A COMPARATIVE STUDY OF THE EXERCISE OF PROSECUTORIAL DISCRETION IN SOUTH AFRICA, AUSTRALIA, AND THE UNITED STATES OF AMERICA

By

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TABLE OF CONTENTS

ABSTRACT

The quest to reduce criminality by effective prosecution has become the paramount role of prosecutors in criminal jurisdictions worldwide. As gatekeepers of the criminal justice system, prosecutors perform different roles intended to foster accountability and advance the rule of law. Among other aspects, prosecutors observe the concepts regulating plea negotiations and the rule against double criminality to achieve this objective. These concepts are promoted by the discretionary authority of prosecutors, depending on the domestic legislation/s advancing the exercise of prosecution. In other words, the success of prosecutorial discretion depends on the relevant domestic legislation advancing the rule of law in domestic systems. In the context of the current study, it is argued that, even though South Africa, the United States of America, and Australia share the Anglo-American prosecutorial model, they exhibit different prosecutorial characteristics influenced by their internal judicial mechanisms. In the case of South Africa, the National Prosecuting Authority (NPA) constitutes the central legislative authority promoting prosecutorial discretion. Despite the relevant legislative framework, the country's prosecution regime cycle has been marred by resignations and/or dismissals of successive prosecutors from office. The consequence of this is reflected in the multiple challenges currently plaguing the South African criminal justice system. Broader academic debate holds that these pitfalls occur within the nexus of the constitutional and legislative framework of the NPA. This thesis assesses the NPA's role regarding its core prosecution function. This research relies on content by a review of related literature using qualitative methodology to validate primary and secondary data. The thesis, by a critical analysis of the relevant constitutional jurisprudence, including case law, learned publications and related legislations such as the NPA Act 32 of 1998, contends that, although South Africa seems to have advanced in the jurisprudence of prosecutorial discretion, the discretionary authority of prosecutors in the exercise of prosecutorial responsibilities is still not guaranteed when compared to jurisdictions such as the US and Australia. It is recommended that the NPA Act be amended in conjunction with the relevant constitutional provisions to address the shortcomings plaguing prosecutorial discretion in South Africa.

DECLARATION

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A COMPARATIVE STUDY OF THE EXERCISE OF PROSECUTORIAL DISCRETION IN SOUTH AFRICA, AUSTRALIA, AND THE UNITED STATES OF AMERICA.

I declare that the above thesis is my own work and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

I further declare that I submitted the thesis to originality-checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

11 May 2023

SIGNATURE **DATE**

DEDICATION

This study is dedicated to the memory of my parents, Joseph and Fungile Cecelia (MaNgwenya) Sithole, my brothers, Zakhele Johannes (Bizaboyza) Sithole and Fr Bongani Anthony (Sithole'wami) Sithole and my sister Venetia Thokozile Sithole. There is no doubt that wherever they are, they are worthy ancestors.

Lalani Ngoxolo BoMasangane, BoMathupa!

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Mr Sylvester Sithole

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

AUS	Australia
USA	United States of America
NPA	National Prosecuting Authority
NDPP	National Director of Public Prosecutions
IAP	International Association of Prosecutors
UK	United Kingdom
JPs	Justices of Peace
DPP	Director of Public Prosecutions
CPS	Crown Prosecution Service
NSW	New South Wales
CDPP	Commonwealth Office of Director of Public Prosecutions
DEIC	Dutch East India Company
SWAPO	South West Africa People's Organisation
SANDF	South African National Defence Force
ANC	African National Congress
ICC	International Criminal Court
UN	United Nations
ENCJ	European Network of Councils for the Judiciary
IMT	Nuremberg International Military Tribunal
UNODC	United Nations Office on Drugs and Crime
IPM	Innocence Project Movement
SCC	Supreme Court of Canada
SDPPs	Special Directors of Public Prosecutions

DDPP	Deputy Director of Public Prosecutions
POCA	Prevention of Organised Crimes Act
AFU	Asset Forfeiture Unit
DSO	Directorate of Special Operations
DA	Democratic Alliance
DPCI	Directorate for Priority Crime Investigation
AGSA	Auditor-General of South Africa
ACJR	African Criminal Justice Reform
PID	Independent Police Investigative Directorate
SIU	Special Investigation Unit
SCCU	Specialised Commercial Crime Unit
ICCPR	International Covenant on Civil and Political Rights
FSRA	Federal Sentencing Reform Act
USSC	United States Sentencing Commission
ALRCR	Australian Law Reform Commission Report

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

This thesis is a comparative study of the prosecutorial discretion process in South Africa, Australia (AUS), and the United States of America (USA). It examines prosecutorial powers in the context of nolle prosequi (unwilling to prosecute) and iudicium prosequi (decision to prosecute), which ultimately define the role of the National Prosecuting Authority (NPA) in the administration of criminal justice. It looks at the scope of prosecutorial authority in general, the legality of prosecutorial conduct concerning how the decision to prosecute or not was reached, and the possibility of judicial review. Indeed, as this thesis argues, prosecutors possess enormous powers that could devastate criminal proceedings, particularly the accused. For this reason, the study examines the mechanisms for oversight control of the prosecutorial authority in the selected countries.

While the importance of prosecutorial discretion in the administration of criminal justice is internationally acknowledged,[1] little academic attention has been given to this topic,[2] particularly in South Africa.[3] For this reason, this study will look at the requirements of

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[1] See Fred Zacharias and Bruce Green "Prosecutorial Neutrality" (2004), *University of San Diego Public Law and Legal Theory Research Paper Series* 2 (stating that the exercise of prosecutorial discretion plays a central role in every justice system); De Villiers “Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models” (2011), THRHR 248; Rebecca Krauss “The Theory of Prosecutorial Discretion In Federal Law: Origins and Developments” (2012) *Seton* HCR 2; Richard Uviller “Ethics in criminal advocacy, symposium, the neutral prosecutor: the obligation of dispassion in a passionate pursuit” (2000), FLR 1697. See also Mark Weinberg in *Judicial Oversight of Prosecutorial Discretion: A Line in the Sand?* (Paper presented at Criminal Law Conference, Prosecutions Division of the Department of Justice of the Hong Kong Special Administrative Region, 26 October 2015, Hong Kong) 1-17.

[2] See Stephanos Bibas "The Need for Prosecutorial Discretion" 2010 *Faculty Scholarship* 369; Yang “Public Accountability of Public Prosecutions” (2013), MULR 28.

[3] Of note is the observation of Frene Ginwala in *Prosecutorial Independence and Ministerial Oversight* (Report of the Enquiry into the Fitness of Advocate Vusi Pikoli to Hold the Office of National Director of Public Prosecutions, November 2008) [51] 39 (hereinafter, the Ginwala Commission) in which she stated the following: “[M]uch of the focus of South African scholars, jurists, and media has been on prosecutorial independence. Sufficient attention has not been paid to the requirement of democratic accountability of

prosecutorial accountability as has been adopted in the criminal justice systems of the US and Australia, comparing these to South Africa. Further, the study discusses the future of South Africa regarding international best practice.

South Africa's current prosecution system purports to concentrate prosecutorial powers on one single National Prosecuting Authority (NPA)[4] and some degree of independence to the National Director of Public Prosecutions (NDPP).[5] The thesis examines the historical developments that led to establishing what is now known as a 'single' NPA in South Africa that aims to be truly independent, fair, and accountable to its citizens to understand this. Since its establishment in 1998, court cases challenging its decisions which are too controversial in the public eye to be ignored, have increased.[6] This propels us to examine and consider some critical lessons South Africa should consider in tackling its fresh challenges under the new constitution.

The new South African Constitution was promulgated on 18 December 1996 as its first democratic constitution.[7] It was widely welcomed with optimism as the crowning achievement of a new democratic order.[8] More importantly, it marked a significant departure from the previous apartheid government's "[c]ulture of authority" to a new democratic "[c]ulture of justification", in which the exercise of government authority by

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the prosecuting authority. In focusing only on independence from political interference they have erred in conflating freedom from control with freedom from accountability. Further, scant attention has been paid to the nature, content, and ambit of the 'final responsibility' of the Minister, and even less to the relationship between this responsibility and the prosecutorial independence of the NDPP".

[4] See Section 179 (1) of the Constitution of the Republic of South Africa 108 of 1996 (hereinafter Constitution of South Africa).

[5] Section 179 (5) of the Constitution of SA.

[6] Some of the controversial cases herein considered include *NDPP* v *Jacob Zuma* 2009 (2) SA 277 (SCA); *Freedom Under the Law v NDPP and Others*; *Johan Booysen v NDPP.*

[7] The constitution was promulgated by President Nelson Mandela on 18 December 1996 following approval by the Constitutional Court (hereinafter CC) on 4 December 1996. It is the highest law in the land and features democratic values and a Bill of Rights and is widely acclaimed as the most progressive constitution in the world https://www.brandsouthafrica.com/governance/constitution-sa-glance/the-constitution-of-south-africa (Date of use: 19 April 2018); see also Citation of Constitutional Laws Act 5 of 2005.

[8] Heinz Klug *Constitution of South Africa: A Contextual Analysis* (Hart Publishing Oxford, 2010) 5; Chis Hart "A Realistic View of South African Democracy" http://businessmediamags.co.za/a-realistic-view-of-south-african-democracy/ (Last Accessed: 19 April 2018).

government officials must be justified in terms of the Constitution.[9] Hence, the Constitution demands that those who act on behalf of the State act with diligence when dealing with criminal cases.[10] However, this leaves the NPA between "[a] rock and a hard place", balancing people's rights and carrying out its primary constitutional duty of prosecuting crime. This challenging aspect of decision-making in criminal proceedings affects the NPA's public accountability records. Beyond this, the NPA remains the only independent government authority without a properly constituted independent oversight body that can assist it in improving its efficiency and accountability records.[11] This gap has been identified by commentators as a fundamental contributor to unlawful political interferences with the decisions of the NPA, particularly in high-profile cases.[12]

Scholars have also considered that, given the extensive discretionary powers prosecutors enjoy in criminal proceedings, there is a need to enhance a check and balance system to protect human rights.[13] The process of decision-making by

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[9] Heinz Klug, Constitution of South Africa 5; See the argument by Justice Kate O' Regan, *ex parte* Chairperson of the Constitutional Assembly, in re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) [24] – [25] (hereinafter the First Certification Case).

[10] See J Henney in *Brown v NDPP* (2012), 1 All SA 61 (WCC) para. 2.

[11] In terms of Section 7 (1) (c) of the "Establishment of the Office of the Ombudsman for the City of Johannesburg by-laws" (2014), the City Ombudsman may investigate any matter relating to a decision to lay charges or prosecute an alleged offender.

[12] It is important to note the chronology of events which laid the foundation for wielding executive influence in the decision-making process of the NPA. On 23 August 2003, the first National Director of Public Prosecutions (Mr Bulelani Ngcuka) released a press statement pursuant to which he announced, inter alia, that the NPA was not going to pursue the corruption case against Jacob Zuma (Accused Number 1) despite a prima facie case of corruption against him. It is also interesting to note that, at the time, Mr Zuma was the deputy President of the ruling African National Congress Party or ANC; hence the NDPP's expression of doubt for the prospects of successful prosecution. Following this statement, the NPA indicted only Accused Number 2, together with 11 other corporate entities involved in the matter. See *State v Jacob Zuma and Others* Case No: Cc358/05 [8-9]. Subsequent decisions and litigation arising from this issue include: *Helen Suzman Foundation v President of the Republic of South Africa and Others, Glenister v President of the Republic of South Africa and Others* (2014), ZACC [32], Democratic Alliance v The President of the RSA and Others (263/11) (2011), ZASCA 241.

[13] Joan Jacoby *The American Prosecutor: A Search for Identity* (1980), xxi; Bruce Green and Ellen Yaroshefsky "Prosecutorial Accountability" (2016), NDLR 5; Abby Dennis "Reining in the Minister of Justice Prosecutorial Oversight and the Superseder Power" (2007), DLJ, 135; James Vorenberg, "Narrowing the Discretion of Criminal Justice Officials" (1976), DLJ 651.

prosecutors is often secretive,[14] thereby slipping past the reach of judicial scrutiny.[15] Regarding South African law, prosecutorial decisions are expressly excluded from the process of judicial review by the courts.[16] However, South African courts may rule on any decision or form of conduct that conflicts with the constitutional values and principles set out in the new constitution.[17]

This thesis examines the above issues to show how the courts have interpreted constitutional principles to guide the exercise of prosecutorial discretion in South Africa,[18] compared to the US and Australia. By adopting this comparative approach, the study will inform South African policymakers about historical and contemporary developments in the criminal justice systems regarding international best practice. Accordingly, the thesis will encourage more informed decisions in tackling the prosecutorial discretion challenges in South Africa.

1.2 Aims and objectives

The main aim of this thesis is to analyse the legal frameworks of the exercise of

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[14] Yang "Public Accountability of Public Prosecutions" (2013), MULR 28; Australian Law Reform Commission Sentencing of Federal Offenders Report No 15 (1980), stating that "[t]he process of prosecutions in Australia is probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice."

[15] Yang (2013), MULR 28; Fred Zacharias and Bruce A Green "Prosecutorial Neutrality" (2004). *University of San Diego Public Law and Legal Theory Research Paper Series* 2; Loewenstein "Judicial Review and the Limits of Prosecutorial Discretion" (2001), ACLR *3*51.

[16] Section 1 (ff) of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter PAJA); See also *NDPP v Freedom Under Law (*2014) ZASCA 58 (SCA) [19];S 33 of the constitution.

[17] Du Bois et al, Wille's Principles of South African Law 9th ed (JUTA Cape Town 2007) 18; Freedom Under Law v Acting Chairperson Judicial Service Commission and Others (2011), (3) SA 549 (SCA) [19]-[21]; Affordable Medicine Trust and Others v Minister of Health and Others (2006), (3) SA 247 (CC) [75].

[18] See the reasoning of the courts in *Freedom Under the Law v NDPP and Others* (2017), (1) SA 254 GNP [131]. The court affirmed that a decision not to prosecute is unconstitutional and thus reviewable. In *NDDP v Jacob Zuma* (1995), (4) BCLR 401 SA (CC) [35], the Supreme Court of Appeal (SCA) confirmed that a decision to prosecute is not susceptible to review under PAJA; also in *Booysen v NDPP and Others* (2014), (2). All SA (KZD) 391 [12], the court was more elaborate in stating that "The definition of administrative action in PAJA specifically excludes a decision to prosecute or continue a prosecution. It is thus not reviewable under PAJA. Without this exclusion, such a decision would clearly amount to administrative action since the definition includes a decision by an organ of state when exercising a power in terms of the constitution or exercising a public power or performing a public function in the of any legislation. See for example: *Sanderson v Attorney General* (1998), (2) SA 38 (CC) [26]; *Wild and Another v Hoffert NO and Others* (1997) (7) BCLR 974 (N) [4]-[12].

prosecutorial discretion in South Africa, the US and Australia to highlight some critical institutional challenges and barriers to the proper exercise of prosecutorial discretion and accountability in South Africa. It also aims to establish international benchmarks regarding contemporary norms and practices. This will provide the basis for improving efficiency in prosecutorial discretion in South Africa.

The study has the specific objective of analysing the legal standing of the exercise of prosecutorial discretion in South Africa concerning specific provisions of the 1996 democratic Constitution concerning establishing a single independent prosecuting authority.[19] Discussions will consider Sections 179 (1), (4), (5) and (6) of the Constitution and Sections 33 (1) and (2) of the NPA Act, which provides for administrative oversight of the Minister of Justice over the affairs of the NPA. The thesis will discuss the concepts of plea bargaining, double jeopardy, and sentencing comparatively as prevailing in the respective jurisdictions of the US, Australia and South Africa. Amid comparative claims, the thesis equally explores the prosecutors' duty to prosecute, other successive penal codes and the legal frameworks for ensuring public accountability in prosecutorial decision-making. Furthermore, the theory of utilitarianism will be explored in conjunction with Williams' criticisms, based on morality and good conscience,[20] with the main aim of exposing the gaps between prosecutorial conduct and legislative control in South Africa.

1.3 The problem statement

The NPA became functional on 1st August 1998 with the establishment of the office of the NDPP, in terms of Section 179 (1) of the 1996 Constitution. The first prosecutor[21] faced the enormous challenge of issuing first hand a series of prosecution policies and

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[19] *S*ection 179 (1) of the constitution.

[20] Dryer "Utilitarianism, For and Against" (1975), CJP, 4, 549-559.

[21] For the purposes of this study, the first prosecutor refers to Advocate Bulelani Ngcuka, who was appointed by President Thabo Mbeki as the first National Director (NDPP). He was later embroiled in a controversial decision, in which he entered a nolle prosequi not to prosecute the then deputy President Jacob Zuma despite the existence of prima facie case against him. He later resigned in July 2004. Zuma was later elected president in May 2009, and was forced to resign by his ruling political party (African National Congress, ANC) in February 2018. He is currently back in court to answer the same criminal charges.

directives, which must be observed throughout the nine provinces.[22] He inherited the more daunting task of addressing the mass resignation of many highly experienced prosecutors nationwide who served under the previous apartheid government.[23] This gap, coupled with relative inexperience and absence of quality advisers, his choice of prosecution policies and decisions triggered seemingly insurmountable controversies that have troubled the NPA to date. Since the beginning, the idea of prosecutorial oversight seemed to have become a panacea to the debate between various commentators.

In addition to the challenge of prosecutorial oversight, Section 12 (1) of the NPA Act provides for a non-renewable term of ten years for which the NDPP is expected to hold office. Since its inception in 1998, the NPA has had more than six different NDPPs, and no one has completed their term of office. This negative feedback reflects a lack of consistency and a leadership deficit in the affairs of the NPA. While some commentators have attributed this problem to the professional gaps created by the massive resignations of experienced prosecutors during the transition period from apartheid to a democratic republic, the new constitutional framework providing for an independent exercise of discretion places prosecutors directly under the authority of top executive members, namely, the President of the Republic and the Minister of Justice.[24] It has also been described as an ambitiously constituted constitutional framework, the merit of which can be readily proved from its historical development.[25]

More recently, however, there has been a progressive shift in academic debate from the issues of prosecutorial independence, executive influence and political control to prosecutorial oversight for more accountability.[26] This study views this shift as an indication of a fundamental problem of poor accountability mechanisms in the prosecutorial decision-making process. It calls for more scientific studies on prosecutorial

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[22] Section 179 (5) of the constitution.
[23] Schönteich (2014), *SA Crime Quarterly* 6.
[24] This observation was made by the *Ginwala Commission* (52).
[25] Schönteich (2014) SA Crime Quarterly 5.
[26] See the Ginwala Commission (51).

discretion in South Africa to find solutions to its significant challenges.

1.4 The research questions

This thesis will address whether there are gaps in academic research on the exercise of prosecutorial discretion in South Africa. Answering this question leads to the following sub-questions: what are the real reasons and the root causes of such knowledge gaps? How does this affect the exercise of prosecutorial discretion by the NPA? What measures can be adopted to improve the situation?

In answering the above questions, the study will ultimately address the theoretical basis for exercising prosecutorial discretion and whether the South African Constitution provides sufficient guidance. Another critical question this research seeks to answer is whether the modus operandi of the NPA conforms to international principles and normative standards compared to Australia and the US. With the answers to these questions, the study will ask whether the current situation in South Africa creates the need for new independent oversight institutions and how such institutions can exercise their oversight to bring about greater efficiency and accountability in prosecutorial discretion in South Africa.

1.5 Literature review

The exercise of prosecutorial discretion creates a balance between substantive criminal codes and criminal law enforcement. Several studies have been conducted on this topic, exposing a diversity of relevant jurisprudence in various countries. According to Krauss,[27] the term “prosecutorial discretion” first appeared in 1961 American case law in the Supreme Court case of *Poe v Ullman*.[28] The modern theory of prosecutorial discretion is

[27] Rebecca Krauss “The Theory of Prosecutorial Discretion in Federal Law: Origins And Developments" (2012), *SHC,* 26.

[28] *Poe v Ullman* 367 US 497 530 (1961). The matter involved a married couple’s request for declaratory relief against the enforcement of anti-contraception laws passed by the State of Connecticut. In response to the prosecutor’s claim that he had a duty to enforce the Connecticut statute, Justice Harlan described the prosecutor’s statement as “unbounded prosecutorial discretion.” Since that day, American judges began to use the term in virtually all criminal law decisions.

generally expressed as "[t]he prosecutor on behalf of the executive makes criminal law enforcement decisions, which the courts are powerless to review."[29] Although this theory recognises all the fundamental elements of prosecutorial discretion in contemporary practice, there has not been enough literature to fully explore its content in many countries, particularly South Africa.

The South African Department of Justice reports that South African academic literature only began investigating this topic in the late 1970s after the apartheid government formally recognised the public prosecution service as a professional agency that deserves greater public recognition.[30] Consequently, the attorney general's provincial offices for public prosecutions started attracting more academic research in the 1990s when South Africa began transitioning to democracy.[31] One of the foremost South African academic contributions is Schonteich's[32] *Lawyers for the People: The South African Prosecution Service,* which chronicles the historical development of the prosecution service in South Africa, from the colonial era until the transition to democracy in the early 1990s.

Baker and Delong have noted that, since the 1970s, scholarly interests in prosecutorial discretion have grown significantly worldwide, especially with the spread of various systems of democratic exercise of prosecutorial discretion powers.[33] Many legal scholars have also followed recent legal developments regarding the expanding scope of

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[29] Krauss (2012), SHC, 24.

[30] South African Department of Justice Report (1 July 1979) 6.

[31] Busani Selabe "The Independence of the National Prosecuting Authority of South Africa: Fact or Fiction?" *LLM Dissertation UWC* (2015), 10; Martin Schönteich "Strengthening Prosecutorial Accountability in South Africa" (2014), ISS 1-23; Martin Schönteich, "The National Prosecuting Authority 1998 - 2014: A Story of Trials and Tribulations" (2014), *SACQ* 5-15.

[32] Martin Schonteich (2014), SACQ 7.

[33] Newman, Baker and Delong "The Prosecution-Initiation of Prosecution" (1933), JAICLC 770; Delong "The Prosecuting Attorney: Powers and Duties in Criminal Prosecution" (1934), JCLC 1025; Newman Baker and Delong "The Prosecution-Initiation of Prosecution" (1933), JAICLC 695; Howard Abadinsky "*Discretionary Justice: An Introduction to Discretion In Criminal Justice"* (1984), 61; Abraham Goldstein "*The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* (1981); Joan Jacoby "The Prosecutor's Charging Decision: A Policy Perspective" (1977), NILECJ 2; Lezak and Leonard "The Prosecution's Discretion: Out of the Closet, not out of Control," In: Pinkele and Louthan *Discretion, Justice and Democracy: A Public Policy Perspective* (1985); Wayne Lafave "The Prosecutor's Discretion In The United States" (1970), AJCL 532.

prosecutorial discretion powers in many jurisdictions.[34] While some authors focused more on the scope of prosecutorial authority in many more states,[35] others attempted to investigate the effectiveness of prosecutorial accountability mechanisms in various public prosecution institutions.[36] Many have also advocated for increased oversight of the activities of public prosecutors.[37]

Wadhia argues that the main reason for the increasing calls for more oversight regulation of prosecutorial discretion stems from human rights awareness and the need to protect the rights of criminal suspects, who may be vulnerable to illegal procedures in the prosecution process. Indeed, such a step, if taken, is likely to reduce the cases of prosecutorial misconduct and restore public confidence in the process. As Wadhia[38] puts it, "[l]egal institutions ought to reform if the public is to have confidence in the justice delivery system."

Beale comments that increased regulation of prosecutors in contemporary justice systems will require more than just reforms. This argument stems from the need for national democratic systems to balance various competing goals and constitutional principles in the relationship between prosecutorial independence and democratic principles of prosecutorial neutrality and accountability.[39] Subjecting prosecutors to strict democratic accountability procedures could potentially conflict with the principle of

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[34] Lezak and Leonard "The Prosecution's Discretion: Out of the Closet, not out of Control", In: Pinkele and Louthan *Discretion, Justice And Democracy: A Public Policy Perspective* (1985), 217.

[35] Abrams Norman "Internal Policy: Guiding the Exercise of Prosecutorial Discretion" (1971), UCLALR 10.

[36] Zacharias and Green (2004), *University of San Diego PLLTRP* 12; Bruce and Green "Policing Federal Prosecutors: Do too many Regulators Produce too Little Enforcement?*"* (1995), *TLR* 69, 76 – 77.

[37] Shoba Wadhia "The Role of Prosecutorial Discretion in Immigration Law" (2010), *CPILJ* 244 (advocating bolder standards on prosecutorial discretion and greater mechanisms for oversight and accountability when such standards are ignored); Richard Uviller "Ethics in Criminal Advocacy, Symposium, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit" (2000), *FLR*, 1711.

[38] Wadhia (2010), *CPILJ,* 244 (advocating bolder standards on prosecutorial discretion and greater mechanisms for oversight and accountability when such standards are ignored); Uviller (2000), *FLR*, 1711.

[39] Beale "Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control" https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5985&context=faculty_scholarship (Accessed: 19 April 2018).

prosecutorial independence and neutrality.[40] However, Du Toit and Ferreir note that, in initiating a prosecution, there must be a reasonable prospect of a conviction; otherwise, the process should be halted.[41] The South African Prosecution Policy further prescribes that prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution before deciding whether or not to institute criminal proceedings against an accused.[42] Burchell and Hunt agree that a prosecution should typically follow once the prosecutor is satisfied there is sufficient evidence to provide a reasonable prospect of a conviction.[43]

According to Zacharias and Green, prosecutorial neutrality is a scientific approach to proper prosecutorial conduct.[44] In this sense, proper conduct must be viewed in the context of compliance with the rule of law and constitutional values. Also, it may arguably amount to administrative constraints on the proper exercise of discretion if internal administrative supervision and other informal mechanisms, such as public oversight, are not designed to set the boundaries for prosecutorial discretion.[45] This construction coincides with the Australian criminal justice system as Hodgson et al point out that, where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process.[46] However, this view has been rejected by American judges, who criticise it as ineffective in curbing prosecutorial misconduct,

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[40] Beale "Prosecutorial Discretion in Three Systems https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5985&context=faculty_ (Accessed: 19 April 2018).

[41] Du Toit and Ferreir, Reasons for Prosecutorial Discretion, *Potchefstroom Electronic Law Journal, PER / PELJ,* 18 (2015), 5.

[42] See for instance NPA Prosecution Policy of 2014 http://www.npa.gov.za/ReadContent504.aspx 5 (hereafter Prosecution Policy) and Crown Prosecution Service, England and Wales Code for Crown Prosecutors 3 para. 2.1. (Accessed 17 February 2023).

[43] Burchell and Hunt, South African Criminal Law and Procedure, Juta & Company Ltd, 2nd ed. Volume 1, 1970.

[44] Zacharias and Green (2004), *PLLTRP* 1-69.

[45] Zacharias and Green (2004), *PLLTRP* 12; Bruce and Green "Policing Federal Prosecutors: Do too Many Regulators Produce too Little Enforcement*?"* (1995), TLR 69, 76-77.

[46] Hodgson et al*,* The Decision to Prosecute: A Comparative Analysis of Australian Prosecutorial Guidelines, *Criminal Law Journal*, (2020), Vol 44, p. 155.

especially because the motive behind the prosecutor's decision is usually not easily discernible.[47]

There are doubts about the efficacy of increased prosecutorial oversight in improving access to justice for victims of crime and protecting defendants' rights. According to Davis,[48] "[e]ven the most dangerous person's right to liberty is invaluable".[49] By this statement, Davis suggests that the defendant's rights should be protected against any form of prosecutorial misconduct by legally enforceable means to ensure that justice is seen to be done to victims of crime and defendants. On the other hand, Davis states as follows:

> The starting point is to locate the clusters of injustice within the system. This is because we have recognised [sic] at the outset that far more justice is administered outside courts than in them. Clearly, most injustice is done by persons who are not judges […] where we do find clusters of injustice is in the backward agencies, and these are generally the ones that deal with problems that seem more human than economic, including police and prosecutors […] etc. By and large, injustice results far more from the exercise of discretionary power than [from] the application of rules.[50]

Davis's view illustrates why South African mainstream authors have relied more on constitutional law in their analysis of prosecutorial discretion.[51] In other words, it is not just the application of the prosecution policies but the conduct of the prosecutor that must comply with constitutional values and principles. As stated earlier, introducing oversight mechanisms and guidelines is generally expected to make prosecutorial discretion more transparent, holding prosecutors more accountable for their decisions.[52] This is important because the power to exercise discretion in criminal prosecutions is essential to doing

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[47] Freedberg v United States Department of Justice (DDC 1988,03 F Supp 107.

