> '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'.[515]

The Attorney General of South West Africa was therefore independent like in South Africa. The Administrator of the South West Africa issued proclamation 5 of 1918 which specified that the Criminal Procedure and Evidence Act of 1917 was to be effective in South West Africa. The only minor changes that were made by the South

---

[512] Horn 'The unique constitutional position of the Prosecutor-General of Namibia and the effect of the independence of the office on the functioning of the prosecuting authority in relationship with the Ministry of Justice and the Attorney-General.' 2000 *Unpublished Thesis, UNISA* at 3

[513] Wiechers, *The Namibian Constitution: Reconciling legality and legitimacy, in* Bösl, Horn & Du Pisani, *Constitutional democracy in Namibia. A critical analysis after two decades* (2012) 56.

[514] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019 at 3.

[515] Section 7(2) of the Criminal Procedure and Evidence Act of 1917.

West territory were that 'Attorney General' was substituted with the 'Crown-Prosecution'. Section 7 of the Criminal Procedure and Evidence Act of 1917 with the minor changes read as follows;

> '(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.'

There were practical similarities in the powers of the prosecuting authority in South Africa and South West Africa. In 1926, the two systems differed when the South African Criminal and Magistrates' Courts Procedure Amendment Act 39 of 1926 amended section 139 of the South African Act and section 7 (1) and (2) of the Criminal Procedure and Evidence Act by placing the Attorney-Generals under the control and directions of the minister.[516]

This 1926 Act did not apply in South West Africa thus the Attorney-General remained free from political control. Later the term Crown Prosecute reverted to Attorney General in South West Africa through the Criminal Procedure and Evidence Proclamation 30 of 1935 which repealed Proclamation 20 of 1919. Although South West Africa was still independent, section 7 (2) stated that; 'the right of prosecution vested and entrusted to such Attorney-General is absolutely under his own management and control.'

Whist the office of the Attorney general was placed under political power in South Africa, the South West Africa remained independent. This was so even after South Africa established the General Law Amendment Act 46 of 1935 which stated that;

> '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 fi t, 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'

[516] Section 1(3) and (4) of the Amended Criminal Procedure Act 25 of 2004.

It meant therefore that the Attorney General in South West Africa had wide powers and discretion unlike their counterparts in South Africa meaning that political intervention in South West Africa was subtle.

The independence of the Attorney General in South West Africa was lessened in 1977 when there was a new Criminal Procedure and Evidence Act[517] which was applicable in South West Africa. This Act made it mandatory that there be political control over the prosecutorial Authority. Section 3(5) of the Act read as follows;
The sections read as follows:

> '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.'

Although the position was imposed on the people of Namibia it was still resisted as highlighted in the words of Acting Supreme Court of Namibia Judge AJA Leon (as he then was) who commended on section 3 that;

> It was made applicable by an apartheid government bent on domination [–] 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[518]

Horn comments that the political authority given to the Minister was exercised whenever the interests of the South African government were at stake and if not sufficient they would use other means.[519] The other means were exercised in a case were soldiers of the South African Defence Forces (SADF) killed a SWAPO activist and the AG of South West Africa instituted criminal proceedings against the soldiers. The President of South Africa issued a certificate to halt the criminal prosecutions as

[517] 51 of 1977.
[518] *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1), at 36f.
[519] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at119, accessed on 4 January 2018

he was authorised by section 103 of the Defence Act[520] to do so, if the prosecution against SADF members are for acts committed in the operational area.

It can therefore be noted that Namibia was not spared from the principles of the apartheid regime that was bend on oppression and discrimination not informed by the rule of law.[521] The Namibian Constitution introduced a new dispensation where a new office was responsible for public prosecutions.[522] This new office is called the office of the Prosecutor-General and there were many changes that the Constitution introduced.[523]

5 3 The Prosecuting Authority of Namibia

The prosecuting authority under the Namibian Constitution was placed in the hands of the PG. Consequently, the constitution provided that any other legislation that had referred to the AG before the Constitution now referred to the PG in Article 141(2) of the constitution which states that;

> '… 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.'

It is important to note that the constitution did not provide for the change of name only as it created a separate office of the Attorney-General (AG) who exercised final responsibility for the office of the PG.[524]

[520] 44 of 1957.
[521] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 119, accessed 15 January 2019.
[522] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019 at 41
[523] Article 88 of the Constitution of the Republic of Namibia Act 1 of 1990).
[524] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 120 accessed 15 January 2019.

The office of the PG is a constitutional establishment in terms of Article 88 of the Namibian Constitution which reads;

> [t]here shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Service Commission.

The appointee by the President the Prosecutor-General should hold legal qualification and be a fit and proper person.[525] It should be noted that the Constitution is silent on the term of service in office of the PG. However, the retirement age for other offices appointed in a similar manner like the Judges[526] and Ombudsman,[527] they may hold office until they turn 65, the President has a discretion to extend the retirement age to 70 and it can be assumed the same with the PG. Section 88A provides for the removal of the Prosecutor-General from office by the president acting on the recommendation of the Judicial Service Commission (JSC).

Article 88(2) highlights the powers of the PG and these include the power;

> '(a) to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;
> (b) to prosecute and defend appeals in criminal proceedings in the High Court and the
> Supreme Court;
> (c) to perform all functions relating to the exercise of such powers;
> (d) to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;
> (e) to perform all such other functions as may be assigned to him or her in terms of any other law.'

The powers of the Prosecutor General to prosecute are augmented by the Criminal Procedure Act (the Act).[528] This is the Act that gives the PG the prerogative to institute criminal prosecutions in all areas of jurisdiction for the Namibian courts.[529]

Amongst his powers the Prosecutor General has the power to take over private prosecutions.[530] Also according to section 6 of the Act, the PG has the power to

[525] Article 88 (1) (a) and (b) of the Constitution of the Republic of Namibia Act 1 of 1990.
[526] Article 82 of the Constitution of the Republic of Namibia Act 1 of 1990.
[527] Article 90 of the Constitution of the Republic of Namibia Act 1 of 1990.
[528] Section 4 Criminal Procedure Act 25 of 2004.
[529] Section 2(1) Criminal Procedure Act 25 of 2004.
[530] Section 11(2) Criminal Procedure Act 25 of 2004.

withdraw charges before plea or to stop proceedings thereafter. The Act also empowers the PG or any other authorised prosecutor to withdraw charges before plea and the accused will not be entitled to a verdict.[531] The proceedings may be stopped also by the prosecutor after plea but before conviction and the accused will be entitled to a verdict of acquittal.[532] No proceeding can be stopped without the written consent of the PG or any other person authorised to do so

5 4 Independence of the Prosecutor-General

It is important for the PG to be independent from outside influence and independence especially from the executive and politics. As such there is a need for independence of the PG ensured through the process of appointment and dismissal. It should be noted that neither the Constitution nor the Act specifically provides for the independence of the PG. The greatest challenge to the independence of the PG is the establishment of the office of the AG which the constitution states in no uncertain terms that the powers and the functions of the AG are 'to exercise the final responsibility for the office of the Prosecutor-General'[533]

There are problems that come with this position. Firstly the Attorney-General is appointed by the President in accordance with the provisions of Article 32 similar to the appointment of the Prime Ministers and ministers. Although the Constitution nowhere states that the Attorney-General is part of the Cabinet, his/her appointment is provided for in the same article as that of prominent members of the Cabinet.[534] Furthermore the AG is the principal legal adviser to government.[535] The AG therefore is more an executive figure that he is independent and there is a number of indicators.

One of them is that the constitution provides that the AG is appointed in accordance with Article 32 and article 32 provides for the appointment of;

[531] Section 6 of the Criminal Procedure Act 25 of 2004.
[532] Section 6 (a) of the Criminal Procedure Act 25 of 2004.
[533] Article 87(a) of the Constitution of the Republic of Namibia Act 1 of 1990.
[534] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May at 41
[535] Article 87(b) of the Constitution of the Republic of Namibia Act 1 of 1990.

'(bb) Ministers and Deputy-Ministers;
(cc) the Attorney-General;
(dd) the Director-General of Planning;
(ee) 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.'

It is therefore logical to see the inclination of the Attorney General's office to politics, although it is not expressly stated that the AG is a member of cabinet the way he is appointed is similar to that of the other distinct members of cabinet.[536] It can be concluded that the way the AG is appointed is more political and his exercise of final responsibility over the PG exposes the PG to political interference.

On the other hand there are other pointers in the constitution that point to an intention of the framers of the constitution to promote the independence of the PG. Firstly the PG is appointed by the President upon the recommendation of the Judicial Service Commission (JSC) just like the judges and other ombudsman.[537] This shows an element of independence as the JSC is an independent institution. The PG is appointed by the president on the recommendations of the Judicial Service Commission[538] just like judges and the ombudsman.

The JSC consists of the Chief Justice, a judge appointed by the President, two members of the legal profession, and the Attorney-General.[539] Political manipulation of the Commission is therefore difficult since the judges are appointed by the President upon the recommendation of the President and the two lawyers are appointed by the law society thus no relationship or accountability

[536] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 121 accessed 14 January 2019.
[537] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 121 accessed 14 January 2019.
[538] Article 88(1) of the Constitution of the Republic of Namibia Act 1 of 1990.
[539] Article 85(1) of the Constitution of the Republic of Namibia Act 1 of 1990.

to the political powers.[540] The JSC is therefore a more neutral party to involve in the appointment of the PG thereby ensuring independence and impartiality in the appointment.

The term 'on the recommendation of the JSC' was tested in Namibia when the President elected Advocate Kasutu to be ombudsman without waiting for the recommendation of the JSC and there was a public uproar upon which the President withdrew the appointment and the JSC forwarded a list to the President on top of it being Advocate Bience Gawanas who the President then appointed. According to Horn this created a good precedent for the appointment of public officers on the recommendation of the Commission.[541] It meant that the President could not simply ignore the JSC.

It is important to note that the power given to the JSC at the dismissal is similar to that given at appointment. Section 88A (1) provides for the removal of the PG before expiry of his term and this is done by the President acting on the recommendation of the JSC. The PG can only be removed on the ground of 'incapacity or for gross misconduct, and in accordance with the provisions of Sub-Article (3)'[542].

Sub-Article (3) provides for the establishment of a tribunal that shall inquire on the matter and report to the JSC. After deliberating on this report the JSC makes their recommendation to the President. If they recommend that the PG be removed the President must remove the PG. The president therefore is mandated to follow their recommendations he has no discretion since the provision is couched in mandatory terms not discretionary.[543] It stands therefore that the decision to remove the PG belongs to the JSC and not the President and

[540] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 121 accessed 14 January 2019.
[541] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 121 accessed 14 January 2019.
[542] Article 88A (2) of the Constitution of the Republic of Namibia Act 1 of 1990.
[543] Article 88A(3) (c) of the Constitution of the Republic of Namibia Act 1 of 1990.

as discussed earlier the JSC is more impartial enhancing the independence of the PG.

There is an issue of concern highlighted above that Sub-Article 87(a) of the Constitution mandates the AG; 'to exercise the final responsibility for the office of the Prosecutor-General' and it is feared the PG may be subordinate to the AG, a more political office. The dispute between the two offices was articulated and solved in the case of *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General.*[544]

The case arose because of a letter that had been written by the AG noting the insubordination of the PG. The letter that was in the heads of arguments showed complaints by the PG that the AG had been giving instructions to his officials to withdraw a case and this was an attempt to defeat the ends of justice.[545]

What gave rise to the matter is that there was a case of discrimination against the national broadcaster which was dragging. The AG had informed the PG that he intended to withdraw prosecution and all proceedings were to come to a halt. The PG responded by informing the AG that he did not find himself bound by the instruction as he was independent and acted under no-one's direction.[546]

As a result of this clash, a petition was brought by the AG to the Supreme Court to determine the issues listed below;

> '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;

[544] 1998 NR 282 (SC) (1).
[545] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 121 accessed 14 January 2019.
[546] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1) p 119ff

(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 AG based their arguments on the premise that final responsibility meant the ultimate prosecuting discretion and that s 3(5) of the Criminal Procedure and Evidence Act of 1977 was still law and the exercise of the PG's powers were subject to the direct control of the AG. The final argument was 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.[547] The PG in response only tried to bring out the issue of the independence of the prosecuting authority underlying the position of the Constitution.[548]

The Supreme Court came to an attention-grabbing conclusion on all issues. First it found that outside section 3(5) of Act 51 of the 1977 Act, there is nothing in the Constitution that places the PG under the direction of the AG.[549] Reference was also made to the case of *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others* which indicated that one of the fundamental functions of the prosecuting authority was the discretion to proceed or withdraw prosecutions.[550] Lastly, the court also confirmed that the AG was a political appointment whilst the PG was a quasi-judicial one and such distinction was apparent in the Constitution.

Using the spirit of the Constitution of the Namibian people the court affirmed the case of *State v Van Wyk* where it was stated that;

---

[547] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General 1998 NR 282 (SC) (1)* p 2ff
[548] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 121 accessed 14 January 2019.
[549] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1) 295.
[550] *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others* 1994 (1) SA 387 (C) at 393H–394H.

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

In the spirit of never wanting to see the characteristics of apartheid resurface again, Judge Leon also stated that;

> '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.'[551]

The court also emphasised that there was no need for the two offices to fight since the final responsibility merely meant a duty to account to the President, Cabinet and Parliament but not to interfere with the decision of the PG.[552] Final responsibility was held to be the duty to account to the executive and the legislature but does not include the power to interfere with the decisions of the PG.[553] The court dealt with the issue of final responsibility indicating that it does not mean that the PG is subservient to the AG as the AG has no authority over the decisions made by the PG. [554]

The ruling cleared all uncertainty and fervently expressed the independence of the PG as far as his mandate to prosecute is concerned. A strong point was made that the two offices functions were in relation to the three branches of government, the AG being executive and the PG being judicial.[555] Each therefore had a duty to keep the other accountable but could not usurp or take over the functions of the other. One other important point to note is that the Namibian Constitution seems to leave out the Minister of Justice in relation to the prosecutorial authority unlike the South African Constitution where it is the Minister who exercises final responsibility, the same

---

[551] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General 1998 NR 282 (SC) (1)* 295 at 293B, 302A–B).
[552] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 126 accessed 14 January 2019.
[553] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1) 38.
[554] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1).
[555] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General 1998 NR 282 (SC) (1)* p 292.

minister who exercised this responsibility before the Constitution of Namibia. The minister however, is never mentioned in the Namibian Constitution in relation to prosecutions.

Another pointer on the independence of the PG in the Constitution is that the PG is appointed and his office regulated in the same manner as the Judges and the ombudsman. In the case of *Ex Parte Attorney-General* it was held that to compromise independence of the judiciary will be a violation of the Constitution,[556] and can be concluded safely that to compromise the independence of the PG will be a violation of the Constitution. This position is supported by a statement by Horn who stated that 'one of the major tenets of the principles, namely the independence of the judiciary, is not only strongly protected, but also interpreted broadly to include the prosecutorial authority.'[557]

5 5 Accountability of the PG

The prosecuting authority exercises extensive jurisdiction with regards to a prosecuting decision. There is a need to exercise such discretion within a certain legal framework to allow for responsibility and accountability.[558] To this extent, the United Nations Guidelines on the Role of Prosecutors encourages nations to set out guidelines for their prosecutors for the exercise of discretionary powers to improve fairness and consistency in decision making.[559] Indongo suggests that these guidelines should be in the form of a published policy or statute. When this is done, it will enhance public protection.[560] He furthermore states that in order to offer better protection, these guidelines should be enforceable in court.[561]

---

[556] *Ex Parte Attorney-General: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 NR 303 (SC) p 48.
[557] Horn *The forerunners of the Namibian Constitution* 2002
[558] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 108.
[559] United Nations. 1990. *Guidelines on the role of prosecutors: Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*. Available at http://www2.ohchr.org/english/law/pdf/prosecutors.pdf; last accessed 19 October 2008.
[560] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 108.
[561] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 108.