[48] Kenneth Davis "Discretionary Justice" (1970), *JLE* 56.

[49] Kenneth Davis (1970), *JLE* 56.

[50] Ibid.

[51] Schönteich (2014), *ISS* 1-24.

[52] De Villiers "Is the Prosecuting Authority under South African Law Politically Independent? An Investigation into the South African and Analogous Models" (2011), *JCRL,* 253.

justice.[53] Thus, what is important is that prosecutorial discretion is exercised efficiently and with utmost neutrality.

Determining how prosecutors arrived at any decision is case-specific. As Bibas[54] noted, one must not only rely on rules to achieve justice but also on "fine-grained" moral evaluation since discretion follows the rule of law. For this reason, society should be more concerned about discretion that is character-specific rather than contextual.[55]

Another way prosecutorial efficiency can be realised is prosecutorial fairness, which often follows public opinion.[56] In other words, prosecutors make decisions knowing that what is a fair decision in the public eye can also directly affect their reputation as attorneys. Consequently, prosecutors are nudged into making sound decisions since they are also concerned about public opinion.[57] This view was expressed by the South African Supreme Court of Appeal in *DA v NDPP,*[58] in which it stated:

> It is in the public interest and of direct concern to political parties participating in parliament that an institution, such as the National Prosecuting Authority (NPA), acts in accordance with constitutional and legal prescripts. It can hardly be argued that citizenry, in general, would be concerned to ensure that there was no favouritism in decisions relating to prosecutions.

This opinion of the court stresses the importance of public interest, not only as a constitutional requirement but equally as a motivation for prosecutors to exercise their powers with diligence to keep up public confidence in the criminal justice system.

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[53] Bibas (2010), *FS*, 370.

[54] Bibas (2010), *FS*, 371.

[55] Ibid.

[56] Bibas (2010), *FS*, 373.

[57] Ibid.

[58] Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others (2011), (5) SA 388 (CC) [17]. See recent decision of the full court in Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus and Freedom Front Plus v Moqhaka Local Municipality and Others (2012), (2) SA 88 (FB) [5] [17], in which the court ruled that "It clearly is in the public interest that the issues raised in the review application be adjudicated and, in my view, on the papers before us, it cannot seriously be contended that the DA is not acting genuinely and in good faith, in the public interest". See also Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others (2001), (3) SA 549 (SCA) [21].

The prosecutor's neutrality in decision-making is essential to achieving diligence.[59] This is likely why prosecutors are generally required to demonstrate neutrality in exercising prosecutorial discretion.[60] Considering the inherent ambiguities, the current question is how the Constitution and law guide the exercise of prosecutorial discretion on the path of neutrality. There have been attempts to approach the neutrality requirement by introducing a prosecutorial ombudsman specifically for prosecutors.[61] An ombudsman is defined in Black's Law Dictionary as an influential functionary empowered to investigate and express conclusions concerning the grievances of any citizen whose rights have been adversely affected by an official's action or inaction.[62]

Proponents of prosecutorial ombudsmen in the criminal justice system are generally more concerned with certain institutional conditions, which encourage corruption and prosecutorial misconduct. Jones and Cohn[63] present the ombudsman programme as an impetus for change in the following statement:

> One role of an ombudsman is to consider how issues and problems in individual cases may require system-wide changes to make an impact on organisational [sic] culture. The ombudsman's independence gives the office the ability to aggregate individual grievances and the respect within the organisation [sic] to promote systemic change at top administrative levels. Systems change emphasises [sic] outcomes, public accountability, and monitoring.

The emphasis on systemic change at the administrative level indicates the need for a collaborative approach in prosecuting institutions. According to Hsia and Beyer,[64] this

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[59] Richard Uviller "Ethics in Criminal Advocacy, Symposium, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit" (2000), *FLR*.

[60] Zacharias and Green (2004), *PLLTRP,* 3.

[61] Millard "Bespoke Justice? On Financial Ombudsmen Rules and Principles" (2011), *DJ,* 232-258; Milan Remac "Standards of Ombudsman Assessment: A New Normative Concept? (2013), *UL*, 62-78.

[62] Black's Law Dictionary(1968) 4th ed.

[63] Judith Jones and Alvin Cohn "State Ombudsman Programs" (US Office of Juvenile Justice and Delinquency Program OJJDP) (2005), *JJB*, 6.

[64] Heidi Hsia and Marty Beyer "*System Change through State Challenge Activities: Approaches and Products"* http:ojjdp.ncjrs.org/pubs/generalsum.html#177625 (Accessed: 10 October 2017). In the Philippines, for example, the ombudsman functions as the general implementer of anti-graft and corruption laws, specifically for gathering evidence, and investigation and prosecution of corruption cases involving high-ranking public officials. See Froilan Cabarios "Corruption Control in the Criminal

also involves seeking improvements and cooperation across many other related organisations for broader positive outcomes, which are not individual to specific programmes or situations. In this context, the ombudsman programme will effectively handle individual complaints of prosecutorial misconduct and widen cooperation among other government institutions, such as the police or investigative officers. It is also argued that this system improves efficiency and judicial confidence in the prosecutor's fundamental fairness and integrity.[65]

In Davidow's[66] view, a prosecutorial ombudsman in the criminal justice system would look more like a fourth branch of government. Although he did not explain what a fourth branch of government in this context may mean, it is sufficient to assume the elements of institutional independence and integrity from the definition of an ombudsman. Other aspects of an effective ombudsman functionary may include:

i. full independence of the agency in which the ombudsman operates;

ii. qualified staff – that is, legal experts to investigate and substantiate violations;

iii. sufficient funding and resources; and

iv. sufficient statutory authority to carry out investigations and mandate improvements.[67]

In addition to these requirements, the prosecutorial ombudsman should also operate in good faith and with immunity from civil liability and political influence.[68] Accordingly, this thesis examines the possibility of this aspect of prosecutorial oversight to improve

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Justice System of the Philippines" *Resource Material Series* No 76. http://www.unafei.or.jp/english/pdf/RS_No76/No76_19PA_Cabarios.pdf (Accessed: 19 April 2018).

[65] Green and Yaroshefsky (2016), *NDLR*, 51-52.

[66] Robert Davidow "Criminal Procedure Ombudsman Revisited" (1982), *JCLC*, 952.

[67] Puritz and Scali "Beyond the Walls: Improving Conditions of Confinement for Youth in Custody https://www.ncjrs.gov/pdffiles1/ojjdp/204607.pdf (Accessed: 12 October 2017).

[68] Puritz and Scali, https://www.ncjrs.gov/pdffiles1/ojjdp/204607.pdf (Accessed: 12 October 2017).

efficiency in exercising prosecutorial discretion in South Africa.

1.6 Significance of the study

Little research explores the exercise of prosecutorial discretion in South Africa compared to other developed nations such as the US and Australia. There is even less academic contribution to adopting new reform measures for actualising prosecutorial accountability, except for Schonteich's works and that of a handful of other scholars. Although the reason for this lack of intellectual interest is unclear, it has partially contributed to the common misconception regarding the role of prosecutors from the apartheid era in the modern South African state. It may be the case that the radical transformation brought about by the new democratic constitution set the standard for addressing the relationship between the NPA and other international law agencies, such as the International Association of Prosecutors (IAP). The current study examines the practice of prosecutorial discretion in SA compared to other developed jurisdictions, such as Australia and the US. Based on the relevant analysis, the study aims to contribute positively to reforms to enhance the mandate of the NPA. In that way, the study will advance the search for a new legal framework to implement prosecutorial accountability measures, at least in South Africa.

This thesis sets out to achieve three main objectives. The first is to advance arguments for holding the legal framework for prosecutorial discretion in SA legally valid under international law. Second, and concerning this, it is hoped that upholding the validity of these provisions under South African and international law means they could be deployed to advance the NPA. Thirdly, it is hoped that the thesis will draw attention to these provisions, guiding prosecutorial discretion in South Africa than they have attracted until now. In this way, the study will stimulate further research on the topic.

1.7 Methodology

The thesis adopted qualitative methodology and relied on content analysis through desk review to analyse primary and secondary data, including constitutional and legislative documents, case law and relevant publications. The study used theoretical illustrations

drawn from contemporary studies to synthesise the existing principles to realise the main objective of the thesis, to provide a legal and theoretical explanation for the practice of prosecutorial discretion in South Africa and the comparable jurisdictions of the US and Australia.

South Africa, Australia and the US all operate under common law adversarial systems of public prosecution, which underscore the assertion that the trio have not responded effectively to the challenge of prosecutorial misconduct, partly because of the principle of separation of powers. Second, both the US and South Africa share a common history of past discriminatory practices in their prosecution services, which resulted in massive corruption and human rights violations on a national scale. Thirdly, since the US and Australia have highly developed prosecutorial systems in terms of organisational structure, laws, principles, and jurisprudence, which are useful benchmarks for evaluating the South African situation and learning some important lessons as to how relevant challenges may be overcome. In contrast to the South African system, the prosecutor in the US criminal justice model is not a lawyer assigned to represent the prosecutorial interests of the government, as is the case in South Africa, as stated in Section 179 (2) of the South African Constitution. In the US system, the prosecutor at the state and federal level is a public official, either elected or appointed to exercise executive authority over their constituency. The federal prosecutor is attached to the Department of Justice, which, to some extent, exercises supervisory control over district prosecutors.

The rationale for using comparative analysis rather than a contextual study of the South African system alone is motivated by examining the exercise of prosecutorial discretion in South Africa will interrogate some of the challenges confronting the NPA. As noted, the study adopts a comparative methodology by comparing the position in South Africa with the law and practice in the US and Australia. In this way, the research reveals the extent to which South Africa is similar or different from these two advanced jurisdictions, to draw on their respective approaches and practices to explain a new dimension and proposals for the reform of the exercise of prosecutorial discretion, and other measures suggested in the thesis.

1.7.1 Hypothesis

The study hypothesises that the existing legal framework for exercising prosecutorial discretion in South Africa is comparable to the standards set in the constitutions of other developed criminal justice systems. This conforms to common best practices and international instruments. However, a useful legal framework for transformational reform is still required for controlling the exercise of prosecutorial discretion in the form of an oversight regulatory framework. Hence, there is a need for a more scientific study of how the challenges facing the NPA can be tackled following the constitutional principle of legality and the rule of law, as is the case with other developed criminal justice systems such as the US and Australia.

1.7.2 Limitations of the study

This study is limited to the exercise of discretion in criminal matters. Its comparative analysis is limited to prosecutorial discretion in South Africa, the US and Australia. The concept of discretion is not specific to criminal matters since judges also exercise discretion while delivering judgments in virtually all judicial decisions, i.e., criminal and civil claims. The police also use their discretion concerning decisions related to their investigative roles in the prosecution process. Therefore, this study will not extend the scope of its comparative analysis to other forms of discretion, including that used in civil matters. The exercise of discretion in civil claims thus lies outside the scope of this study. However, references will be made to the modus operandi of such exercise to illuminate the argument in the thesis. Cases and legal principles from different jurisdictions can be alluded to. However, they remain examples as the study will be restricted to South Africa, the US and Australia for comparative analysis.

1.7.3 Outline of the thesis

Chapter One

The chapter provides an overview of the thesis, including a contextual background to the main arguments and an appraisal of subsequent chapters that form the body of the thesis. It also sets out a comprehensive framework for conducting the study. The focus of the

chapter is to set out all the research tools used in realising the ultimate objectives of the study. Finally, the chapter discusses the significance of the study based on the proposed framework introduced in the thesis.

Chapter Two

The chapter discusses the historical development of the public prosecution system in South Africa in three periods. First, the colonial era, which illuminates the historical account of classical literature on prosecutorial functions during the colonial administration. Second, the apartheid era, which began after the Union of South Africa in 1910 and was characterised by discriminatory practices in the prosecution service. Thirdly, under democracy, preceding the wake of negotiations to end apartheid and the adoption of an interim democratic Constitution in 1993. The chapter concludes by examining the conceptual and theoretical frameworks of exercising prosecutorial discretion in the global context.

Chapter Three

The chapter discusses the application of prosecutorial discretion and the relevant concepts that justify prosecutorial authority. It also highlights the law and practice of prosecutorial discretion in South Africa, Australia and the US. Furthermore, it reflects on the meaning of prosecutorial discretion, the reasons for the exercise of prosecutorial discretion and how it can be regulated within the common law criminal justice system.

Chapter Four

This chapter examines the theory of utilitarianism, reflecting on prosecutorial independence and neutrality and discussing the theoretical foundation and application of prosecutorial discretion in South Africa. It sets the stage for discussions on prosecutorial discretion and draws lessons from the experiences of two advanced continental criminal justice jurisdictions, Australia and the USA. This allows one to understand and develop a well-informed critique of the South African experience, both historical and current.

Chapter Five

This chapter addresses the dynamics of prosecutorial discretion in SA. The analysis covers dominus litis and its application, examines interpretation by the courts, and the interplay of politics and prosecutorial discretion. It examines cases of prosecutorial misconduct and the challenges resulting from a deficit in prosecutorial discretion. In this regard, the question of discretion and its application, the policies and practice, and other related issues are discussed by examining how the courts have interpreted the relevant legislative frameworks in practice. Based on empirical data, the chapter discusses in greater depth the exercise of discretion and how this is influenced by political affiliation.

CHAPTER TWO
THE HISTORICAL ORIGINS OF PROSECUTORIAL DISCRETION

2.1 Introduction

This chapter addresses the historical origins of prosecutorial discretion. Emphasis is placed on the origins of prosecutorial discretion in Australia and the United States of America (US), including the subsequent inclusion of the doctrine in South Africa's constitutional framework. The importance of this chapter is reflected in the theoretical assumptions of historical facts about the origins of the public prosecutor. With these "theorisations and articulations",[69] the chapter will provide a better understanding of the origins and importance of prosecutorial discretion in terms of domestic and international normative standards.

Modern criminal justice systems entrust public prosecutors with enormous statutory powers to use their discretion and determine whether a criminal offence should be prosecuted. As Yue Ma[70] writes, the exercise of prosecutorial discretion in modern criminal justice systems is a product of evolution, coupled with an indispensable feature of the modern-day public prosecution systems. This chapter provides a better understanding of the origins of the concept of prosecutorial discretion in South Africa, Australia, and the USA.

2.2 The origins of prosecutorial discretion

Until the late twentieth century, the responsibility to pursue criminal prosecutions has been an exclusive preserve of private individuals.[71] In England, historians attribute the

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[69] See Victoria Colvin and Philip Stenning *The Evolving Role of Public Prosecutor: Challenges and Innovations* (Routledge NY 2019) 1. The authors used this expression to explain the rationale behind the comparative study of public prosecution in common law countries.

[70] Yue Ma "Exploring the Origins of Public Prosecution" (2008), *ICJR,* https://journals.sagepub.com/doi/abs/10.1177/1057567708319204 (Accessed: 20 August 2019).

[71] Jonathan Rogers "Restructuring the Exercise of Prosecutorial Discretion in England" (2006), *OJLS* 775, 797–98; Rebecca Krauss "The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments" (2009), *SHCR,* 2.

right to criminal prosecution as a more recent development since there was no official right to that effect before this time. The first traces of public participation in criminal prosecutions involving different modes of accusation spread in England and other parts of Europe after that. This chapter section focuses on the development of prosecution in the US from the colonial period until the formation of the modern US prosecutorial system. We explore some of the colonial events that contributed to the evolution and transition of modes of prosecution from England to the US and Australia and its inclusion and subsequent implementation in South Africa.

Generally, the modern public prosecutor is considered to have evolved through many criminal justice traditions, loosely identified in both common and civil law jurisdictions.[72] However, many lawyers seem to have lost interest in digging for the true history of the modern prosecutor. Langbein[73] observes that most legal researchers assume that the modern prosecutor in the English common law jurisdiction "goes back to some antiquity".[74] Moreover, because lawyers are also aware of the controversial nature of the office of the public prosecutor, many would instead focus their argument on pushing for reform of the prosecution process rather than concern themselves with what they dismiss as old history. This may explain why the emergence of the modern prosecutor can be explained better in terms of the unique legal history of each common law jurisdiction.[75]

Scholars focusing on the concept of prosecution share the opinion that most of the functions of the modern prosecutor originated from the public complaints office of the

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[72] See Chinedu Olugbuo The Exercise of Prosecutorial Discretion During Preliminary Examinations at the International Criminal Court (LLD Thesis, University of Cape Town, 2016) 21; Despina Kyprianou The Role of the Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice (Springer Heidelberg 2009) 32; Ministry of Justice of New Zealand "Examining the Prosecution Systems of England and Wales, Canada, Australia and Scotland: A Background Document to the Review of Public Prosecution Services in New Zealand" (September 2011), 1-71.

[73] John Langbein "The Origins of Public Prosecution at Common Law" (1973), *AJLH*, 313-335*;* Victoria Colvin and Philip Stenning *The Evolving Role of Public Prosecutor: Challenges and Innovations"* (Routledge NY 2019) 1.

[74] Langbein (1973), *AJLH*, 316; Colvin and Stenning (2019), 2.

[75] It has been argued that much of what happened in a country's past always forms the basis for the action taken in the present. See Tameshnie Deane *Affirmative Action: A Comparative Study* (LLD Thesis, University of South Africa, 2005), 7.

Justice of the Peace (JP), established in the United Kingdom (UK) in the 14th Century.[76] The 14th-century office of the JP can be likened to the British magistrate's courts today. It was established mainly to conduct investigative and forensic functions in criminal prosecution.[77] The Marian committal statutes eventually adopted these functions in 1554. In terms of the Marian committal statutes, the JPs must choose the critical aspects of the evidence, which are material to prove the offences,[78] especially regarding manslaughter and felony cases.

Many of the activities and functions of JPs were designed ostensibly to complement prosecution initiated by citizens or complainants affected by a given crime. As Langbein[79] noted, the role of the JPs did not supersede the traditional "gratuitous citizens prosecution"; they merely complemented it. While operating as a small complementary entity to the traditional citizens' prosecution, it became clear to the King that it needed more than just the JPs to investigate and prosecute crimes more effectively. Thus, the office of the Director of Public Prosecutions (DPP) was created in 1879.[80] It was now that the entire function of prosecutorial responsibilities rested with highly qualified state officials under the office of the DPP.[81] This was subsequently complemented by the creation of the Crown Prosecution Service (CPS) in 1986 as the first state-sponsored institution of lawyer-prosecutors in England and Wales.[82]

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[76] Colvin and Stenning (2019), 2; Langbein (1973), *AJLH,* 315-335; Jacqueline Hogson "The French Prosecutor in Question" (2010), *WLLR*, 1361-1411; Esmein *A History of Continental Criminal Procedure with Special Reference to France* (Little Brown and Company, Boston 1913/2000) trans. John Simpson, Lawbook Exchange Ltd, Union, NJ.

[77] It is noteworthy that, although the investigative and forensic functions of the JPs commenced in the 14th century, they were not confirmed in any legislation until the passage of the Marian Statutes in 1554 and 1555, respectively. See Colvin and Stenning (2019), 2.

[78] See Lambard *Eirenarcha: Or of the Office of the Justices of Peace,* Theatrum Orbis Terrarum Ohio (1970), 211; Colvin and Stenning (2019), 3.

[79] Langbein (1973), *AJLH*, 318; Colvin and Stenning (2019), 2.

[80] Colvin and Stenning (2019), 2.

[81] Colvin and Stenning (2019), 2.

[82] Philip Stenning *Appearing for the Crown: A Legal and Historical Review of Criminal Prosecution Authority in Canada* (PQ Brown Legal Publications, Cowansville, 1986), 194; Colvin and Stenning (2019), 2.

According to a parallel historical account by Esmein,[83] The public prosecutor already existed as far back as at least the late 13th and early 14th centuries. This account records a much earlier activity of the public prosecutor figure than Langbein's "well-documented" account.[84] Meanwhile, criminologists and legal scholars have tried to attribute the origin of the modern prosecutor to three essential components of the criminal justice system, namely, police, courts, and correctional services.[85] The nature of the functions of the public prosecutor, which did not require any publicity, makes it even more challenging to trace the actual date of its first existence. Behind closed doors, the prosecutor can control judicial discretion on sentencing, open pathways to alternative measures, or even deny entry into the criminal justice system entirely.[86]

Another interesting theory on the origins of the modern prosecutor is related to the concept of it being an "unplanned evolution" in the criminal prosecution system.[87] This refers to the thinking that the modern prosecutor is not necessarily a product of any progressive thinking that predicted its emergence in the modern criminal prosecution system.[88] Also, the emergence of a system of private prosecutors later in the 17th and 18th centuries paved the way for the arrival of public prosecutors in the English common law system.[89] For example, the need arose to appoint an attorney general, who was responsible for initiating prosecution on behalf of the government.

Whatever the case may be about the origins of the modern prosecutor at common law, there can be no doubt, and recent literature confirms, that English common law criminal prosecution traditions have significantly influenced former British colonies. These include

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[83] Adhemar Esmein was an 18th century French jurist and professor of legal history.

[84] According to Colvin and Stenning (2019), 2. The duo further emphasised that modern prosecution scholars "owe a considerable debt to Langbein for explaining the origins of the modern public prosecutor within the common law system".

[85] Colvin and Stenning (2019), 1.

[86] Uviller (2000), *FLR,* 1718; Wadhia (2010); *Connecticut PILJ* 266; Davis, Arbitrary Justice 9.

[87] Ramsey, "The Discretionary Power of "Public" Prosecutors in Historical Perspective" (2002), *ACLR,* 1309.

[88] Davis (2002), 189.

[89] Olugbuo The Exercise of Prosecutorial Discretion During Preliminary Examinations at the International Criminal Court 21.

South Africa, the US, and Australia. Although the prosecution policies and directives of the common law criminal justice system in these countries differ, they share a comparative inter-jurisdictional influence that can be explored academically to instigate reforms regarding international norms and standards.

2.3 The evolution of prosecutorial discretion in the US

The office of the modern-day public prosecutor began in the US in the late 18th century.[90] The exercise of prosecutorial discretion in the US is founded on a system of liberal democracy. Thus, democratic values of "liberty, equality and justice for all" inspired the US liberation movement that questioned the colonial authority of European monarchs in the 17th and 18th centuries.[91] This movement subsequently provided the framework for the constitution and made the US a leading liberal democracy.[92] Although the common and civil law systems of England and Wales had spread widely across Europe since the 17th century, the US system equipped prosecutors with far-reaching powers to exercise discretion in investigating and prosecuting crime.

One has to necessarily rely on the perspectives of scholars who have traced the evolution of the US prosecutor's discretionary powers to understand the origins of the US prosecutor. According to Jacoby,[93] The pertinent question to start with ought to be, "[I]f there is no other prosecutor like this, then where did the office come from, and what was it that gave this position this unique set of features?" The US prosecutor's unique power and influence come mainly from common law and civil law traditions in continental Europe, which recognise its discretionary decision-making authority.[94] However, Jacoby believes there is still a need to determine this factual assertion with a scholarly theory

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[90] Steinberg, "From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney and American Legal History" (1984), *CD,* 568-592.

[91] US Government "US History" http://www.ushistory.org/gov/1d.asp (Accessed: 15 May 2019).

[92] Morton Horwitz "Republicanism and Liberalism in American Constitutional Thought" (1987), *WMLR*, 57-74.

[93] Joan Jacoby "The American Prosecutor in a Historical Context" https://cdn.ymaws.com/mcaamn.org/resource/resmgr/Files/About_Us/AmericanProsecutorHistorical.pdf (Accessed: 30 September 2018).

[94] Colvin and Stenning (2019), 1.

proving how European colonisation shaped the US prosecution system.[95]

As indicated, the US was under British colonial authority until the 17th century. Its first attorney general was appointed to exercise discretion on criminal matters on behalf of the colonial government.[96] This would become the office of the Department of Justice of the US later in the seventeenth17th century. Subsequently, prosecutorial discretion was introduced in the US criminal justice system in terms of the first Judiciary Act of 1789.[97] The Act provides explicitly for appointing a learned attorney in the US, armed with the *sole mandate to exercise his discretion in criminal prosecution*.[98] Although the office of the prosecutor may have originated from colonial civil and common law systems, the exercise of prosecutorial discretion originated from the National Judiciary Act itself.

This statute directs the attorney general to commence with prosecution before indictment.[99] Despite several complaints about the conduct of prosecutors in the US, the judiciary has remained adamant about not reviewing and controlling the statutory independence of the decision-making powers of the public prosecutor. By placing the decision-making powers of the prosecutor beyond review and control, the US conventional law system uniquely features what constitutes a "[n]early omnipotent prosecutor."[100]

2.4 Australia

British colonial power extended to Australia, which makes it relevant to note that Australia's legal history of prosecutorial discretion is like that of America. However, it has

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[95] Joan Jacoby https://cdn.ymaws.com/mcaamn.org/resource/resmgr/Files/AboutUs/AmericanProsecutorHistorical.pdf (Accessed: 30 September 2018). Date?

[96] In 1643 the British installed the first attorney general in Virginia, USA; Other British colonies to which the practice expanded beyond England and Wales included European countries such as France, Germany, and Australia; Olugbuo *The Exercise of Prosecutorial Discretion During Preliminary Investigations at the International Criminal Court* 22.

[97] Langbein (1973), *FSS*, 315.

[98] In terms of chapters 20 and 35, 1 stat 73, 93.

[99] *Whyte v United States* (1984), 471 A 2d 1018.

[100] Langbein (1973) ,*FSS,* 443.

remained a Constitutional Monarchy under the British Queen. It is imperative to highlight the three stages of the country's constitutional evolution to give a proper historical basis to its modern prosecution system. "The origin and formation of the Commonwealth of Australia; the transformation of the central and regional governments; and the establishment of independence."[101]

2.5 The formation of the Commonwealth Federation

The Commonwealth of Australia was established in 1900 after negotiations and conferences between six formerly independent colonies.[102] The British Queen is the Head of State.[103] The formation of the Commonwealth ushered in a new era of prosecution in Australia.

The British colonial government introduced a system of private prosecution in Australia. Criminal defendants would be transferred to penal colonies in North America and the Caribbean, where the prosecutorial process occurred.[104] In 1823, the penal code was enacted in New South Wales (NSW) civil and criminal courts.[105] Police officers often handled private prosecutions brought by citizens in NSW. However, it was marred by corrupt practices, as some of the officers were ex-convicts from the military and had no legal qualifications.[106] Although the attorney general was expected to ensure that

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[101] Ministry of Justice New Zealand "Examining the Prosecution Systems of England and Wales, Canada, Australia, and Scotland" (2011). Paper published by the New Zealand Ministry of Justice to review the prosecution system and explore possibilities for new reform. 38.

[102] They include New South Wales (NWS); Queensland (Qld), South Australia (SAU); Tasmania (Tas); Victoria Ireland (Vic) and Western Australia; see Commonwealth of Australia Constitution Act of 1900.

103 See Section 61 of the Constitution Act 1900; other Australian territories which were granted a limited right of self-government include the Australian Capital Territory, the Northern Territory, and Norfolk Island. Seven others which are administered by the Commonwealth government include "Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Jervis Bay and the Territory of Heard Island and McDonald Islands"; See Bruce Kercher "Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850" (2003), *LHR*, 527.

[104] Bruce Kercher (2003), *LHR*, 527.

[105] Notably, New South Wales became known as the first largest Australian colony because it covered most of the Australian territory and also included all parts of the eastern and southern coasts which were populated mainly by ex-convicts and convicts, marines and their wives, and other Australian settlers who began arriving by the end of the 17th Century.

[106] Chris Corns "Police Summary Prosecutions: The Past, Present and Future" (paper presented at the History of Crime, Policing and Punishment Conference, Canberra, 9 – 10 December 1999); See

prosecutions followed English common law traditions, there were growing concerns in Australia about his increasing political activities, especially in the 1970s.[107]

In Europe, in the Middle Ages, the criminal prosecution process was conducted by police officers. However, prosecution by the police was becoming all too reliant on the powers of the executive since independence in prosecution decision-making could not be achieved. Police are funded and controlled by the government; as a result, there is no need to overstate the possibility of bias. Even though criminal prosecution at the time was considered an essential duty of every citizen, the police maintained control of all criminal investigations in absolute terms.[108]

The idea of police prosecution was particularly problematic for two reasons: first, the police often undertook prosecutions without consultations with designated higher authorities.[109] Second, there were also concerns that individual police prosecutors were acting in their personal interests in seeing the case proceed.[110] Due to this, the whole idea of police prosecution was regarded as corrupt and inconsistent by the public and the British government. It equally lost the trust and confidence of private citizens, especially concerning crimes committed by high-profile individuals.[111] From many independent and state-commissioned investigative reports conducted about the prosecution system in Australia, it was clear that there was an urgent need for reform.[112]

In 1982, the state of Victoria became the first province to introduce the Office of the

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also State Library New South Wales "Law and Justice in Australia" (2011), www.sl.nsw.gov.au (Accessed: 27 April 2018).

[107] This document is from the New Zealand Ministry of Justice "Examining the Prosecution Systems of England and Wales, Canada, Australia and Scotland: A Background Document to the Review of Public Prosecution Services in New Zealand" (September 2011) at 43; See *www.justice.govt.nz.*

[108] Manchester *Crime, Criminology and Public Policy* (1974), NYC Press, 32.

[109] Damian Bugg "*The Role of the DPP in the 20th Century"* (Paper presented at the Judicial Conference of Australia, Melbourne, 13 November 1999).

[110] Kenny Yang "Public Accountability of Public Prosecutors" (2013), *MULR*, 35.

[111] JQC McKechnie "Directors of Public Prosecutions: Independent and Accountable" (1996), WALR, 271.

[112] For example, the Australian Law Reform Commission report of 1980 which described the prosecution process as mostly secretive and poorly documented, and therefore poorly understood. *Report of the Australian Law Reform Commission, Sentencing of Federal Offenders, Report No 15* (1980); McKechnie (1996), WALR 61.

Director of Public Prosecutions (DPP) in an apparent positive response to the enormous challenges confronting the public prosecution process.[113] For the first time, the DPP Act introduced the policy of prosecutorial independence in the criminal prosecution system for the entire Commonwealth.[114] All Commonwealth of Australian states eventually joined the Victorian transition to the DPP-controlled public prosecution system.

Like a typically modern public prosecutor in a universal law system, the Commonwealth DPP cut a powerful and enigmatic figure.[115] All decisions concerning prosecuting crimes committed against the Commonwealth Federation, which was traditionally carried out by state attorneys-generals in cooperation with the police and citizens,[116] had now fallen to the DPP, as determined by each jurisdiction.[117] Although the respective DPPs Act empowered them to handle prosecutions within their respective state jurisdictions, some states did not expressly provide for such a role, even after creating the DPP.[118] For example, in Western Australia (WA), the wording of Section 12 of the Director of Public Prosecution Act of 1991 did not initially grant the DPP permission to make prosecution decisions. Instead, it still allowed the police to exclusively decide whether to conduct summary prosecutions with or without input from the DPP.[119]

2.5.1 The calls for separation

The successful establishment of an independent Director of Public Prosecutions in

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[113] Director of Public Prosecutions Act, 1983.

[114] Ibid.

[115] Joan Jacoby *The American Prosecutor: A Search for Identity* (Lexington Books 1980) xxi; Green and Yaroshefsky "Prosecutorial Accountability" (2016), *NDLR*, 5 (describing the modern day prosecutor's authority as "extraordinary power"); Abby Dennis "Reining in the Minister of Justice Prosecutorial Oversight and the Superseder Power" (2007), *DLJ*, 135; Vorenberg "Narrowing the Discretion of Criminal Justice Officials" (1976), *DLJ,* 651 (arguing that the prosecutor's office is associated with "boundless powers").

[116] Yang (2013), *MULR*, 28.

[117] Rod Harvey "The Independence of the Prosecutor: A Police Perspective" (paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Melbourne 18 April 1996), 5.

[118] Yang (2013), *MULR*, 28.

[119] In terms of Section 12, prosecutions for an offence committed against the Commonwealth can still be carried out by any person other than the Director. However, the Director may inform the person of his intention to take over the matter if need be.

Victoria and other states injected progressive reforms into the Commonwealth justice system. This development not only ended the old controversial system of criminal prosecutions initiated by the police and citizens[120] but effectively subjected the police to the professional guidance and supervision of new attorney prosecutors working under the DPP.[121] Needless to say, this would eliminate police bias and improve public confidence in the justice system.[122] There was no question of the police being independent of the executive control of the prosecution decisions since they are part of the government and expected to obey orders.[123] This prompted calls to separate DPPs from the police.

Yang[124] noted that the DPP position was introduced mainly to bring consistency into the system by enforceable prosecution policy guidelines. Such recommendations further refined the duties of the DPP and safeguarded their independence from the executive authority.[125] An essential part of such recommendations examined policies that would make DPPs more publicly accountable by reviewing and criticising their conduct throughout the prosecution process.[126] For that to happen, it was essential that the DPP be allowed to exercise discretion more independently from the politics of the state and the police. Although a prosecution service entirely independent of the government and the police is rare, it was "eminently sensible" to separate the prosecution from the political process.[127]

The basic argument for separation highlights important reasons ranging from the need

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[120] Damian Bugg *The Role of the DPP in the 20th Century* (Paper presented at the *Judicial Conference of Australia*, Melbourne, 13 November 1999).

[121] Other states that adopted their own respective DPP Acts include NT (DPP Act of 1990); NSW (DPP Act of 1986); SA (DPP Act of 1991); WA (DPP Act of 1984); Qld (DPP Act of 1982); Tasmania (DPP Act of 1983), which was formerly the Crown Advocate Act of 1973, but was renamed in terms of the new DPP Act of 1983.

[122] Yang (2013), *MULR,* 35.

[123] Tony Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (1989), 238; Bugg (1999), 6.

[124] Yang (2013), *MULR,* 36.

[125] Report of the Australian Law Commission at 103.

[126] Ibid.

[127] Yang (2013), *MULR*, 35.

for independence to delays and inefficiencies, especially regarding politically sensitive prosecution decisions. Additionally, the traditional response from the police and citizens became redundant as crimes became more complicated in the 1970s.[128]

2.5.2 Establishment of the Commonwealth Director of Public Prosecutions

The Victoria establishment of DPP in 1983 was followed by the establishment of the Commonwealth's Office of Director of Public Prosecutions (CDPP). Unlike the state DPPs, the Commonwealth DPP or CDPP prosecutes offences committed under federal law or outside the Australian territories.[129] The policy framework for conducting public prosecution by the CDPP is known as the "Prosecution Policy of the Commonwealth." The Prosecution Policy of the Commonwealth underpins all of the decisions made by the CDPP throughout the prosecution process and is designed to promote consistency in prosecutorial decision-making.[130]

Although the DPPs are responsible for making prosecutorial decisions in their respective domestic jurisdictions, the attorney general remains the First Law Officer regarding the DPP Act.[131] That indicates their responsibility as the only prosecutor accountable to the Commonwealth Parliament for decisions made in the prosecution process, notwithstanding that they do not necessarily make those decisions. The CDPP, headed by the attorney general, makes decisions independently to prosecute all alleged offences against Commonwealth law and conducts crime proceedings.[132]

The separation and subsequent establishment of the CDPP became necessary to

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[128] Hinchcliffe "A Brief History of the CDPP" (speech delivered at the Commonwealth Director of Public Prosecutions 25th Anniversary Dinner, Old Parliament House, Canberra, 5 March, 2001). http://www.cdpp.gov.au/Director.Speeches/20090305jh-a-brief-history-of-the-CDPP.aspx

[129] See CDPP "How We Differ from State DPPs" https://www.cdpp.gov.au/prosecution-process/how-we-differ-state-dpps (Accessed: 20 May 2019).

[130] Ibid.

[131] New Zealand Ministry of Justice Examining the Prosecutorial Systems of England, Wales, Canada and Australia, 44.

[132] See the summary of the Commonwealth Prosecution Policy as provided in the *Annual Report of the CDPP for 2009-2010*, the Director of Public Prosecutions Act 1983, and the information on the CDPP's website: *www.cdpp.gov.au* (Accessed: 20 May 2019).

address concerns raised by the Australian Law Reform Commission in 1980. The Commission stated that public prosecution in Australia is "probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice."[133] Nevertheless, a full-scale transfer of all prosecution powers to the CDPP to conduct all prosecutions is yet to happen.[134] For now, the retention of police prosecutors remains a practical necessity.[135]

2.6 The evolution of the modern Public Prosecutor in South Africa

The history of South African public prosecutors can be traced back to the early 18th century when a group of merchants from the Netherlands first arrived in the Cape to start trade. In 1803, the merchants, identified as the Dutch East India Company (DEIC), decided to settle and set up a Colony in the Cape, known as the Cape Colony.[136] As part of the colonial process for administering criminal justice and punishing offenders, the colonial administrators set up a public prosecution officer who went by the name of *Fiskaal.*[137] This officer performed two primary functions: prosecuting and investigating allegations of corrupt practices or negligence of duty brought against public officials. One can safely say that the Fiskaal was the watchdog of the colony, ensuring public officials performed their official duties diligently and justly.

Initially, the general public welcomed the Fiskaal with great confidence. The Fiskaal also enjoyed the public trust and the full cooperation of the DEIC directors in all criminal investigations. It was generally considered a welcome development by the Executive Directorate of the DEIC, also known as the Lords Seventeen in the Netherlands,[138] which

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[133] Note the Crown Prosecution Service "Resource Accounts 2009-2010: Financial Report" (2011). See *www.cps.gov.uk.*

[134] Yang (2013), *MULR,* 40-41.,

[135] Yang(2013), *MULR,* 41.

[136] Note that, from 1803 to 1805, the United Netherlands otherwise known as the Batavian Republic, took control of the Cape and renamed it Cape Colony.

[137] A Dutch word which translates into English as 'the shrike'.

[138] Note that the Council of the Seventeenth in the Netherlands was granted federal character status with six chambers by government charter and with authority to colonise any territory for trade. Also, the DEIC was better known to Anglophone countries as *Vereenigde Landsche Ge-Otroktrooieerde Oostindische Compagnie* (VOC). See *https://www.sahistory.org.za/topic/dutch-east-india-company-deicvoc* (Accessed:

considered elevating the office of the Fiskaal to a more independent entity, with powers to make independent decisions in respect of all criminal matters within the Cape Colony.[139] Eventually, the prosecutor Fiskaal became recognised as an equal member of the Cape Colony's governing council, meaning he was no longer answerable to members of the executive and could exercise his authority to investigate the governor and report any adverse findings to the seat of government in the Netherlands.[140] Further, the Fiskaal also controlled the police until the late 18th century.[141] However, with increasing responsibilities and expanding criminal jurisprudence, the Fiskaal began to struggle with rising incidents of organised crime involving both citizens and public officials. Thus, the colonial administrators decided to try a new system in which the Fiskaal was to be replaced by a qualified legal practitioner accompanied by a legal secretary. The office of the attorney general lasted for about three years before the British took over the Cape from the Dutch in 1806 and restored the office of the Fiskaal with slight changes.[142] Thus, the Fiskaal became a Crown Prosecutor, working with the newly installed British Governor to control civil and criminal matters in the courts.[143] However, unlike the first Fiskaal under Dutch rule, the Fiskaal under British rule was accused of engaging in corrupt practices constituting an abuse of office.[144]

The office of the British-installed attorney generals existed until 1910[145] when all four provinces of South Africa merged as a single Republic (The Union of South Africa). Members of the cabinet were directly accountable to the electorate; the attorney general was also considered inherently vulnerable to political interference.[146] In 1926, the attorney general came under the control of the Minister of Justice,[147] who was required

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21 May 2019).

[139] Schönteich (2001), ISS Monograph 27.

[140] Schönteich (2001), ISS Monograph 28.

[141] Ibid.

[142] Schönteich (2001), ISS Monograph 29.

[143] Ibid.

[144] Bekker (1995), *Consultus* 27.

[145] It is important to note that the date 1910 marked the establishment of the Union of South Africa.

[146] Schönteich (2001), ISS *Monograph* 32.

[147] Keuthen "The South African Prosecution Services: Linchpin of the South African Criminal Justice

to approve most of his decisions.[148] However, as elected members of the cabinet were accountable to the electorate, there were particular concerns about their risk of being influenced by their desire to be re-elected when exercising prosecutorial decisions.[149] Also, considering the enormous prosecutorial powers given to the attorney generals of the four provinces, the possibility of their being truly independent of political control became equally doubtful.[150]

Although there were no clear indications or evidence of political interference in many of their prosecutorial decisions, it was clear that such fears could erode public confidence in the criminal justice system across the country. Therefore, the law was amended in 1926, giving the Minister of Justice final control over all prosecutions.[151] In effect, however, the 1926 amendment gave the government even more control over criminal prosecutions through the Minister of Justice.[152] It was highly unrealistic to expect that the attorney generals would be free from the government's political control since the authority to prosecute was assigned to them by the Minister of Justice. It was evident in the statement credited to then Minister of Justice Tielman Roos, who argued in favour of political control of the attorney generals, stating as follows:

[T]he Chief reason why it is necessary to put this bill (referring to the 1926 Amendment Act) on the Statute books is, in my opinion, that there is no authority whatsoever over and responsibility of the Attorneys-General. Administrative responsibility is completely absent.[153]

Although Minister Tielman's statement sought to reassure the public that the attorney general's office would be genuinely independent and respected, two attorney generals

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System?" (2007). Unpublished LLM mini-dissertation, University of Cape Town, 10.

[148] Schönteich (2001), ISS Monograph 32.

[149] Van Zyl and Melissa Steyn "Prosecuting Authority in the New South Africa" (2000), *Centre for the Independence of Judges and Lawyers Yearbook* 138.

[150] Schönteich (2001), ISS Monograph 32.

[151] Bekker "National or Super Attorney-General: Political Subjectivity or Juridical Objectivity?" (1995), *Consultus* 27.

[152] Bekker (1995), *Consultus,* 27.

[153] Schönteich (2001), ISS Monograph 32.

reportedly resigned in protest of the 1926 Amendment legislation.[154]

A subsequent version of the legislation in 1935 also contained no formal separation of powers between the executive Minister of Justice and the attorney generals, implying that direct or indirect political control was still possible.[155] However, it is essential to note that, in practice, the minister rarely interfered with the prosecutorial decisions of the attorney generals, even though the legislation ultimately gave him absolute control over prosecutions.[156]

2.6.1 Prosecutorial authority during the apartheid era

The office of the attorney general remained under the control of the Minister of Justice until 1948. This general election year would bring about drastic legislative changes in South Africa. A group of racist right-wing politicians won the election using the then National Party (NP) platform. After taking over political power, a new system of racial segregation laws named “apartheid” was introduced. Determined to enforce a system of oppressive legislation primarily targeted at the majority non-white citizens of South Africa,[157] the apartheid government introduced drastic measures to gain more control of the judiciary and the criminal justice system.[158] For example, in terms of the Public Service Act of 1957, magistrates could face disciplinary action, compulsory retirement, transfer without consent, demotion and dismissal by the minister for any public comment criticising another government department or the apartheid government.[159] These factors severely compromised the independence of the magistrates to perform

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[154] Keuthen The South African Prosecution Services 10.

[155] Schönteich (2001), ISS Monograph 32.

[156] Schönteich (2001), ISS Monograph 32.

[157] For example, the Land Use Act of 1913.

[158] In terms of Section 45 (3) of the *General Law Amendment Act 68 of 1957*.

[159] Gready and Kgalema *"Magistrates Under Apartheid: A Case study of Professional Ethics and the Politicisation of Justice"* (August, 2000). Research report written for the Centre for the Study of Violence and Reconciliation. https://www.google.co.za/search?ei=T8nkXN6SJLPrxgOyq64Ag&q=apartheid+criminal+justice+system&oq=apartheid++criminal+&gs_l=psy-ab.1.1.0j0i22i30l3j0i22i10i30.1022.5 280..9648. 0.0..0.299.3849.2-14.....0....1..gws-wiz 35i39j0i20i263j0i67.n17cz-bbO1Q (Accessed: 22 May 2019).

their functions in the service of justice.[160]

However, the more frequent the attempts by the apartheid government to curtail constitutional freedom, the more the Minister of Justice, the courts and attorney generals showed a remarkable disinclination to political control of their prosecutorial discretion.[161] For example, there was an instance in which the court rejected an application for *mandamus* to compel a prosecution. In a similar instance, Bekker[162] relates how the court refused an interdict application to compel the attorney generals not to prosecute where they should or to proceed with a prosecution where they should not.

However, there was a notable incident in which the court and attorney generals were forced to succumb to executive interference.[163] This incident was linked to the murder of one Ishmail Shifidi, a South West Africa People's Organisation (SWAPO) activist, who was allegedly murdered by members of the South African Defence Force (SANDF) during a political rally in Windhoek, Namibia.[164] When the Minister of Justice and the attorney general rejected the request of the South African apartheid government to stop the prosecution of the accused members of the SANDF, the South African President invoked Section 103 of the Defence Act of 1957.[165] It was not until 1992[166] that a new Attorney General Act 92 of 1992 elevated attorney generals to a more dignified status regarding guaranteed security of tenure[167] in recognition of their prosecutorial independence.

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[160] Gready and Kgalema "Magistrates Under Apartheid: A Case Study of Professional Ethics and the Politicisation of Justice" (Accessed: 22 May, 2019).

[161] Bekker (1995), *Consultus,* 27.

[162] Ibid.

[163] Ibid.

[164] It is important to note that Windhoek, South West Africa, was at that time under the political control of the South African government.

[165] In terms of Section 103 of the Defence Act, the president may issue a certificate preventing any prosecution of a member of the SANDF or acts committed during their military operations.

[166] It is important to note that, as of 1992, negotiations had already begun to end apartheid and install a democratic government in South Africa.

[167] Security of tenure means that, in terms of the Act, an attorney general could not be removed from office without the consent of parliament.

2.6.2 Prosecutorial authority in South Africa's constitutional democracy

The advent of the current National Prosecuting Authority (NPA) began towards the end of the apartheid era in 1994, following a successful democratic election in South Africa.[168] The process of enthroning democracy started with the government, led by the newly elected African National Congress (ANC) party, determined to dismantle all apartheid discriminatory laws and policies and replace them with constitutionally democratic ideals. An interim Constitutional Committee was established to draft the first interim Democratic Constitution.[169] In 1996, South Africa adopted its first democratic Constitution.[170] The new Constitution introduced some novel changes regarding the administration of criminal justice in South Africa.[171] It also provided for establishing an independent prosecution authority known as the National Prosecuting Authority (NPA).[172] The sole mandate of the NPA is to institute criminal proceedings on behalf of the State.[173] Before the 1996 Constitution and the NPA Act, the outgoing apartheid government had successfully introduced a new Attorney General Act 92 of 1992, which became the first Act to fully recognise administrative independence and security of tenure for the attorney general.[174]

Most importantly, the Act sought to elevate the attorney generals above the control of the Minister of Justice. By implication, the Act allowed attorney generals and their delegates to become solely responsible for prosecution decision-making, free of ministerial interference.[175] However, the ANC-led government rejected the Act, citing ulterior motives by the outgoing apartheid government, partly due to the timing.

In place of the Attorney Generals Act, the ANC-led Government successfully established

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[168] The African National Congress Party led by a black majority won the 1994 democratic elections.

[169] Constitution of the Republic of South Africa Act 200 of 1993.

[170] Constitution of the Republic of South Africa 108 of 1996.

[171] For example, the constitution provided for the establishment of an independent National Prosecuting Authority in terms of Section 179.

[172] NPA Act 32 of 1998.

[173] Section 179 (2) of the 1996 constitution.

[174] Section 4 of the Attorney General Act 92 of 1992 (hereafter Attorney General Act).

[175] Section 4 of the Attorney General Act.

the current NPA Act as a product of constitutionalism.[176] Regarding the constitutional provision establishing the NPA Act, the President of the Republic of South Africa will appoint the National Director of Public Prosecutions.[177] Some attorney generals challenged this position because it impinged on the constitutional principle of separation of powers between the legislature, executive and judiciary.[178] The Constitutional Court rejected this argument, ruling that the NPA is not part of the Judiciary; therefore, the appointment of its head by the president does not contravene the doctrine of separation of powers.[179]

That decision by the Constitutional Court did not seem to satisfy the debate about the actual independence of the NPA. According to Schonteich,[180] two related concerns that needed to be addressed were as follows: the first has to do with the power of the executive to influence or interfere with the functions of the NDPP using the Minister of Justice in particular as an agent.[181] The other concern is the centralised and hierarchical nature of the NPA, whereby the NDPP was bestowed with considerable power over the provincial Directors of Public Prosecutions and, by implication, nationwide.[182]

2.7 Conclusion

The chapter has demonstrated how the different legal cultures under review have developed diverse approaches in dealing with the evolution of the common law prosecutor. As discussed in the text, the US and Australia adopted the idea of a public prosecutor through British occupation as far back as the 14th century. South Africa's

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[176] Section 179 of the 1996 constitution.

[177] Section 179(1) (a) of the Constitution of the Republic of South Africa 1996 (Act 108 of 1996).

[178] Ex Parte Chairperson of the Constitutional Assembly: in the recertification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC).

[179] Ex Parte Chairperson of the Constitutional Assembly: In the recertification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC).

[180] M Schonteich "A Story of Trials and Tribulations: The National Prosecuting Authority 1998 - 2014", (2014), SACQ.*http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1991-38772014000100002* (Accessed: 2 October 2018).

[181] Ibid.

[182] Bekker (1995), *Consultus,* 27.

historic reception began with the arrival of the Dutch at the Cape Colony. The process was interrupted by British occupation and reforms of the office of the attorney general and the criminal prosecution system.

A look at the evolution of common law prosecutors in these different jurisdictions shows that the continual changes and transformation of the criminal justice process seem to be the central focus. The emergence of the modern public prosecutor improved the public prosecution process. In subsequent chapters, the thesis will explore how these historical events have improved prosecutors' conduct in their respective jurisdictions.

In exercising prosecutorial discretion, the modern prosecutor is expected to make unbiased decisions to maintain public trust. This expectation is generally known as prosecutorial conduct during the prosecution decision-making process. Prosecutorial misconduct, on the other hand, is a process by which a prosecutor counters a fair criminal trial process. Hence, conduct by a prosecutor which threatens public confidence in the criminal justice system ought to be subjected to judicial review, aside from a decision over whether to prosecute. The next chapter focuses on the doctrine of prosecutorial discretion, aiming to understand the concepts behind the exercise of prosecutorial authority better.

CHAPTER THREE
UNDERSTANDING THE DOCTRINE OF PROSECUTORIAL DISCRETION

3.1 Introduction

The previous chapter focused on the origin and historical development of the concept of prosecutorial discretion, highlighting the most salient characteristics informing prosecutorial authority. It analysed the historical evolution and progressive development of prosecutorial discretion in the US, Australia and South Africa. This chapter focuses on the application of prosecutorial discretion along with the relevant concepts that justify prosecutorial authority. It focuses inter alia on the meaning of prosecutorial discretion, the reasons for the exercise of it, and how it can be regulated within the common law criminal justice system. It is important to have a complete understanding of the value of the exercise of prosecutorial discretion to the criminal justice system before exploring its implications in actual practice in South Africa, Australia and the US.

The discretion to prosecute or not is a serious exercise with the potential of severely affecting the fundamental rights and freedom of the accused persons, victims, and families.[183] Therefore, it is essential to ensure that the process is conducted with the utmost rigour. This is perhaps the primary reason why prosecutors are subjected to reasonable measures of public accountability.[184] The nature and content of such measures and how they impact the process of prosecutorial discretion are detailed in subsequent sections of this chapter. This chapter is divided into three sections. The first section discusses the meaning of prosecutorial discretion, followed by conceptual clarifications on key aspects fundamental to exercising prosecutorial authority. The second section deals with a comparative synopsis of the exercise of prosecutorial discretion in the US, Australia and South Africa. The third section discusses the exercise

[183] Du Toit and Ferreira “Reasons for Prosecutorial Decisions” (2015), *PER*, 1.

[184] Muntingh et al “An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future” (2017), *DOI*, 7.

of prosecutorial authority in terms of international norms and standards.

3.2 The meaning of prosecutorial discretion

Prosecutors are public officials designated to prosecute individuals accused of committing criminal offences. They are responsible for ensuring the laws passed by the legislator, and endorsed by the executive, are correctly implemented.[185] The prosecutor exercises enormous power compared to other government officials because s/he exercises legitimate authority that can deprive a person of their liberty, destroy their reputation, or perhaps take away their life in jurisdictions with capital punishment.[186] For example, while a lawyer strives to win their case at all costs, the prosecutor's role is to investigate convicted persons who are guilty and exonerate those who are not.[187]

Prosecutorial discretion is one of the most critical functions a prosecutor has. It refers to a gatekeeping process in which a prosecutor distinguishes cases that merit prosecution from those that may not necessarily need to be prosecuted.[188] It is not allowed for a prosecutor to apply double standards in the same case, acting as an advocate for the government on the one hand and acting as an independent officer of the court charged with the responsibility to do justice on the other.[189] The sole role of the prosecutor is to seek justice and justice only. The provision of justice requires a balance between the obligation to convict the guilty and serving the course of justice. A considerable amount of discretion is needed to make these difficult choices. When referring to the legitimacy of the rules of prosecutorial discretion and authority, Brown stated:[190]

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[185] See Bruce Federick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical*. Final Report to the National Institute of Justice (2012).

[186] Ibid.

[187] Ibid.

[188] Ovid Lewis "Discretionary Justice: A Preliminary Inquiry, by Kenneth Culp Davis", 21 CWRLR, 21, 164.

[189] See Anne Poulin "Prosecutorial Discretion and Selective Prosecution: Enforcing Prosecution after United States v Armstrong" (1997), *ACLR*, 34. Analysing the Supreme Court's case law on selective prosecution and concluding that "the protection from selective prosecution has been a disfavored [sic] right".

[190] Brown How Criminal Law Dictates Rules of Prosecutorial Authority 2.

> [p]rocedural rules that require highly favoured jurisdictional choices about how to define criminal offences and to specify the purposes of punishment are considered by their fundamental nature to be critical to legitimacy […] they are necessary for defining crime and punishment and for the legitimate implementation of criminal justice […], including the rules of prosecutorial charging authority.[191]

During his tenure of office as the attorney general of the USA, Justice Jackson addressed prosecutorial discretion on 1st April 1940. He explained that the prosecutor should bring charges in cases where the defendant's conduct is the most egregious, the public calm is the greatest, and the proof is the strongest.[192] Essentially, that is what is expected of prosecutors. They are important role players in the criminal justice system, but not in an improper way. The idea that they are in charge must not ignore due process or neglect other essential players in the system.[193] Simply put, prosecutors must decide whether to charge or not, who to charge, what to charge, and the method to charge, for example, a plea bargain, a common procedural requirement in the exercise of prosecutorial discretion.[194] Considering that the concept of a plea bargain is discussed in this chapter to clarify the essential requirements of prosecutorial discretion, it is necessary to understand its meaning in context and where and when it can appropriately apply when exercising prosecutorial discretion.

3.3 Concept of prosecutorial discretion

According to Mansfield and Peay, for the rule of law to be enforced, there must be guiding concepts for regulating human behaviour. Given that the criminal prosecution process may hardly cover all circumstances in which crimes have been committed, "significant" discretion must be vested in those exercising prosecutorial authority to allow them to choose whether or not to prosecute in particular situations or circumstances.[195] The

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[191] Ibid 3.

[192] Speech by Robert H Jackson, Attorney General of the United State delivered at the second annual conference of United States Attorneys, 1 April 1940. Available at: https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf [Accessed: 20 May, 2021].

[193] Speech by Robert Jackson, 1 April 1940.

[194] *Krieger v Law Society of Alberta* (2002), 3 SCR. 65 [CanLII] para. 43.