A definite tool of accountability of the PG in Namibia is that there has to be a *prima facie* case before prosecution can be instituted.[562] What it means is that evidence must be sufficient, which is admissible and which provides prospects of successful prosecution.[563] The qualification here is that, it does not permit any evidence available but rather admissible evidence. Inadmissible evidence is malicious and can lead to a delictual action instituted against the prosecutor general for malicious prosecution.[564]

The Constitution of Namibia requires the prosecutor general to account in terms of the law. Article 88(2) states that that the powers and functions of the PG are 'to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings.' Accountability to the law is also in the sense that the PG has to prosecute whenever there is a *prima facie* case to prosecute.[565] Article 88(2) (a) seems to oblige the PG to prosecute each *prima facie* case.

The Judicial Service Commission (JSC) is the only body that exercises authority over the PG. The JSC may remove him from office after recommending it to the President for the removal..[566] Indongo notes that although the JSC has no authority to interfere with the decision of the PG, they have the power to look into the personal conduct of the PG.[567] The JSC has the power to look at the *mala fides* of the PG although he is not accountable to anyone for prosecuting decisions.[568] This accountability to the JSC for personal conduct also enhances the responsibility of the PG to the General public to act professionally and ethically.

---

[562] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 107.
[563] National Prosecuting Authority of South Africa. 1999. *Manual for the National Prosecuting Authority of the Republic of South Africa*. Pretoria: NPA.
[564] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 107.
[565] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 108.
[566] Article 84(1) Constitution of the Republic of Namibia Act 1 of 1990.
[567] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 106.
[568] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 106.

The PG is also accountable to the executive and to parliament. There is an accountability that is required in the exercise of prosecutorial functions that they should be conducted within certain confines.

If the PG's intentions in prosecutions are found to be malicious, recommendations can be made to the President for removal and this holds the PG accountable to pursue prosecutions in good faith.[569] It is important to note that once the JSC recommends for PG's removal, the president must remove the PG and this is mandatory.[570]

Moreover if the PG pursues prosecutions maliciously they can be sued for damages. The delictual claim for malicious prosecution can be undertaken once proceedings are concluded, accused is acquitted with abundant evidence that the process of prosecution was initiated wrongfully as evident in the case of *George Lifumbela Mutanimiye v The Minister of Safety & Security.*[571] It is important to mention that although the court found that the plaintiff had failed to prove his claim for malicious institution of prosecutions his claim for malicious continuation of prosecution was upheld. Not only is the PG liable for instituting malicious prosecutions but also for continuing with such prosecution.[572]

The facts in the case of *George Lifumbela Mutanimiye v The Minister of Safety & Security* are based on a attack by the Caprivi Liberation Army (CLA) which led to the destruction of property and death of people. Consequently it was ordered that the prominent members of the United Democratic Party (UDP) should be arrested as the UDP was believed to be the military wing of the CLA. The Plaintiff was arrested after

[569] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 106.
[570] Article 88A (3) (c) Constitution of the Republic of Namibia Act 1 of 1990.
[571] (2017) NAHCMD 197. The plaintiff claimed for damages from the minister of State and Security as the 1st defendant, the Prosecutor-General as the 2nd defendant and the Government of Namibia as the 3rd defendant for malicious prosecutions to the amount of NAD 22 057 520 the principle claim being against the Minister of State and Security and the PG.
[572] White 'Tort law in America: An intellectual history,' 2003 available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2762&context=dlj Accessed on 7 June 2019.

a tip off that he was an organiser and supporter of UDP and that he supported the secession of Caprivi from Namibia by violent means.[573]

The accused was charged together with 125 other accused persons for many crimes with the most serious one being high treason. On 11 February 2013, the plaintiff was acquitted and discharged in terms of section 174 of the Criminal Procedure Act 1977 (CPA). The claim followed the arrest and detention by the Ministry of State and Security and subsequent prosecution by the PG.[574] Of importance is the claim against 2nd defendant, the PG, who was sued on grounds that;

> 'the second defendant or her employees wrongfully and maliciously set the law in motion against the plaintiff and continued to do so by prosecuting the plaintiff for the crimes set out in the indictments without probable cause, without having sufficient information at their disposal which substantiated such charges or justified the prosecution of the plaintiff on such charges; alternatively, without having any reasonable belief in the truth of any information given to them which could have implicated the plaintiff in the commission of high treason or the commission of any of the serious crimes referred to in the indictment.'

The facts that the plaintiff relied on are that by 17 November 2005 the PG or her employees had knowledge of witness statements and their testimony but they proceeded to prosecute and continued to do so until the day of his release in 2013.[575] Furthermore, he indicated, it was improper and unjustifiable to continue prosecuting him even after the last witness who had mentioned him in their statements had testified on 2 February 2006.[576] As such he contended that the decision to continue with prosecution was done with improper and ulterior motive. His argument is that the 2nd defendant should have stopped prosecution in terms of Section 6(b) of the Criminal Procedure Act, Act 51 of 1977 by 17 November 2005 or within a reasonable time thereafter. The 2nd defendants in their plea indicated that they had a *prima facie* case and they could not stop prosecution before 2012 given that they did not know which witness would implicate the plaintiff.[577] Plaintiff argued however that if the PG had

[573] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 para 8.
[574] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 pg10.
[575] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 15.
[576] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 45.
[577] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 22.4

applied his mind he would have declined to prosecute or at least he would have declined to continue prosecuting.[578]

The court held that the PG in exercising discretion has to act on the basis of information before him to ensure that the decision is not influenced improperly.[579] To avoid malicious prosecutions the court held that prosecutions should be initiated and instituted where a case is 'well founded, upon evidence reasonably believed to be reliable and admissible, and should not continue with such proceedings in the absence of such evidence.'[580] This means that the discretion to prosecute is not immune to judicial scrutiny if the discretion is exercised improperly.[581] The test or principle is therefore whether there is reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (or maintained).[582]

The court held that the test for reasonable and probable cause was very onerous as it contains an objective and a subjective element.[583] It means that there should be information at the disposal of the prosecutor and there must be an actual belief which must be reasonable in the circumstances before him.[584] The plaintiff claimed that the second defendant and/or her employees wrongfully and maliciously continued the prosecution as from 17 November 2005, or 2 February 2006 for the crimes set out in the indictment against the plaintiff.[585] The question to be answered by the court was;

> 'if probable cause exits initially, but during the course of the criminal prosecution it becomes clear that there is no probable cause to continue such prosecution, is there then any liability when a party maintains the action thereafter?'[586]

The same question was addressed in the case of *Hathaway v State of New South Wales*[587] which held that;

> 'Maintaining proceedings is a continuing process. It is conceivable that a prosecutor may act for proper reason (i.e. non-maliciously) or with reasonable and probable

[578] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 43.
[579] *Makapa v Ministry of Safety and Security and Others (I 57/2014) [2017] NAHCMD* 130 at 36.
[580] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 72.
[581] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 72.
[582] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 72.
[583] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 74.
[584] Makapa v Ministry of Safety and Security and Others (2017) NAHCMD 130 at 74.
[585] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 para 85
[586] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 para 88
[587] 2009 NSWSC at 116.

> cause (or the plaintiff may be unable to prove malice, or the absence of reasonable or probable cause) at the time of institution of proceedings, but, at a later point in the proceedings, and while the proceedings are being maintained, the existence of malice or the absence of reasonable and probable cause may be shown. At any time at which the sole or dominant purpose of maintaining the proceeding becomes an improper (malicious) one, or the prosecutor becomes aware that reasonable and probable cause for the proceedings does not exist, or no longer exists, the proceedings ought to be terminated, or the prosecution is malicious.'[588]

In the *Zreika v State of New South Wales* case, the court held that the prosecutor should have stopped prosecution when the witness failed to identify the accused in a photo identification where the plaintiff's photo was arrayed with other photos, it was held at this moment that the prosecutor lacked reasonable and probable cause but continued anyway with the prosecution.[589]

In the case at hand the last witness had testified on 17 November 2005 and he was held in detention until the evidence was evaluated in 2010 and the state's case was closed. This was despite that prosecution did not have enough evidence to make out a *prima facie* case requiring an answer from the plaintiff.[590]

Using this test, the court held that the continued detention and prosecution of the plaintiff from November 2005 was malicious. In its own words the court held that;

> '…the employees of the second defendants did not exercise their powers in a *bona fide* manner. They left the plaintiff to be incarcerated for no *bona fide* reason. In my view no prosecutor acting objectively and properly could have continually sought a postponement of the matter for over two years and objected to bail on the evidence it had. The employees of the second defendant did not exercise any discretion. The prosecutors failed to apply an independent mind to the facts of the case.'

In describing malicious prosecution the court held prosecutions are motivated by malice where there was an intention to injure.[591] In the matter of *Glinski v McIver*[592] it was held that the presence of malice is usually apparent where it can be shown that a prosecutor lacked an honest belief in the justification of commencing proceedings because in the circumstances it will mean that the proceedings were motivated by

[588] *State of New South Wales v Hathaway* 2010 NSWCA 188 para 118.
[589] 2011 NSWDC 67.
[590] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 94.
[591] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD at 81.
[592] [1962] AC 726 at 766.

something extraneous or improper. Malice covers any motive other than a desire to bring a criminal to justice.[593]

Liability for malicious prosecutions was established and the only question left unanswered was the issue of quantum for damages. The case is important in that it holds the PG accountable to the law to institute and maintain proceedings in good faith and not to be influenced by any other motive than the information before them and the evidence before them in relation to the offence.

5 6 Reviewability of the decision not to prosecute

The Namibian prosecutorial functions are unique. The uniqueness is in what the Supreme court in the *Ex Parte: Attorney-General*[594] case called the quasi-judicial appointment of the PG. The appointment of the PG was called a quasi-judicial appointment. It is important to look into this term, what it means and its implications on the accountability and independence of the PG.

A quasi-judicial act is defined by Weichers as an act done by a non-judicial officer but which resembles a judicial act.[595] For an Act to be judicial it must be one that is done whilst exercising discretion.[596] There was once a time when the classification of decisions into judicial, quasi, judicial and administrative was fashionable in South Africa and Namibia they used the same terms. However the separation of functions has been dismissed by Hoexter as unhelpful.[597] The case of *Administrator of the Transvaal v Traub*[598] going further to state that the classification into administrative, judicial and or quasi-judicial adds nothing when deciding whether to review a public decision or not.[599] Helpful or not the Supreme Court termed the functions of the PG quasi-judicial and it is important to establish what it means and its implications.

---

[593] Glinski v McIver [1962] AC 726 at 766.
[594] 1998 NR 282 (SC) (1) at 292.
[595] Wiechers *Administrative law* (1985).
[596] Indongo "The uniqueness of the Namibian Prosecutor-General," 2008 *The Independence of the Judiciary in Namibia* 99-112 at 104.
[597] Hoexter *Administrative Law in South Africa* 2ed (2012) 355.
[598] 1989 (4) SA 731 (A) 763H-I.
[599] *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A) 763H-I.

The general rules for judicial functions applies for quasi-judicial functions which is that the performance of the functions should meet the principles of natural justice.[600] The nature of the act determines whether the principles of natural justice should be complied with. This is because there are further requirements like; that the act should not only involve the exercise of discretion, but should also affect a person or a person's existing rights, powers, or privileges.[601] Further the act should be performed to meet such purposes for which the power was conferred on the official that is the decision should be rational.[602]

Principles of natural justice have been summed up in the maxim *audi alteram partem* ("hear the other side".[603] The maxim includes a variety of duties and these are;

> 'The duty to give all involved parties the opportunity to state their cases
> The duty to communicate all potentially prejudicial facts and
> Considerations to the person so affected so they can answer thereto
> The duty to provide reasons for decision taken, and
> The duty that the organ exercising the discretion acts impartially.'[604]

It has been acknowledged that the failure to give reasons for a decision does not automatically mean non-adherence to the principle of natural justice.[605] This is considering that there are some exercise of discretion that are termed free discretion for which no reasons are required for making the decision and according to Indongo this seems to be the position of the PG.[606] If the functions of the PG are quasi-judicial it means that the duties stated above have to be complied with by the decision maker in order to for the decision to be justifiable.

Indongo points out that the purpose of the rules of natural justice are to make sure that administrative organs that perfume judicial and quasi-judicial functions should duly

---

[600] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 104.
[601] *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A).
[602] Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC) para 36.
[603] De Ville *Judicial Review of Administrative Law in South Africa (2003) 218.*
[604] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 105.
[605] *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A).
[606] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 105.

apply their mind to matters before them.[607] It seems therefore that Indongo is of the opinion that quasi-judicial functions are administrative functions which are reviewable under administrative law. This is supported by Baxter who indicates that quasi-judicial functions are easily reversible than other administrative functions.[608] A question then arises of whether the decision not to prosecute is reviewable under administrative law in Namibia.

In short, Indongo points out that the PG has independence and discretion provided he adheres to the following conditions:

- 'The Prosecutor-General acts within the powers conferred on the office to prosecute on behalf of the Namibian people and in the name of the state
- The Prosecutor-General exercises such powers subject to constitutional provisions and keeps the Attorney-General properly informed on relevant matters, and
- The Prosecutor-General duly applies his/her mind to the case before him/ her, acts honestly and impartially, and discloses to the accused all facts on which the charges are based.' [609]

These provisions show that the PG is independent and free from outside influence, meaning that the PG's not susceptible to scrutiny.

This notion is reinforced by Indongo that the PG of Namibia exercises his powers without responsibility since there are no review procedures unless the decision is unconstitutional.[610] However even where the decision is unconstitutional it still has to directly affect the affected person for there to be judicial interventions.[611]The case of *Ex Parte: Attorney-General*[612] is clear that the power vested in the PG is absolute and there is no review. Indongo emphasised that the decision by the PG not to prosecute cannot be reviewed assessed, questioned or examined.[613]

---

[607] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 105.
[608] Baxter *Administrative law* (1984).
[609] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 105.
[610] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 106.
[611] Article 18 Constitution of the Republic of Namibia Act 1 of 1990.
[612] *Ex Parte: Attorney-General,* 1998 NR 282 (SC).
[613] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 110.

The only time when the decision to prosecute is challenged is when the PG appeals against a judgement in favour of the accused and the court assesses whether the appeal is not wrongful. The court can find that the PG's acted wrongly in appealing and dismiss the appeal and the court can award costs if deemed fit for the respondent.[614] Failure to have a review mechanism leaves the public at the mercy of the PG.

5 7 The principle of legality in Namibia

The Constitution of Namibia sets the minimum requirement to be met for a state to be called a just state. This is called a *Rechtsstaat,* a state governed by the rule of law.[615] This term was used in one of the first constitutional Judgements in *Ex Parte Attorney-General: In re The Constitutional Relationship between The Attorney-General and The Prosecutor-General.*[616] The court came to the conclusion that the exercise of the final responsibility over public prosecutions by the Attorney General who was a political appointee ensured independence of the prosecution authority and this was hall mark to the rule of law.

The PG cannot act against constitutional provisions and promote the rule of law.[617] There is nothing much to state about the review under the principle of legality in Namibia since the literature review shows that the term is not popular in Namibia. The principle is undeveloped although there is an appreciation that Namibia is a '[r]echtsstaat just as South Africa under the apartheid regime was not'[618] Namibia is set and founded on democratic principles that have created a constitutional state founded on law and justice and has thereby establishing a civil society. Whatever the

[614] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 110.
[615] Horn "The unique constitutional position of the Prosecutor-General of Namibia and the effect of the independence of the office on the functioning of the prosecuting authority in relationship with the Ministry of Justice and the Attorney-General." 2000 *Unpublished Thesis, UNISA* at 7
[616] 1998 NR 282 (SC) (1).
[617] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 100.
[618] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1) at 34.

notion of the rule of law Namibia subscribes to it has not been expounded on the courts to establish its extent in holding the exercise of public power accountable.

5 8 Private prosecutions in Namibia

The only apparatus and main mechanism available against the decision not to prosecute is private prosecutions in Namibia as provided for in section 5 of the Criminal Procedure Act. If the PG declines to prosecute, a private person can institute private prosecution.[619] According to section 5 of the Criminal Procedure Act the private prosecutor has to have a substantial interest in the trial arising out of some injury suffered by that person as a result of such offence.[620] The people who can institute private prosecutions include the spouse of that person and where the offence led to death the child or wife of that person, a legal guardian or curator of a child or lunatic.[621] Private prosecution may be instituted personally or with legal representation.