[195] Mansfield and Peay The Director of Public Prosecutions: Principles and Practices for the Crown

exercise of prosecutorial discretion creates room for flexibility in criminal law enforcement.[196]

This study will discuss key concepts underpinning the authority of prosecutors and their role in exercising prosecutorial discretion. These concepts applied in the USA, Australia and South Africa include plea bargaining, double jeopardy, prosecutorial accountability, and prosecutorial immunity.

3.3.1 **Plea bargaining**

While prosecutors in the US, Australia and South Africa can determine whether to prosecute in each case, they must also decide which method to use in prosecuting the case, including plea bargaining. Plea bargaining refers to a method of prosecution common to all three above jurisdictions.[197] After the American civil war, which lasted from 1861-1865, there was a significant increase in crime, resulting in the need to resolve cases expeditiously to prevent the system from overcrowding. It was now that plea bargaining came into being.[198]

The concept of plea bargaining relates to a person who pleads guilty, admits guilt to some offences and receives judicial benefits for such rightful conduct.[199] The need for plea bargaining is to prevent the criminal justice system from becoming overcrowded, especially when limited resources are available to ensure that all criminal defendants get the jury trial to which they are constitutionally entitled.[200] The plea bargain allows the court to focus on criminal trials with contested guilty pleas. Of course, it would be a waste of time and resources for the court to sit in judgement in a case where criminal defendants

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Prosecutor (1987), Tavistock Publications London, 27.

[196] Mansfield and Peay (1987), 27.

[197] See Turner LI *Plea Bargaining and International Criminal Justice.* Available at: https://www.mcgeorge.edu/Documents/Publications/turner_TUOPLR472.pdf [Accessed 16 April 2020].

[198] Peet Bekker, "Plea bargaining in the United States of America and South Africa" (1996), *CILJSA,* 29, 2. 168-222.

[199] Ibid.

[200] Ibid.

plead guilty.[201] Presently, more cases end up in plea bargains to prevent system overload.[202]

If a person is convicted of a crime with a mandatory minimum penalty, the judge must sentence that person according to that minimum period or possibly more. This has changed the leverage judges have regarding charging decisions in pre-negotiations.[203] The reality of jurisdictions practising plea bargain is that, if a defendant goes to trial, s/he has reconciled that the sentence will be harsh.[204] Hence, it is better to settle the case using a plea bargain. However, some defendants may be aware of their innocence yet mindful that some evidence might jeopardise their case, where the prosecutor might choose to convict on that basis with a mandatory minimum sentence of, say, ten years. In this instance, the defendant might opt for a plea bargain, in which the minimum required sentence could drop drastically, for example, below one single year.[205] In such scenarios, most defendants opt for a plea bargain, even though they might be innocent. The result is that they choose the least and most favourable sentence.[206]

The idea of subjecting an innocent defendant to a guilty plea for a crime they did not commit for fear of the mandatory minimum ignores the reality and strength of the case.[207] It is also accepted that the jury indicted the case, although not supported by evidence that the criminal defence attorney who reviewed the case concurs that the client should plead to a crime s/he did not commit.[208] It also overlooks that, in a federal criminal justice

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[201] Stephen Thaman "Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases" (2007), *EJCL,* 11.3, 1-54.

[202] See Esther Steyn, Plea-bargaining in South Africa: Current Concerns and Future Prospects.

Available at: https://open.uct.ac.za/bitstream/item/18337/Steyn_Article_2007.pdf?sequence=1 [Accessed: 15 April 2020].

[203] Stephen Thaman (2007), 1-54.

[204] Ibid.

[205] Ronald Weich "Plea Agreements, Mandatory Minimum Penalties and the Guidelines" (1988), FSR, 1. 4, 266-269.

[206] Ibid.

[207] Richard Oppel "Sentencing Shift Gives New Leverage to Prosecutors" The New York Times (2011). Available at: https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html [Accessed: 15 April 2020].

[208] Oppel (2011).

system such as the US, no defendant can plead guilty to a crime unless the US District Court finds that the plea is factually supported.[209] Based on the evidence on record during the plea hearing, the judge must be convinced that the defendant committed the crime to which s/he is pleading guilty.[210] In this situation, it is argued that, by controlling the charges, the prosecutor inevitably controls the sentencing. This is confirmed by the fact that, once a charge with a mandatory minimum sentence is brought, it automatically determines the sentence to be served by the defendant.[211] According to the US determination on plea bargains, such disputes are not settled at the Attorney General's Office but at the level of Congress. They constitute some of the contestation associated with plea bargains as a concept.[212]

Plea bargains are entrenched in the US, Australian, and South African criminal justice systems. According to Scott and Stuntz, plea bargaining is when an accused gives up his right to a fair trial in exchange for fair judgement from the State prosecutor.[213] In essence, this practice serves as an alternative to dispute resolution while at the same time striking a balance between ensuring that the convicted person is punished for the offence committed and ensuring the timeous disposal of cases.[214] Although there are some similarities, there are also marked differences in the application of plea-bargaining by the three jurisdictions of the USA, Australia and South Africa.

Kerscher states,[215] "South Africa is a classic example of a country that adopted plea bargaining after the Anglo-American model." Against that historical background, South Africa's law has been described as fundamentally accusatorial rather than inquisitorial.[216]

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[209] Arrigo "United States v Robison and the Enforcement of Plea Bargains across Federal Jurisdictional Lines: To Bind or Not to Bind?" (1994), *DPLR,* 43, 909.

[210] See *US v Richard Green,* 346 F Supp 2d 259, Case No 04-1225.

[211] Oppel (2011).

[212] Ibid.

[213] Robert Scott and William Stuntz, "Plea Bargaining as a contract" (1992*)*, *YLJ,* 101.

[214] Andre Botman An Evaluation of the Benefit of Plea and Sentence Agreements to Unrepresented Accused (2016), University of the Western Cape.

[215] Kerscher Martin Plea Bargaining in South Africa and Germany (2013), Stellenbosch University, 6.

[216] Turner/Chodosh, Plea Bargaining Across Borders, 76.

South Africa has far fewer instances of plea-bargaining than the US, whose prison population has grown phenomenally, causing a strain on the country's budget.

Although Australia has a high conviction rate, its prison population is far lower than in the US.[217] South Africa's crime rate is high, as is the prison population, including those awaiting trial. The implication is that increasing plea bargaining could relieve the criminal justice system of time and resources and prioritise serious criminal cases.[218] The significance of discussing plea bargaining partially demonstrates the discretionary powers of prosecutors and matters of prosecutorial accountability.

3.3.2 **Double jeopardy**

Double jeopardy is another area in which all three jurisdictions vary substantially. The concept represents a procedural defence by which an accused person is prevented from being retried on the same or similar charges following a valid acquittal or conviction.[219] Once the defence of double jeopardy is raised, evidence will be placed before the court for ruling as a preliminary matter to determine whether the plea is substantial. A projected trial will be prevented from proceeding.[220] In most common law countries, double jeopardy is a matter of constitutional defence. In others not practising the common law tradition, it is merely an issue of statutory interpretation.[221]

The concept of double jeopardy is traceable to ancient Greece and Rome.[222] The doctrine seems to have originated in the principle *non bis in idem* (an issue once decided must not be raised again).[223] In 355 BC, Demosthenes remarked, "the laws forbid the same

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[217] Walmsley "World Prison Population List" (2018), World Prison Brief, 12th ed, IPR.

[218] Ibid.

[219] David Rudstein "A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy" (2005), WMBRJ 14, 1.

[220] Ibid.

[221] Jordaan *Double Jeopardy in South Africa* (1997), LLD thesis, 3.

[222] Marcus and Waye (2010), 360.

[223] William Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963), 3rd ed, Cambridge: Cambridge UP, 695–6.

man to be tried twice on the same issue."[224] The concept has since evolved, and currently, the US system remains firmly committed to this centuries-old tradition.[225] Although the double jeopardy clause became obligatory in the US in 1969,[226] as provided for in the Fourteenth Amendment, it nevertheless was strongly observed for centuries beforehand.[227] However, there is no constitutional basis for the doctrine of double jeopardy in Australia.[228] Double jeopardy is a creature of common law subject to statutory limitation or negation. Retrials have been allowed in the face of fresh and compelling evidence after acquittals.[229]

The double jeopardy doctrine is interpreted as a limit to the exercise of prosecutorial discretion, particularly in circumstances detrimental to the accused/victim of a case. Courts have interpreted the double jeopardy clause to prohibit most convictions or acquittals for good reasons.[230] In particular, it is unjust to prolong an individual's conviction or acquittal for reasons of a flawed discretionary authority.[231] Justice Black phrased this concern memorably in *Green v United States* by reiterating that:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty.[232]

Permitting prosecutors to exercise undue authority to foster conviction or acquittal protracts the hardship of criminal defence. The rule against double jeopardy seeks to

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[224] Martin, Friedland *Double Jeopardy* (1969), at vii.

[225] Ibid.

[226] Jordaan (1997), 3.

[227] Ibid. The fifth amendment of the US Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb".

[228] Marcus and Waye (2010), 353.

[229] Ibid.

[230] Ibid.

[231] Forrest Alogna "Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction" (2001), *CLR*, 86, 1131.

[232] See *Green v United States* (1957), 355 US 184 (5-4 decision).

amend that gap in the law.[233] Courts have interpreted the double jeopardy clause to regulate effects on appeals to lessen the already substantial burden on criminal defendants.[234] In South Africa, the concept of double jeopardy mainly applies in the context of labour law. Where employees have been acquitted at a disciplinary enquiry, or the presiding officer has imposed a sanction less severe than dismissal, the defendants/acquitted persons cannot generally be subjected to a second enquiry on the same offence.[235] In legal proceedings, it is regular practice that a person cannot be tried for the same offence twice once that person has been convicted or acquitted by a competent court of law.

3.3.3 **Prosecutorial accountability**

The requirement of prosecutorial accountability stems from a persistent increase in prosecutorial misconduct. As Green and Yaroshefsky[236] noted: "[T]he persistence of prosecutorial misconduct is a *sine qua non* for the new prosecutorial accountability." This means there would be no need for prosecutorial accountability without prosecutorial misconduct, whether actual or perceived. However, as prosecutors are humans prone to mistakes, misconduct is bound to occur due to bias and prejudice. Therefore, it suffices to say that prosecutorial misconduct has always existed and is associated with prosecutors. Although public awareness of prosecutorial accountability is increasing, it does not mean prosecutorial misconduct is also rising. This position has been expressed in what is termed 'rhetorical and regulatory shifts' as follows:

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[233] Forrest Alogna (2001), 86, 1131.

[234] Ibid.

[235] Matsika and Erasmus "Double Jeopardy: The Dichotomy of Fuelwood use in Rural South Africa" (2013), 5 *Energy Policy*, 716-725.

[236] Green and Yaroshefsky "Public Accountability" (2016), NDLR, 85.

> [t]he broader public, awakening to injustices in the criminal justice system; understandings, in particular, regarding wrongful convictions, including the responsibility of prosecutors' conduct; expanded academic attention to prosecutors' conduct, drawing particularly on social science insights into systemic deficiencies; and, most importantly, a burgeoning criminal justice reform movement that has included prosecutorial misconduct on its agenda.[237]

This reasoning allows prosecutors to be subjected to civil rights actions for misconduct. Civil liability is rarely a viable remedy in many jurisdictions. Absolute and qualified immunity doctrines severely limit the circumstances in which prosecutorial misconduct establishes a civil rights claim.[238] Generally, the courts are less keen to compensate victims of prosecutorial abuse. The courts stick to decisions that would deter future wrongdoing and protect "honest prosecutor[s]" from the "substantial danger of liability."[239] However, prosecutors are not perfect human beings; occasional misconduct is inevitable and should be anticipated by the law.[240]

Regarding public opinion, prosecutors are generally expected to make correct and just decisions. This expectation appears unrealistic, given that prosecutors are not immune to external influence or human weakness. The human mind is naturally complex; therefore, no amount of regulation can guarantee a perfect exercise of prosecutorial discretion. Even within the ranks of the so-called renowned prosecutors with high integrity, there is no such thing as a perfect decision, especially because prosecutors in contemporary democracies have adopted more diversified approaches to decision-making.[241]

Recently, many states have begun to prioritise criminal prosecution issues beyond domestic lines. This is done to complement the impressive rise in public awareness of the challenges of the criminal justice system. More communities have learned to demand

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[237] Ibid.

[238] Green and Yaroshefsky (2016), *NDLR*, 64.

[239] Bruce and Green "Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyer's Mistakes?" (2010), *CLR*, 2161.

[240] Green and Yaroshefsky (2016), *NDLR*, 85.

[241] Ibid.

justice and more accountability from public prosecutors. Prosecutorial powers are expected to be broad in scope and simultaneously subject to accountability measures. However, the common law system is adversarial[242] and may require expanding the range of prosecutorial powers. On the other hand, civil law systems are inquisitorial[243] and may not require widening the scope of their prosecutorial power.[244]

Developments in prosecutorial discretion strengthen the need for governments to promote prosecutorial accountability in the public's best interest.[245] The critical question is whether the exercise of prosecutorial discretion ought to be based on the principle of neutrality. That being the case, prosecutors are bound to be accountable for their decisions.[246] Public accountability can be interpreted as impacting smaller interest groups negatively and potentially affecting the role of prosecutors. This is particularly evident in the US prosecution system, where prosecutors are selected based on their personal commitment to the public interest. They require more objectivity and stricter adherence to unambiguous legislative directives. The US follows a democratic regime to elect prosecutors. It is worth noting that prosecutors are not given a life of guaranteed tenure as US federal judges.[247] Therefore, the US criminal justice system is predicated on the belief that prosecutors are more likely to satisfy public interest since their decisions can adversely affect their careers. This generates conflict between prosecutorial accountability and prosecutors who may completely ignore the impact of public reactions

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[242] The adversarial system or adversary system is a legal system used in common law countries where two advocates represent their parties' case or position before an impartial person or group of people, usually a judge or jury, who attempt to determine the truth and pass judgment accordingly.

[243] Ambos "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports" (2000), *EJCCLCJ,* 89 – 118. An inquisitorial system is a legal system in which the court, or a part of the court, is actively involved in investigating the facts of the case. This is distinct from an adversarial system, in which the role of the court is primarily that of an impartial referee between the prosecution and the defence.

[244] Yue Ma "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective" (2002), *ICJR*, 22 – 54.

[245] Zacharias and Green (2004), *USPL* 56.

[246] Ibid. See also Richman "Old Chief v the United States: Stipulating Away Prosecutorial Accountability?" (1997), VULR, 960.

[247] Zacharias and Green (2004), *USPL,* 56, 57.

on their career interests.[248] The focus on prosecutorial accountability is often discussed in line with the precepts of neutral prosecutions, often referred to as the neutral prosecutor, who can set aside career interests and focus on public interest and accountability.[249]

According to Zacharias and Green,[250] prosecutors facing public accountability challenges may be subjected to established normative standards of practice. This may explain why the public expects a candidate of high integrity as a prosecutor, as observed in the US. Elected officials could appoint such prosecutors and faithfully trust them to apply accepted criteria in exercising their discretion. To satisfy this accountability requirement, the prosecutor must remain substantially neutral throughout the decision-making process, where neutrality is critical to prosecutorial decision-making. Therefore, a prosecutor's decision to prosecute must reveal their neutrality.[251]

There is a need for more robust commentary and analysis on the topic of prosecutorial accountability. It is neither helpful to ask prosecutors to be "accountable" nor fair to criticise prosecutors for alleged failures to act "unaccountably". Indeed, the accountability rhetoric is singularly unpersuasive as a criticism because even the most egregious prosecutorial decisions can ordinarily be defended on the grounds of accountability. Ultimately, this analysis suggests the need for deeper thinking by prosecutors and public articulation of more explicit first- and second-order principles that can guide prosecutorial decisions. Every conception presupposes prosecutors should make decisions based on the consistent application of norms derived from the law and common societal understanding.

Accountability mechanisms provide a benchmark for reviewing prosecutorial decisions, which must be articulated by the prosecution authority. This is mostly known as the prosecution policy of a particular state or criminal justice jurisdiction and is usually

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[248] Ibid.

[249] Ibid.

[250] Zacharias and Green (2004), *USPL*, 56, 57.

[251] Zacharias and Green (2004), *USPL,* 56, 68.

formulated after identifying the fundamental constitutional values of the state.[252]

3.4 Prosecutorial immunity

Prosecutorial immunity is based on the notion that prosecutors are immune from prosecution. This important concept relates to the fact that the prosecutor is immune from being sued civilly for their conduct as a prosecutor.[253] In all prosecutorial conduct regarding charging, plea bargaining, trials, convictions and acquittal, a prosecutor enjoys absolute immunity from being sued civilly.[254] In an overwhelming number of cases, prosecutors are immunised. The idea behind absolute prosecutorial immunity is that, if the prosecutor had to fear any defendants bringing a civil lawsuit against them for wrongful prosecution, the prosecutor would have satisfied two requirements detrimental to justice.[255] First, the prosecutor would be deterred from making difficult decisions. Second, the prosecutor would essentially have to create an entire wing of the prosecutor's office devoted to defending civil lawsuits because it is obvious that the prosecutor would want to countersue if given the opportunity.[256]

Prosecutorial decisions must be made independently, without fear of prisoners, criminal defendants, or liturgists. While such authority seems to be a concern, it could be addressed by eliminating civil liabilities for prosecutors.[257] The US Supreme Court clearly explained that prosecutorial immunity involves balancing evil, as it is not perfect in every instance but, overall, is better for the judicial system. In the US, for example, prosecutors have the least accountability.[258] They cannot be sued and are, for the most part, not prosecuted in misconduct cases. Even though internal disciplinary measures against

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[252] Ibid.

[253] McClelland "Somebody Help Me Understand This: The Supreme Court's Interpretation of Prosecutorial Immunity and Liability" (2013), *JCLC*, 102, 1323.

[254] McClelland (2013), *JCLC*, 102, 1323.

[255] See *Buckley v Fitzsimmons* (1993), 509 US 259.

[256] Ibid.

[257] McClelland (2013), *JCLC*, 102, 1323.

[258] For detailed clarification, see Niles "A New Balance of Evils: Prosecutorial Misconduct, Iqbal, and the End of Absolute Immunity" (2017), *SJCRCL*, XIII:137.

prosecutors exist in principle, they rarely translate into practical action.

In the Cliven Bundy case, a federal judge dismissed the indictment against Cliven Bundy due to what she described as “outrageous” misconduct by Nevada prosecutors.[259] She repeatedly referred to similar wrongdoing in a previous case in which an appeals court delivered an incredibly rare ruling. The prosecutorial misconduct was so severe that the court discarded dozens of criminal charges, and the government was barred from filing new ones.[260] The court explained how significant the problem of prosecutorial misconduct proves to be. The interesting aspect is the courts which could oversee the prosecutor’s discretion exercises, have no supervisory authority.

3.5 Application of prosecutorial discretion

The need for prosecutorial discretion was expressed by the Supreme Court of Canada in *Krieger v Law Society of Alberta*,[261] wherein it was stated that an exercise of prosecutorial discretion ought to be treated with great respect due to its importance to the courts, members of the executive and other statutory bodies.[262] One crucial way a prosecuting authority is expected to exercise this professional discretion of whether or not to prosecute is to ensure that it does not act arbitrarily.[263] Thus, prosecutorial authorities must ensure that the exercise of the discretion to prosecute or not is not performed arbitrarily.[264]

The exercise of prosecutorial discretion generally entails initiating prosecution against a given suspect. This is done to determine the type of charges to file, when to file them, and whether to stop the investigation or offer a plea bargain to the accused person.[265] All these discretionary powers fall within the scope of the prosecutor. Typically, exercising

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[259] *US v Bundy* (29 October 2013), United State District Court for the District of Nevada .
[260] *US v Chapman*, decided by the 9th Circuit Court of Appeals in 2008.
[261] 2002, SCC 65 [45].
[262] Krieger v Law Society of Alberta (2002), SCC 65 [45].
[263] Shoba Wadhia “The Role of Prosecutorial Discretion in Immigration Law” (2010), *CPILJ*, 246.
[264] Ibid.
[265] Ibid.

prosecutorial discretion begins when the prosecutor is convinced that a criminal offence has been committed. For this reason, discretion becomes a guideline to assist with decision-making. Such an exercise of discretion is generally unreviewable.[266] This is not because the courts lack jurisdiction to review their decisions but because they generally avoid interfering with prosecutorial discretion. What is important is that such powers are not exercised arbitrarily by prosecutors; instead, prosecutors are expected to be gatekeepers of the criminal justice system.[267] This is also because they exert enormous influence in the administration of criminal justice, more so than any other official in the justice system.[268]

Against this background, it is also important to mention the possibility of abuse of public authority by those who control the prosecution process. Indeed, prosecutors are often accused of misconduct. This occurs when a prosecutor is suspected of abusing his discretionary powers. The courts have argued that "misconduct" can be a misnomer since it suggests that the prosecutor must act with a culpable state of mind.[269] In *People v Hill*, the court used the term "prosecutorial error" rather than "prosecutorial misconduct."[270] American courts have defined prosecutorial misconduct as "[t]he use of deceptive or reprehensible methods to attempt to prosecute a defendant, influence the court or the jury."[271] Therefore, a defendant alleging misconduct must prove that the decision to prosecute was ill-conceived or born out of bad faith.[272] This does not prove the prosecutor's intent *per se* but enables the court to determine the effect of the prosecutor's decision to prosecute the defendant.[273]

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[266] Tracy Meares "Rewards for Good Behaviour: Influencing Prosecutorial Discretion and Conduct with Financial Incentives" (1995), *FLR,* 851-862.

[267] Patel v National Director of Public Prosecutions (2018), 2 SACR 420.

[268] Vorenberg "Decent Restraint of Prosecutorial Power" (1981), *HLR*, 1521- 522.

[269] See *People v Hill* (1998), 17 Cal 4th 823.

[270] Ibid.

[271] See for example *People v Hill* (1998), 17 Cal 4th 800, 819; *People v Espinosa* (1992), 3 Cal 4th 806, 820; *People v Pitts* (1990), 223 Cal App 3d 606, 691.

[272] See *People v Benson* (1990), 52 Cal 3d 754, 793.

[273] *See People v Vargas* (2001), 91 Cal App 4th 506.

Another critical aspect of prosecutorial discretion is the need to monitor the conduct of prosecutors. This is because the exercise of prosecutorial discretion is central to the administration of justice[274] and can have an equally adverse effect on the rights of citizens. Consequently, such exercise of powers must be monitored and regulated,[275] although it can be argued that prosecutorial discretion cannot be effective if overregulated.[276] This may pose a more serious challenge for prosecutors in the administration of justice. Several factors have been identified that might potentially constrain the prosecutor's discretion.[277] These include legal rules, ambiguously worded prosecution policy guidelines, and a lack of resources. These factors have become increasingly influential in the decision-making process of evaluating whether to pursue a criminal case. To some extent, judicial control of prosecutorial discretion can also be added as a constraining factor.[278]

The impact of the above-mentioned contextual constraints is subjective. In some jurisdictions, it is conceived that the prosecutor's judgement could be undermined by the interdependent relationships between the three arms of government.[279] This may negatively impact the "strength of the evidence, the seriousness of the offence, and the defendant's criminal history"[280] and perhaps justifies the need for prosecutors to be publicly accountable for their actions and decisions, which may also create an opportunity for abuse of the prosecutorial process.[281] In Germany, for example, prosecutors can be held criminally liable if the petition from which they authorise the decision to prosecute includes a refusal to investigate certain offences. According to the German principle of

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[274] Zacharias and Green (2004,) 3.

[275] Robinson Darryl, "How Criminal Law Dictates Rules of Prosecutorial Authority" file:///C:/Users/lenovo/Desktop/Brown%20%20How%20Criminal%20Law%20Dictates%20Rules%20of%20Prosecutorial%20Authority.pdf *(*Accessed: 27 February 2018) 5.

[276] Frederick and Stemen, "The Anatomy of Discretion: An Analysis of Prosecutorial Discretion Making" (2012), Technical Report Vera Institute of Justice iii.

[277] Frederick and Stemen (2012), *Technical Report* iii.

[278] Ibid.

[279] Martin Schönteich "Strengthening Prosecutorial Accountability in South Africa" (2014), *ISS,* 255.

[280] Frederick and Stemen (2012), *Technical Report* iii.

[281] Ibid.

Rechtsbeugung, such abuse of prosecutorial powers makes a prosecutor liable to a sentence of up to five years in prison.[282] However, this approach is not applicable in South Africa. In the matter between *Van der Westhuizen v State,*[283] the Supreme Court of Appeal ruled that the prosecutor cannot be blamed for failing to enforce a subpoena order compelling witnesses to support the appellants' case. Instead, the court suggested that such compelling orders ought to be re-evaluated by criminal justice policymakers to avoid distortions and a lack of understanding of prosecutorial functions in the future.[284]

The above arguments can be assumed to mean that the exercise of prosecutorial discretion equals the need for accountability. It is common knowledge that prosecutors are fallible and often fall prey to prosecutorial misconduct.[285] Even the so-called elite prosecutors with notable reputations and excellent achievements in the legal field can be caught 'offside' at times by judges.[286] For instance, serious prosecutorial misconduct may include breaking the code of legal practice during decision-making while prosecuting.[287] A prosecutor is said to have committed serious prosecutorial misconduct if s/he fails to furnish the defence attorney with evidence that could potentially exonerate the accused person/s and goes ahead to convict them.[288] Other generally known forms of prosecutorial misconduct include making "improper arguments" that could mislead the court on the facts of the case; "improper use of media" sources, either by giving the press too much access to the details of the defendant's case or the so-called "media trial" before the verdict; "introduction of false evidence", or tampering with the source of correct evidence; and discrimination in choosing the jury or judge based on sex, religion, or ethnicity as this could potentially violate the constitutional rights of the defendant, judge,

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[282] See Isabel Kessler A Comparative Analysis of Prosecution in Germany and the United Kingdom: Searching for Truth or Getting a Conviction? In Wrongful Convictions: International Perspectives on Miscarriages of Justice (2008), 213, 216, Ronald Huff and Martin Killias (eds).

[283] (266/10) (2011) ZASCA 36 (28 March 2011) para 4.

[284] Frederick and Stemen (2012), *Technical Report* iii.

[285] Abbe Smith, "Are Prosecutors Born or Made? (2012), *GJLE,* 943.

[286] Ibid.

[287] Ibid.

[288] See https://legaldictionary.net/prosecutorial-misconduct/ (Accessed: 29 October 2018).

or jury.[289]

One of the practical realities behind prosecutorial misconduct is the absence of judicial review, a process that provides public sensitisation on how prosecutors arrive at their decisions. Such remedies may be pursued in the case of abuse of prosecutorial authority. This is made even more difficult because much of the prosecutorial decision-making process is "secretive".[290] Furthermore, when a justice system struggles with the volume of cases, it is the prosecutors' responsibility to use their discretion to decide which cases should be pursued, dropped, or plea bargained away to spare State resources.[291]

3.6 Synoptic comparison of prosecutorial discretion in the US, Australia, and South Africa

The three jurisdictions share the principles of separation of powers between the legislative, executive, and judicial arms of government, with appropriate checks and balances to ensure accountability.[292] However, variations stem from the different political systems practised in each country. South Africa exhibits characteristics of a centralised national prosecution authority; the US and Australia constitute federal systems in which prosecutorial authority is distributed between federal governments. Such a decentralised system of prosecutorial authority impacts the principle of separation of power and further enhances checks and balances.

South Africa, the US and Australia also share a similar regulatory framework for criminal procedures that promote the presumption of innocence principle. Requirements designed to ensure voluntary confessions embedded in the criminal justice system are also enhanced. Some procedures include the right to counsel and non-permissible evidence

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[289] Online Legal Dictionary https://legaldictionary.net/prosecutorial-misconduct (Accessed: 29 October 2018).

[290] Zacharias and Green (2004), USPL, 67.

[291] Ibid.

[292] De Villiers Is the Prosecuting Authority under South African Law Politically Independent? An Investigation into the South African and Analogous Models (2011). https://repository.up.ac.za/bitstream/handle/2263/17739/DeVilliers_Is(2011).pdf?sequence=1 (Accessed: 29 October 2018).

obtained illegally.[293] However, the three jurisdictions exhibit variations in exercising common principles. These are the exclusionary rule, plea bargaining, and double jeopardy.

According to Marcus and Waye,[294] the development of US jurisprudence is linked to democratic rights, explaining why the country's constitution is dominated by such 'rights'. According to Marcus and Waye (2004), this led to the USA developing a rights-based jurisprudence that governs criminal investigation and process.[295]

Conversely, Australia was described as 'official-centric' in its approach as opposed to the rights-centric approach in the US. The drafters of the early 1890s Australian Constitution deliberately refused embedding rights on the justification that the English system of responsible government was a sufficient assurance of civil liberty.[296] These writers concur with the rejection of a rights-centric approach on the justification that the approach would provide more benefit to "alien elements in Australian society."[297] South Africa, on the other hand, has a different history of colonisation and struggle for democracy not shared with the US or Australia. The need to address historical injustices of prolonged institutionalised and legislated racial inequality and the desire of the privileged white minority to protect its wealth largely influenced the type of constitution negotiated in South Africa. Put another way, South Africa previously protected the rights of the racially privileged minority but, due to a negotiated constitution, extended such protection to cover the previously abused majority while ensuring the protection of the property rights of the privileged few.[298]

While the three jurisdictions are democratic and abide by principles of separation of

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293 https://repository.up.ac.za/bitstream/handle/2263/17739/DeVilliers_Is(2011).pdf?sequence=1(Accessed: 29 October 2018).

294 Marcus and Waye "Australia and Unites States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2" (2010), *FP*, 583.

295 Ibid.

296 Marcus and Waye (2010), FP, 337.

297 Ibid.

298 Ibid.

powers and the rule of law, there are variations in the criminal justice systems that impact prosecutorial authority, independence, and accountability. Not only are these differences historical, but some have to do with the value system behind the interpretation of common doctrines such as plea bargaining and double jeopardy.

3.7 International standards for exercising prosecutorial discretion

The common law adversarial criminal justice system encountered two significant boosts internationally during the 20th century. The first was the adoption of *UN Guidelines on the Role of Prosecutors.*[299] The second concerns the adoption of *International Standards of Professional Responsibility* and a *Statement of the Essential Duties and Rights of Prosecutors. [300]* The latter was adopted by the International Association of Prosecutors (IAP). Its main objective is to set out international normative standards for prosecutors at local and international levels.[301] These guidelines have brought about significant improvement in the standards of prosecutorial discretion practices among UN member states. For example, the foundational principle of the International Criminal Court (ICC) is to establish the benchmark for international best practice in the exercise of prosecutorial discretion.

The ICC aspires to institutionalise the idea of universal justice. In its inclusive notion of human suffering in which "all peoples are united by common bonds", the ICC embodies the cosmopolitan worldview according to which all victims are citizens deserving the protection afforded by the rule of law. The court's intent to treat all people equally and to privilege no one over another is a cornerstone of cosmopolitanism's regard for "the moral worth of persons" [and] the equal moral of all persons.[302]

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[299] 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 (Hereinafter: The UN Guidelines for Prosecutors).

[300] Adopted by the International Association of Prosecutors (IAP) on 23 April 1999, following its establishment in June 1995 at the UN offices in Vienna. (Hereinafter: Standards of Professional Responsibility).

[301] See generally Article 2.3 of the IAP Constitution.

[302] Peskin An Ideal Becoming Real? The International Criminal Court and Limits of Cosmopolitan Vision of Justice (2010). In: R Pierik and W Werner (eds), Cosmopolitanism in Context: Perspectives from

In exercising prosecutorial discretion, the prosecutor must consider the worldview on criminal justice delivery. Just as a prosecuting authority should aspire to institutionalise the idea of universal justice, a prosecutor should internalise international normative standards of practice. This is because the drafters of international law believe that the peaceful coexistence of nations cannot be achieved without shared moral values and legal principles.[303] However, each state is responsible for accepting and domesticating such international legal standards. While international guidelines and norms do not necessarily guarantee a perfect prosecution system, it is important to acknowledge its role in fostering an era of prosecutorial accountability.

In international law, international normative standards and legal principles enjoy widespread acceptance owing to their application to the development of human rights. Generally, norms are developed to ensure that the decision-making process during criminal prosecution is more predictable.[304] Also, they promote organisational efficiency for prosecuting authorities.[305] According to Miller and Wright,[306] international prosecutorial norms can develop and consistently shape prosecutors' behaviour, even without any judicial monitoring. Instead, what needs to be monitored, as Bibas[307] has rightly argued, are external forces that may "[p]ush prosecutorial discretion in the wrong direction, away from the public's sense of justice." What comes to mind in this context may include agency costs or a lack of adequate resources that can guarantee consistency in the exercise of prosecutorial discretion.[308]

International Law and Political Theory, 196.

[303] Tomuschat "The Legacy of Nuremberg" (2006), JICJ, 4, 830; Luban "A Theory of Crimes against Humanity" (2004), YJIL 29, 85; Larry May *Crimes against Humanity: A Normative Account* (2005), Cambridge University Press, 326; Cassese "The Rationale for International Criminal Justice". In: A Cassese (ed), *The Oxford Companion to International Criminal Justice* (2009), 123, at 127; Roach "Value Pluralism, Liberalism and the Cosmopolitan Intent of the International Criminal Court" (2005), *JHR,* 4, 475, 485–486.

[304] See Eisenstein and Jacob (1977); Eisenstein et al (1988); Ulmer (1997).

[305] Dixon (1995); Engen and Steen (2000).

[306] See Miller and Wright in Bibas p. 374.

[307] Stephanos Bibas "The Need for Prosecutorial Discretion" (2010), *TPCRLR,* 369, 371-73.

[308] Ibid.

Even when there are no clear international guidelines, a prosecuting authority ought to endeavour to develop its own guiding principles. This enables the authorities to guard against idiosyncratic decision-making or to justify any deviations as reasonable and necessary in court.[309] It is necessary to mention that judges must also exercise discretion when deciding on criminal matters. Hence, a judge's decision may be subject to public scrutiny and judicial review.[310]

Generally, international instruments are designed to reflect consistency and uniformity in practice, especially regarding access to justice. Accordingly, consistency is essential when international law ascribes to its normative standards. According to article 17 of the UN Guidelines for Prosecutors, regulatory guidelines for exercising prosecutorial discretion promote fairness and consistency, as a prosecutor must be diligent throughout the decision-making process. This is the aspect of the guidelines considered more important when dealing with corruption cases against public servants. However, the exercise of such discretionary powers must be consistent with local practice.

The requirement of consistency under international law begins with the certainty of rules guiding the exercise of prosecutorial discretion. For example, publishing the prosecutorial guidelines helps prosecutors to play by the book. According to article 17 of the UN Guidelines for Prosecutors, the prosecutor's powers should be clearly published to ensure easy reference and compliance with the guidelines. This approach is believed to guarantee fairness and consistency in the process. Additionally, head prosecutors play a pivotal role in guiding subordinate prosecutors, which is a process that encourages consistency. According to Bibas,[311] consistency can also be maintained using administrative instruments that regulate the appointment of prosecutors and prosecutorial candidates.

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[309] Ibid.

[310] Ibid.

[311] Stephanos Bibas (2010), *TPCRLR*, 369, 371-73.

3.7.1 **The requirement of effectiveness in international law**

International guidelines require efficiency in the exercise of prosecutorial discretion. Under article 20 of the *UN Guidelines for Prosecutors,* effectiveness in prosecutorial decision-making is underlined as a remedial measure to achieve justice. In terms of this article, effectiveness entails that a prosecutor ought to cooperate with the police adequately, other government agencies and the public, to ensure that justice and fairness are achieved. This also indicates the complex nature of prosecutorial justice, which requires some form of partnership with stakeholders within the justice system other than prosecutors to ensure justice and fairness. In the preamble to the guidelines, fairness or impartiality form the primary ingredients of an effective prosecution system.[312] According to the IAP Standards of Professional Responsibility*,* cooperation between a prosecutor and other stakeholders is required for effectiveness in prosecutorial services.[313]

In most criminal justice systems, the effect of democratic principles on regulated government entities tends to influence the decision of prosecutorial authorities. Although such a trend may serve as additional checks and balances,[314] it has challenges in achieving justice. On this note, maximum cooperation between prosecutorial authorities and sister agencies cannot be guaranteed unless the prosecutor is impartial.

3.7.1.1 **The principle of impartiality**

One of the principal reasons for formulating the *UN Guidelines for Prosecutors* is to promote impartiality. This requirement considers the specificities of the legislative framework in which different justice systems operate.[315] Impartiality implies exercising prosecutorial discretion without fear, favour, or prejudice.[316] It remains one of the most effective measures to guarantee public accountability when exercising prosecutorial

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[312] See Preamble para. 12 of the UN Guidelines for Prosecutors.

[313] See generally Article 5 (b) of the IAP Standards of Professional Responsibility.

[314] Peter Markowitz “Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty” (2017), *BULR,* 97, 535.

[315] See Article 4 of the UN Guidelines for Prosecutors.

[316] Article 4 para (a) of AIP Standards of Professional Responsibility.

discretion.[317]

3.7.1.2 **The principle of independence**

Article 2 of the IAP standards of professional responsibility provides that prosecutorial authority must be legitimate. It must be exercised independently, free from political influence, with unfettered access to justice.[318] Article 10 of the UN Guidelines for prosecutors provides that prosecutors must be separate from the judiciary.[319] However, the article further states that non-prosecutorial authorities should cooperate with prosecutors to guarantee independence.[320] Following the establishment of this international instrument in the 1990s, prosecutors have enjoyed more protection throughout the decision-making process, enhanced by democratic practices such as observance of the rule of law and the principle of separation of powers.[321] Additionally, many democratic states have adopted the IAP Standards of Professional Responsibility as a standard for guiding prosecutorial decisions. Such developments have increased public attention on prosecutorial decisions concerning the conduct of prosecutors.

3.7.1.3 **The need for international normative standards**

International standards of practice for prosecutors often give expression in law to the fundamental principle of prosecutorial justice to ensure fairness and consistency. Article 17 of the UN Guidelines for Prosecutors specifically mentions fairness and consistency as universal regulatory standards when exercising prosecutorial discretion. A typical example is when the prosecution invokes a waiver of prosecution.[322] This means the prosecutor is likely to waive prosecution in similar situations in the future or risk

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[317] Ibid, para. (b).

[318] Article 2 (2.1) of the AIP Standards of Professional Responsibility (1999).

[319] UN Guidelines for Prosecutors (1990).

[320] UN Guidelines for Prosecutors (1990).

[321] It is important to note that, as of 1990 when the UN Guidelines for Prosecutors was adopted, African countries such as South Africa and Nigeria, in particular, were yet to transition into a democratic system of government. South Africa officially became a democratic state in 1994, and Nigeria followed suit in 1999.

[322] UN Guidelines for Prosecutors (1990).

inconsistency and unfair discriminatory practices. The article further directs prosecutors to attend to crimes committed by public officials to avoid an impression of unfairness and inconsistency in prosecuting crimes. International law recognises the importance of fairness and consistency in the face of official corruption or abuse of public office and cases involving grave violations of human rights and other conduct recognised by international law.[323] However, this does not prevent prosecutors from being consistent with domestic prosecutorial discretion guidelines.

Since prosecutorial discretion is primarily a function of specific normative and systematic frameworks, international recognition of normative practices merely appreciates the substantive rules of prosecutorial conduct. The established norms for recurring cases and illustration of exceptions usually develop by common-law accretion of precedent.[324] This enables future prosecutors to follow precedents from the accumulated wisdom of their predecessors, making it easier for prosecutors to be accountable for their decisions. Normative standards could be the necessary benchmarks for achieving consistency in prosecution services. A shift from the international normative standards in situations that are not materially different may give rise to unjust circumstances relating to each case.

The requirement of the international normative standard of consistency generally refers to uniformity in outcomes or decision-making.[325] Consequently, in many domestic jurisdictions, inconsistency or lack of uniformity is most likely attributed to a normative issue. Perhaps this explains how dealings with normative concerns gave rise to the consistency principle.

In the Southern County District of the US, for example, research had shown that inconsistency was generally not a concern until the 1970s when the new office culture divided crimes into specific units. No two units prosecute the same offences, which helps maintain fairness and consistency in similar crimes. This is followed by tight supervision

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[323] Article 15 of the UN Guidelines for Prosecutors (1990).
[324] Stephanos Bibas (2010), *TPCRLR*, 374.
[325] Frederick and Stemen (2012), 47.

and the so-called 'round tabling' of cases to ensure consistency in practice and outcomes.[326] Further, it is important to note that a round table determination of what charges to press and what plea to offer has guaranteed consistency in several similar cases.[327] This strategy certainly helps to determine the outcomes of similar cases and is particularly useful when a domestic prosecution system is dealing with limited resources and time constraints.

3.7.2 **Methodological issues**

Prosecuting authorities in domestic jurisdictions mainly function differently and independently of other legal traditions.[328] For example, previous sections of this chapter highlighted the adversarial and inquisitorial prosecution system.[329] Commentators generally do not view any differences in their respective methodologies as substantially significant. It has been argued that contemporary developments in democratic prosecutorial systems have made it more difficult to differentiate between their respective methods in practice.[330]

For example, no criminal justice system can pass the test of legitimacy and the rule of law without the common law principle of presumption of innocence, which is a critical factor in the modern-day administration of justice.[331] This most fundamental principle of the criminal justice system makes it imperative for the State Prosecutor to first determine on the grounds of probability whether an accused person can be found guilty of criminal conduct. Perhaps this explains why a prosecutor is more likely to commit the limited resources of the State to investigate and prosecute more serious crimes. Another critical

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[326] Frederick and Stemen (2012), 47, 48.

[327] Frederick and Stemen (2012), 48.

[328] Philip Stenning "Prosecutions, Politics and the Law: The Way things Are" in Danwood Chirwa and Liz Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012), 109.

[329] See Kai Ambos "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports" (2000), *EJCCLCJ,* 8.
89-118.

[330] Kai Ambos (2000), *EJCCLCJ,* 8, 89-118.

[331] Ibid.

example of the methodology is how many states have laid down rules, procedures, and limited exceptions accorded to specific individuals, such as foreign diplomats protected by diplomatic immunity, minors, and persons suffering from insanity.[332]

Another critical uniform methodology in modern-era prosecutorial systems is the separation of power between the executive, legislature and judiciary. While the legislature makes laws interpreted by the judicial arm of government, only the executive arm may initiate prosecution. Although judges also apply their discretion in interpreting the law, ensuring that the prosecution process is brought to court falls on the prosecutor, who is part of the executive arm.

Prosecutorial independence is another method inherent in the rule of law. A prosecuting authority must be given the legislative backing to exercise prosecutorial discretion independently and without interference. Without prosecutorial independence, the prosecutor cannot be justifiably subjected to public accountability measures. According to a 2015 Annual Report on *Independence and Accountability of the Judiciary and of the Prosecution*, published by the European Network of Councils for the Judiciary (ENCJ), "prosecutorial independence does not stand on its own. It must also be understood that independence is directly linked to accountability."[333] This seemingly implies that a prosecuting authority that enjoys the status of prosecutorial independence must be subject to prosecutorial accountability measures.[334]

> In common law systems, it is usual that a prosecutorial authority operates independently and free from undue interference. However, the independence of the prosecuting authority must produce prosecutorial accountability. This is further enhanced by local practice in some jurisdictions, such as the appointment method of the chief prosecutor, the legal status of the office and powers of the prosecutor, the

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[332] William Schabas Prosecutorial Policy and Practice: Selecting Situations and Cases. In: Carsten Stahn The Law and Practice of the International Criminal Court (2015), 365. Oxford Scholarly Authorities on International Law (OSAIL).

[333] See ENCJ Project on Independence and Accountability 2014-2015, adopted The Hague 5 June, 2015, 11.

[334] *ENCJ* Project (2015), 11.

degree of autonomy of the prosecutorial authority, and the tenure of the incumbent.[335] All these factors prove to be essential for the effective management of prosecutorial independence. The Supreme Court of Canada aptly described the importance of prosecutorial independence as follows:

> [i]ndependence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General to act independently of political pressures from government and sets the Crowns' exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process.[336]

The need to function independently from political pressures is critical to prosecutorial independence. It ensures that any decision to initiate a criminal prosecution is not politically induced but based on evidentiary and public interest tests. Stenning[337] defines the evidentiary test as a measure to verify whether the evidence obtained against the accused person is sufficient, credible, and admissible in court to secure a conviction. Also, public policy tests involve decisions based on the public interest rather than legal judgments.[338] In the South African context, for example, the prosecutor can proceed with the prosecution if there is prima facie evidence to secure a conviction.[339] However, in Canada, the public interest policy is generally conceived as a legal standard to achieve the public good.[340]

Generally, every prosecutor adopts the prosecution policy of a particular domestic prosecution system. Likewise, a criminal proceeding is generally instituted once sufficient evidence exists to prosecute. Making this determination is known as the exercise of

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[335] Kai Ambos (2000) *EJCCLCJ,* 8, 89-118.

[336] Paragraph 46 of *Miazga v Kvello Estate* (2009), *SCC* 51.

[337] Philip Stenning "Prosecutions, Politics and the Law: The Way Things Are". In: Danwood Chirwa and Liz Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012), 106.

[338] Stenning (2012), 106.

[339] See part 4 of the South African Prosecution Policy, 1 December 2005; See also the Appeal Court decision in *Gouriet v Union of Post Office Workers* (1978), para. 523-4.

[340] Deborah MacNair "In the Name of the Public Good: Public Interest as a Legal Standard" (2006), *CCLR*, 10, 175-204.

prosecutorial discretion. In some countries, this may include the prosecutor's powers to act more effectively by using their discretion to enter a plea bargain with a suspect. Depending on the circumstances of a particular case, evidence that can be discovered can be used against other suspects with the cooperation of an accused person while exploring the plea bargain option.[341] This also ensures that a state's resources are not wasted for prosecution purposes.

Similar methods exist in other common law systems where the functions of a prosecutor do not include investigative procedures. Under this policy, the prosecutor may rely on evidence provided by a different government institution, focus on the overall exercise of prosecutorial discretion and whether or not to pursue justice after a full investigation into the crime has been concluded.[342] This practice has been replicated in many common law countries, including South Africa and England, where the chief prosecutor is either known as Director of Public Prosecutors (DPP), as in the case of England and Wales, or National Director of Public Prosecutions (NDPP) in South Africa. Neither the DPP nor the NDPP is involved in investigating crimes, as this is the responsibility of the police.[343]

It is important to note that, in some instances, adversarial systems have mandated a prosecutor to get involved in the investigation and prosecution processes. For example, following the end of the Second World War, the allied forces set up the Nuremberg International Military Tribunal (IMT) to investigate and prosecute various war crimes across Europe. In this instance, prosecutors could participate fully in the investigation process.[344] Domestic jurisdictions eventually abandoned this method because it infringed on prosecutorial independence.

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[341] William Schabas (2015), 365.

[342] Julia Fionda Public Prosecutors and Discretion: A Comparative Study (1995), 14; Kai Ambos (2000), EJCCLCJ, 8, 89-118.

[343] Kai Ambos (2000), EJCCLCJ, 8, 89-118.

[344] See Preamble to the Charter of the IMT adopted pursuant to an agreement signed on 8 August 1945 by the Government of the United States of America, the French Republic Provincial Government, and the Governments of the then United Kingdom which included Great Britain, Northern Ireland and Soviet Socialist Republics.

The exercise of prosecutorial discretion in modern-day governments has been described as part of the judicial process at all stages of prosecution.[345] There seems to be an endless expansion of what constitutes prohibited conduct in criminal and administrative contexts. This is coupled with a necessary expansion of the scope of discretionary powers of the prosecutor. Hence, states must adopt stricter methodological standards to guarantee prosecutorial services that meet societal expectations. This can be achieved by providing enforcement resources commensurate with the pace of expansion in prosecutorial discretion.[346]

3.7.3 **Procedural norms**

Every prosecution authority is a product of the evolution of a systematic criminal procedure system. The critical position occupied by prosecutors in all criminal justice systems centres on rules and procedures that must be adhered to when prosecutorial duties and responsibilities are exercised. This is a critical factor in ensuring that procedural rules and guidelines for prosecution are given traditional values and meanings. Criminal procedural rules are the hallmarks of effective prosecutorial systems. Prosecutorial independence, institutional integrity and impartiality in administering justice cannot be achieved without criminal procedure rules.[347] Despite characteristic differences in various legal systems, prosecutors uniformly remain key role players regarding prosecutorial discretion. Indeed, it has been argued that:

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[345] Kai Ambos (2000), EJCCLCJ, 8, 89-118.

[346] Ibid.

[347] See foreword by Yury Fedotov, Executive Director of the United Nations Office on Drugs and Crime in The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide (2014). UN Document stating that the rule of law cannot be upheld, nor can human rights be protected, without effective prosecution services that act with independence, integrity and impartiality in the administration of justice.

> [a]part from their responsibility to dispose of criminal cases for prosecution, prosecutors in every country play some important roles in the criminal investigation despite the differences in basic legal principles. In some countries, prosecutors have overall responsibility for the investigation, while in others they have a limited role in carrying out an investigation.[348]

In line with the mandate of the United Nations Office on Drugs and Crime (UNODC), states which are party to the UN Guidelines on the Role of Prosecutors[349] and the IAP Standards of Professional Responsibility[350] must reform their respective justice systems. This ensures that it conforms to UN norms and standards of prosecutorial discretion.[351] However, maintaining internationally recognised norms will require well-trained prosecutors and State protection following international best practice. In some instances, prosecutors are emboldened by domestic legislation consistent with local practice.[352] An excellent example is where a prosecutor is given the right to supervise a criminal investigation. On many occasions, this method influenced the most appropriate decisions in court.

Another significant aspect of international best practice is the need for prosecutors to consider public interest as an essential factor in exercising prosecutorial discretion.[353] In addition to the public interest, a prosecutor must act fairly, consistently, and expeditiously.[354] All this points to the exercise of prosecutorial discretion based on

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[348] Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders "Cooperation Between the Police and the Prosecutors" in *Annual Report for 2001 and Resource Material Series No 60,* part two (Work product of the 120th International Senior Seminar: Effective Administration of the Police and the Prosecution in Criminal Justice), 195.

[349] United Nations Guidelines and Procedures for Standards.

[350] International Association of Prosecutors Standards and Procedures.

[351] See foreword by Yury Fedotov, Executive Director of the United Nations Office on Drugs and Crime in The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide (2014) UN Document.

[352] Article 11 of the UN Guidelines on the Role of Prosecutors.

[353] Ibid. See also article 4 (2) (f) of the *IAP Standards of Professional Responsibility* providing that (where local practice permits prosecutors to exercise a supervisory role in relation to compliance with court orders or non-prosecutorial functions, they must act in the public interest).

[354] See article 4.1 of IAP Standards of Professional Responsibility.

reasonable grounds and following international best practice.[355]

Sometimes, prosecutors may fall short of fairness and consistency. Public perception of perceived lack of fairness or inconsistency in prosecutorial decisions will negatively affect their sense of justice and prosecutorial accountability. Such negative public perceptions of the criminal justice system can be worsened by the rise in cases involving intentional misconduct by prosecutors.[356] This challenge has been summarised by the Innocence Project Movement (IPM) as follows:

> [R]egardless of the extent of error or misconduct committed by a prosecutor – from the simplest of mistakes to the intentional withholding of exculpatory evidence – actions undermine the accuracy of criminal trials and threaten to create wrongful convictions at unacceptably high rates. The courts, prosecutors' offices, defence attorneys, legislators and state bar disciplinary authorities must work together to develop a comprehensive system of prosecutorial oversight to ensure the quality of prosecutorial behaviour.[357]

It is difficult for the public to determine how much of a prosecutor's behaviour would constitute prosecutorial misconduct. However, there is increasing public awareness of prosecutorial misconduct, which is symptomatic of the general dissatisfaction with the criminal justice system. In fact, despite international norms and standards guiding local prosecutors, public prosecution systems continue to reveal the possibility of abuse. Langbein[358] suggests that a prosecution ought to remain local and draw experience from the knowledge of the local community it is designed to serve to cushion the impact.

3.8 Scope and limits of prosecutorial discretion

Perceptions of prosecutorial discretion have been negative in most instances. Academic

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[355] As provided in article 4.2 (d) of *IAP Standards of Professional Responsibility* and without which the criminal matter cannot proceed.

[356] See for example, The Innocence Project Prosecutorial Oversight: *A National Dialogue in the Wake of Connick v Thompson* (2016).

[357] See for example, The Innocence Project Prosecutorial Oversight: *A National Dialogue in the Wake of Connick v Thompson* (2016), 20.

[358] Langbein (1973), FSS 335.

articles and legal write-ups have not been kind, considering the connotative nuances in the descriptions of prosecutorial authority in general. It is argued that prosecutors wield extraordinary[359] power, given the broad discretion and latitude in the execution of their duties. Because they are at the heart of the criminal justice system,[360] they are responsible for initiating criminal justice processes[361] and, to a large extent, determining outcomes.[362]

While judges are perceived as "servants of the law",[363] administrators of justice if not zealous advocates and problem-solvers[364] trusted by the courts to ensure that "guilt shall not escape or innocence suffer",[365] public prosecutors operate mainly behind closed doors when deciding who and what to charge.[366] Understandably, efforts to curb what has been perceived as enormous powers by prosecutors are bound to follow. In some instances, there were claims that prosecutors become blinded by self-interest and prosecutorial conflicts of interest, hence the calls for legal and political accountability.[367]

Balancing political accountability and independence of the prosecution has been problematic because the prosecutorial authority in all three jurisdictions, the USA, Australia and South Africa, are often politicised by the fact that prosecutors are political appointees. Under Australian law, the commonwealth model provides that the governor-general appoints the DPP and associate director of prosecutions.[368] Similarly, in South Africa, all senior prosecuting officials are political appointees.[369] The US is no exception

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[359] Robert Jackson "The Federal Prosecutor" (1940), 31 *AICL*, 31, 3, 3.

[360] *Berger v United States* (1934), 295 US 78, 88.

[361] Rachel Barkow "Separation of Powers and the Criminal Law" (2006), SLR, 58, 989, 2006, 997.

[362] Máximo Lange "Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure" (2006), *AJCL,* 33, 223, 2006, 224–25.

[363] See State of Louisiana v Blaise Gravois. 234 So. 3d 1151.

[364] ABA Prosecution Function Standard (1993) 3rd ed, (hereafter, ABA Model Rule) 3-1.2.

[365] *Singer v United States* (1965), 380 US 24, 37.

[366] Kenneth Davis. Discretionary Justice: A Preliminary Inquiry,(1969), pp. xii, 233. Baton Rouge: Louisiana State University Press, 189.

[367] Davis (1969), 189.

[368] De Villiers Is the Prosecuting Authority under South African Law Politically Independent? An Investigation into the South African and Analogous Models (2011), *THRHR,* 74.

[369] De Villiers (2011), *THRHR,* 74.

to this rule. Even though all three jurisdictions demand that prosecutors cannot be forced to either prosecute or terminate a prosecution, the issue of political accountability *vis-à-vis* political independence cannot be ignored in the process of prosecutorial decision-making. Owing to the sentiments of extraordinary powers of prosecutors, this office must be protected to the extent that prosecutors are allowed to perform prosecutorial duties with high professional integrity and without fear, favour, or prejudice.

3.9 Conclusion

The science of prosecutorial discretion lies with relative insights into the legitimacy of its normative values in practice. The legitimacy of substantive criminal law rests on the principle that it prescribes the appropriate criteria for determining criminal liability, such as proof of guilt. This creates the necessity for procedural practices by which such prescriptions can be administered.[370] Procedural practices include prosecutorial systems integral to the rule of law.[371] This also defines the relationship between substantive criminal law and procedure for expressing its legal validity in terms of the State's authority over the rights of its citizens, who are offenders.[372]

Generally, prosecutors are primarily guided by criminal procedural rules in substantively determining liability for prosecution and punishment. The principal aim of substantive criminal law and its commitment to criminal justice is to set the corresponding procedural machinery of justice in motion. The idea of compliance with prosecution policy guidelines is ostensibly to ensure that substantive rules are not undermined.[373] In previous sections of this chapter, the most salient aspects underpinning the concept of prosecutorial

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[370] Markus Dubber The Criminal Trial and the Legitimating of Punishment, in 1 The Trial on Trial 85 (2004), RA Duff et al (eds). Discussing the role of the trial process in legitimising criminal law and punishment in terms of autonomy principles.