Where the PG declines prosecution the section gives the interested party the right to request for a *nolle prosequi* from the PG and this is the certificate that gives the interested party insurance to take the matter to court. The certificate is valid for 6 months and if the 6 months lapse before prosecution is initiated the certificate expires.[622] Section 5 also gives the interested party power to obtain a compelling order for the PG to decide to prosecute or not to especially where the decision has been outstanding for more than 6 months.[623] It should be noted that the PG also has the power to take over the private prosecutions after issuing the certificate of *nolle prosequi.* Section 8 of the Criminal procedure Act also allows for private prosecutions under statutory right. Section 8(1) reads:

> 'Anybody upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.'

[619] Section 7 of the Criminal Procedure Act 25 of 2004.
[620] Section 7(1) (a) Constitution of the Republic of Namibia Act 1 of 1990.
[621] Section 7(1) (b-d) Constitution of the Republic of Namibia Act 1 of 1990.
[622] Criminal Procedure Act 25 of 2004.
[623] Criminal Procedure Act 25 of 2004.

According to the section this right shall only be exercised after consultation with the PG and after the PG has withdrawn his right to prosecute in relation to that specific offence or in respect of a group of specified offences in relation to which the person in question is authorised to exercise such right of private prosecutions.[624]

Section 9 provides for securities before private prosecutions are pursued. Before private prosecution, it is mandatory for the person to deposit 100 Rand as 'security that he will prosecute the charge against the accused to a conclusion without undue delay' and any amount the court may deem fit as costs which the accused may incur in respect of his defence to the charge.[625] In case the private prosecute fails to finalise the matter the security is forfeited to the state.[626] The provision of security is a good mechanism to ensure that private prosecutors are held accountable in the exercise of their function in prosecuting.

Section 11 provides that once the private prosecutor defaults on the date of the trial the accused is discharged if the court is not satisfied that he is reasonably prevented from attending. If the court is satisfied that the default is not wilful the matter may be postponed to a later date. Once discharged such an accused person may never be prosecuted again under private prosecution in respect of that charge and is entitled to an immediate release from custody.[627] However the PG can resume prosecution of accused in respect of that charge

5 9 Separation of powers in Namibia

To guarantee the separation of powers, the Constitution differentiates between political appointees, who are appointed by the President, and independent offices appointed by the President at the recommendation of the Judicial Service Commission, also an independent body.[628] This separation is apparent in the *Ex Parte*

[624] Section 8(2) of the Criminal Procedure Act 25 of 2004
[625] Section 9(b) of the Criminal Procedure Act 25 of 2004.
[626] Section 9(3) of the Criminal Procedure Act 25 of 2004.
[627] Section 11 of the Criminal Procedure Act 25 of 2004.
[628] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019 at 8

Attorney-General: In re The Constitutional Relationship between The Attorney-General and The Prosecutor-General case that differentiated a political appointment from a quasi-judicial appointment.

The Namibian Constitution took a radical approach towards the separation of powers between the executive and the prosecutions authority. The radical approach was rejected by South Africa in the making of its constitution.[629] Separation of powers ensures a separation of the Executive the judiciary and Parliament and each organ in its sphere is a guarantor for the rule of law ‘the promotion and protection of human rights entrenchment of good governance based on the moral standards of accountability and transparency.’[630]Separation of powers in Namibia is firmly entrenched in the Namibian Constitution.[631]

5 10 Conclusion

In summary, the chapter looked at the history of the prosecutorial authority in Namibia and found that the concept of prosecutorial independence has always been alive. The laws that applied in Namibia before the Constitution were influenced by and large by the laws applicable in South Africa. Namibia was a part of South Africa and it was called South West Africa including the apartheid laws and policy. The prosecutorial authority of South West Africa before the Constitution vested in the Attorney General and he enjoyed autonomy of prosecuting power.

The power of the Attorney General to prosecute was mainly regulated by the Criminal Procedure and Evidence Act. Just like this Act applied in South Africa it also applied in Namibia. However, when the South African Criminal and Magistrates’ Courts Procedure Amendment Act No. 39 of 1926 amended section 139 of the South African Act and section 7 (1) and (2) of the Criminal Procedure and Evidence Act by placing the Attorney-Generals under the control and directions of the minister, Namibia did not follow the same path thus the AG in South West Africa remained independent whilst

[629] *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.
[630] Venaan ‘Separation of powers a practical experience’ *Namibian* available at https://www.namibian.com.na/index.php?id=87220&page=archive-read accessed 13 May 2019.
[631] Nakuta & Chipepera ‘The Justice Sector and the Rule of Law in Namibia Management, Personnel and Access’ available at https://www.nid.org.na/images/pdf/democracy/Management_Namibian_Justice_System.pdf accessed on 28 May 2019 pg 18.

the one in South Africa was not. In time however the new Criminal Procedure and Evidence Act of 1977 made it mandatory for the AG to be under the control of the Minister in Namibia as it was in South West Africa.

This was not long since the Constitution established a new office responsible for prosecutions which is called the office of the PG. The office of the AG was not entirely done away with however under the new Constitution. The Constitution indicated that the AG had final responsibility over the PG. The chapter found that there were a number of provisions in the Constitution that promoted the independence of the PG. First and foremost the Constitution provided that the PG was appointed by the President on the recommendation of the JSC. The term 'on the recommendation' of the JSC means that the President cannot appoint the PG without considering the list of names sent to him by the JSC.

The same applies on the removal of the JSC from office. Removal of the PG had to be done through recommendation from the JSC and it should be emphasised that after the JSC made a recommendation to remove the PG, the recommendation 'must' be adhered to. The constitutional provision is couched in mandatory terms meaning that the President has no discretion not to remove the PG once the recommendation to remove him has been made.

Involving the JSC so appoint and remove from office the PG, upholds the independence of the PG since the JSC consists of the Chief Justice, a judge appointed by the President, two members of the legal profession, and the Attorney-General. Political manipulation of the Commission will therefore be difficult since the judges are appointed by the President upon the recommendation of the JSC and the two lawyers are appointed by the law society thus no relationship or accountability to the political powers.

The chapter highlighted that Namibia as the South West African territory of South Africa had endured the oppression of apartheid and the new Constitution ensure to shield the prosecutorial authority from political power. In this attempt the Constitution has a provision that provided difficulties in ensuring political interference with the PG and this is the provision that gives the AG final responsibility over the PG. This

provision was expounded in the case of *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* case that explained whether the AG could direct the PG to institute or stop prosecutions. The court in this case came to the conclusion that final responsibility did not mean that the AG could usurp the powers to prosecute from the PG. The final responsibility as contemplated in the Constitution only meant the power of the AG to account to Parliament and the Executive on the activities of the PG not to take over prosecutions. Whatever dispute was existing between the AG and the PG was resolved, there is no power, office or institution that could interfere with the PG's prerogative or discretion to prosecute.

In the same breath of accountability the chapter found that in Namibia the PG can be held liable for a delictual claim for malicious prosecution. It has been held that malicious prosecutions are prosecutions that are conducted for any other purpose that is not to convict an accused person. It was held that the PG being represented by the prosecutor has to have reasonable and probable cause to institute proceedings. The prosecutor has to use the information before him and has to be satisfied that the information before him is sufficient to create a good case where the accused has to answer. Where such information is absent and the PG initiates prosecution he can be sued for damages for malicious prosecution.

The last guard against adverse decisions not to prosecute in Namibia was found in the chapter? to be private prosecutions. Once the PG refuses to prosecute, he issues a certificate *non prosqui* to a person who meets the required criteria and such person can institute private prosecutions. There are a couple of measures provided for in the Criminal Procedure and Evidence Act which hold the private prosecutor accountable and to protect the accused. These include the payment of surety for the private prosecution to ensure that the prosecution is conducted and concluded without delay. Furthermore where the private prosecutor fails to avail himself on the day of the hearing for no satisfactory reason, the matter will be thrown out and the accused will not be prosecuted again for the same offence under private prosecution. It stands therefore that in Namibia the prosecutorial authority is so independent that their decision not to prosecute cannot be reviewed and the only option is for private

prosecution. Where prosecution has been conducted and one believes it was conducted for an improper motive they can institute for a delictual claim.

CHAPTER 6

CONCLUSION

6 1 Introduction

The previous chapter dealt with the prosecutorial authority of Namibia. The chapter looked at the history of the law in Namibia, with special relation to the provisions dealing with the prosecutorial authority. Thereafter, the chapter looked at the Constitution of Namibia and how it caters for the independence of the prosecutorial authority. Moreover, the previous chapter looked at the nature of prosecutorial independence as provided for in the law of Namibia. Thereafter, the chapter delved into the issue of accountability of the NPA of Namibia with special insight on the accountability of the decision to prosecute and not. In this breath the chapter looked at the reviewability of powers to prosecute under the Namibian laws and the legal principles that guide the review. At the same time the chapter looked at principles such as the rule of law and the separation of powers. In conclusion, the chapter looked at the provision for private prosecution in Namibia as well as the law that allows for it.

This chapter is the conclusion chapter of the thesis, and it will round up everything that has been discussed in previous chapters. The chapter will look at the findings that have been made in relation to the research aims that have been highlighted in the first chapter. In doing so, the chapter will succinctly outline the position of prosecutors in each jurisdiction that has been discussed, namely: Zimbabwe, South Africa, and Namibia. It will go on to juxtapose each jurisdiction adjacent to the other to bring out, vividly, the similarities and the differences that come out, in relation to Zimbabwe.

Having done that, the chapter will discuss various positions of independence of the prosecuting authority in these jurisdictions, and the principles that support their positions in relation to its independence. The strengths and weaknesses in position that Zimbabwe has adopted will be highlighted leading to recommendations on the areas that Zimbabwe has been found to be lacking. Finally, the chapter will conclude

on private prosecutions of South Africa and Namibia and their comparison to Zimbabwe.

6 2 History of the law in Zimbabwe, South Africa and Namibia

It is common cause that the three jurisdictions discussed share a common ancestry in common law. Whilst Zimbabwe was colonised by England, South Africa and Namibia also became British colonies, which later adopted the Roman Dutch Law. Roman Dutch law also had a profound effect on the law in Zimbabwe.

It is clear from the previous chapters that common law has had a tremendous impact and influence on the law in Zimbabwe, South Africa and Namibia. Zimbabwe being a former British colony was influenced by English and the Roman Dutch Law. It was discovered in chapter two that the combination of the Roman Dutch Law and the English law is what is commonly referred to as the common law. Chapter two listed the other sources of law in Zimbabwe, including the Constitution, statutes, case law and customary/traditional law. It was found that, although common law still applies in Zimbabwe, common law crimes no longer exist due to the development of a codified criminal law system, identified as the Criminal code.

It was also found that the establishment of an independent and separate office of the Prosecutor General in the three jurisdictions was a reaction to a history of colonisation and oppression and thus prosecutorial independence erupted to curb human rights violations and to protect society from arbitrary prosecutions by political figures and organs of state. Chapter 2 also highlighted that in Zimbabwe, the office of the Attorney-General, before the 2013 Constitution, was the prosecutorial authority and there was no separate institution that was mandated with the powers to prosecute.

The same conclusion was reached in Chapter 4,that the South African common law is also derived from the Roman-Dutch law as applied in the Cape during the 17th and the 18th centuries and is developed by foundations that are developed through judicial

precedent.[632] It was found in chapter 4 that, before 1926, the responsibility to prosecute rested on the Attorney-General who was free from any political control as they exercised strict autonomy.[633] It was found that the office of the Attorney-General in South Africa was introduced in 1928 and was responsible for handling prosecutions.[634]

Unlike Zimbabwe, the Attorney-Generals of South Africa were many, one for each province, who acted as public officials and they could hold other offices such as chief of police or prisons and was at times allowed to practice privately.[635] Through the 1935 Amendment , the Attorney-Generals of South Africa were placed under the control of the minister who was given the power to amend their decisions.

Chapter 4 indicated that ministerial control over the Attorney-Generals of South Africa increased before independence as a result of the General Law Amendment Act of 1957 and Section 3(5) of the Criminal Procedure Act 51 of 1977. These provisions permitted the Minister not only to reverse the decision by the Attorney-General, but he could at times 'himself in general or in any specific matter, exercise any part of such authority and perform any of such functions' of the Attorney-General.[636] There was the introduction of strict control of public prosecutions by the executive highlighting the influence of politics over prosecutions in Apartheid South Africa.

It is imperative to keep in mind that until 1994 South Africa was under the oppressive rule of the apartheid government. Just like Zimbabwe's colonial rule, laws were not applied equally to the citizens. In the same breath, the prosecuting authority before the political independence of these countries was state machinery at the disposal and will of the politicians. It is important to note that section 35 of the Criminal procedure

[632] History and back ground 'Supreme court of Appeal' available at http://www.justice.gov.za/sca/historysca.htm accessed on 3 January 2019.
[633] Redpath 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa' 2012 (186) *ISS Monograph* at 9.
[634] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 5.
[635] Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 January 2018 at 5.
[636] General Law Amendment Act of 1957 and Section 3(5) of the Criminal Procedure Act 51 of 1977

Act was declared unconstitutional in the case of *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* as it allowed the Minister to actually exercise some of the powers of the prosecuting authority.[637] An independent and separate office of the NPA was created in the democratic constitution of 1994 against a background of arbitrary use of the prosecutorial powers.

Chapter 5 highlighted that the history of South Africa and that of Namibia are interwoven.[638] It was found that the history of the legal system of Namibia tells the greater legal history of Southern Africa's Roman Dutch law. It was revealed in Chapter 5 that Namibia was a territory of the Union of South Africa until Proclamation 1 of 1921 which gave the Administrator of South West Africa legislative powers and Act 42 of 1925 of the South African Parliament which instituted a Constitution for the territory.[639]

Chapter 5 highlighted that, it was not only a matter of law but that South Africa held sovereign power over the South West Africa as was stated in the *R v Christians*[640] case. The chapter exposed that Namibia was administered as the fifth province of South Africa and this included the implementation of the policy of apartheid in Namibia.[641] Before this Constitution, the laws that applied in South Africa applied in to the South West African which meant that the laws in relation to the prosecutorial authority applicable in South Africa were applicable in Namibia. Just as in South Africa, the prosecution authority vested in the Attorney-General.

Section 3(5) of the Criminal Procedure Act 51 of 1977 which applied in South Africa also applied in Namibia and it gave the minister power over prosecutions. Chapter 5 highlighted that the political authority given to the Minister in Namibia was exercised

---

[637] *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC) at 301.
[638] Horn, 'The unique constitutional position of the Prosecutor-General of Namibia and the effect of the independence of the office on the functioning of the prosecuting authority in relationship with the Ministry of Justice and the Attorney-General.' 2000 *Unpublished Thesis, UNISA* at pg 1.
[639] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019
[640] 1924 AD 101.
[641] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May 2019

whenever the interests of the South African government were at stake and if not sufficient they would use other means.[642] This was basically because Namibia was not spared from the principles of the apartheid regime that were bend on oppression and discrimination not informed by the rule of law.[643]

6 3 Independence of the Prosecuting Authority of Zimbabwe, South Africa, and Namibia

Chapter 4 revealed that the issue of prosecuting independence is highly contested and a politicised issue.[644] It was discovered that in Zimbabwe, the power to prosecute lies in the NPA headed by the Proecutor General while in South Africa the NPA is the prosecutorial authority headed by the NDPP and in Namibia the NPA is headed by the PG.

It was observed that there are pillars of prosecutorial independence that are visible in each jurisdiction and these pillars summarise the core of prosecutorial independence as discovered in the previous chapters.

6 4 Pillars of Independence

The term pillar refers to the fundamentals or core elements or organs that constitute the independence of the prosecutorial authority and these are highlighted below.

The first pillar found to be existent and fundamental in all the three jurisdictions is institutional independence. From the discussions in the above chapters, it came out clearly that prosecutorial independence carries the face of both institutional and

[642] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at119, accessed on 4 January 2018

[643] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 119, accessed 15 January 2019.

[644] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 8.

individual levels. Institutional independence was found to be independent from any other institution or organ of State. In Zimbabwe for example the office of the Prosecutor General is separate from that of the Attorney-General. The Prosecutor General is not a member of the Public Commission. It was found that institutional independence demands that the NPA, as an institution is not under the control or influence of any other organ of state especially the judiciary, parliament, or the executive, which are the main organs of state.