[371] Darryl Brown, How Criminal Law Dictates Rules of Prosecutorial Authority https://law.rutgers.edu/sites/law/files/attachments/Brown%20-%20How%20Criminal%20Law%20Dictates%20Rules%20of%20Prosecutorial%20Authority.pdf (Accessed: 28 October 2018).

[372] Ibid.

[373] Ibid.

discretion and how they apply in criminal jurisdictions were discussed.

Prosecutorial discretion is a product of criminal procedure rules meant to endure demanding criminal law processes.[374] Based on the lapses of prosecutorial discretion advanced herein, it is relevant that policymakers consider effecting arbitrary changes in future procedural regimes not to undermine the efficiency of the prosecutorial system,[375] especially by facilitating liability and punishment decisions that conflict with the central purpose of criminal law.[376] In addition, prosecutors ought to cooperate fully with experts in fields in which they lack competence and understanding. This is mainly because some cases cannot be fairly decided without the opinion of specialised government agencies or private institutions. For example, in cases which involve provable scientific facts or are too technical for the layman, the services of a relevant expert ought to be sought in the interest of justice.

The legal validity of this normative practice can be found under the UN Guidelines for Prosecutors discussed in previous sections of this chapter. This document articulates the guidelines for prosecutors to always cooperate with the police, the courts and other agencies to ensure prosecutorial effectiveness.[377] One major shortcoming of this provision is that it does not elaborate on what cooperation with other agencies entails. However, in some instances, a prosecutor may rely on such guidance to determine the viability of a particular criminal case. After all, every prosecutor ought to know the court's expectations by virtue of their professional training. Otherwise, unnecessary delays and postponements are likely to occur.[378]

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[374] Ibid.

[375] Ibid.

[376] For scholarly attention, see Rogers The Role of the Public Prosecutor in Applying and Developing the Substantive Criminal Law, in The Constitution of Criminal Law 53 (2013), RA Duff et al (eds); Dripps The Substance-Procedure Relationship in Criminal Law, in Philosophical Foundations of Criminal Law 409 (2011), RA Duff and Stuart Green (eds); Duff et al, 3 The Trial on Trial: Towards a Normative Theory of the Criminal Trial 102-10 (2007), arguing criminal law's expressive function can imply certain procedures, such as exclusionary rules as a response to the prosecution's lack of moral standing; William Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice (1997), YLJ, 107, 1.

[377] See Article 20 of the UN Guidelines for Prosecutors.

[378] In *Van Heerden & Another v NDPP & Others* (2017), (145/2017) ZASCA 105 (11 September 2017).

After analysing prosecutorial discretion and related concepts underpinning the functions of a prosecutor, including the relevant international legal framework regulating prosecutorial authority, the chapter concludes with an appraisal of the salient factors discussed in previous sections to provide a roadmap for subsequent discourse. The next chapter will conceptualise a theoretical approach to prosecutorial discretion and how it applies in the US, Australia and South Africa. The chapter will also analyse and justify the theoretical models utilised to further scholarly understanding of prosecutorial discretion.

The SCA ruled that the right of an accused person to a fair trial within a reasonable period entitles him to ‘extraordinary remedy' to permanently stay the prosecution if the delay resulted from the prosecutors.

CHAPTER FOUR

THE EPISTEMOLOGY OF PROSECUTORIAL AUTHORITY

4.1 Introduction

The previous chapter discussed the meaning of prosecutorial discretion and concepts relevant to prosecutorial decision-making, such as plea bargaining, prosecutorial immunity and accountability. This chapter critically examines the theory of prosecutorial authority in the context of adversarial prosecutorial systems. It reflects on the relevance of evidence in prosecutorial decision-making, including the factors influencing prosecutorial authority. From a philosophical point of view, the chapter discussed the moral theory of utilitarianism to highlight the primary considerations upon which most prosecutors choose whether or not to prosecute. This portion of the chapter examined the salient characteristics of positive decision-making and the fundamental questions driving prosecutorial discretion. These dynamics are complemented by the theory of prosecutorial authority to form the theoretical framework on which the study is based.

Furthermore, the chapter analyses the nature, scope and limits of prosecutorial authority in common law compared to civil law systems. The discussion includes an analysis of the normative framework and methodological and procedural issues regarding prosecutorial authority in a democratic setting. The main objective of this chapter is to discuss the theoretical framework and normative grounds on which the conceptions of prosecutorial authority are based and the legal validity thereof. The argument in this chapter can thus be read as a defence of the general principles and international benchmark for exercising prosecutorial authority, from its origins to contemporary developments. Evidence is of utmost importance among the factors influencing criminal prosecution, and therefore, it lies at the epicentre of prosecutorial decision-making. Before delving into the theoretical and normative frameworks, it is essential to discuss the role of evidence in prosecutorial decision-making. This role is reflected in what is commonly referred to as evidence-based

prosecution.[379]

4.2 Evidence-based prosecution

Evidence-based prosecution, often termed victimless prosecution, is a collection of techniques used by prosecutors in domestic violence cases to convict abusers without the cooperation of an alleged victim.[380] This practice, common in federal systems, is mainly used by specialised prosecutors and state attorneys. It relies squarely on using a variety of evidence to prove the guilt of an abuser, with limited, antagonistic or no participation by the abuser's victim.[381] Evidence-based prosecution arose from the unique challenges facing domestic violence cases. Although domestic abuse has been prevalent throughout history, and its impact is notably severe, aggressive prosecutions have been undertaken only in recent decades.[382]

Since the 1970s, increased public awareness has led to tougher laws and the ever-expanding role of law enforcement and the criminal court system in what had previously been regarded as a family matter. From the 1980s onward, such cases have increasingly faced prosecution in the criminal justice system.[383] Prosecutors managing such cases often face the challenge of an unwillingness or inability to cooperate with prosecution from the victims.[384] In jurisdictions of aggressive enforcement of domestic laws, a significant percentage of victims prove reluctant to cooperate with prosecution. Such choices are made for various reasons, including seeking dismissal of charges, recounting statements about the abuse, refusing to talk about it, perjuring themselves

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[379] Theresa Messing "Evidence-Based Prosecution of Intimate Partner Violence in the Post-Crawford Era: A Single-City Study of the Factors Leading to Prosecution" (2016), CD, 1-24.

[380] Louise Ellison "Prosecuting Domestic Violence without Victim Participation" (2002), *MLR,* 65, 834-858.

[381] Carolyn Hoyle *Negotiating Domestic Violence* (1998), Oxford: Clarendon Press, 180.

[382] Peterson et al "The Role and Impact of Forensic Evidence in the Criminal Justice Process" revised report 6-10-10, National Institute of Justice #2006-DN-BX-0094. Available at: https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf (Accessed: 6 June 2020]).

[383] Leigh Goodmart Troubled Marriage: Domestic Violence and the Legal System, (2013), NYW Press, 112.

[384] Robert Davis, Barbara ES and Heather JD "Effect of No-Drop Prosecution of Domestic Violence Upon Conviction Rates" (2001), *JRP* 3, 1-13.

in court to protect the abuser, or refusing to come to court altogether.[385]

Evidence-based prosecution arose from the desire to prosecute domestic violence cases without pressure on victim/s to cooperate when s/he might face retaliation or other dangers from doing so; or when such pressure is applied but proves ineffective.[386] In previous decades, evidence-based prosecution was used in isolated instances, but recently, it has become routine. Studies have revealed that some prosecutors who recorded high conviction rates without victim cooperation used evidence-based prosecution.[387] Evidence-based prosecution was strongly encouraged, if not mandated, for agencies receiving federal funding to stop violence against women in countries such as the USA.[388]

In its infancy, evidence-based prosecution was often referred to as victimless prosecution. However, as prosecutors, victims and victim advocates frequently point out, evidence-based prosecution often does not deal with victimless crime, nor does it seek to remove the victim's interest from the case. It instead focuses on the crime and its impact without relying on the victim's participation.[389] Given that all prosecutions are evidence-based, limiting the debate of the factors influencing prosecutorial decision-making to evidence-based prosecution does not exhaust the issue. In context, evidence-based prosecution is best understood as prosecution without testimony from the victim or principal witnesses, instead using all remaining or alternative forms of evidence.[390] The most common evidence used in evidence-based prosecution includes call and recording transcripts, witness statements, medical records, prior police reports, restraining orders, docking records, letters from the suspect, video or audio tape interviews with the victims,

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[385] Robert Davis, Barbara and Heather (2001), *JRP* 3, 1-13.

[386] Louise Ellison (2002), *MLR,* 65.

[387] Eric et al "Convictions versus Conviction Rates: The Prosecutor's Choice". Available at: https://core.ac.uk/download/pdf/7080885.pdf (Accessed: 6 June 2020].

[388] The conviction rates of US state prosecutors were obtained from the Census of Prosecutors,

2001, and for federal prosecutors from. Available at: http://www.ojp.usdoj.gov/bjs/pub/press/fcjt03pr.htm. (Accessed: 6 June 2020].

[389] Eric et al, https://core.ac.uk/download/pdf/7080885.pdf.

[390] Richard Boylan "What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys" (2005), *ALER*, 379-402.

defendant statements and many more.[391] The evidence is often complemented using expert witness testimony from a domestic violence expert who may be an experienced victim advocate researcher or law enforcement officer. The role of the expert witness is to explain the reasons for the victim's absence or testify on behalf of the alleged abuser and educate on the dynamics of domestic violence or victimisation.[392]

Evidence-based prosecution from the prosecutor's point of view can result in domestic convictions of more abusers, particularly those who might otherwise go free due to their effectiveness in manipulating or threatening their victims to keep them from testifying.[393] This has the added benefit of keeping both uncooperative and cooperative victims safer by placing less emphasis on their role in the prosecution.[394] This results in fewer reasons for the abuser to seek revenge against the victim.[395] Advocates of evidence-based prosecution have also considered the drop in domestic violence over the past decades as a sign of the effectiveness of this unique factor.[396] Evidence-based prosecution also generates obvious criticisms from both ethical and practical perspectives. It overrides a victim's wishes based on the state's role in regulating vengeance and fighting domestic abuse. Although it is often hailed for limiting physical contact between abusers and victims, thereby reducing the risk of a violent reaction, evidence-based prosecution is not always applicable in most domestic violence cases.

In *Crawford v Washington*,[397] the US Supreme Court reversed the conviction of a defendant previously charged guilty of stabbing a man. The court's decision was partly

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[391] Cowling "Basic Criminal Procedure from Arrest through Trial". Available at: http://www.allencowling.com/false04B.htm. (Accessed: 6 June 2020).

[392] Cowling http://www.allencowling.com/false04B.htm.

[393] Richard Boylan (2005), *ALER*, 379-402.

[394] While prosecutors and victim's advocate often contend that the un-cooperative victim's desire for prosecution is based on manipulation, there are also contrary views. Many victims of domestic violence constantly make rational choices concerning their own safety given that they stand a better position than the prosecutor to judge whether the prosecution helps or hurts. See Tonya McCormick "Convicting Domestic Violence Abusers when the Victim Remains Silent" (1999), *BJPA*, 13, 427 446.

[395] Richard Boylan (2005), *ALER*, 379-402.

[396] Abigail et al "Domestic Violence Cases Involving Children: Effects of an Evidence-based Prosecution Approach" (2006), *VV*, 21, 213-229.

[397] *Crawford v Washington* (2004), 124 S Ct 1354.

based on statements made by his wife to police officers and introduced at trial under a hearsay exception, despite her not being present to testify in court. In the reasoned opinion of the court, admitting out-of-court statements under a hearsay exception, even if deemed necessary by the court, violates the defendant's right according to the Sixth Amendment Confrontation Clause.[398] The new standard of assessment replaced the old doctrine set out in *Ohio v Roberts,*[399] in which the court previously established that a trial court could admit out-of-court statements under the hearsay exceptions, provided the statements portray elements of reliability. The court's decision significantly impacted evidence-based prosecution by limiting the use of many hearsay exceptions relied on by prosecutors. In *Davis v Washington*,[400] the court further limited the doctrine, specifically regarding 911 call recordings. The Supreme Court held that hearsay statements made in 911 calls requesting assistance were not "testimonial"; therefore, the introduction at trial did not violate the Confrontation Clause as stipulated in *Crawford v Washington*.[401] These judgments made significant strides in differentiating circumstances on which evidence-based prosecution may necessarily apply.

4.3 Factors influencing prosecutorial decision-making

Evidence matters greatly in prosecutorial decision-making, particularly at the initial screening decision phase. Throughout the life of a case, prosecutors ask two questions:

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[398] According to the court in *Crawford v Washington*, the Confrontation Clause of the Sixth Amendment bars admission of certain hearsay statements of unavailable witnesses. See para. 1370.

[399] See US Supreme Court decision dealing with the Confrontation Clause of the Sixth Amendment to the United States Constitution in *Ohio v Roberts* (1980), 448 US 56.

[400] See *Davis v Washington* (2006), 547 US 813, 126 S Ct 2266.

[401] In the decision authored by Justice Antonin Scalia, the court ruled that the Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford v Washington*, does not apply to "non-testimonial" statements not intended to be used in a future criminal prosecution. Although McCottry identified her attacker to the 911 operator, she provided the information intending to help the police resolve an "ongoing emergency," not to testify to a past crime. The court reasoned that, under the circumstances, McCottry was not acting as a "witness," and the 911 transcript was not "testimony." Therefore, the Sixth Amendment did

not require her to appear at trial and be cross-examined. The court's decision however received contrary views. In the concurrent opinion of CJ Rehnquist, he stated "I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case."

Can I prove this case? Should I prove this case? The first question is a primary question commonly asked during screening, and the answer relies heavily on evidence and the strength of the evidence.[402] As the case progresses, other factors besides evidence come into the decision-making process and shift to the second question: Should I prove this case? The answer to the second question brings different factors into play.[403] These factors include the severity of the offence, the conduct of the defendant and the defendant's criminal history.[404] The prosecutor's discretion to charge lies at the heart of prosecutorial functions, and three features of the charging decision stand out. First, the decision relies on internal and external factors and involves enormous power, which Justice Robert H Jackson described as "the most dangerous power of the prosecutor."[405] Second, the power is virtually unreviewable. Lastly, the charging decision is an exercise of discretion involving many considerations that cannot be reduced to a simple formula.[406]

External factors such as resource availability, case load, availability of support staff and access to investigators also influence prosecutorial decision-making.[407] These are resources outside the prosecutor's comfort zone, which also affect the way they evaluate cases. These factors have pushed prosecutors to centralise resources within their office to enable them to determine cases using judicial processes such as plea bargaining, prosecutorial accountability, and so on.[408] In this regard, the prosecutor matters a great deal in deciding the outcome of a case. Also, a significant variation exists across prosecutors in terms of decision-making. They differ in their interpretation of justice and fairness.[409] Whether fairness means consistency in process or outcome is a matter

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[402] Bennett Gershman, "Prosecutorial Decision-making and Discretion in the Charging Function" (2011), *HLJ,* 62, 1259.

[403] Ibid.

[404] Ibid.

[405] Robert Jackson, J*AICLC,* 31, 3.

[406] According to Burger, "Few subjects are less adapted to judicial review than the exercise by the Executive of his/her discretion in deciding when and whether to institute criminal proceedings…" See *Newman v United States* (1967), 382 F 2d 479, 480 DC Cir.

[407] Bennett (2011), *HLJ* 62, 1259.

[408] See *S v Porritt and Another* (SS40/2006) (2017), *ZAGPJHC*, 73 (10 March 2017), Application for Centralisation.

[409] Heike Gramckow "Enhancing Prosecutors' Ability to Combat and Prevent Juvenile Crime in Their

of individual interpretation. Therefore, the outcome of each case is determined by the prosecutor's interpretation of judicial processes and is subject to the fact that the prosecutor's role is to do justice.[410]

For some prosecutors, justice means a consistent outcome in which a similar result is consistently recorded for the same offence.[411] The role of consistency is, therefore, important in the criminal justice process. Besides consistency, other prosecutors interpret justice as an individualised treatment to the extent that each defendant in a criminal trial is assessed independently with a specific outcome. How the outcome affects such defendants is a matter of justice for many prosecutors.[412] Consequently, justice in a criminal trial will vary, depending on the prosecutor's interpretation and the factors influencing the case. For one prosecutor, a sense of justice may centre on equality and equitable treatment concerning the outcome. For another, justice may centre on the individualised treatment of defendants and a possible outcome because of that treatment.[413]

The difference in these scenarios promotes variations in prosecutorial decision-making. This is commonly presented in a broader context as prosecutorial discretion, *viz* a process by which prosecutors choose between cases that merit prosecution from those not worthy, depending on the specific factors surrounding or influencing the case.[414] Using prosecutorial discretion, prosecutors may produce different outcomes in similar cases depending on the factors affecting such results.[415] Despite the difference in interpretation of justice across prosecutors, all prosecutorial outcomes are driven by a

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Jurisdictions" (2009), JB.

[410] Brian Johnson "The Missing Link: Examining Prosecutorial Decision-Making Across Federal District Courts" *Final Technical Report of the National Institute of Justice* (2010).

[411] Ibid.

[412] Ibid.

[413] Ibid.

[414] See Thomas Keil and Gennaro, "Capriciousness or Fairness? Race and Prosecutorial Decisions to Seek the Death Penalty in Kentucky" (2008), I, 4, 49.

[415] Ibid.

sense of justice; the sense of justice results in fair treatment of the defendant.[416] On this note, it is instructive to point out that, while evidence could contribute a great deal to the outcome of a case, prosecutors need to pay attention to internal and external factors that may contribute to the subsequent determination of a case and how such factors can be controlled.[417]

4.4 Prosecutorial discretion and the theory of utilitarianism

Should the prosecutor sentence the criminal defendant to death for killing people or spare their life for fear of taking away human life? Faced with such competing obligations, applying moral ethics may seem controversial. However, whatever decision the prosecutor makes, the fact remains that killing is wrong in the eyes of the law and morality.[418] Consequently, the prosecutor will continue to punish criminals according to the law, including capital punishment for jurisdictions that provide one.[419] The question is then raised as to whether the prosecutor has the legal authority to stop the killer and, if s/he fails to do so, whether s/he will be termed morally correct for refusing to kill or legally wrong for refusing to comply with the law.[420] In other words, should more attention be focused on the intent behind prosecutorial decision-making or the consequence of such a decision?[421] This dilemma is clarified in the moral theory of utilitarianism.

The moral theory of utilitarianism focuses on the results or consequences of human action and treats intention as irrelevant.[422] Good consequences could be the product of good action, but it is necessary to determine what a good consequence is. One needs to

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[416] Ibid.

[417] Bennett and Gershman (2011), *HLJ,* 62, 125.

[418] Peter Singer "Ethics and Intuitions" (2005), *JE*, 9, 331-352. Del Ponte, "Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY" (2006), *JICJ*, 4, 539-558.

[419] Del Ponte (2006), *JICJ*, 4, 539-558.

[420] Richard Fuller "Morals and the Criminal Law" (1941), *JCLC*, 32, 624.

[421] The challenge of prosecutorial decision-making and the difficult choices as to whether or not to prosecute have been identified by many writers to be the major challenge facing prosecutors in criminal courts. See Morris Cohen "Moral aspects of the Criminal Law" (1940), *YLJ*, 49, 987-1026.

[422] See The History of Utilitarianism, Stanford Encyclopedia of Philosophy. Available at: https://plato.stanford.edu/entries/utilitarianism-history/ (Accessed: 16 June 2020].

examine the dynamics of the theory of utilitarianism to interrogate this question. Modern utilitarianism was founded in the 18th century by the British philosophers Jeremy Bentham and John Stuart Mill.[423] The theory was also explored by ancient philosophical Greek thinkers such as Epicurus.[424] All these philosophers agree that actions should be measured in terms of the good consequence they produce.[425] In *Brinegar v United States*,[426] the Supreme Court held that prosecutorial decision-making would be justified, provided ample evidence suggested the prosecutor's discretion to prosecute and punish would produce the best result. Things are often done for the sake of an anticipated outcome which is good. For instance, people study to get good grades or work to get money, where the question is raised, why pursue good grades or money? It may be to seek affirmation from superior authorities or get a degree certificate, but then it becomes pertinent to ask why people want affirmation or approval. These questions may increase but are answered each time by the desire for an anticipated positive outcome.[427]

Utilitarians believe the desire to want or to expect a positive outcome should be the moral driver of human action. Like Kant, utilitarians agree that a moral theory should apply equally to everyone.[428] To achieve this aim, they propose that every moral theory be grounded in something intuitive, and nothing other than the desire to do justice could comply with such requirements.[429] Utilitarianism is a hedonistic moral theory, interpreted

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[423] Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (1907), Oxford: Clarendon Press, 1.

[424] Stephen Rosenbaum "Epicurean Moral Theory" (1996), HPQ, 13, 389-410.

[425] Bentham (1907), 10.

[426] *Brinegar v United States* (1949), 338 US 160,175-76. The court's decision based on probable cause is subject to the understanding that the prosecutor bears a subjective belief that there is at least some quantum of proof in terms of the scope and quality of evidence amounting to "probable cause" before filing charges. In other words, that it is more likely than not that a crime was committed and that the defendant committed the alleged crime. Although this standard refers to the "methods by which a prosecutor may pursue criminal charges, including complaints, information, and grand jury indictments," the substance of the standard focuses not on a prosecutor's "methods" of charging but, rather, on the prosecutor's belief in the factual basis for the charges, his belief in the defendant's guilt or innocence, and the avoidance of improper considerations in charging.

[427] Bentham (1907), 10.

[428] Wood Allen *Kantian Ethics* (2008) Cambridge University Press, 14.

[429] Thomas Hindes "Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process" (1977), *UPLR,* 126, 344.

by the understanding that good is equal to justice, and the essence of morality is to 'rubber stamp' justice as the outcome. To express utilitarianism more generally is to say people are always encouraged to act to produce the greatest good for the greatest number, as a typical reflection of the principle of utility.[430]

By invoking the theory of utilitarianism, it is argued that no matter how important the prosecutor's opinion may be in prosecutorial decision-making, it may not override the dictates of morality, the conscience of humanity, or the good opinion of the majority.[431] The theory of utilitarianism is democratic to the extent that the minority may have their say, but the majority must have their way for the good of all.[432] Utilitarianism suggests that prosecutorial decisions be made from the position of a morally benevolent, disinterested spectator and that selfish interests or desires must not guide such decisions.[433] Rather, prosecutorial decisions ought to incorporate the values of morality and good conscience in the interest of justice. The extent to which morality and good conscience can be exercised is a question that often emerges as a criticism of utilitarianism. To exhaust this criticism, one must consider the hypothetical example expounded by Bernard Williams.[434]

Williams offered a hypothetical example in which a man named Jim undertook a botanical expedition in South America, coming across a group of 20 indigenous people who were prisoners and surrounded by a group of soldiers.[435] The prisoners were about to be executed by the soldiers for protesting against their oppressive regime. For some reason, the leader of the soldiers offered Jim the chance to shoot one prisoner as a sacrifice for

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[430] Simon "Hedonistic Act Utilitarianism: Action Guidance and Moral Intuitions". Available at: http://uu.diva-portal.org/smash/get/diva2:1393442/FULLTEXT01.pdf (Accessed: 16 June 2020).

[431] See Brandt "Utilitarianism and Moral Rights" (1984), *CJP,* 14, 1-19.

[432] Ibid. The application of utilitarianism or the principle of utility is common in federal systems in which prosecutorial decisions are often reached by the majority of judges in a jury trial.

[433] Sarah Welling "Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision" (1988), *ALR,* 30, 85; Joseph Vanover "Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice" (1998), JDR*,* 183.; Thomas Morawetz, "Utilitarian Theory of Judicial Decision" (1979), *ASLJ,* 339.

[434] Dryer "Utilitarianism, For and Against" (1975), *CJP*, 4, 549-559.

[435] Mark Jenkins *Bernard Williams* (2014), Routledge Taylor and Francis Publishers, 1.

19 to be set free. He added that, should Jim refuse to shoot one prisoner to save the remaining 19, his soldiers would shoot all 20 prisoners.[436] The theory of utilitarianism focuses on actions, not intentions, and Williams presents this analogy as a critique of utilitarianism. The hypothetical case clearly demands that Jim shoot one person to save 19, but William argues no moral theory ought to demand the killing of innocent life.[437] Thinking like a Kantian, Williams argued that it is not Jim's fault that the head soldier presents him with an immoral request, which he is under no moral obligation to obey.[438] Although at first glance, this may appear to be a simple conclusion to draw, utilitarianism is a very demanding moral theory, as the dilemma at the heart of this analogy would imply. The theory suggests that prosecution is complex and, all too often, prosecutors are faced with difficult choices.[439] However, no matter how difficult or complex the situation might seem, prosecutors are expected to make good choices that reflect a sense of justice. They are important role players in the criminal justice system, so their decisions should be prudent and justified based on equity, morality and good conscience; otherwise, they jeopardise the criminal justice system.[440] In the case of Jim and the indigenous people, William argues that, instead of planning to kill one person, Jim should improvise alternative means to save all 20 people, as they all face the threat of death.[441]

Two aspects must be considered to apply the theory of utilitarianism in any study, the act and rule of utilitarianism.[442] When Bentham and Mill first proposed their moral theory, it was in a form now known as act utilitarianism or classical utilitarianism.[443] This form of utilitarianism argues that, in any situation, decision-makers should choose actions that

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[436] Ibid.

[437] Ibid.

[438] Mark Jenkins (2014), Routledge Taylor and Francis Publishers, 1.

[439] Christopher Russell "The Prosecutor's Dilemma: Bargains and Punishments" (2003), *FLR,* 72, 93.

[440] Christopher Russell (2003), *FLR,* 72, 93.

[441] Mark Jenkins (2014), Routledge Taylor and Francis Publishers,1.

[442] Jacob, Act Utilitarianism vs Rule Utilitarianism. Available at: https://repozitorij.hrstud.unizg.hr/islandora/object/hrstud%3A1725/datastream/PDF/view (Accessed: 16 June 2020].

[443] Jacob https://repozitorij.hrstud.unizg.hr/islandora/object/hrstud%3A1725/datastream/PDF/view (Accessed 16 June 2020).

produce the greatest good for the greatest number.[444] However, the act that produces the greatest good for the greatest number might not seem right in all instances. For example, suppose a surgeon has five patients awaiting organ transplantations. The first patient needs a heart, the second a lung, two await kidneys, and the last one needs a liver. The doctor knows that all five patients will die before their names appear in the service book. In a short while, the doctor notices an isolated patient suffering from acute brain failure is a match for all five transplants. Although it seems absurd, Williams noted that a utilitarian would kill the isolated patient and use the organs for transplantation to save the five lives.[445] Although this action leads to the death of an innocent life, five lives will be saved in return, thereby complementing the principle of doing the greatest good for the greatest number.[446]

While most utilitarians share the ideals of 'act utilitarianism', others differ and say it places innocent lives at risk, constituting a biased example of moral utilitarianism. This has led some utilitarians to devise what is referred to as 'rule utilitarianism'.[447] This holds that decision-makers ought to live by rules that, in general, are likely to lead to the greatest good for the greatest number.[448] Rule utilitarianism compels decision-makers to think of the long-term consequences of their actions. A society where people are taken off the streets to have their organs harvested will have less utility than one in which people live free from such eventualities.[449] Therefore, rule utilitarianism discourages prosecutorial decision- making that might maximise utility in the short term. Rather, it allows the decision-making process to follow rules that maximise utility for the long term.[450] Consequently, this approach will be reasonable for those harbouring human organs, namely the totality of human beings. The moral theory of utilitarianism discusses the

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[444] Jeremy Bentham (1907), Oxford: Clarendon Press, 10.

[445] Christopher Jones "The Utilitarian Argument for Medical Confidentiality: A Pilot Study of Patients' Views" (2003), *JME,* 29, 348-352.

[446] Mandal Jharna "Utilitarian and Deontological Ethics in Medicine" (2016), *TP,* 5.

[447] See Harsanyi John "Rule Utilitarianism and Decision Theory" (1977), *E,* 11, 25-53.

[448] Ibid.

[449] Ibid.