From chapters 2 to 5 it can be concluded that another pillar of independence was found to be individual independence which refers to the independence of the individual members of the prosecutorial authorities and how they exercise their powers free from interference and this includes the heads of the prosecutorial authorities. The submission is that only where a decision is made purely on legal criteria does it become non-partisan, impartial, fair and equal to all.[645]

It was found that each individual prosecutor is held to high standards of ethical conduct and values like honesty and confidentiality. They are implored to act diligently in exercising their prosecutorial functions without any fear or favour. As an example it was found in chapter 3 that the Zimbabwean Constitution in section 260(1) calls for the Prosecutor General not to be subject to anyone and to 'exercise his or her functions impartially and without fear, favour, prejudice or bias.' It was revealed that in the three jurisdictions, there is a code of ethics states that the prosecutors should prosecute without fear, favour or prejudice. The same was found in chapter 4 that 32(1)(a) of the NPA Act of South Africa demands that every member of the NPA serves impartially, in good faith without fear, favour or prejudice subject only to the Constitution and the law.

It was found that individual independence also goes to the heart of the appointment and dismissal of the heads of the NPA. It was discussed that in South Africa, at institutional level, the leader of the NPA has a 10-year term of office.[646] The Supreme Court of Appeal of South Africa has made it clear that the NDPP must be able to make

[645] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 258
[646] Section 12(1) of the National Prosecuting Authority Act 32 of 1998.

his considerations free from any political influence, as it should also be free from the influence of government.[647]

At individual independence in Namibia chapter 5 discussed that there has to be a *prima facie* case before prosecution can be instituted.[648] What it means is that evidence must be sufficient, which is admissible and which provides prospects of successful prosecution.[649] The qualification here is that, the evidence should be admissible evidence without which the institution of prosecution could be labelled malicious and can lead to delictual action taken for malicious prosecution.[650] This holds the individual prosecutors accountable whenever they make a decision to prosecute thus free form malice of ulterior motive.

Functional independence is also one of the pillars of prosecutorial independence discussed in the thesis and it relates to the functioning of the NPA. Functional independence highlights that that the functions of the prosecutors should never be conducted by any other person who is not a member of the NPA. Functional independence is similar to institutional independence but it emphasises more on the freedom from external influence in conducting prosecutorial functions. An example in Zimbabwe is that as far as the exercise of the prosecutor's powers is concerned, the prosecutor answers only to the Prosecutor General and to no one else. What it means is that so long as the prosecutors are employed by the NPA, they are answerable only to the Prosecutor General, who cannot delegate these powers to any other body.

Another pillar of independence was found to be financial independence which implies that the prosecutorial institution should be given enough money to adequately discharge duties independently without relying on anyone else outside the NPA financially.[651] It was also found that financial independence goes down to the financial

[647] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 28.
[648] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 107.
[649] National Prosecuting Authority of South Africa. 1999. *Manual for the National Prosecuting Authority of the Republic of South Africa*. Pretoria: NPA.
[650] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 107.
[651] Fombad, *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 338.

security of the individual members of the enhancing their independence in decision making.

The financial independence of the head of the prosecutorial authority is of particular importance to the financial independence of the NPA. It was found that a fixed salary is a guarantee that there can be no arbitrary reduction in salaries if an unfavourable decision is made against someone with the power to reduce the salary thus ensures independence.

In South Africa, to cater for financial independence, it was found that only an Act of Parliament can reduce the salaries of the NDPP.[652] The same also is for a deputy director's salary which may also not be reduced unless by an Act of Parliament guaranteeing for financial independence.[653]

1.7.11 6 4 1 Constitutional caveats in the Appointment of leaders of NPA

An important pillar of the independence of the NPA is the independence and impartiality of the leader of the NPA and it is ensured mostly in how he is appointed and dismissed from office. It was discovered that to ensure that there is accountability on the appointment of the head of prosecutorial powers, the framers of the Constitutions of Zimbabwe, South Africa and Namibia made sure that it is not the sole responsibility of an individual to appoint the head of the prosecutorial power.

In Zimbabwe, it was found in Chapter 3 that the PG is appointed in the same manner as the judges of the High Court.[654] It was found that the judiciary and the executive are involved in the appointment of the Prosecutor General and it is not the sole responsibility of one person or institution of State.

The same was discovered in South Africa where, after consulting with the Minister of Justice and the NDPP, the President may also appoint the Directors of Public

[652] Joubert (9th ed) *Criminal procedure handbook* (2009) 53.
[653] Section 18(6). National Prosecuting Authority Act 32 of 1998.
[654] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.

Prosecutions (DPP).[655] After consulting with the Minister of Justice and the NDPP, the President may also appoint the various DPPs at the various High Courts.[656]

In perspective, in Namibia it was discovered that the PG is appointed by the President upon the recommendation of the Judicial Service Commission (JSC) just like the Judges and other ombudsman.[657] This shows an element of independence as the JSC is an independent institution. The JSC is a neutral party to involve in the appointment of the PG, thereby ensuring independence and impartiality in the appointment.

It was discovered also that in the three jurisdictions, the president does not solely hold the power to dismiss the head of the NPA. He acts in consultation with the JSC, or other tribunals set to provide procedural fairness and reduce arbitrary dismissals.

6.5 Hurdles to Prosecutorial independence in Zimbabwe, South Africa, and Namibia

It was noted that there a lot of difficulties that the independence of the NPA face in Zimbabwe, South Africa, and Namibia; the greatest being the powers of political figures and political appointments. With special mention in Zimbabwe, it was discovered that the police and the military are often found amongst the number of those who exercise prosecutorial power. In summation these hurdles were discussed, both the legal and factual hurdles.

1.7.12 6 5 1 Political interference hurdles

It was found that institutional and financial pillars of prosecutorial independence do not raise any questions on potential interference with the NPA but the constitutional

[655] Section 11 of the National Prosecuting Authority Act 32 of 1998.
[656] Section 13 of the National Prosecuting Authority Act 32 of 1998.
[657] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 121 accessed 14 January 2019.

provisions providing for the appointment of NPA heads raises the question of whether those who appoint the heads of the NPA do not have the power to influence the NPA through these appointees. The three jurisdictions have all answered this question of potential interference.

In Zimbabwe, it was held in the *Gula-Ndebele v Bhunu NO* that where the Constitution states that the President appoints on the recommendation of another body, it does not mean that the President appoints the person into that office.[658] It was found that according to the Constitution, the President cannot make the decision to appoint the Prosecutor-General *mero muto*, which means that without the recommendations from the Judicial Services Commission, the decisions cannot standalone and without the decisions the recommendations also cannot stand.

It was discovered that the risk of political interference in South Africa rests in that all senior prosecutors are political appointees. The power to appoint the NDPP creates a risk that the President may choose a NDPP who is loyal politically and if he is not; with the concurrence of the largely ruling party parliament, the President may remove the NDPP who is not loyal.[659] It was found in chapter 4 that the entire top echelon of the NPA, at least 14 positions, is appointed by the President and Minister of Justice without any input from other key stakeholders, such as Parliament, professional bodies or the public in general, posing a serious risk to independence of the NPA.[660]

In South, it was discovered that the fear of an independent NPA by the politicians in South Africa is worsened by the 'presidential presumptive', where seemingly criminal prosecutions for serious offences can now be instigated against a sitting President.[661]

To curb the Presidential upper-hand on the appointment of the NDPP, the Supreme Court of Appeal overturned the decision to appoint a NDPP by the President, indicating that the President does not have unfettered discretion. Accordingly, it was

[658] *Gula-Ndebele* v *Bhunu NO* 2010 (1) ZLR 78 (H)
[659] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 12.
[660] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 15.
[661] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* at 10

concluded that the President is accountable to the law in the appointment of the NDPP. It stands that the appointment of the NDPP by the President is not absolute discretion as the appointee must be a fit and proper person.

The same fear of political interference was found in Zimbabwe where the President appoints and dismisses the Prosecutor General. Although the JSC presents a shortlist to the President from which to pick from the successful candidates, it was discovered that ultimately, it is the duty of the President to make the final decision of appointment. The Constitution was found to provide even further that if the President not satisfied with the list given to him by the JSC, he may require the JSC to provide a further list of three qualified people. In the end, the President has the ultimate discretion to choose whom to appoint as the head of the NPA. In Namibia there is the potential hurdle to appointment, it is not political but rather judiciary since the JSC is the one involved in the appointment of the PG.

1.7.13 6 5 2 Accountability

It was discovered in Chapter 4 that the Constitutional Court of South Africa is clear that prosecutors are not supposed to be under the control of any organ of state.[662] However, it was discovered that the Constitution states that 'the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.' [663] It means that the Minister of Justice exercises final responsibility over the NPA. This places the NPA under the control of the Minister who is a political figure, tying the NPA to the influence of politics.

It was found in the same chapter that there is a school of thought that Ministerial responsibility does not translate to control. The chapter expressed that there is difference between responsibility and control none of the provisions in the Constitution and the Act provides the Minister with prosecutorial discretion with regards to the prosecution of individuals.[664] The conclusion from a critique of scholars was that the Minister does not interfere with prosecutorial discretion but rather ensures that it is

[662] *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)* para 227.
[663] Section 179(6) of the Constitution of the Republic of South Africa 108 of 1996.
[664] De Vlliers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) THRHR 247at 260 at 258

exercised responsibly,[665] since the Minister is entitled to be kept informed although he may not interfere with the prosecutorial decisions. [666]

In Namibia, a potential hindrance to the independence of the PG was seen in the establishment of the office of the AG which the Constitution states in no uncertain terms that the powers and the functions of the AG are 'to exercise the final responsibility for the office of the Prosecutor-General.'[667]

Problems that were noted with this position. Firstly, the Attorney-General is appointed by the President in accordance with the provisions of Article 32 similar to the appointment of the Prime Ministers and ministers. Although, the Constitution nowhere states that the Attorney-General is part of the Cabinet, his/her appointment is provided for in the same article as that of prominent members of the Cabinet,[668] he is the principal legal adviser to government[669] and the conclusion was that the AG is more an executive figure and he exercises final responsibility over prosecutions.

It was found that two cases resolve the dispute between the two offices. In the case of *Ex Parte: Attorney-General. In re: The Constitutional Relationship between The Attorney-General and the Prosecutor-General* [670] , the Constitutional Court found that there is nothing in the Constitution that places the PG under the direction of the AG,[671] concluding that only the PG had the discretion to proceed or withdraw prosecutions.[672] The conclusion in the same case was also that the AG was a political appointment whilst the PG was a quasi-judicial one and such distinction was apparent in the Constitution.

In the end the conclusion was that the two offices should not fight as final responsibility meant a duty to account to the President, cabinet and parliament but not to interfere

[665] De Vlliers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) THRHR 247at 260 at 258
[666] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 32.
[667] Article 87(a) of the Constitution of the Republic of Namibia Act 1 of 1990.
[668] Horn 'An introduction to the Namibian Constitution' available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf accessed on 13 May at 41
[669] Article 87(b) of the Constitution of the Republic of Namibia Act 1 of 1990.
[670] 1998 NR 282 (SC) (1).
[671] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1) 295.
[672] *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others* 1994 (1) SA 387 (C) at 393H–394H.

with the decision of the PG.[673] In a sense therefore the chapter concluded that final responsibility is the duty to account to the executive and the legislature but does not include the power to interfere with the decisions of the PG.[674] From this conclusion it can safely be put therefore that the PG in Namibia is not subservient to the AG as the AG has no authority over the decisions made by the PG [675]and the two offices functions are in relation to the three branches of government AG being executive and the PG being judicial.[676] Each had a duty to keep the other accountable but could not usurp or take over thus respecting the separation of powers doctrine.

1.7.14 6 5 3 Parliament

The influence of Parliament in the three jurisdictions over the NPA was found to be minimal and not topical to a great extent. Section 262 of the Zimbabwean Constitution mandates the Prosecutor-General to submit to the Parliament an annual report on the operations and activities of the National Prosecuting Authority for the previous year.[677] The report is submitted through the appropriate Minister increasing the risk of political interference. Provisions such as these subject the Prosecutor-General to parliamentary scrutiny and submitting through the Ministry of Justice Legal and Parliamentary Affairs implies a subsidiary role of the Prosecutor-General to the executive. It can be concluded however that this does in no way affect the making of decisions by the NPA to prosecute or not to prosecute.

In South Africa, the NPA is accountable to Parliament through various Parliamentary portfolio Committees. The most relevant being the Portfolio Committee on Justice and Correctional Services (formerly the Portfolio Committee on Justice and Constitutional Development). Between the years 2012 and 2016, the Portfolio Committee is recorded

[673] Horn, 'The independence of the prosecutorial authority of South Africa and Namibia: A comparative study' available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 126 accessed 14 January 2019.
[674] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1) 38.
[675] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1).
[676] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General 1998 NR 282 (SC) (1)* p 292.
[677] S 262 of the Constitution of Zimbabwe 2013.

to have called the NPA to report to it on 9 occasions.[678] The Parliamentary Portfolio Committee is recorded to have ordered the then NDPP, Shaun Abrahams, to explain why there had been charges against the then Minister of Finance which were dropped a few days later. Mutingh *et al* indicates that such summons set a bad precedent on the independence of the NPA.[679]

1.7.15 6 5 4 Judiciary

Chapter? dealt with the question of whether the judiciary in South Africa could interfere with the decision to appoint the head of the NPA. While there is case law in the form of the *Democratic Alliance v President of the Republic of South Africa and others,*[680] The court *a quo* dismissed the case indicating that there was no basis on which the court would interfere with the President's power to appoint the NDPP,[681] but on appeal the Supreme Court of Appeal found the independence of the NPA is very important.

In Namibia, it was found that the JSC's involvement in the appointment, the power to look into the personal conduct of the PG and the power to look at the *mala fides* of the PG poses a threat to the independence and impartiality of the PG. If the PG's intentions in prosecutions are found to be malicious, he can be recommended to the President for removal and this holds the PG accountable to pursue prosecutions in good faith but at the same time poses a threat to his impartiality.[682] It was also revealed in chapter 5 that once JSC recommends the PG for removal the president must remove the PG and this is mandatory giving too much power to the JSC on the removal of the PG from office.[683]

It was also discovered in chapter 5 that the independence of the PG is enriched by the term 'on the recommendation of the JSC' in the appointment of the PG by the President. This is because in Namibia, chapter 5 revealed that there was a

[678] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1at 24.
[679] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 24.
[680] 2012 (1) SA 417 (SCA).
[681] Democratic Alliance v President of the Republic of South Africa and others 2012 (1) SA 417 (SCA) para14.
[682] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 106.
[683] Article 88A (3) (c) Constitution of the Republic of Namibia Act 1 of 1990.

public uproar when the President elected Advocate Kasutu to be ombudsman without waiting for the recommendation of the JSC and the President withdrew the appointment and the JSC forwarded a list to the President on top of it being Advocate Bience Gawanas who the President then appointed. The conclusion is that this was a good precedent as the President could not make arbitrary decision and simply ignore the JSC.

6 6 Accountability of the NPA

It was accepted in the previous chapters that that accountability requires:

> 'a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.'[684]

It was also concluded that independence without accountability 'poses an obvious danger to the public interest, which requires the fair and just administration of the criminal justice system'.[685]

There was a general thread of consensus in all previous chapter that whilst there is need to hold the NPA accountable, care should be taken not to infringe on the wider discretionary powers given to the prosecutors by the law. What it means is that balance should be established between accountability and independence or put differently accountability and oversight

Accountability was found to be a form of control or restrain on the exercise of powers by the prosecutorial authority. Accountability of the NPA is to itself, to the public and to the law, without which prosecutions can be conducted arbitrarily. It came out that accountability guards against the making of 'arbitrary, capricious, and unjust

[684] Corder , Jagwanth and others, 'Report on Parliamentary Oversight and Accountability Faculty of Law '1999 available at http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf accessed on 11 January 2019.
[685] Flatman, 'The Independence of the Prosecutor, Prosecuting Justice Conference, Melbourne 18 and 19 April 1996,' 1996 available at http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf accessed on 29 December 2018.

decisions'.[686] The core issue when the question of accountability of the NPA is raised is that of balancing delicately between independence and oversight.[687]

It was also found the greater accountability of the NPA is seen in the higher ethical and moral standards that are expected of the individual public prosecutors. In Zimbabwe, the National Prosecuting Authority (Code of Ethics) Regulations, 2015 establishes that the members of the NPA including the prosecutors should be independent, accountable credible, providing that the prosecutors should be people of high integrity, who act with professionalism providing excellent service.[688] The NPA code of ethics also lists as part of accountability that the decision to prosecute or not should be made independently by the prosecutor free from political, public and judicial interference.[689]

Impartiality was discussed in the previous chapters and it was found that, it alludes to the rules of natural justice which are encapsulated in two latin maxims, namely *audi alteram partem* (hear the other side) and *nemo iudex in sua causa esse debet* principle (no one should be a judge in their own case).[690] The first Latin term entails that there should be a hearing of the other side where a decision to be made is adversely against them. According to the narrowest form of the principle of natural justice a decision would be fair if it adheres to the two principles.[691]

It was established that, although the law does not provide for the prosecutor hearing both sides before he decides to prosecute or not, he should be accountable. Accountability mandates the prosecutor to issue a certificate *nolle prosqui*, which is prima facie proof that he has refused to prosecute. Adherence to procedural fairness

---

[686] Flatman, 'The Independence of the Prosecutor, Prosecuting Justice Conference, Melbourne 18 and 19 April 1996,' 1996 available at http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf accessed on 29 December 2018.
18 and 19 April 1996 http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf
[687] Muntingh, Redpath & Petersen, 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 8.
[688] Part II of the National Prosecuting Authority (Code of Ethics) Regulations, 2015.
[689] NPA code of Conduct available at https://www.npa.gov.za/sites/default/files/Library/Code%20of%20Conduct%20published%2029%20December%202010.pdf accessed 19 July 2018.
[690] De Ville *Judicial Review of Administrative Law in South Africa* (Lexis Nexis Butterworts 2003) 218.
[691]Groves 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285.

has intrinsic value in that even where a system is not preferable, its effectiveness can be measured by how fair the process is.[692] This means that sometimes the fairness of the outcome can be measured by the fairness of the process.[693]

It was also discovered that the prosecutors have a duty to act fairly. Fair procedure has the capacity to legitimise governments.[694] Baxter states that even where governmental powers seems to be extravagant, where there is fair procedure, the radical powers of state could be tolerable.[695] However, this is not so when it comes to the exercise of prosecutorial powers in in Zimbabwe where the prosecutor has an absolute right to decide whether to prosecute or not without engaging any of the parties affected.

It was also found that under the principles of natural justice, the prosecutor has a duty to act fairly.[696] This is true even of the Zimbabwean legal system, where this duty is a constitutional duty enshrined in section 69 of the Constitution, which provides that everyone has a right to a fair hearing.[697] Whilst acting judicially, this duty to act fairly that lies on the prosecutor depends upon the provisions of statute and the rules that are set out in that statute.[698]

In South Africa, it was found that the office of the NDPP has little oversight in South Africa and this causes problems too as there is too much risk of abuse of this power.[699] Schönteich points out that there is no real constructive oversight of the NPA in South Africa, which scrutinises the activities of the prosecution.[700] Whilst ensuring that there

---

[692] Summers 'Evaluating and Improving Legal Processes: A Plea for Process Values' (1974) 60 *Cornell Law Review* 1 2.
[693] Thibaut & L Walker *Procedural Justice* (L. Erlbaum Associates: 1975) 117 to 224.
[694] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 11May 2018 at 15.
[695] Baxter *Administrative law* (Juta 1984) at 540.
[696] *Re R.N*. (An Infaot) (1967 (2) B. 617, 530P,
[697] Section 69 of the Constitution of Zimbabwe, 2013
[698] Nagendra, 'Quasi Judicial and Judicial Functions available,' at http://www.atimysore.gov.in/trg_sch/2014-15/w_calendar/August/GV/DAy%201%20GV.pdf accessed on 04 July 2018
[699] Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1 at 7.
[700] Schönteich 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January at 3.

is independence, accountability is important as it establishes a delicate balance of power.[701] A conclusion was reached that whilst the NPA of South Africa accounts to various institutions like Parliament and the executive, 'the NPA's policies and performance are not subject to review or scrutiny by any independent and dedicated entity' like in the case of the police or the prison services.[702]

1.7.16 6 6 1 Namibia goes a bit further

In Namibia, if the PG pursues prosecutions maliciously, they can be sued for damages. The delictual claim for malicious prosecution succeeds where the proceedings are concluded, and the accused is acquitted and evidence is abundant that the process of prosecution was initiated wrongfully.[703] There is a case that dealt with whether the PG can be held accountable if prosecutions are conducted maliciously. Not only is the PG liable for instituting malicious prosecutions but also for continuing with such prosecution.

In the case of the *George Lifumbela Mutanimiye v The Minister of Safety & Security*[704] the plaintiff claimed for damages from the PG and the damages were granted against the Prosecutor general as one of the defendants in the matter. The court held that before prosecution was pursued there was need for the prosecutor to have reasonable and probable cause to instigate or to continue with prosecution. It was held that there should be information at the disposal of the prosecutor and there must be an actual belief which must be reasonable in the circumstances before him either to start prosecution or continue with prosecution at any stage during the trial.[705]

The conclusion in chapter 5 in relation to review of prosecutorial powers was that reviewing of the decisions by the NPA to prosecute or not have affects its

[701] Schönteich 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3.
[702] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3.
[703] White 'Tort law in America: An intellectual history,' 2003 available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2762&context=dlj Accessed on 7 June 2019.
[704] (2017) NAHCMD 197.
[705] *Makapa v Ministry of Safety and Security and Others* (2017) NAHCMD 130 at 74.

independence.[706] Reviewability thus becomes one of the potential interferences with the independence of the NPA but a necessary accountability tool for checks and balances.

6.7 Judicial review of prosecutorial powers

It was found that through judicial review, the courts have the power to measure every exercise of power for constitutional muster. However, it was apparent that all three jurisdictions differ in the way they review the power to prosecute and the courts in the three jurisdictions differ on how they view the nature of prosecutorial powers. In Namibia the prosecutorial powers are termed quasi-judicial powers whilst in South Africa they are deemed to be executive powers and in Zimbabwe they are quasi-judicial-political powers.

1.7.17 6 7 1 Prosecutorial power as Administrative: Zimbabwe

The thesis found that administration is said to be the point where three government organs meet.[707] A school of thought was highlighted that subscribes that administrative action could be the exercise of a variety of powers including legislative, judicial or the exercise of a discretionary, non-judicial order nor merely a ministerial act.

One school of thought, in Zimbabwe, is that the decisions by the NPA in the exercise of its prosecutorial functions do not fall into the realm of administrative law since section 259 of the Constitution states that the office of the Prosecutor-General does not form part of the civil service Commission. [708] Another school of thought indicates that prosecutorial powers are administrative in nature since the NPA falls under the Civil service Commission which is the administrative branch of government according to section 199 of the Constitution.[709]

[706] Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others (2012) ZASCA 15
[707] Nagendra, 'Quasi-Judicial and Judicial Functions available,' at http://www.atimysore.gov.in/trg_sch/2014-15/w_calendar/August/GV/DAy%201%20GV.pdf accessed on 04 July 2018.
[708] Section 259 of the Constitution of the Constitution of Zimbabwe 2018.
[709] Section 199 of the Constitution of Zimbabwe

The thesis found that the main function of administrative law is to exert reasonable control over the exercise of power by administrative authorities so that they do not exceed their powers or abuse them.[710]

It was identified that the right to just administrative action in Zimbabwe is not only provided for in the Constitution, it is also provided for in the Administrative Justice Act (AJA) and according to the *ultra vires* principle, the public administrator is not allowed to exercise his powers outside the law.[711] Under this principle the administrator should be free of bias, whether institutional pecuniary or otherwise.[712] Administrative action is defined by the AJA as 'any action taken or decision made by an administrative authority.'[713] According to the Act an administrative authority includes 'any other person or body authorised by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned.'[714]

Under such a broad definition, the functions of the NPA can easily be classified as administrative function since the NPA is a body authorised by an enactment to exercise power or a duty and has the authority to carry out the function of prosecution. The AJA is not clear in defining what administrative action is and according to the definition prosecuting powers could fit in as an administrative action since prosecutors are authorised by an enactment to perform the functions.[715] It was concluded that the definition in the Act (AJA) is immensely wide and could fit the exercise of any power if the AJA does not expressly exclude it.[716]

---

[710] Administrative law guide available at http://tsime.uz.ac.zw/claroline/backends/download.php?url=L0FkbWluaXN0cmF0aXZlX0xhd19fR3VpZGVfMjAxMy5kb2N4&cidReset=true&cidReq=AD211 accessed on 14 August 2018.
[711] Mavedzenge 'Administrative Justice and the Constitution', *The Herald* 18 August 2018.
[712] Mavedzenge 'Administrative Justice and the Constitution', *The Herald* 18 August 2018.
[713] Section 2 of the Administrative Justice Act [Chapter 10:28].
[714] Section 2(d) of the Administrative Justice Act [Chapter 10:28].
[715] Administrative law guide available at http://tsime.uz.ac.zw/claroline/backends/download.php?url=L0FkbWluaXN0cmF0aXZlX0xhd19fR3VpZGVfMjAxMy5kb2N4&cidReset=true&cidReq=AD211 accessed on 14 August 2018.
[716] *U-Tow Trailers (Pvt) Ltd* v *City of Harare & Anor* 2009 (2) ZLR 259 (H).

It was found that the courts in Zimbabwe sometimes go straight to apply the PAJA without delving into the question of whether the powers to prosecute were administrative like in the *Telecel case* where the court implicitly, found it to be a moot point that the exercise of prosecuting powers could not be administrative in nature. The court simply proceeded as if it was uncontested that the power was administrative in nature.

It was also found that the Act specifically states that section 3(1) (c), 3(2) and 6 do not apply to 'decisions to institute or continue or discontinue criminal proceedings and prosecutions.'[717] Sections 3(1) (c), 3(2) and 6 relate to the factors to be considered when making administrative decisions. These sections could mean the inclusion of prosecutorial powers as administrative actions or that the failure to adhere to principles in the listed sections does not give rise to unlawfulness. The listing of the powers to prosecute or not with the exercise of executive and judicial powers in Part (ii) of the Schedule however, gives rise to more questions since these functions lie exclusively outside the purview of administrative action.[718]

It can be concluded that the power to prosecute in Zimbabwe is more inclined to administrative powers and this has serious implications on the independence of the NPA of Zimbabwe since administrative functions are readily open to judicial review and scrutiny.

1.7.18 6 7 2 Prosecuting powers as executive: South Africa

It was found in chapter 4 that the source of the review of public power in South Africa is that every person has a right to 'administrative action that is lawful, reasonable and procedurally fair.'[719] In South Africa, the powers to prosecute are inclined more to the executive because the Minister responsible for the administration of justice exercises final responsibility over prosecutions.

[717] Part I of the schedule of the Administrative Justice Act [Chapter 10:28].
[718] Part I of the schedule of the Administrative Justice Act [Chapter 10:28].
[719] Section 33 of the Constitution of the Republic of South Africa NO. 108 of 1996.

Due the doctrine of constitutional avoidance, the question whether the exercise of power is administrative cannot be avoided. In the *Freedom Under Law v National Director of Public Prosecutions and Others* case, it was held that the offices of the NDPP and the DPP, which are endowed with this power are public offices and their exercise of such power involve the exercise of power in terms of the NPA Act which has external legal effects and lastly, it 'adversely affects the rights of the public, and at least the complainants, who are entitled to be protected against crime through, amongst other measures, the effective prosecution thereof.'[720]

1.7.19 6 7 3 Prosecutorial powers as quasi-judicial: Namibia

In Chapter 5 it was discovered that there are some arguments that the power to prosecute takes the form of quasi-judicial nature that is, it is more of a judicial function. It has been held that the judiciary in its broader sense other than the judges also includes the prosecutors and when talking about the independence of the judiciary the independence of the prosecutors should be taken into consideration.[721]

The chapter came up with prosecutorial functions that have the trappings of judicial functions, and they include:

i. Presentation of a case
ii. Ascertainment of the fact by means of evidence
iii. Dealing with disputes involving the question of law
iv. Decisions involve the application of law to facts
v. Such act would prejudicially affect the parties

In *Gula-Ndebele* v *Bhunu NO,* the court stated that if the proceedings of any other quasi-judicial body are tainted by procedural irregularities recognisable at law as vitiating such proceedings, the court could set aside such proceedings before they are concluded and before any recommendation was made.[722] In summary, if prosecutorial powers assume the nature of the exercise of judicial functions they should adhere to procedural fairness and they can be set aside solely on this ground alone.

[720] Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP) para 131
[721] Independence and Accountability of the Prosecution *ENCJ report* 2014-2016.
[722] In *Gula-Ndebele* v *Bhunu NO* 2010 (1) ZLR 78 (H).

It was established that the PG, in exercising discretion, has to act on the basis of information before him to ensure that the decision is not influenced improperly.[723] What it means is that to avoid malicious prosecutions, it should be initiated and instituted where a case is 'well founded, upon evidence reasonably believed to be reliable and admissible, and should not continue with such proceedings in the absence of such evidence.'[724] This means that the discretion to prosecute is not immune to judicial scrutiny if the discretion is exercised improperly.[725] The test or principle is whether there is reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (or maintained).[726]

It can be concluded that the Namibian prosecuting functions are unique. The uniqueness is in what the Supreme court in the *Ex Parte: Attorney-General*[727] case called the quasi-judicial appointment of the PG. The appointment of the PG was called a quasi-judicial appointment. A quasi-judicial act is defined by Weichers as an act done by a non-judicial officer but which resembles a judicial act.[728] For an act to be judicial it must be one that is done whilst exercising discretion.[729]

The general rule for judicial functions applies for quasi-judicial function which is that the performance of the functions should meet the principles of natural justice.[730] The nature of the act determines whether the principles of natural justice should be complied with. This is because there are further requirements like; the act should not only involve the exercise of discretion, but should also affect a person or a person's existing rights, powers, or privileges.[731] Further, the act should be performed to meet such purposes for which the power was conferred on the official i.e. the decision should be rational.[732] Indongo points out that the purpose of the rules of natural justice

[723] *Makapa v Ministry of Safety and Security and Others (I 57/2014) [2017] NAHCMD* 130 at 36.
[724] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 72.
[725] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 72.
[726] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD 197 at 72.
[727] 1998 NR 282 (SC) (1) at 292.
[728] Wiechers *Administrative law* (1985).
[729] Indongo "The uniqueness of the Namibian Prosecutor-General," 2008 *The Independence of the Judiciary in Namibia* 99-112 at 104.
[730] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 104.
[731] *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A).
[732] Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC) para 36.

are to make sure that administrative organs that perform judicial and quasi-judicial functions should duly apply their mind to matters before them.[733] It seems that Indongo is of the opinion that quasi-judicial functions are administrative functions which are reviewable under administrative law. This is supported by Baxter who indicates that quasi-judicial functions are easily reversible than other administrative functions.[734] A question then arises of whether the decision not to prosecute is reviewable under administrative law in Namibia.

6 8 Classification of functions as judiciary, administrative, executive, or quasi-judiciary

It was concluded that the classical structuring according to the separation of powers between legislative, judiciary and the executive has evolved in South Africa.[735] The classification of functions was highly regarded in the pre-constitutional South Africa but is very unpopular in Constitutional South Africa. It was found that the classification of powers into judicial and quasi-judicial, executive and purely administrative 'adds nothing to the process of reasoning: and the court could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned.'[736]

In conclusion the classification of powers doctrine has been abandoned. Abandoning the classification of powers was also aggravated by the existence of another principle under which the exercise of power can be reviewed and such principle is the principle of legality, which is a part of the rule of law.[737]

[733] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 105.
[734] Baxter *Administrative law* (1984).
[735] Seedorf & Sibanda *Separation of powers* in, Woolman & Bishop 'Constitutional law of South Africa' (2nd ed) (Juta and Co 2013)12-10.
[736] *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A) 763H-I.
[737] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019 at 1.