[450] Ibid.

principle of utility and the difference between the act utilitarianism and the rule utilitarianism in the process of decision making.

While utilitarian theory provides a notochord to prosecutorial decision making, it does not entirely exhaust the fundamental questions surrounding prosecutorial authority. The arguments advanced by utilitarian philosophers only provide a selection of the factors to consider throughout the decision-making process. These factors are the salient points directing the decisions of most prosecutors. Notwithstanding this, the question of prosecutorial authority remains critical. Prosecutorial authority is the main driver of prosecutorial decision making. Gershman framed this to say, at the heart of prosecutorial authority is the prosecutor's charging decision.[451] Like other fiduciary relationships, prosecutors have discretionary powers over criminal defendants, who are inherently vulnerable.[452] Therefore, whether to prosecute is a discretion vested in their authority as prosecutors. Efforts to theorise prosecutorial authority have yielded few results. A combination of legal instruments, including prosecutorial decision making, have been identified as justifications for prosecutorial authority.[453] For analysis, the debate on prosecutorial authority is reflected in the theory of government discussed below.

4.5 Conceptualising the theory of prosecutorial authority

An essential theoretical framework for explaining the concept of prosecutorial authority is the theory of government as propounded by Charles Krieger in the Supreme Court of Canada (SCC) as follows:

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[451] Bennett Gershman "Prosecutorial Decision-making and Discretion in the Charging Function" (2011), *HLJ,* 62, 1259.

[452] Daniel Richman "Old Chief v United States: Stipulating Away Prosecutorial Accountability?" (1997), *VLR,* 83, 963–64.

[453] Bruce Green and Rebecca Roiphe "A Fiduciary Theory of Prosecution" (2019), *AULR,* 69, 101.

> In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.[454]

In some respects, prosecutorial authority is analogous to prosecutorial power or discretion. It is also referred to as enforcement discretion in criminal law. Prosecutorial authority generally refers to the requisite duty of any law enforcement agent or agency to decide whether to exercise their enforcement powers against a criminal suspect.[455] In common law adversarial justice systems, this decision-making process is generally understood as the exercise of prosecutorial discretion. Thus, a crucial concept in this regard is the principle of charging discretion, which Zacharias and Green classify as "prosecutorial neutrality",[456] "prosecutorial independence",[457] or "prosecutorial authority."[458] In *Krieger v Law Society of Alberta,*[459] the Supreme Court of Canada (SCC) defined prosecutorial discretion as follows:

> Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office, and which are protected from the influence of improper political and other vitiating factors by the principle of independence.[460]

This definition seeks to drive home the idea that the connection between prosecutorial discretion, the power of the prosecuting attorney, and the principle of independence is more apparent than real. Thus, prosecutorial discretion should be independent and duly authorised by law. This position is also illustrated by Francois du Bois' conception of the

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[454] Krieger v Law Society of Alberta (2002), SCC 65. [45].

[455] Shoba Wadhia "The Role of Prosecutorial Discretion in Immigration Law" (2010), *CPILJ*, 2, 246.

[456] Fred Zacharias and Bruce Green "Prosecutorial Neutrality" (2004), *USPLLTRPS,* 25, 1 – 69.

[457] Ibid.

[458] Ibid.

[459] 2002, 3 SCR 65 [CanLII] para 43.

[460] *Krieger v Law Society of Alberta* (2002), 3 SCR 65 [CanLII] para. 43.

authority of law:

> To say that law claims authority is misleading in one respect. The law is not a person and therefore cannot claim anything… a fuller understanding of law is made easier by the more accurate statement that it is persons who claim that law is authoritative and has the attributes can lay claims to the law's authority.[461]

In this context, a pragmatic example of such persons laying claims to the law's authority are prosecutorial authorities.[462] In the literal sense, prosecutorial discretion is unenforceable where legal authority is absent.[463] In other words, without the authority of law, compliance and consistency with criminal procedure will be impractical. Thus, according to Luna, "unprincipled discretion or lack of consistency can threaten the authority of law and those charged with enforcing it, and could potentially reduce popular compliance with legal demands."[464] The understanding here is that prosecutorial authority will be highly constrained if it lacks legitimacy as an essential attribute of legal norms. This refers to a community's recognition of the binding nature of the legal order and the appropriateness of sanctions for violating it.[465]

Prosecutorial discretion is central to the administration of justice,[466] with mandatory prosecutorial duties being shouldered by the responsible authorities. Observations indicate that this duty remains significantly constrained.[467] According to Frederick and Stemen, notwithstanding the notion that prosecutorial discretion is largely broad and unrestrained, "prosecutorial decision-making is further constrained by several contextual

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[461] Du Bois, Willes Principles of South African Law 9th ed (2007), 7.

[462] See *Du Bois* (2007), 7. Arguing that persons with the authority of law such as the judiciary, the law makers and members of the police force will be unable to justify their enforcement actions without reference to the authority of law.

[463] Erik Luna "Principled Enforcement of Penal Laws" (2000), *BCLR*, 4, 515-523.

[464] Erik Luna (2000), *BCLR,* 4, 515-523.

[465] John Haley *Authority Without Power: Law and the Japanese Paradox* (1991), Oxford University Press, 6.

[466] Fred Zacharias and Bruce Green (2004), *USPLLTRPS,* 25, 1 – 69.

[467] Darryl Brown, "How Criminal Law Dictates Rules of Prosecutorial Authority" file:///C:/Users/leovo/Desktop/Brown%20%20How%20Criminal%20Law%20Dictates%20Rules%20of%20Prosecutorial%20Authority.pdf (Accessed: 27 February 2018), 5.

factors…"[468] The factors envisaged here are the rules, resources, and relationships that have become increasingly influential in evaluating whether to pursue a criminal case. Even without judicial control of charging discretion, prosecutorial authority is still subject to constitutional constraints, which are perhaps unenforceable, except by prosecutors themselves.[469]

The impact of contextual constraints, such as those mentioned above, differs in different jurisdictions. Commentators generally agree that the availability of resources and the relationships between the executive and judiciary can sometimes undermine judgments on the "strength of the evidence, the seriousness of the offense, and the defendant's criminal history."[470] This admission constitutes an important step in holding prosecutors accountable for their actions and opens the doors to the possibility of criminal liability for abuse of prosecutorial authority.[471] In Germany, for example, prosecutors can be criminally liable for illegally authorising crime victims to petition the court for an order to compel prosecution or for failing to investigate or prosecute "colourable" offences. According to the German principle of Rechtsbeugung, this criminal offence makes one liable to a sentence of up to five years in prison.[472] In the South African case of *Van der Westhuizen v State,*[473] the Supreme Court of Appeal ruled that the prosecuting attorneys cannot be blamed for not insisting on enforcing a subpoena order issued for witnesses that could support the appellant's case. It has therefore been suggested that contextual constraints ought to be re-evaluated by criminal justice policymakers to avoid distortions

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[468] Bruce Frederick and Don Stemen The Anatomy of Discretion: An Analysis of Prosecutorial Discretion-Making – Technical Report (2012), Vera Institute of Justice, iii.

[469] Comment by J Kozinski in *United States v Redondo-Lemos* (1992), 955 F 2d 1296, 1300 (9th Cir).

[470] Frederick and Stemen (2012), iii.

[471] Darryl Brown,

"How Criminal Law Dictates Rules of Prosecutorial Authority" file:///C:/Users/lenovo/Desktop/Brown%20%20How%20Criminal%20Law%20Dictates%20Rules%20of%20Prosecutorial%20Authority.pdf, 5.

[472] See Isabel Kessler "A Comparative Analysis of Prosecution in Germany and the United Kingdom: Searching for Truth or Getting a Conviction? In Wrongful Convictions: International Perspectives on Miscarriages of Justice (2008), 213, 216. Ronald Huff & Martin Killias (eds).

[473] *Van der Westhuizen v State* (2011), (266/10) *ZASCA* 36 (28 March 2011) para. 4.

and lack of understanding of prosecutorial functions in the future.[474]

Grounding prosecutorial authority on the principles of criminal justice is an important aspect of the evolution of criminal justice systems globally. Historical antecedents show that even ancient communities administered criminal justice through specially designated authorities. It is unsurprising that, with the development of modern states, many governments have tended to prioritise criminal justice, both within the state and internationally. This development is not only in response to the community's demands for punishment of crimes and justice but also serves as a powerful tool for a government to intervene "destructively" in the lives of citizens.[475] By using the term "destructively", the author is attempting to shed light on the expanding scope of prosecutorial powers and the tremendous impact prosecutorial decisions can have on citizens' fundamental rights. By establishing prosecutorial authority, governments are, in Griffin's terms, making a symbolic assertion of their powers or so-called "entitlements to information as property."[476]

The independence of prosecutorial authorities varies significantly with jurisdiction. As asserted earlier, prosecutorial authority is subject to significant constraints, even when respective constitutions accord prosecutors expansive discretionary powers.[477] However, it must be appreciated that prosecutors function with much less constraint in some jurisdictions, such as the US legal system.[478] Luna and Wade made an almost exhaustive list of what these limitless discretionary powers, with little or no judicial supervision,[479] would entail in practice:

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[474] Frederick and Stemen (2012) iii.

[475] Paul Robinson and John Darley "The Utility of Desert" (1997), *NULR*, 91 453, 482.

[476] Griffin Lisa "Criminal Lying, Prosecutorial Power, and Social Meaning" (2009), *CLR,* 97, 1536.

[477] Rebecca Krauss "The Theory of Prosecutorial Discretion In Federal Law: Origins and Developments" (2012), *SHCR,* 6, 1, 2.

[478] Rebecca Krauss (2012), *SHCR*, 6, 1, 2.

[479] Andrew Loewenstein "Judicial Review and the Limits of Prosecutorial Discretion" (2001), *ACLR,* 38, 351.

> Prosecutors decide whether to accept or decline a case and on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects of pre-trial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed upon conviction. These and other discretionary judgments are often made without meaningful internal and external review or any effective opposition. In many (if not most) American jurisdictions, the prosecutor is the criminal justice system. For all intents and purposes, he makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences.[480]

Although not exhaustive, all the functions stated above are characteristic of the two main systems of prosecutorial authority, the common law system, which is mainly adversarial, and the civil law system, which is mainly inquisitorial.[481] Throughout history, these criminal justice systems differed substantially in defining the scope of prosecutorial authority. However, of late, it has been noted that contemporary practices in criminal justice systems have blurred these once substantial differences between the common and civil law models.[482]

4.5.1 International benchmarks for prosecutorial charging authority

Two significant developments in the 20th century regarding prosecutorial authority can be isolated. The first is the adoption of the United Nations Guidelines on the Role of Prosecutors.[483] These guidelines brought about significant changes concerning how prosecutors in UN member states discharge their prosecutorial mandate. The second development is the adoption of Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors[484] by the International

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[480] Luna Erik and Wade Marianne "Prosecutors as Judges" (2010), *WLLR,* 67, 1415.

[481] Kai Ambos "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports" (2000), *EJCCLCJ,* 8, 89 – 118.

[482] Yue Ma "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective" (2002), *ICJR,* 12, 22-52.

[483] The UN Guidelines for 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.

[484] Standards of professional responsibility adopted by the International Association of Prosecutors (IAP) on 23 April 1999, following its establishment in June 1995 at the UN offices in Vienna.

Association of Prosecutors (IAP). These standards by IAP ostensibly serve as an international benchmark for prosecutorial conduct.[485]

The atrocities of civil wars and revolutions that largely marked the 20th century and the failure of many states to bring perpetrators to justice exposed the prosecutorial weaknesses inherent in most member states of the United Nations. In addition to the failure of states to bring perpetrators of heinous crimes to justice, there are many inconsistencies within international criminal justice systems and values. These inconsistencies testify to the discord in how prosecutorial authorities in different countries function. For instance, the idea of universal human rights, which assumes that different countries share common moral aspirations to uphold civil liberties and human rights, is largely uncontested and real. However, observation 'on the ground' points to a different direction. This validates the views of Drumbl, who states that "it's one thing to agree to the universal repudiation of the great evils and to agree that victims are entitled to accountability. It is another matter to accept the universality of categorizing [sic] the great evils as crimes." In my view, Drumbl's observation points to the need for constituting an effective and accountable prosecutorial authority, especially in the context of international law or, more precisely, the ICC. The ideals of the ICC's prosecutorial authority have been succinctly described as follows:

> [a]spires to institutionalize [sic] the ideal of universal justice. In its inclusive notion of human suffering in which 'all peoples are united by common bonds' the ICC embodies the cosmopolitan worldview in which all victims are citizens deserving the protection afforded by the rule of law. The court's intent to treat all people equally and to privilege no one over another is a cornerstone of cosmopolitanism's regard both for 'the moral worth of persons' [and] the equal moral of all persons.[486]

As set out in international law and the ICC, the exemplary standards of a prosecutorial authority are founded on the global community's shared perception that peaceful

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[485] See Generally Article 2.3 of the IAP Constitution.

[486] Peskin "An Ideal Becoming Real? The International Criminal Court and Limits of Cosmopolitan Vision of Justice". In: R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (2010), 196.

coexistence can only be cultivated by strengthening and retaining shared moral values.[487] The responsibility of maintaining and protecting these shared values, both at the local and international level, rests mainly on the individuals with ultimate prosecutorial authority.

In reality, the prevalence of prosecutorial misconduct is not necessarily lower under the current UN Guidelines, complemented by the *Standards of Professional Responsibility and Statements of the Essential Duties and Rights of Prosecutors* by the International Association of Prosecutors (IAP).[488] However, it can be reasoned that including certain principles and guidelines as the anchor of the new era of prosecutorial accountability to promote effectiveness, impartiality, and fairness is a step in the right direction. The views of the courts, commentators, and legal scholars may be used to interpret and give content to some of the dominant aspects of these codes and guidelines.

4.5.1.1 Effectiveness

Article 20 of the *UN Guidelines for Prosecutors* states, "In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions". Similarly, paragraph 12 of the Preamble to the Guidelines indicated that effectiveness, among other reasons such as impartiality and fairness, forms the basis of the instrument.[489] The IAP *Standards of Professional Responsibility* describe the principle of cooperation between prosecutors and other law enforcement agents as a requirement for effectiveness in prosecutorial services.[490] In most criminal procedure contexts, the

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[487] Tomuschat "The Legacy of Nuremberg" (2006), *JICJ,* 4, 830; Luban "A Theory of Crimes against Humanity" (2004), *YJIL*, 29 85; Larry May *Crimes against Humanity: A Normative Account* (2005), Cambridge University Press, 326; Cassese "The Rationale for International Criminal Justice". In: A Cassese (ed), (2009), the Oxford Companion to International Criminal Justice*,* 123, at 127; Roach "Value Pluralism, Liberalism and the Cosmopolitan Intent of the International Criminal Court" (2005), *JHR*, 4, 475, 485–486.

[488] See Standards of Professional Responsibility and Statements of the Essential Duties and Rights of Prosecutors by the International Association of Prosecutors. Available at: https://www.iap-association.org/Resources-Documentation/IAP-Standards-(1) (Accessed: 25 June 2020).

[489] See Preamble para. 12 of the *UN Guidelines for Prosecutors*.

[490] See Generally Article 5 (b) of the IAP Standards of Professional Responsibility.

democratic dynamics at play have also revealed the power of other regulated entities to influence prosecutorial authorities' discretion. Such trends can equally serve as additional checks for their effectiveness against external influences on prosecutorial authority.[491] These dynamics support a more limited idea that prosecutorial authorities' discretion cannot be implemented effectively in adversarial criminal justice systems without the cooperation of other regulated agencies.

4.5.1.2 Impartiality

One of the principal reasons for formulating the *UN Guidelines for Prosecutors* is to promote impartiality while considering the particular framework in which each government functions.[492] The notion of impartiality generally entails performing prosecutorial duties without fear, favour, or prejudice.[493] The instrument also relates this to the requirement of non-sectionalism instead of the public interest or succumbing to media pressure while exercising prosecutorial discretion.[494] Impartiality can also be said to be synonymous with "objectivity."[495]

4.5.1.3 Consistency

Achieving consistency in prosecutorial services demands the publication of rules which prosecutors must adhere to as they exercise discretion. Article 17 of the *UN Guidelines for Prosecutors* provides that countries which vested prosecutorial powers in prosecutors should publish rules or regulations to guide them in exercising discretion. This is meant to enhance fairness and consistency in prosecutorial decision-making.[496] Apart from these regulatory instruments, head prosecutors also play a pivotal role in guiding subordinate prosecutors and encouraging consistency. Head prosecutors should

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[491] Peter Markowitz "Prosecutorial Discretion Power at Its Zenith: The Power To Protect Liberty" (2017), *BULR,* 97, 535.

[492] See article 4 of the UN Guidelines for Prosecutors.

[493] Article 4 para. (a) of IAP Standards of Professional Responsibility.

[494] Article 4 para. (b) of IAP Standards of Professional Responsibility.

[495] Article 4 para. (c) of IAP Standards of Professional Responsibility.

[496] UN Guideline for Prosecutors (1990).

encourage line prosecutors to follow their exemplary rhetoric and public aspirations regarding justice delivery. According to Bibas,[497] consistency can also be maintained by using administrative instruments relevant to hiring, promoting, and firing prosecutor candidates who seem prone to "going rogue".

4.5.1.4 Independence

In terms of Article 2 of the *IAP Standards of Professional Responsibility*, the condition for exercising prosecutorial authority entails express permission in the jurisdiction. This often comes with the requirement that such powers are authorised to function independently from political influence and also to ensure unfettered access to justice by citizens.[498] Article 10 of the UN Guidelines for Prosecutors provides that "Prosecutors must be strictly separated from the Judiciary."[499] The Act states that even non-prosecutorial authorities should be transparent and consistent in dealing with prosecutors to guarantee independence.[500] From the advent of the two international benchmark instruments in the 1990s, prosecutors have enjoyed more general legal protection in terms of the widening scope of prosecutorial discretion, tailored to conform to the existing and emerging contemporary democratic practices. Such democratic practices include the rule of law and the separation of powers within the three arms of government.[501] Following adoption of the *IAP Standards of Professional Responsibility* in 1999, prosecutorial authorities in many states have had to consider a new phenomenon, making it even more essential to make the correct decision. This phenomenon has simply increased attention on prosecutorial decisions and cases of misconduct by the media, academics, and commentators.

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[497] Stephanos Bibas "The Need for Prosecutorial Discretion" (2010), *FS,* 373, 374.

[498] Article 2 (2.1) of the IAP Standards of Professional Responsibility (1999).

[499] UN Guidelines for Prosecutors, 1990.

[500] UN Guidelines for Prosecutors, 1990.

[501] It is important to note that, as of 1990 when the UN Guidelines for Prosecutors was adopted, African countries such as South Africa and Nigeria in particular were yet to transition to democratic systems of government. South Africa officially became a democratic state in 1994 and Nigeria followed suit in 1999.

4.5.2 International normative standards for prosecutors

In international law, normative standards refer to a wide range of international developments or practices which enjoy widespread acceptance as relevant and important if maintaining shared values. Although norms may be generated by recognised international bodies such as the IAP, credence is given primarily to their application to human rights development and protection. Accordingly, one can say that the nature of such human rights obligations by expressed recognised international bodies depends on creating norms within the international community. Moreover, creating norms is as important as their implementation since various systems adopt different approaches to the sanctity of each norm. Research shows that norms are generally developed to make the decision-making process more predictable[502] and cater for the organisational efficiency needs of prosecutorial authorities.[503]

According to Miller and Wright, internal prosecutorial norms, for example, can develop and consistently shape prosecutors' behaviour, even without any judicial monitoring.[504] This development creates consistency in exercising prosecutorial discretion against lawless and arbitrary decisions. As Bibas rightly observed, "[w]hat we need to watch for in practice then, are the forces that push prosecutorial discretion in the wrong direction, away from the public's sense of justice."[505] He mentions agency costs as one of the most troubling forces against consistent prosecutorial discretion.[506] Therefore, norms must be developed to shield prosecutorial decision-making from unsustainable development and practices. Accordingly, Bibas suggests encouraging prosecutors to establish patterns and habits against idiosyncratic discretion and try to justify deviations from those habits, thereby also developing evolving guidelines,[507] referred to as norms. After all, judges also have some discretion, which they must often justify in their rulings with reasoned, written

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[502] See Eisenstein and Jacob (1977); Eisenstein et al (1988); Ulmer (1997).
[503] Dixon (1995); Engen and Steen (2000).
[504] See Miller and Wright. In: Bibas (2010), FS, 373, 374.
[505] Stephanos Bibas (2010), FS, 373, 374.
[506] Ibid.
[507] Ibid.

opinions subject to appellate review and public scrutiny.[508]

International benchmark instruments for prosecutors often express the fundamental principle of consistency in law, specifying this principle in clauses invoking normative standards. Article 17 of the *UN Guidelines for Prosecutors* provides regulatory guidelines for discretionary functions to enhance fairness and consistency, including "institution or waiver of prosecution."[509] It is also specified that prosecutors:

[s]hall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized [sic] by international law and, where authorized [sic] by law or consistent with local practice, the investigation of such offences.[510]

This means prosecutors must be consistent with local practice in making prosecutorial decisions.

Prosecutorial authority essentially functions within normative systems and frameworks. However, international recognition of normative practices does not negate substantive rules of prosecutorial conduct. The established norms for certain recurring types of cases and illustrations of exceptional cases are usually developed by common-law accretion of precedent.[511] This enables newer attorneys to follow precedents from the accumulated wisdom of their predecessors, thereby making it easier for prosecutors to justify their decisions. In essence, normative standards could serve as the necessary benchmarks and mental anchors for achieving consistency in prosecution services. Normative effects on prosecutorial services could easily transform into injustice if applied to inherently dissimilar situations without considering circumstances relating to each case.

Normative standards are extended by the principle of consistency, which generally refers

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[508] Ibid.
[509] UN Guidelines on the Role of Prosecutors (1990).
[510] Article 15 of the UN Guidelines for Prosecutors (1990).
[511] Bibas (2010), *FS*, 373, 374.

to uniformity in outcomes or, at the least, uniformity in decision-making.[512] Thus, inconsistency or lack of uniformity is most likely attributed to normative issues. However, normative issues are sometimes developed primarily from concerns about consistency.

In the Southern County District of the US, for example, research has shown that inconsistency was generally not a concern since office culture divided crimes into specific units, with no two units prosecuting the same offences. This is followed with tight supervision and the so-called round tabling of cases to ensure consistency in practice and outcome.[513] It has been reported that this round table determination of charges to file and pleas to offer have also contributed to consistent outcomes in related cases.[514] This particular strategy often determines the outcomes of cases in other ways, particularly in the face of limited resources and time constraints.

4.6 Methodology issues

Prosecuting authorities in domestic criminal justice systems function differently and independently of one another's legal tradition regarding methodology or approach.[515] As indicated in previous discussions, this phenomenon manifests within the two main legal systems, the "common law system, which is predominantly adversarial and the civil law justice system, which is mainly inquisitorial."[516] Although historically different, commentators have played down the differences as irrelevant or insignificant; their argument being contemporary developments illustrating modern-era prosecutorial services in some civil law countries have blurred critical distinctions that may have existed in methodology.[517]

In all domestic legal systems, the common law principle of presumption of innocence

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[512] Frederick and Stemen (2012), 47.

[513] Frederick and Stemen (2012), 47, 48.

[514] Frederick and Stemen (2012), 48.

[515] Philip Stenning "Prosecutions, Politics and the Law: The Way Things Are". In: Danwood Chirwa and Liz Nijzink (eds) (2012), *Accountable Government in Africa: Perspectives from Public Law and Political Studies*, 109.

[516] Kai Ambos (2000), *EJCCLCJ,* 8, 89-118.

[517] Ibid.

remains a critical factor in the administration of justice. There is scarcely any justice system in the modern era where the accused is pronounced guilty before they can prove their innocence. The general presumption prevalent in most criminal justice systems is that states are more likely to commit their resources only to investigate and prosecute serious crimes. In the rules laid down by most states, procedures and limited exceptions are accorded to diplomats protected by diplomatic immunity, minors, and the insane.[518]

Perhaps the most dominant methodology in modern-era systems is the separation of prosecutorial powers from other arms of government, namely the judiciary and legislature. Most significantly, this includes separating prosecutorial powers between two executives, namely the executive and prosecuting authority of government. Although they may fall within the same organ of government, they are usually required to exercise their discretion independently.

The prosecutor's independence as an individual and the prosecuting authority as an institution lies at the heart of the rule of law. Without the privilege of working independently, prosecutors cannot fulfil their obligations in prosecuting crime and cannot be held accountable to the public. According to a 2015 Annual Report on Independence and Accountability of the Judiciary and of the Prosecution, published by the European Network of Councils for the Judiciary (ENCJ), "[i]ndependence does not stand on its own. It must also be recognized [sic] that independence is directly linked to accountability".[519] This means that the prosecuting authority cannot lay claims to independence without due regard to public accountability.[520] After all, society is responsible for granting it the independence for which it strives.

In all common law countries, it is a general rule that the prosecutorial authority is accorded or guaranteed independence from political interference in carrying out their

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[518] William Schabas Prosecutorial Policy and Practice: Selecting Situations and Cases in Carsten Stahn The Law and Practice of the International Criminal Court (2015), 365. Oxford Scholarly Authorities on International Law (OSAIL).

[519] See ENCJ Project on Independence and Accountability 2014-2015 adopted in The Hague 5 June 2015 (2015), 11.

[520] ENCJ Project, 11.

duties as mandated by the constitution. However, determining independence depends on certain methodological factors, which may influence prosecutorial independence and accountability. These include the appointment method of the chief prosecutor, the legal status of the office and powers of the prosecutor, the degree of autonomy of the prosecutorial authority, and the tenure of the incumbent.[521] These factors are so essential that, without effective management, the prosecutor cannot have true independence. Describing the importance of prosecutorial independence, the Supreme Court of Canada declares that the

> [i]ndependence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process.[522]

Prosecutorial independence ensures the prosecutor's decision whether to initiate criminal investigations or prosecution is not politically induced but based on evidentiary and public interest. Stenning defines an evidentiary test as whether the evidence obtained against the accused person is sufficient, credible, and admissible in court to secure a conviction.[523] The public policy tests involve decisions based on the public interest rather than legal judgments.[524] According to the South African prosecution policy, the prosecutor can proceed with the prosecution once there is prima facie evidence necessary for conviction.[525] In Canada, the public interest is generally conceived as a legal standard to achieve public good.[526]

In most common law systems, prosecutors generally rely on the modus operandi of the

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[521] Ambos (2000), *EJCCLCJ*, 8, 89-118.

[522] Paragraph 46 of *Miazga v Kvello Estate* (2009), SCC 51.

[523] Stenning (2012), 106.

[524] Ibid.

[525] See part 4 of the South African Prosecution Policy, 1 December 2005. See also the Appeal Court decision in *Gouriet v Union of Post Office Workers* (1978), AC 435; para. 523 – 4.

[526] Deborah MacNair "In the Name of the Public Good: Public Interest as a Legal Standard" (2006), *CCLR,* 10, 175 – 204.

country to initiate criminal proceedings. In most, if not all, cases, criminal proceedings are instituted once there is sufficient information regarding an offence. The prosecutor is then expected to exercise their discretionary powers to determine the nature of the charges, depending on the chances for successful prosecution. However, in some countries' legal traditions, the prosecutor can act more effectively by using his powers to negotiate a plea bargain with a suspect. A plea bargain will only be entered if the suspect helps the prosecutor by giving evidence that can be used to prosecute other suspects or by cooperating with the state such that resources are not wasted by going through a lengthy trial.[527]

Another arrangement prevalent in common law systems is that prosecutorial functions are effectively separated from investigative ones. In this arrangement, the prosecutor relies on evidence provided by a different institution of government. This allows prosecutors to focus strictly on the overall exercise of prosecutorial discretion and prosecution after the police or the authorised agency in charge of the investigation has finished conducting a full investigation into the crime.[528] This practice has been replicated in many common law countries, including South Africa and England, where the chief prosecutor is either known as the Director of Public Prosecutors (DPP), as in England and Wales, or the National Director of Public Prosecutions (NDPP) in South Africa. Neither the DPP nor the NDPP is involved in investigating crimes, as this is the responsibility of the police.[529] However, research has shown that some adversarial systems have allowed prosecutors to conduct investigations and prosecute crimes in some instances.