6 9 Reviewability of the power to prosecute or not to prosecute

It was found that it is usually the decision not to prosecute rather than to prosecute that is problematic since the decision to prosecute, if wrong, can be challenged in the court during trial, where if the state fails to put up a material case an application for discharge can be made.[738]

It was found that prosecutors have unreviewable discretion, especially regarding charging and plea bargaining.[739] In addition to this power, is the power to select which matter to prosecute and which not to prosecute. It was found that prosecutors enjoy wide discretionary powers in Zimbabwe, South Africa and Namibia. It was concluded that the power to prosecute is 'virtually absolute power'.[740] It was established therefore that the prosecutorial authority should enjoy a certain level of immunity from judicial review, but this is the exception and not the norm.[741]

6 10 Review of prosecutorial powers

Having established that there is no need to classify the powers to prosecute, there was a discussion of some of the cases where the courts have reviewed prosecutorial powers. In two cases in Zimbabwe the Constitutional Court ordered the Proecutor General to issue certificate *non-prosequi* where he had declined prosecution. These are *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe*[742] and the *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and*

[738] Higgins. 'Reviewing Prosecution Decisions', *9th Annual National Prosecutors' Conference* 2008 Dublin castle conference centre available at https://www.dppireland.ie/filestore/documents/PAPER_-_Micheal_OHiggins_BL.pdf accessed on 13 August 2018.
[739] Vorenburg, 'Decent Restraint of Prosecutorial Power', 1981 (94) 7 *Havard law Review* 1521-1573 at 1521.
[740] Erik Luna & Marianne Wade, *Prosecutors as Judges*, (2010) 67 *WASH. & LEE L. REV.* 1413, 1427.
[741] Higgins, 9th 'Annual national prosecutors' conference' 2008 available at https://www.dppireland.ie/filestore/documents/PAPER_-_Micheal_OHiggins_BL.pdf accessed on 12 July 2018.
[742] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.

Protection from Direction and Control (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).[743]

Although there had been arguments that the power to prosecute is not susceptible to judicial control these two cases concluded that no exercise of power was beyond the demands of legality. In summary the law demanded that if the Prosecutor General declined to prosecute he was to issue a certificate of non-prosecution, thus this procedure should be followed as provided by the law.

It can be concluded that the Constitutional court of Zimbabwe and the Supreme Court of Appeal were correct in the application of the law as they did not interfere with the Prosecutor General's decision, but demanded adherence to the law that required a certificate *nolle prosequi* to be issued where a decision not to prosecute was made. The position was rightly argued by the *amicus curea* that the Prosecutor General had a positive duty to issue certificate *nolle prosequi* and he had no discretion.[744] It was concluded therefore that the court, was not overstepping its bounds but simply demanding accountability to the law.

Chapter 3 therefore concluded that it is the law itself that puts restrictions on the exercise of prosecutorial powers and the NPA through its PG was to act in accordance with the Constitution and the law.[745] It was mandatory to issue the certificate *non prosqui* where the party showed substantial and peculiar interest.[746] Although the conclusion is that the court did not interfere with prosecutorial discretion, some argued that the court should not have ordered that the certificate be issued within 5 days as this amounted to replacing the decision of the PG by the court with its own contrary to the separation of powers doctrine.

On the other hand, chapter 5 concluded that in Namibia, the Supreme Court, in the case of *Ex Parte: Attorney-General*[747] was clear that the power vested in the PG is

[743] *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).
[744] S16 Criminal Procedure and Evidence Act.
[745] S 261(1) of the Constitution of Zimbabwe, 2013.
[746] *Norman Sengeredo* v *The State* CCZ 11-14.
[747] *Ex Parte: Attorney-General,* 1998 NR 282 (SC).

absolute and there is no review, concluding that the decision by the PG not to prosecute cannot be reviewed assessed, questioned, or examined.[748]

6 11 Rule of law and the principle of legality

It was found that the judiciary is the watchdog of the Constitution and cannot sit idle and allow the exercise of any power; constitutional, administrative, or otherwise be abused to the detriment of citizens' right.[749] This means that the nature of the power exercised is not as important as its conformity with the law.

In South Africa, for example, it was established that courts can go beyond the PAJA to scrutinise the exercise of any power under the principle of legality.[750] Under this principle it was found that through case law the decision not to prosecute is subject to judicial review under the rule of law.[751] The conclusion in chapter 4 was therefore that the question of whether the decision not to prosecute is administrative or not is not very important as there is another principle under which the exercise of any power can be reviewed and such principle is the principle of legality, which is a part of the rule of law.[752] The Supreme Court of Appeal of South Africa rightly held that the NDPP is integral to the rule of law.[753] The emphasis was that the exercise of all public power, be it administrative or not, was subject to Constitutional review. The principle of the rule of law is also one of the founding values of the South African Constitution.

In the discussion of Zimbabwe, it was found that, the rule of law is listed together with some other founding values like supremacy of the Constitution, rule of law and

[748] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 110.
[749] Gubbay, 'The progressive erosion of the rule of law in independent Zimbabwe'*, Third International Rule of Law Lecture: Bar of England and Wales Inner Temple Hall,* 2009 available at http://www.cfuzim.org/index.php/legal-cases/335-the-progressive-erosion-of-the-rule-of-law-in-independent-zimbabwe accessed on 22 July 2018.
[750] *Democratic Alliance v The Acting National Director of Public Prosecutions* (2012) ZASCA 15 para 37.
[751] *Democratic Alliance v The Acting National Director of Public Prosecutions* (2012) ZASCA 15 para 27.
[752] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019 at 1.
[753] *Democratic Alliance v President of the Republic of South Africa & others* 2012 (1) SA 417 (SCA)

fundamental human rights and freedoms.[754] The rule of law was found to reinforce the supremacy of the law, and providing that every exercise of power should be sanctioned by the law and that no act or conduct should be above the law, so the law should provide for parameters for the exercise of power.[755] The rule of law ensures that the law is supreme, and it can be enforced by judicial review, a mechanism which no exercise of power should be able to escape, thus ensures that no exercise of power is beyond scrutiny.

In the *Telecel* case, the court found that the decision not to issue a certificate *nolle prosequi* was wanting of legality. The court's decision was based on the fact that since the PG had refused to prosecute, he should have gone further to establish whether the private person met the other requirements in section 13 of the Criminal Procedure and Evidence Act, rather the PG went on to refuse to prosecute without making such an assessment. This amounted to abuse of his discretion. Commenting on the importance of legality, the Court looked at the *Affordable Medicines Trust & Others* v *Minister of Health & Others* which stated that

> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.' [756]

Using the principle of legality, the court found that there was a peremptory provision requiring the provision of the certificate and failing to issue the certificate in the circumstances was wanting in legality. Since there was, a law couched in mandatory terms, the prosecutor was entitled to follow this route. [757]

---

[754] Section 3a, b and c of the Constitution
[755] Section 2 of the Constitution of Zimbabwe, 2013.
[756] *National Director of Public Prosecutions and Others* v *Freedom Under Law* 2018 (1) SACR 436 (GP)
the court cited the *dictum* of Ngcobo J in *Affordable Medicines Trust & Others* v *Minister of Health & Others 2* 006 (3) SA 247 (CC) para 49.
[757] Section 12 (1)(d) of the National Prosecuting Authority Act [*Chapter7:20*].

It is interesting to note that there are limits to the powers of judicial review under the principle of legality. This is highlighted in the *Telecel case* when the court mentioned reviewability on the grounds of illegality and rationality.

In Chapter 5 on Namibia, it was found that the Constitution of Namibia meets the minimum requirement to be met for a state to be called a just state which they called a *Rechtsstaat,* which is a State governed by the rule of law.[758] This term was used in one of the first Constitutional judgements in *Ex Parte Attorney-General: In re The Constitutional Relationship between The Attorney-General and The Prosecutor-General,*[759] that came to the conclusion that the exercise of the final responsibility over public prosecutions that the Attorney General, who was a political appointee ensured independence of the prosecution authority and this was hall mark to the rule of law.

That the PG in Namibia cannot act against constitutional provisions also promotes the rule of law.[760] There is nothing much to state about the review under the principle of legality in Namibia since the literature review shows that the term is unpopular in Namibia. The principle is undeveloped although there is an appreciation that Namibia is a '[r]echtsstaat just as South Africa under the apartheid regime was not,'[761] Namibia is set and founded on democratic principles that have created a constitutional state founded on law and justice, thereby establishing a civil society. Whatever the notion of the rule of law, Namibia subscribes to it but has not been expounded on by the courts to establish its extent in holding the exercise of public power accountable.

1.7.20 6 11 1 Bounds of review under legality

It was found in the thesis that courts run a risk of interfering with the independence of the prosecuting authority. There was therefore a need to demarcate or set boundaries of judicial review on the exercise of prosecuting powers. The boundaries are usually

[758] Horn "The unique constitutional position of the Prosecutor-General of Namibia and the effect of the independence of the office on the functioning of the prosecuting authority in relationship with the Ministry of Justice and the Attorney-General." 2000 *Unpublished Thesis, UNISA* at 7
[759] 1998 NR 282 (SC) (1).
[760] Indongo, 'The uniqueness of the Namibian Prosecutor-General,' 2008 *The Independence of the Judiciary in Namibia* 99-112 at 100.
[761] *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General* 1998 NR 282 (SC) (1) at 34.

in the form of grounds of review. In Zimbabwe the Telecel case referred to the *Council for Civil Service Unions* v *Minister for the Civil Service*, which it called the *locus classicus* on judicial review. In this case the court listed the grounds of judicial review as 'procedural impropriety' irrationality and illegality'. Illegality means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Using rationality the case mentions the ground of review that the decision was:

> 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.' [762]

By procedural impropriety, the court mentioned that it meant 'failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'[763]

It should be noted that the court in the *Telecel* case refused to use the rationality test in establishing whether the Prosecutor General was correct in his assessment of whether to prosecute or not to prosecute. The court stated that 'dealing with the irrationality ground invoked by the appellant, I do not think that the respondent's assessment of the evidence against the accused persons in question can properly be subjected to review.'[764] The definition that the Zimbabwean court adopted for rationality is the *Wednesbury* one which boggles the mind why South Africa would readily accept rationality as a ground of review under legality.

1.7.21 6 11 2 Rationality as a ground of review under legality

In Chapter 3, Dumbutshena CJ analysed the English jurisprudence on the reviewability of prerogative powers and came to a conclusion that the test for rationality is a bit intrusive on the wide discretion of the President.[765] For the test of rationality,

---

[762] *Council for Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL).
[763] *Council for Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL) 950-951.
[764] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.
[765] *Patriotic Front-Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC) 325-326.

Zimbabwe has adopted the Wednesbury approach and this is that that the decision will be reviewable if the decision is so outrageous in its defiance of logic or accepted standards that no reasonable person who has applied his mind to the question to be decided would have arrived at that decision.[766]

The formulation of rationality seems to take the form of reasonableness as a ground of review. The problem that arises is that reasonableness is concerned with the correctness of the decision, it goes into the merits of the decision and can have the effect of unjustifiable intrusion by the court onto the prosecutor's discretion.[767] The reasoning was that the functions and the wide discretion given to the Prosecutor-General forms 'part of his constitutional prerogative and cannot ordinarily be questioned by the courts'[768] However, South Africa has accepted the test of rationality as the minimal requirement for review.

In the *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa,* it was held that every decision has to abide to the constitutional requirement of rationality as a prerequisite for constitutional validity.[769] It stands that rationality is the minimum mandatory requirement for any exercise of public power.[770] By demanding such high standards, there is assurance for the equal application of the law and a general public confidence that none is above the law including the NPA.[771]In *National Director of Public Prosecutions v Freedom under Law,*[772] the court made an order that the NPA should reinstitute charges that had been previously dropped using the test of rationality.

---

[766] *PF (ZAPU) v Minister of Justice* 1985 (1) ZLR 305 (S). See also *Rushwaya* v *Minister of Local Government* S-6-87 and *Affretair* v *MK Airlines* 1996 (2) ZLR 15 (S).
[767] *African Tribune Newspapers (Pvt) Ltd & Ors* v *Media & Information Commission & Anor* 2004 (2) ZLR 7 (H)
[768] *Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe* (Civil Appeal No.SC 254/11) [2014] ZWSC1.
[769] *Pharmaceutical Manufacturers: In re Ex parte Application of the President of the RSA* 2000 (2) SA 674 (CC) para
[770] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019.
[771] *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA 15 para 29
[772] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58.

The NDPP in the above case had argued that the power she had to review decisions to prosecute or not in 179(5) (d) ousted the power of the court to review non-prosecution.[773] The court held that the excessive discretion granted to the NDPP in section 179(5) to review the decision not to prosecute does not oust constitutional obligation of the courts to review grounds of legality, rationality and administrative reasonableness.[774] The Court held it inconceivable that in a Constitutional order, the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants accessing to the courts.[775]

In view of the judgments, it can be concluded that review under the principle of legality includes the review on grounds of rationality and on the basis that the decision-maker did not act in accordance with the empowering statute.[776] It is accepted in conclusion that 'legality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner.'[777]

6 12 Separation of powers

It was discovered that the separation of powers facilitates and promotes the protection of citizens against the abuse of public power. Separation was found not only to be in the separation of powers but also functions and personnel and the way staff are appointed, and removed from office. The acceptable separation of powers definition was found in the case of *Ex Parte Fine Brigades Union* case, which defined the doctrine of the separation of powers, stating that:

> 'It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever

[773] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 GNP para 117.
[774] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 GNP para 117.
[775] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 GNP para 117.
[776] (see *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA).
[777] *Minister of Health NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) para 614;

> laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.'[778]

It was found that the Zimbabwean Constitution clearly outlines the functions of the NPA and distinguishes them from those of the police by stating that the Prosecutor General may direct the Commissioner General of police to investigate and report to him. It clearly shows that, while the functions of the public prosecutor are directly linked to the functions of the police, the NPA can never conduct the investigations themselves, rather it refers the investigations to the right institution vested with the power to do the investigations.

In South Africa the separation was found to be implicit and not express. The Constitution provides in section 85 that the Executive powers are vested in the President and his cabinet. In section 43, the Constitution provides that the legislative authority be vested in the legislature at both provincial and national levels and lastly the judicial authority is the courts according to section 165. Accountability is central to good governance and the rule of law and the separation of powers ensures both the independence of institutions and their accountability.[779]

The Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996* (Certification Judgment), held that there was no fixed or rigid doctrine of separation of powers in South Africa.[780] The Court referred to the importance of the doctrine as found in the text of the Constitution that is the structure and the functions of the state including their dependence and interdependence.[781] What the separation of powers seeks to prevent is the accumulation of too much power in one institution.[782] The separation thus is a functional one that allows cooperation between various state bodies and organs without each trespassing onto the functional territory of another.

---

[778] *R* v *Home Secretary, Ex parte Fine Brigades Union* [1995] 2 AC 513.
[779] Schönteich, M, 'Strengthening Prosecutorial Accountability in South Africa,' 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* accessed on 2 January 3. at 5
[780] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa,* 1996 (4) SA 744 (CC) paras 110–111.
[781] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 248.
[782] De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247 at 248.

As a result of the acceptance of this functional separation of power, the courts have adopted strategies to keep an oversight role while respecting the independence and the autonomy of the various organs of state. In cases of disputes between any State parties, the judiciary, which is endowed with the power, to determine what the law is and how it should be applied in the dispute.[783] The court in *R* v *Home Secretary, Ex Parte Fine Brigades Union* seems to have answered this question when it stated that when the court interprets a law that compels someone to do something it is not the court that compels them but the law thus fulfilling the rule of law.[784]

In Namibia, the separation of powers is apparent to prosecution especially as expounded in the *Ex Parte Attorney-General: In re The Constitutional Relationship between The Attorney-General and The Prosecutor-General* case that differentiated a political appointment from a quasi-judicial appointment. Separation of powers in Namibia is firmly entrenched in the Namibian Constitution.[785] A situation where the Parliament is dominated by the executive has been largely criticised in Namibia indicating that there should a separation between parliament and the executive.[786] It has been held not to be in the best interests of democracy for members of the executive to be MPs in Namibia.[787]

6 13 Principles of law guiding review of prosecutorial powers

To avoid the excessive interference of the judiciary onto the decisions made by the NPA during judicial review, the dissertation observed some principles of law that the courts have utilised when reviewing the exercise of power by other organs of state that respects the separation of powers. The jurisprudence of South Africa came out to be rich in this area. The strategies are linked to the political question doctrine, which

[783] Rautenbach: *Constitutional Law* 4th edition (LexisNexis Butterworths 2003) at p. 78.
[784] *R* v *Home Secretary, Ex parte Fine Brigades Union* [1995] 2 AC 513.
[785] Nakuta & Chipepera 'The Justice Sector and the Rule of Law in Namibia Management, Personnel and Access' available at https://www.nid.org.na/images/pdf/democracy/Management_Namibian_Justice_System.pdf accessed on 28 May 2019 pg 18.
[786] Venaan 'Separation of powers a practical experience' *Namibian* available at https://www.namibian.com.na/index.php?id=87220&page=archive-read accessed 13 May 2019.
[787] Diescho 'The Necessity of the separation of powers,' *New Era Live* available at https://neweralive.na/posts/dieschos-dictum-the-necessity-of-separation-of-powers-in-government accessed on 20 May 2019.

states that the courts should not interfere in questions that are not of law but are in fact political.

It was noted that there is need to put limits on the court's exercise of its functions of judicial review. If the power to review becomes unfettered, there arises a risk that the courts themselves may interfere with the independence of the NPA. In order to maintain relationships with the more political powers, the courts have developed some strategies to limit their powers of review.[788] Manyika lists three strategies namely;

> '(a) exploiting doctrinal gaps;
> (b) adopting different standards of review; and
> (c) designing different remedies.'[789]

These are important as South African courts have applied them to maintain an oversight over the NPA whilst affording the NPA the necessary independence afforded to it by the Constitution. In relation to (a) exploiting doctrinal gaps, it was found that the constitutional democracy of South Africa is still young and the courts are still defining some terms and developing them. As such, the courts use these gaps in interpreting flexibly to manage relations with other organs of state.[790] Concerning (b), the adoption of different standards of review, it was observed that some standards of review are more infringing on the discretion of the decision maker than some and depending on the nature of the power; the court decides which standard is less intrusive. An example is the standard of rationality which is less intrusive compared to

[788] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN',* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019 at 77

[789] Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 *LLM Dissertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 26 January 2019. at 78

[790] T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.

reasonableness which is so high a standard that it can have the effect of substituting the decision of the public official with that of the court.[791]

As such, it was found that adopting a less intrusive standard of review is a strategy to maintaining the independence of the decision maker whilst maintaining oversight. The last strategy (c) is the designing of different remedies. In order to avoid conflict the courts also choose remedies that has less conflictions when they make their orders. An example is instead of declaring a certain action say by parliament or the executive to be invalid, the court can order that the matter be referred back to the official who made the decision for reconsideration. In addition, instead of ordering the decision maker to follow a particular course the court can recommend a course and not necessarily supervise the order.[792]

The issue of policy considerations was seen to have also been alluded in the *Director of Public Prosecutions v Zuma*[793] and the *Sharma v Brown-Antoine and others*[794] cases where the indication is that whilst the decision not to prosecute is not immune from judicial review, the courts should exercise its powers sparingly. The courts through their policy, limit their own power and they do so to ensure 'safeguarding the independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought.' [795] Another strategy that the South African courts adopt is the judicial self-restraint which was emphasised by the court in the *Freedom Under Law*. The court quoted *R v Director of Public Prosecutions, Ex Parte Manning*,[796] specifically that:

> '[T]he power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the [prosecutor] as head of an independent, professional prosecuting

[791] T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.
[792] T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.
[793] *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)
[794] *Sharma v Brown-Antoine and others* [2007] 1 WLR 780 (PC)
[795] *National Director of Public Prosecutions v Freedom Under Law* (2014) ZASCA 58 para 25
[796] (2001) QB 330 para 23

> service, answerable to the [National Director of Public Prosecutions] in his role as guardian of the public interest, and to no-one else.'[797]

It was held that it would be great naivety of the court at times to pretend to be oblivious to the political context of a matter before it.[798] The restraint of the courts however does not mean that they should abdicate their powers.[799] On adopting the strategy of different standards of review, it was revealed that the courts have indicated that review under legality requires standards of legality and rationality.[800] Legality demands that all power must be authorised by law and rationality demands that every decision should meet an ends means test whereby the means employed are rationally related to the purpose for which the power was conferred.[801]

As such, the courts have approved a minimalist standard of review for rationality which is called the minimum threshold for review thus justifying review of even the most political decisions.[802] In some cases, the review under legality has been held to include a procedural element. An example was seen in *Albutt v Centre for the Study of Violence and Reconciliation and Others*,[803] where the court dismissed the President's decision to release political prisoners without hearing the views of the victims of the crimes or their relatives. Thus, the decision did not meet the objective that was aimed at nation building.[804] These strategies assist the courts not to break the law and respect the separation of powers between the courts and the NPA.[805]

---

[797] *R v Director of Public Prosecutions, Ex Parte Manning* (2001) QB 330 para 23
[798] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 8.
[799] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) 123
[800] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC).
[801] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) 126
[802] *Democratic Alliance v President of the Republic of South Africa and Other*
[803] 2010 (3) SA 293 (CC) at paras 65-68.
[804] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paras 65 68.
[805] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) P86 at par 22.

6 14 Private prosecutions

It was discovered that the requirements of private prosecution are fairly the same in all jurisdictions. In summation the requirements are that the private party concerned must show the following:[806]

(i) some substantial and peculiar interest,
(ii) in the issue of the trial,
(iii) arising out of some injury,
(iv) which he individually has suffered,
(v) in consequence of the commission of the offence

It was accepted in Zimbabwe, that private bodies can also pursue private prosecutions was followed in the *Telecel* case of Zimbabwe. The court took a broad interpretation of the term party used in section 13. Using section 3(3) of the Interpretation Act, the court found that the law maker did not intend to limit private prosecutions to natural persons. It stated that the substantial interests required in section 13 for private prosecutions could be purely economic and these were interests recognisable by law.

The Prosecutor General, in Zimbabwe, can order for the proceedings to stop for him to take over the proceedings or institute them and or stop them completely.[807]

It was established that the Criminal Procedure and Evidence Act has been amended and it excludes juristic persons from applying for a certificate *nolle prosqui,* thus juristic persons can no longer prosecute privately.[808] The same notion was shared *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional*

[806] *Levy* v *Benatar* 1987 (1) ZLR 120 (S) at 126F.
[807] section 20 of the CP & E Act
[808] Section 16 of the Criminal Procedure and Evidence Act Criminal Procedure and Evidence Act (Chapter 9:07).

Development,[809] where the Supreme Court of Appeal held that a juristic person could not institute private prosecutions.

The dissertation concluded that private prosecutions are conducted by individuals who owe a duty to no institution and are not bound by the principles that guide the NPA to act without fear, favour or prejudice. Private prosecutors are susceptible to influence and abuse by individuals or organs of state and they have no code of ethics that binds them. They are not bound by the separation of powers and thus can infringe on the exercise of power by the other organs of state.

In Namibia, the position is the same and the Prosecutor General has the power to take over private prosecutions.[810] The only apparatus and main mechanism available against the decision not to prosecute is private prosecutions in Namibia as provided for in section 5 of the Criminal Procedure Act. Where the Prosecutor General declines to prosecute, the section gives the interested party the right to request for a *nolle prosequi* from the Prosecutor General and this is the certificate that gives the interested party insurance to take the matter to court. The certificate is valid for 6 months and if the 6 months lapse before prosecution is initiated, the certificate expires.[811]

The section 5 referred to above also gives the interested party power to obtain a compelling order for the Prosecutor General to decide to prosecute or not especially where the decision has been outstanding for more than 6 months.[812] The same can be said of the Zimbabwean Supreme court's decision to compel the PG to issue a certificate *nolle prosequi.*

The jurisdictions require securities before private prosecutions are pursued,for example in Namibia before private prosecution commences, it is mandatory for the person to deposit R100 as 'security that he will prosecute the charge against the accused to a conclusion without undue delay' and any amount the court may deem fit

[809] *Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 1 SACR 308 (SCA).
[810] Section 11(2) Criminal Procedure Act 25 of 2004.
[811] Criminal Procedure Act 25 of 2004
[812] Criminal Procedure Act 25 of 2004

as costs which the accused may incur in respect of his defence to the charge.[813] In case the private prosecute fails to materialise, the matter the security is forfeited to the state.[814] This provision of security is a good mechanism to ensure that private prosecutors are held accountable in the exercise of their functions of prosecuting. These provisions are uniform in Zimbabwe, South Africa, and Namibia.

6 15 Recommendations

From the discussion above and the findings made in this chapter, there are recommendations and lessons that can be drawn by Zimbabwe from Namibia and South Africa to enhance the independence of the NPA. To enhance financial independence the NPA of Zimbabwe should be involved more in the drafting its own budget. The 2015 report included a recommendation that the NPA be granted voting status so that it can be able to directly finance its activities from Treasury disbursements. This could be a reform that can enhance, greatly the independence of the NPA in Zimbabwe.

It means also to an extent that so long this voting status is not granted, the NPA's financial independence is compromised. NPA corporate affairs manager, Allen Chifokoyo, alluded to the lack of financial independence. He stated that:

> 'The NPA has not been capacitated since it became an independent authority. We have become a laughing stock at all the courts as the people compare us to our better equipped counterparts in the judiciary. Prosecutors are now being viewed as subordinates to magistrates while housed in squalid conditions.'[815]

The lack of financial capacitation has led the NPA to rely mostly on section 32(9) of the Act, which provides for the distribution of monies according to the Courts Administration Fund, a fund under the direct control of the JSC making the NPA subject to JSC determination. Section 32(9) deals with how revenue collected from the courts is shared. To reduce financial reliance on any other branch of State there

[813] Section 9(b) of the Criminal Procedure Act 25 of 2004.
[814] Section 9(3) of the Criminal Procedure Act 25 of 2004.
[815] Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.

is need to enact legislation directly responsible for the allocation of funds to the NPA straight from Treasury.

Also, there is need for clarity on the position of whether prosecutorial powers are administrative or not. There is need to be clear in the AJA whether the power to decide whether to prosecute or not is reviewable under the AJA as an administrative power. As it stands, the AJA is a risk to the independence of the NPA considering the remedies that the court can make under the AJA. There is a need to realign the AJA with the new Constitution of 2013 that calls for accountability and the independence of the NPA.

It is even better to make the power to prosecute more executive than administrative so that it is reviewable under the principle of legality where principles of interference call for minimal interference. According to Hoexter, reviewability of decisions on grounds of failure to adhere to rules of natural justice could only be limited to judicial or quasi-judicial functions and could not extent to executive, legislative or purely administrative functions without statutory provisions that provides for the hearing.[816] Alternatively, Zimbabwe can take the approach that the classification of powers is outdated and does not stand in a pro-democracy state that seeks to hold every exercise of power accountable no matter how political the exercise of that power might be. Furthermore, **t**here is a need to give the courts more powers and to develop jurisprudence in the court to allow a higher degree of accountability to the law. The Zimbabwean courts may also adopt the strategies that the South African courts utilise to answer the political question of how much review power the courts have on political decisions. An example is Zimbabwe can exploit doctrinal gaps, like in South Africa, and the courts create a jurisprudence that respects the independence of the NPA from the more political organs of state. It is dangerous to declare that the powers to prosecute are not reviewable, in a democratic state that seeks to protect human rights.

[816] Hoexter *Administrative Law in South Africa* 2ed (2012) 391. See also Manyika, 'The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa' 2016 LLM Dessertation UKZN available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 11May 2018 at 15.

To increase accountability, Zimbabwe can follow the Namibian position allowing for a claim of damages against malicious prosecution. As it stands there is nothing that holds the prosecutor accountable in decision where it has been found that they started prosecutions maliciously. There must be adopted accountability even for the power to prosecute to ensure the protection of society against arbitrary prosecutions. In describing malicious prosecution, the court held prosecutions are motivated by malice where there was an intention to injure.[817] Malice is usually apparent where it can be shown that a prosecutor lacked an honest belief in the justification of commencing proceedings because it would mean that the proceedings were motivated by something extraneous or improper. Malice covers any motive other than a desire to bring a criminal to justice.[818]

To ensure functional independence of the NPA and protection of institutional integrity, parliament can enact legislation that bars anyone who is actively employed by another department, institution, or organ of state to hold prosecutorial powers.

[817] *George Lifumbela Mutanimiye v The Minister of Safety & Security* (2017) NAHCMD at 81.
[818] Glinski v McIver [1962] AC 726 at 766.

Bibliography

Books

Baxter *Administrative law* (Juta1984)

Bingham, *The Rule of Law* (Allen Lane 2010)

Black *Handbook on the Construction and Interpretation of the Laws* (West Publishing Company 1911)

Carolan E *The New Separation of Powers: A Theory of the Modern State* (Oxford University Press: Oxford 2009)

Carpenter *Introduction to South African constitutional Law (Butterworth* Durban: 1987).

De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants 2000).

De Ville *Judicial Review of Administrative Law in South Africa* (Lexis Nexis Butterworts 2003) 218.

Dessart, 'Legislative Reform of the Crown Prosecution service in Belgium' *What Public Prosecution in Europe in the 21st Century Proceedings Pan European Conference* (Council of Europe Publishing 2000).

Dowell *Swapo's struggle for Namibia, 1960-1991: War by other means* Vol 3 (BASLER AFRIKA BIBLIOGRAPHIEN: 1998).

Du Plessis Redpath & Schönteich, 'Report on the South African National Prosecuting Authority' in *Promoting Prosecutorial Accountability, Independence and Effectiveness* (Sofia: Open Society Institute2008).

Feltoe, *A guide to administrative and local government law in Zimbabwe* (Legal Resources Foundation 2006).

Fombad, *Separation of Powers in African Constitutionalism* (Oxford University Press 2016).

Hoexter, *Administrative Law in South Africa* (Juta & Co, Cape Town, 2012).

Horn & Bosl (eds) *The Independence of the Judiciary in Namibia* (Macmillan Education Namibia 2008).

Joubert *Criminal procedure handbook* 9th ed (Claremont: Juta and Company 2009).

Joubert *The Law of South Africa* (Lexis Nexis South Africa 1997).

Madhuku, *An introduction to law in Zimbabwe* (Weaver Press 2010).

Mansfield & Peay *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor: an Inquiry Carried Out at the Centre for Criminological Research (*University of Oxford Routledge: 1987*)*.

Martin and Johnson *The struggle for Zimbabwe: the Chimurenga war* (Ravan Pres 2001).

Medécigo, *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (Springer 2015).

Myer *Indirect rule in South Africa: tradition, modernity, and the costuming of political power* (University of Rochester Press 2008).

Olson *Historical dictionary of European emperialism* (Greenwood Press 1984).

Oxford Dictionary 2nd *Ed* (Oxford University Press 1989).

Pikis *Constitutionalism - Human Rights - Separation of Powers: The Cyprus Precedent (*Martinus Nijhoff Publishers 2006).

Rautenbach: *Constitutional Law* 4th edition (LexisNexis Butterworths 2003).

Rawls *A Theory of Justice* (Harvard University Press: 1972).

Redpath 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa' 2012 (186) *ISS Monograph*.

Saller, *The Judicial Institution in Zimbabwe*, (Siber Ink, South Africa 2004).

Sciolino, *The Holocaust, the Church, and the Law of Unintended Consequences* (Thomas Nelson Publishers 1990).

Seedorf & Sibanda *Separation of powers* in, Woolman & Bishop 'Constitutional law of South Africa' (2nd ed) (Juta and Co 2013).

Street *Judicial review and the rule of law. Who is in Control*? (Constitutional Society 2013).

Tamanaha, *On the Rule of Law, History and Politics, Theory* (Cambridge University Press 2004).

Thibaut & Walker *Procedural Justice* (L. Erlbaum Associates: 1975).

Van de Schyff *Judicial review of legislation: A comparative study of the United Kingdom, the Netherlands and Southen Africa* (Springer 2010) Wallace, Marion & Kinahan. *A history of Namibia: from the beginning to 1990* (Columbia University Press: 2011).

Venn Dicey *Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan 1895).

Wiechers, *The Namibian Constitution: Reconciling legality and legitimacy,* in Bösl, Horn & Du Pisani, *Constitutional democracy in Namibia. A critical analysis after two decades* (Windhoek, Macmillan Education Namibia, 2012).

Wiechers *Administrative law* (Durban: Butterworths1985).

Wiseman & Taylor *From Rhodesia to Zimbabwe: The politics of Transition* (Pergamon Press 1981)

Journal Articles

Barendt 'Separation of powers and constitutional government' (1995) *Public Law* 599-619.

Bennet, 'Conflicts of law-The application of Customary law and the common law in Zimbabwe' (1981) 30(1) *The International and Comparative Law Quarterly* 59-108

De Ville 'The rule of law and judicial review: rereading Dicey' (2006) *The Acta Juridica* 79.

De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' 2011 (74) *THRHR* 247-263.

Dube, 'Roman-Dutch and english common law: the indispensable law in Zimbabwe', (2014) *Afro Asian Journal of Social Sciences* 5(4) 1.

Du Plessis, Redpath & Schönteich, 'Promoting Prosecutorial Accountability, Independence and Effectiveness,' *Report on the South African National Prosecuting Authority* 2008.'

Groves 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285.

Harris, 'The changing Rhodesian political culture: 1969' (1970)1 (2) *Zambezia* 5-8.

Hasson, 'Rhodesia- a police state?' 1966 (22) 5 *The World Today* 181.

Horn, 'The unique constitutional position of the Prosecutor-General of Namibia and the effect of the independence of the office on the functioning of the prosecuting

authority in relationship with the Ministry of Justice and the Attorney-General.' 2000 *Unpublished Thesis, UNISA.*

Independence and Accountability of the Prosecution *ENCJ report* 2014-2016

Independence and impartiality of judges, prosecutors, and lawyers *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*

Indongo, 'The uniqueness of the Namibian Prosecutor-General.' *The Independence of the Judiciary in Namibia. Windhoek: Macmillan Education* (2008): 99-112.

Johnson 'Laying Down the Law: Britain and American lead the way in establishing legal regimes based on universal principles' (1999) *Wall Street Journal* 22.

Kirkman 'The Rhodesian referendum: The significance of June 20, 1969' (1969) (45) 4 *International Affairs (Royal Institute of International Affairs (1944)* 648-657.

Marshall 'The separation of powers: An American perspective' (2006) 22 *SAJHR* 10.
Mckenzie Directors of Public Prosecutions: Independent and Accountable (1996) (26) *Western Australian Law Review* 268-285.

Meagher, Dan --- "The Common Law Principle of Legality in the Age of Rights" 2011 (35) 2 *Melbourne University Law Review* 16449.

Mujuzi, 'Private prosecutions in Zimbabwe Victim participation in the criminal justice system' *South African Crime Quarterly* 2016 (56).

Muntingh, Redpath & Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' 2017 *ACJR* 1-43.
Ndulo African customary law, customs, and women's Rights 2011 *Cornell Law Faculty Publications* 87-120.

UN doc. E/CN.4/2000/3, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*, para. 87.

Redpath 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa' 2012 (186) *ISS Monograph.*

Skylansy, 'The nature and function of prosecutorial power,' 2016 *THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY* 106 (3) 474-520 Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1427 (2010).

Summers 'Evaluating and Improving Legal Processes: A Plea for Process Values' (1974) 60 *Cornell Law Review* 1 2.

Vorenburg, 'Decent Restraint of Prosecutorial Power', 1981 (94) 7 *Havard l Law Review* 1521-1573.

Index of Legislation

Administrative Justice Act (Chapter 10:28).

Constitution of the Republic of South Africa 108 of 1996.

Constitution of the Republic of Namibia Act 1 of 1990.

Constitution of Zimbabwe, 1980.

Constitution of Zimbabwe, 2013.

Criminal Law (Codification and Reform) Act [Chapter 9:23] 23 of 2004.

Criminal Procedure and Evidence Act (Chapter 9:07).

Criminal Procedure Act 25 of 2004.

Criminal Procedure Act 56 of 1955.

Criminal Procedure Act 51 of 1977.

Defence Act 44 of 1957.

General Law Amendment Act of 1957.

Judges' Remuneration and Conditions of Employment Act 47 of 2001.

National Prosecutions Authority Act (code of Ethics) Regulations (CAP 7:20) 2015.

National Prosecuting Authority Act 32 of 1998.

Promotion of Administrative Justice Act 3 of 2000.

Statutory Instrument 83 of 2015 - National Prosecuting Authority (Code of Ethics) Regulations, 2015.

UN doc. E/CN.4/2000/3, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*.

Index of cases

Administrator of the Transvaal v Traub 1989 (4) SA 731 (A).

A-G v Mudisi & Ors S-48-15.

Affordable Medicines Trust & Others v *Minister of Health & Others 2*006 (3) SA 247 (CC).

African Tribune Newspapers (Pvt) Ltd & Ors v *Media & Information Commission & Anor* 2004 (2) ZLR 7 (H).

Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC).

Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 672.

Barclays Zimbabwe Nominees (Pvt) Ltd v *Black* 1990 (4) SA 720 (AD).

Council for Civil Service Unions v *Minister for the Civil Service* [1984] 3 All ER 935 (HL).

Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad 1959 (3) SA 651 (A).

Democratic Alliance v President of the Republic of South Africa and others 2012 (1) SA 417 (SCA).

Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC).

Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA).

Drew V. Drew and Lebura (1855 (2) Macg. 1.8.

Executive Council of the Western Cape Legislature v President of the Republic of South

Africa 1995 4 SA 877 (CC).

Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney- Ex Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others 1999 (1) SA 374 (CC).

Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP).

General and the Prosecutor-General 1998 NR 282 (SC).

George Lifumbela Mutanimiye v The Minister of Safety & Security (2017) NAHCMD 197.

Glinski v McIver Glinski v McIver(1962) AC 726.

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC).

Gula-Ndebele v *Bhunu NO* 2010 (1) ZLR 78 (H).

Hathaway v State of New South Wales 2009 NSWSC.

Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others 1994 (1) SA 387 (C).

In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control (CCZ 13/2017 Const. Application No. CCZ 8/15) [2017] ZWCC 13 (28 October 2015).

Levy v *Benatar* 1987 (1) ZLR 120 (S) at 126F.

Marbury v. Madison 1803 (5) U.S 1 Cr para 165-166.

Makapa v Ministry of Safety and Security and Others [2017] NAHCMD 130.

National Director of Public Prosecutions and Others v Freedom Under Law 2018 (1) SACR 436 (GP).

National Director of Public Prosecutions v Freedom Under Law (2014) ZASCA.

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA).

Norman Sengeredo v *The State* CCZ 11-14.

Patriotic Front-Zimbabwe African People's Union v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC).

PF (ZAPU) v *Minister of Justice* 1985 (1) ZLR 305 (S).

Pharmaceutical Manufacturers: In re Ex parte Application of the President of the RSA 2000 (2) SA 674 (CC).

Pikoli v The President 2010 (1) SA 400 (GNP).

R (Barons Pub Company) –v- Staines Magistrates Court (2013) EWHC 898.

R (Corner House Research and another) v Director of the Serious Fraud Office [2008] UKHL 60.

R v. Christians 1924 AD 101.

R v *Home Secretary, Ex parte Fine Brigades Union* [1995] 2 AC 513.

Rushwaya v *Minister of Local Government* S-6-87 and *Affretair* v *MK Airlines* 1996 (2) ZLR 15 (S).

Sharma v Brown-Antoine and others [2007] 1 WLR 780 (PC).

S v Dubayi 1976 3 SA 110 (TK).

S v Hassin 1972(1) SA 200(N).

S v Jija and Others 1991 (2) SA 52 (E).

S v Makwanyane and Another 1995 (3) SA 391.

S v Yengeni (A1079/03) [2005] ZAGPHC 117.

Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe [2014] ZWSC1.

Tsvangirai & Anor v *Registrar-General & Ors* 2002 (1) ZLR 251 (H).

United Democratic Movement v President of the Republic of South Africa 2003 (1) SA 495 (CC).

U-Tow Trailers (Pvt) Ltd v *City of Harare & Anor* 2009 (2) ZLR 259 (H).

Wilson v Director of Public Prosecutions (2002) 1 All SA 73 NC

Zreika v State of New South Wales 2011 NSWDC 67.

Newspaper Articles

Powell 'Court fixes some of the flaws in South Africa's prosecuting authority' *The Conversation* August 2018.

Kuwadza, 'Military rakes over Prosecutorial Authority Zimbabwe,' *The Independent* 28 October 2016.

Mavedzenge 'Administrative Justice and the Constitution' *The Herald* 18 August 2018.

Mavhinga, 'Why respect for separation of powers principle is vital' *Daily News* 11 April 2015.

Internet Sources

Administrative law guide available at http://tsime.uz.ac.zw/claroline/backends/download.php?url=L0FkbWluaXN0cmF0aXZlX0xhd19fR3VpZGVfMjAxMy5kb2N4&cidReset=true&cidReq=AD211 accessed on 14 August 2018.

Amoo, 'The structure of the Namibian judicial system and its relevance for an independent judiciary,' available at https://www.kas.de/c/document_library/get_file?uuid=6f5df420-fdb8-499c-ee80-c1516dce114e&groupId=252038 last accessed on 10 June 2019.

Baughman, Robertson and Sah '3 professors have a radical idea for how to remove bias from the criminal justice system' http://www.businessinsider.com/how-to-remove-bias-criminal-justice-system-2016-10 last accessed 14 May 2018.

Corder, Jagwanth and others, 'Report on Parliamentary Oversight and Accountability Faculty of Law '1999 available at http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf last accessed on 20 August 2019.

Cowdery, 'Prosecution Policy and Guidelines 1998', available at http://www.odpp.nsw.gov.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2 last accessed on 18 May 2018.

Diescho, 'The Necessity of the separation of powers,' available at https://neweralive.na/posts/dieschos-dictum-the-necessity-of-separation-of-powers-in-government last accessed on 10 June 2019.

Eral, Goldin and Muchaidza, et al 'Indigenous and institutional profile Limpopo river basin', *Working paper 12* available at https://books.google.co.zw/books?id=RWMYBQAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false accessed on 29 June 2018.

Flatman (1996) ‘The Independence of the Prosecutor, Prosecuting Justice Conference, Melbourne 18 and 19 April 1996’ 1996 available at http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf last accessed on 9 February 2019.

Grieve, ‘The Scope of the Rule of Law and the Prosecutor – some general principles and challenges’, available at http://www.iap-association.org/conferences/annual-conferences/18th-annual-conference-and-general-meeting-provisi/18ac_p1_speech_dominic_grieve_final.aspx last accessed on 18 May 2018.

Gubbay, ‘The progressive erosion of the rule of law in independent Zimbabwe’*, Third International Rule of Law Lecture: Bar of England and Wales Inner Temple Hall,* 2009 available at http://www.cfuzim.org/index.php/legal-cases/335-the-progressive-erosion-of-the-rule-of-law-in-independent-zimbabwe last accessed on 22 August 2018.

Hodzi, ‘Reforming the Criminal Justice System in Zimbabwe: Lessons from Kenya’ *Kenya Justice Sector and the Rule of Law DISCUSSION PAPER* 2011 available at https://www.researchgate.net/publication/282268213_Reforming_the_Criminal_Justice_System_in_Zimbabwe_Lessons_from_Kenya last accessed on 28 August 2018.
Hofisi & Feltoe ‘Playing Politics with the Judiciary and the Constitution’2017(1) *ZELJ* https://zimlii.org/system/files/journals/Playing%20Politics%20with%20the%20Judiciary%20and%20the%20Constitution.pdf last accessed 10 July 2018.

Horn ‘An introduction to the Namibian Constitution’ available at http://www.icla.up.ac.za/images/country_reports/namibia_country_report.pdf last accessed on 13 October 2019

Horn, ‘The independence of the prosecutorial authority of South Africa and Namibia: A comparative study’ available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf at 119, last accessed on 4 October 2018.

History and background ‘Supreme court of Appeal’ available at http://www.justice.gov.za/sca/historysca.htm last accessed on 16 October 2019.

Independence and impartiality of judges, prosecutors and lawyers *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* available at https://www.ohchr.org/Documents/Publications/training9Titleen.pdf accessed on 28 August 2018.

International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted on 23 April 1999’, available on http://www.odpp.nsw.gov.au/docs/default-source/guidelines/appendix-a---standards-of-professional-responsibility-and-the-statement-of-the-essential-duties-and-rights-of-prosecutors.pdf?sfvrsn=8 last accessed 14 May 2018.

Kaseke, ‘The Police Republic of Zimbabwe: Zimbabwe as a Police State’, *News day* on 3 June 2018., available at *https://www.newsday.co.zw/2016/08/police-republic-zimbabwe-zimbabwe-police-state/* last accessed 28 June 2018.

Long, ‘Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies’, Available at https://www.hrw.org/reports/2003/safrica/safriglhrc0303-07.htm last accessed on 12 May 2018.

Manyika, ‘The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the constitutional court of South Africa’ 2016 *LLM Dessertation UKZN* available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/13125/Manyika_Gift_Kudzanai_2016.pdf?sequence=1&isAllowed=y accessed on 11 May 2019.

Nakuta & Chipepera, ‘The Justice Sector and the Rule of Law in Namibia Management, Personnel and Access,’ available at

https://www.nid.org.na/images/pdf/democracy/Management_Namibian_Justice_System.pdf last accessed on 28 May 2019.

Ndlovu 'Demand urgent alignment of law' *NewsDay* 25 August 2016, available at https://www.newsday.co.zw/2017/05/demand-urgent-alignment-laws/ accessed on 11 May 2018.

Nagendra, 'Quasi Judicial and Judicial Functions available,' at http://www.atimysore.gov.in/trg_sch/2014-15/w_calendar/August/GV/DAy%201%20GV.pdf accessed on 04 July 2018.

NPA code of Conduct available at https://www.npa.gov.za/sites/default/files/Library/Code%20of%20Conduct%20published%2029%20December%202010.pdf

Nyabeza, 'Progressive reform in the new constitution of Zimbabwe: a balance between the preservative and transformative constitution making process' 2015 *Country Report* 3, available at http://www.kas.de/wf/doc/kas_40484-1522-2-30.pdf?150217083439 accessed on 17 June 2018.

Panel of Constitutional Experts Re Attorney General/Prosecutorial Authority available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF accessed on 28 October 2019.

Principle of Legality in Criminal Law available at https://www.lectlaw.com/mjl/cl015.htm accessed 21 August 2018.

'Report of the inquiry into the fitness of advocate VP Pikoli to hold office,' 2008 available at http://www.justice.gov.za/commissions/2008_ginwala.pdf last accessed on 2 October 2019.

Rupapa, 'Tomana arrested' *Herald* 09 July 2018, available at https://www.herald.co.zw/tomana-arrested-at-court/ accessed on 5 May 2018.

Schönteich, M, ‘Strengthening Prosecutorial Accountability in South Africa,’ 2014 *ISS Paper 255* available at *https://www.files.ethz.ch/isn/183154/Paper255.pdf* last accessed on 2 January.

Sebba, ‘Crime, History and Societies, the Creations and evolution of Criminal Law in colonial and post-colonial societies’, (1999) 3 (1) available at https://journals.openedition.org/chs/936 last accessed 29 June 2018.

Tomana, ‘National Prosecuting Authority Annual Report,’ available at http://www.veritaszim.net/sites/veritas_d/files/National%20Prosecuting%20Authority%202015%20Annual%20Report_0.pdf last accessed on 26 September 2019.

The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders ‘South African Law Commission Discussion Paper 82’ available at http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf last accessed on 16 May 2018.

United Nations Human Right Office of the High Commission Guidelines on the role of the Prosecutor 1980 available at https://www.ohchr.org/EN/Professionalinterest/Pages/RoleOfProsecutors.aspx accessed on 03 July 2018.

Venaan, ‘Separation of powers a practical experience,’ *Namibian* available at https://www.namibian.com.na/index.php?id=87220&page=archive-read Last accessed 10 June 2019.

White, ‘Tort law in America: An intellectual history,’ 2003 available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2762&context=dlj last ccessed on 7 June 2019