For example, after the end of the Second World War, the Nuremberg International Military Tribunal (IMT), set up by the allied forces to try various major war criminals in Europe, permitted prosecutors to investigate and prosecute war crimes.[530] However, this practice

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[527] Deborah MacNair (2006), CCLR, 10, 175-204.

[528] Julia Fionda *Public Prosecutors and Discretion: A Comparative Study* (1995), Oxford University Press UK, 14; Ambos (2000), *EJCCLCJ,* 8, 89-118.

[529] Ambos (2000), *EJCCLCJ*, 8, 89-118.

[530] See preamble to the charter of the IMT adopted pursuant to an agreement signed on 8 August 1945,

had long been abandoned by domestic jurisdictions since it infringed on the independence of prosecutors. It does not seem, however, that administrative dynamics of executive powers have improved the methodology of prosecutorial discretion. Given the ubiquitous nature of prosecutorial authority in the modern era, the expansion in the scope of what constitutes prohibited conduct in criminal and administrative contexts[531] and the expanding range of discretionary powers prosecutors now have, states must adopt stricter methodological standards to ensure prosecutorial services meet the expectations of society. This can be achieved by providing enforcement resources commensurate with the pace of expansion in prosecutorial activities.[532]

4.7 Procedural norms of prosecutorial authority

Prosecutorial authorities in all legal traditions operate within a developed criminal procedure justice system, which has evolved over time. The critical position occupied by prosecutors in all criminal justice systems centres on rules and procedures that must be adhered to when prosecutorial duties and responsibilities are exercised. This is critical for any justice system because, without procedural rules and guidelines, substantive criminal codes cannot be enforced, and human rights cannot be protected. Suffice to say criminal procedure rules are the hallmarks of effective prosecutorial systems, without which the requirements of prosecutorial independence, institutional integrity, and impartiality in the administration of justice cannot be achieved.[533] Despite the differences in legal systems, prosecutors remain key role players in all criminal justice enforcement proceedings because their decisions often have far reached implications on society and

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by the Government of the United States of America, the French Republic Provincial Government, and the Governments of the then United Kingdom which included the Great Britain, Northern Ireland and Soviet Socialist Republics.

[531] Peter Markowitz (2017), BULR, 97, 535.

[532] Ibid.

[533] See foreword by Yury Fedotov, Executive Director of the United Nations Office on Drugs and Crime in The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide (2014). UN Document stating that the rule of law cannot be upheld, nor can human rights be protected, without effective prosecution services that act with independence, integrity, and impartiality in the administration of justice.

individuals alike, positive or negative. As one commentator puts it:

> [a]part from their responsibility to dispose criminal cases for prosecution, prosecutors in every country play some important roles in criminal investigation despite the differences in basic legal principles. In some countries, prosecutors have an overall responsibility over investigation, while in others they have a limited role in carrying out investigation.[534]

In line with the mandate of the United Nations Office on Drugs and Crime (UNODC), member states to the *UN Guidelines on the Role of Prosecutors*[535] and the *IAP Standards of Professional Responsibility*[536] are authorised by international law to reform their criminal justice systems to conform to United Nations' norms and standards for criminal procedure in crime prevention and criminal justice, enshrined in these two key instruments.[537] However, maintaining these standards and norms requires well-trained and well-organised prosecutors and prosecutors who are supported and protected by their governments when implementing international best practices. Exploring these standards and norms exposes one to different noteworthy practices and emerging issues regarding their implementation.

4.7.1 International procedural standards for prosecutors

The primary role prosecutors play in most, if not all, legal systems is to exercise their discretion to initiate prosecution. However, in some instances, authorised by law or consistent with local practice,[538] prosecutors have the right or duty to oversee the legality of respective investigations if they deem fit. This can happen even if the individual prosecutor was not assigned to be part of the investigations. This duty often includes ensuring that court decisions are properly executed. Here, the article also specifically

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[534] Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders "Cooperation between the Police and the Prosecutors" in *Annual Report for 2001 and Resource Material Series No 60,* part two (Work product of the 120th International Senior Seminar: "Effective Administration of the Police and the Prosecution in Criminal Justice") p. 195.

[535] United Nations Guidelines on Role of Prosecutors.

[536] International Association of Prosecutors Standards.

[537] Fedotov The Status and Role of Prosecutors (2014).

[538] Article 11 of the UN Guidelines on the Role of Prosecutors.

references the need for prosecutors to consider public interest as an important factor in exercising discretion.[539] In addition to being mindful of public interest, prosecutors must act fairly, consistently, and expeditiously[540] when the decision to institute criminal proceedings is based on the grounds of reasonable and admissible evidence following international best practice.[541]

One issue that often arises and is tied to the procedural requirement of acting "expeditiously" is that prosecutors have often missed the mark in ensuring fairness and consistency as they expedite cases. Without fairness and consistency, no matter how fast the justice system runs, there will still be no sense of justice and prosecutorial accountability in the public domain. The preceding statement carries greater weight if one examines the justice systems of South Africa and the US, considering public opinion. In these jurisdictions, general views from the public, including research, have continued to question the efficacy of prosecutorial accountability systems, given the increasing number of cases involving intentional misconduct.[542] As the Innocence Project Movement rightly states:

> Regardless of the extent of error or misconduct committed by a prosecutor
>
> – from the simplest of mistakes to the intentional withholding of exculpatory evidence – actions undermine the accuracy of criminal trials and threaten

[539] Ibid. See also article 4 (2) (f) of *the IAP Standards of Professional Responsibility* providing that, where local practice permits prosecutors to exercise a supervisory role in relation to compliance with court orders or non-prosecutorial functions, they must act in the public interest.

[540] See article 4.1 of IAP Standards of Professional Responsibility.

[541] As provided in article 4.2 (d) of *IAP Standards of Professional Responsibility* and without which the criminal matter cannot proceed.

[542] See for example, The Innocence Project Prosecutorial Oversight: A National Dialogue in the Wake of Connick v Thompson.

> The courts, prosecutors' offices, defense attorneys, legislators and state bar disciplinary authorities must work together to develop a comprehensive system of prosecutorial oversight to ensure the quality of prosecutorial behavior [sic].[543]

4.8 Scientific vs legal validity of prosecutorial authority

The science of prosecutorial authority provides insights into the legal validity or legitimacy of its normative values in practice. Further, the legitimacy of substantive criminal law rests on the principle that it prescribes the appropriate criteria for determining criminal liability, such as proof of culpability and sentencing. These aspects necessitate procedural practices by which relevant legal prescriptions can be administered.[544] Procedural practices such as prosecutorial systems are integral to the rule of law.[545] This relationship between substantive criminal law and procedure sets the criteria for the legal validity of the prosecutorial authority of states to prosecute and punish offenders.[546] The implementation of criminal justice is synonymous with its procedure. Darryl Brown, referring to the legitimacy of the rules of prosecutorial charging authority, stated these:

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[543] See for example, The Innocence Project Prosecutorial Oversight: A National Dialogue in the Wake of Connick v Thompson (2016), 20.

[544] Markus *The Criminal Trial and the Legitimation of Punishment. In: 1 The Trial on Trial* 85 (2004), RA Duff et al (eds), discussing the role of the trial process in legitimising criminal law and punishment in terms of autonomy principles.

[545] Brown "How Criminal Law Dictates Rules of Prosecutorial Authority" file:///C:/Users/lenovo/Desktop/Brown%20%20How%20Criminal%20Law%20Dictates%20Rules%20of%20Prosecutorial%20Authority.pdf, 5.; See also Jeremy Waldron "The Concept of the Rule of Law" (2008), *GLR,* 43, arguing for the importance of the procedural and argumentative aspects of legal practice to the rule of law.

[546] Brown, "How Criminal Law Dictates Rules of Prosecutorial Authority" file:///C:/Users/lenovo/Desktop/Brown%20%20How%20Criminal%20Law%20Dictates%20Rules%20of%20Prosecutorial%20Authority.pdf, 5.

> [p]rocedural rules that require or highly favoured jurisdictional choices about how to define criminal offenses and to specify the purposes of punishment are considered by their fundamental nature to be critical to legitimacy […] they are necessary for defining crime and punishment and for the legitimate implementation of criminal justice […], including the rules of prosecutorial charging authority.[547]

Prosecutors are primarily guided by criminal procedural rules in substantively determining liability for prosecution and punishment. Scientifically, the core aim of substantive criminal law and its commitment to criminal justice is to set the compliant procedural machinery of justice in motion. The idea of compliance is ostensible because procedure, in the words of Brown, "ought not to undermine substantive law".[548]

Prosecutorial charging authority is a product of procedure, which should be capable of resisting changes with time.[549] This is especially critical after having adapted to a particular procedural model. Therefore, policymakers must consider possible changes in future procedural regimes not to undermine the efficacy of the prosecutorial system.[550] Moreover, when policymakers fail to consider the possibility of implementing changes in procedural rules in future regimes, the procedural changes can fail substantive provisions, especially by facilitating liability and punishment decisions in conflict with the central purpose of criminal law.[551]

In addition to being shepherded by a clear set of procedural rules or substantive criminal codes, prosecutors must cooperate fully with experts in fields they may not understand.

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[547] Brown, "How Criminal Law Dictates Rules of Prosecutorial Authority" file:///C:/Users/lenovo/Desktop/Brown%20%20How%20Criminal%20Law%20Dictates%20Rules%20of%20Prosecutorial%20Authority.pdf, 5.

[548] Ibid.

[549] Ibid.

[550] Ibid.

[551] For scholarly attention, see Jonathan The Role of the Public Prosecutor in Applying and Developing the Substantive Criminal Law, in The Constitution of Criminal Law 53 (2013), RA Duff et al (eds); Dripps The Substance-Procedure Relationship in Criminal Law, in Philosophical Foundations of Criminal Law 409 (2011), RA Duff and Stuart Green (eds); RA Duff et al, 3 The Trial on Trial: Towards a Normative Theory of the Criminal Trial (2007), 102-10. Arguing criminal law's expressive function can imply certain procedures, such as exclusionary rules as a response to the prosecution's lack of moral standing; Shabas William "The Uneasy Relationship between Criminal Procedure and Criminal Justice" (1997), YLJ, 107, 1.

This is because some cases cannot be fairly decided without soliciting the opinion of specialised agencies of government and private institutions or citizens. This is common in cases that involve provable scientific facts or are too technical for the layman. In such cases, forensic, engineering, accounting or behavioural experts can be called in to aid the courts in deciding whether a crime has been committed and establish the offender's identity.

The legal validity of this normative practice can be found in the *UN Guidelines for Prosecutors.* These guidelines articulate that prosecutors must always cooperate with the police, the courts, and other agencies for prosecutorial effectiveness.[552] One major shortcoming of this provision is that it does not elaborate on what cooperation with other agencies entails. However, in some criminal cases, where expert guidance is required to prove a case, prosecutors always rely on such guidance to determine beforehand whether such evidence will be relevant and admissible in court before instituting any action against a suspect. By virtue of their professional training, every prosecutor should always know the court's expectations about proving a criminal case; otherwise, unnecessary delays and postponements might occur.[553]

4.9 A Synoptic construct of the theoretical framework

The theoretical conceptualisation of this study considers two aspects of prosecutorial functions that define prosecutorial discretion. The first section highlighted the theory of utilitarianism to analyse and discuss the primary considerations relied on in prosecutorial decision-making. By using hypothetical examples, the section unveiled different philosophical conceptions that underpin positive decision-making and how they are interpreted by prosecutors when exercising prosecutorial discretion.[554] This part of the chapter clarifies the dynamics of prosecutorial decision-making and provides the sub-

[552] See Article 20 of the UN Guidelines for Prosecutors.

[553] *Van Heerden & Another v NDPP & Others* (2017), (145/2017) ZASCA 105 (11 September 2017). The SCA ruled that the right of an accused person to a fair trial within a reasonable period entitles him to 'extraordinary remedy' to permanently stay the prosecution if the delay resulted from the prosecutors.

[554] Mark Jenkins (2014), Routledge Taylor and Francis Publishers, 1.

stratum on which prosecutorial authority is discharged. Therefore, the theoretical conception is anchored on the ideal that prosecutorial authority is influenced by positive decision-making.[555]

The second section discussed the theory of prosecutorial authority, setting out the role of prosecutors and the need for accountability in criminal justice systems. The theoretical construct further addresses the international standard for prosecutorial authority by referring to the *UN Guidelines on the Role of Prosecutors,*[556] the Standard of Professional Responsibility and the Statement of the Essential Duties and Rights of Prosecutors.[557] The latter complements the former in establishing the basis on which prosecutorial authority is justified under domestic and international law. In analysing the standard for criminal prosecution set out by the international instruments listed above, the chapter highlights relevant factors driving prosecutorial decision-making, such as effectiveness, impartiality, consistency, and independence. The dependent and interdependent contributions such factors provide in prosecutorial decision-making were analysed to provide functional support to the theory of prosecutorial authority.

4.10 Conclusion

A critical reflection of the above discussions identifies relevant points advanced to justify constructing a theoretical framework on which the study is based. Before engaging the different theoretical dimensions, the chapter analysed the relevance of evidence in exercising prosecutorial authority. Besides evidence-based prosecution, the chapter also discussed other factors influencing prosecutorial decision-making. The chapter built a theoretical framework that justifies prosecutorial discretion. A two-dimensional approach was adopted in which the first part analysed the theory of utilitarianism to discuss the salient factors driving positive decision-making and how such factors contribute to

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[555] Christopher Russell (2003), *FLR,* 72, 93.

[556] UN Guidelines on the Role of Prosecutors, 1990.

[557] The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors were developed within the association and were approved by the IAP in 1999. The standards serve as an international benchmark for the conduct of individual prosecutors and prosecution services.

exercising prosecutorial discretion.

The second part of the chapter focused on the theory of prosecutorial authority to promote a unique framework that addresses domestic and international challenges stemming from the exercise of authority vested in the prosecutor. The section reflects on the normative standard for prosecutors, including methodological challenges, procedural norms for prosecutorial authority and the scientific versus legal validity of prosecutorial authority. These factional discussions, including a synoptic construct of the theoretical debate, collectively provide the framework on which the study is based. The chapter ends after discussing the relevant issues patterning a desired theoretical framework driving prosecutorial discretion. The next chapter analyses prosecutorial discretion in common law jurisdictions with specific reference to South Africa. It will discuss *inter alia* the challenges emanating from courts due to prosecutorial authority.

CHAPTER FIVE

CONTEXTUALISING THE FUNCTIONING OF THE SOUTH AFRICAN PROSECUTOR ACTING AS *DOMINUS LITIS*: ISSUES AND CONTENTIONS

5.1 Introduction

The current chapter discusses the relevant judicial framework justifying the mandate of the South African prosecutor acting as dominus litis. It analyses case law and related jurisprudence pertinent to the functioning of prosecutors as gatekeepers of the criminal justice system. The chapter contextualise issues associated with the functions of the National Prosecuting Authority (NPA) in conjunction with the multiple contentions stemming from the challenge of prosecution at the office of the National Director of Public Prosecutions (NDPP). The chapter further interrogates the relevant provisions of both the constitution and the NPA Act to provide a comprehensive framework relating to the main aim of the thesis and addressing the specific research questions raised in the text. The current analysis is particularly important because it stimulates discussion about the meaning and application of dominus litis as applied in the South African criminal justice system. Generally, the chapter synergises case law, constitutional jurisprudence, and the relevant academic debates about prosecutorial discretion.

The chapter has five sections. Section Two discuss the NPA's legislative mandate in the context of South Africa's constitutional framework and related legislation. Section Four provides a historical context of how political interference has been and continues to hinder prosecutorial authority. Section Five analyses the power interplay and consequences of executive control over the NPA. This section appertains to the president's constitutional mandate to appoint and dismiss the NDPP, referring to such authority as contemptuous to the separation of power doctrine and the independence and impartiality of the NPA. Section Six provides concluding remarks based on the arguments in the text.

5.2 The mandate of the National Prosecuting Authority

The role of the National Prosecuting Authority (NPA) lies at the heart of discussions relevant to prosecutorial decision-making in South Africa. The NPA is guided by the constitutional mission of providing justice to victims of crime by ensuring effective prosecution without prejudice, fear, or favour and collaborating with the public to regulate and suppress criminal activity.[558] Members of the NPA display high levels of integrity, manifest by ethical conduct and principles of morality and honesty, including a zero tolerance for fraud and corruption to achieve this mission. A determining factor guiding members of the NPA[559] is accountability to key stakeholders in the criminal justice system. They also display excellence in providing first-class services in compliance with justice and the rule of law. These attributes are not only a reflection of a commitment to prosecutorial obligations, but they foster professionalism, consistency, credibility, and trust.

Section 179(2) of the constitution authorises the NPA to institute criminal proceedings on behalf of the state and to comply with the necessary requirements thereof.[560] Section 179(4) of the constitution further obliges the NPA to carry out its mandate without fear, favour, or prejudice. The constitutional obligation of the NPA is protected by the National Director of Public Prosecutions (NDPP), who is the head of the NPA.[561] Section 179(5) of the constitution empowers the National Director to determine and institute policy directives applicable to prosecution. These policy directives translate into practical actions after consultation with the Director of Public Prosecutions and the minister responsible for the administration of justice.[562] Section 179(6) of the constitution directs the minister to exercise final supervisory authority, the process in which s/he may request reports from the National Director regarding the functions of the prosecuting

[558] Annual Report 2018/19, National Director of Public Prosecutions in Terms of the NPA Act 32 of 1998.
[559] Annual Report 2018/19.
[560] Constitution of the Republic of South Africa, 1996.
[561] Annual Report 2018/19.
[562] Section 179(5) of the constitution.

authority.[563] Being the principal entity responsible for criminal prosecutions on behalf of the State, the NPA functions within the confines of a legislative framework discussed below.

Section 20(1) of the NPA Act empowers the prosecuting authority to carry out criminal prosecution on behalf of the State, facilitate the necessary functions incidental to "instituting and conducting such criminal proceedings", and discontinue criminal proceedings where necessary.[564] The office of the NDPP is established under Section 5(2) of the NPA Act as a functional unit within the framework of the NPA. The head of the office is the NDPP. The NDPP is assisted by other personnel, including the Deputy National Directors, Special Directors and administrative staff members.[565]

Section 13(1) of the NPA Act authorises the President of the Republic to appoint Directors of Public Prosecutions (DPPs) to head the prosecuting authority at the seats of each High Court within the Republic. Such mandate is exercised after consultation with the minister and the National Director, as stipulated in Section 6(1) of the NPA Act. According to Section 13(1)(a), the appointed DPP is vested with original prosecutorial powers concerning offences committed within their jurisdiction and for specific offences covered under their stipulated prosecutorial authority.[566] Section 13(1)(c) of the NPA Act further authorises the President of the Republic to appoint Special Directors of Public Prosecutions (SDPPs) to carry out certain functions to be proclaimed by a Government Gazette.[567] The SDPPs also have original prosecutorial powers stemming from specific offences identified in the presidential proclamation within their jurisdiction and concurring with the DPP of the jurisdiction concerned.[568]

Section 15(1) of the NPA Act also authorises the minister to appoint a Deputy Director of

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[563] The Constitution of the Republic of South Africa, 1996.
[564] The NPA Act 32 of 1998, (Assented to 24 June 1998) (Date of commencement: 16 October 1998).
[565] See NPA Act, Section 5(2).
[566] See NPA Act, Section 13(1)(a).
[567] Annual Report 2018/19.
[568] Section 13(1) of the NPA Act.

Public Prosecutions (DDPP) vested with original prosecutorial powers in the area of the jurisdiction concerned. However, the DDPP is answerable to the DPP in control, and their powers are confined to the specific area of jurisdiction under their mandate.[569] For their part, prosecutors are appointed to the offices of the National Director and the DPP or the lower offices under Section 16(1) of the NPA Act.[570] While prosecutors may not possess original prosecutorial powers contemplated under Section 20(1) of the NPA Act, they may exercise such powers regarding specific functions and subject to the authority of the National Director or a representative appointed by the National Director. Furthermore, the President of the Republic can establish investigating directorate(s) in the office of the National Director by proclamation in a Government Gazette following unlawful activities set out in the declaration.[571] The investigating directorate is headed by an investigating director, whose powers are subjected to directives from the National Director.

It is important to point out that the NPA Act is not the only document regulating prosecutorial powers. Other domestic legislation is instructive in this regard and calls for attention. The Criminal Procedure Act No 51 of 1977 (as amended) and regulating prosecutions in court provides for the powers, duties, and functions of members of the prosecuting authority.[572] The Act contains provisions on the authority to withdraw charges and terminate prosecution, issue summonses, summary trials and bail, among many other aspects. Other offences related to organised crimes are regulated by the Prevention of Organised Crimes Act (POCA) No 121 of 1998, providing the relevant legislative measures for law enforcement agencies, including the NPA, to fight organised crime and money laundering.[573] Among the measures adopted by the POCA is freezing and confiscating assets and related benefits derived from crimes in circumstances where the accused is finally convicted.[574] Enforcement measures under the POCA also focus

[569] Section 15(1) of the NPA Act.
[570] See the appointment of prosecutors under Section 16(1) of the NPA Act.
[571] For details on the functions of prosecutors, see Section 20 of the NPA Act.
[572] Criminal Procedure Act No 51 of 1977.
[573] See Prevention of Organised Crime Act 121 of 1998.
[574] Chapter 5 of the Prevention of Organised Crime Act 121 of 1998.

on properties used to facilitate the commission of an offence or obtained as benefits of crime.[575] The Act also authorises the National Director to seek relevant information from government departments regarding investigations pertinent to the Act without necessarily having to issue subpoenas.[576]

While the relevant legislation discussed so far apply to cases invoking domestic jurisprudence, complementary legislation has been adopted to create a nexus between domestic and international law for proper functioning and to clarify the role of prosecutors. In this regard, the Act, in implementing the Rome Statute of the International Criminal Court Act No 27 of 2002, is instructive in directing investigations and prosecution of international crimes, including genocide, war crimes, and crimes against humanity, as provided for by the Act. The investigation and prosecution of related terror activities, such as terrorism and terror financing, are otherwise regulated by the Protection of Constitutional Democracy against Terrorism and Related Activities Act No 33 of 2004.[577]

5.3 Prosecutorial authority in South Africa

Like anywhere else, South Africa has a constitutional obligation to prosecute crimes, and this authority is vested in the prosecutor. In *The State v Tshotshoza*,[578] the court expressly acknowledged the existence of a crime that ought to be prosecuted and punished by a competent prosecuting authority. The authority in question is duty-bound to institute the relevant procedural measures to ensure effective prosecution. This constitutional mandate is the exclusive prerogative of prosecutors.[579] The cardinal role of

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[575] Chapter 6 of the Prevention of Organised Crime Act 121 of 1998.

[576] See Section 71 of the Prevention of Organised Crime Act 121 of 1998. Other subsidiary domestic legislation complementing the functions of the NPA include the Witness Protection Act No 112 of 1998; Prevention and Combating of Corruption Activities Act No 12 of 2004; Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007; Child Justice Act No 75 of 2008; Prevention and Combating of Trafficking in Persons Act No 7 of 2013 and the State Attorney's Amendment Act No 13 of 2014. These are some from amongst other instruments of domestic legislation that serve to justify the role and functions of the NPA.

[577] Both instruments complementing domestic and international law contain provisions permitting extraterritorial jurisdiction in respect of specific offences stated in their respective legislative framework.

[578] *The State v Tshotshoza* (2010), 2 SACR 274 (GNP) para. 18.

[579] *The State v Basson* (2004), 1 SACR 285 (CC) paras 32-33; *The State v Basson* (2007), 1 SACR 566 (CC) para. 144, with reference to Section 179(2) of the constitution.

a prosecutor is to act as an intermediary judicial officer between two parties in conflict. In adversary prosecutorial systems, the judicial officer plays the role of an impartial arbiter between two parties in conflict, seeking relief in the form of a judicial remedy.[580] It is the norm for the State to represent the citizenry in such trials.[581] The burden is on the prosecutor to place credible evidence before the court to consider the 'ingredients' of an offence to have qualified it as a crime.[582] In other words, the prosecutor bears the burden of proving the accused's guilt through a trial process, in which the accused is given the necessary guarantees to prove their case.[583]

In adversarial prosecutorial systems such as South Africa, the prosecutor is considered dominus litis (having absolute control over the prosecution process).[584] In this capacity, the prosecutor has discretion over pre-trial procedures and the entire prosecution process.[585] The prosecutor also determines the route the prosecution will follow in attaining its logical conclusion.[586] Similar to other adversarial systems, South African prosecutors serve as gatekeepers of the prosecutorial system. The prosecutors perform multiple functions throughout the prosecution process, including a critical assessment of the conduct of police officers, a strict evaluation of the merits of the case, and a proper and active representation of society through the proceedings.[587] Owing to the functions stated herein, the prosecutor is duty-bound to lay charges against the offender while protecting the rights of the innocent.[588] Consequently, the prosecutor's integrity largely

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[580] *The State v Mamabolo* (eTV intervening) (2001), 1 SACR 686 (CC) para. 55; Wolf (2011), TSAR 712; *The State v Rudman; The State v Mthwana* (1992), 1 SA 343 (A) 348F: "The essential characteristic of the adversary system is that the presiding judicial officer appears as an impartial arbiter between the parties".

[581] *Porritt v National Director of Public Prosecutions* (2015), 1 SACR 533 (SCA) para. 13 (hereafter the Porritt case).

[582] The Porritt case para. 11; *Van Breda v Media 24 Ltd* (2017), 2 SACR 491 (SCA) para. 50 (hereafter the Van Breda case).

[583] *The State v Lavhengwa* (1996), 2 SACR 453 (W) 485c-e.

[584] *The State v Moshoeu* (2007), 1 SACR 38 (T) 41e; *The State v Matthys* (1999), 1 SACR 117 (C) 119e-f.

[585] *The State v Sehoole* (2015), 2 SACR 196 (SCA) para 10.

[586] *The State v Khalema*, and five similar cases (2008), 1 SACR 165 (C) para. 22.

[587] *The State v Sithole* (2012), 1 SACR 586 (KZD) para. 7.

[588] David Broughton "The South African Prosecutor in the Face of Adverse Pre-Trial publicity" (2020), *PELR,* 23, 1-36.

determines the integrity of the criminal justice system.[589] The act of initiating and discontinuing prosecution allows prosecutors to obtain absolute control over peoples' liberty. Referring to this unique privilege enjoyed by prosecutors, the USA Supreme Court stated as follows:

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing [sic] any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.[590]

Melilli additionally notes that the prosecutor is the only government official who lays charges against a citizen and institutes prosecution, with the likely consequences of limiting their freedom.[591] One aspect of utmost importance in the constitutional framework of South Africa is the obligation to prosecute accused person[s] for offences that threaten the rights of fellow citizens.[592] The South African prosecuting authorities align with prosecutorial systems used in other Anglo-American jurisdictions in which the prosecutors "enjoy a virtually unfettered discretion as to whether a person suspected of criminal conduct should be prosecuted or not and, if prosecuted, for which offences and before which court,''[593] where "the discretion to prosecute is a wide one."[594] The Constitutional Court states that "the prosecution of a crime is an obligation of the State."[595] This obligation is rooted in the State's unique power to initiate prosecutions following section 179(2) of the 1996 Constitution. By providing for an independent prosecutorial authority capable of acting on behalf of the State, "the Constitution makes it plain that [the] effective prosecution of crimes is an important constitutional

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[589] David Broughton (2020), *PELR,* 23, 1-36.

[590] *Young v United States ex rel Vuitton et Fils* (1987), SA 481 US 787, 814 (hereafter the Young case).

[591] *Mahupelo v Minister of Safety and Security* (2017), 1 NR 275 (HC) para. 132 (hereinafter the Mahupelo case).

[592] *The State v Basson* (2004), 1 SACR 285 (CC) paras.32-33.

[593] *The State v Yengeni* (2006), 1 SACR 405 (T) para 52 (hereafter the Yengeni case).

[594] *Van der Merwe v Minister of Justice* (1995), (2) SACR 471 (SCC), (hereinafter the Van der Merwe case).

[595] Van der Merwe case (1995).

objective."[596]

Although the decision to prosecute is considered a constitutional imperative, such a duty may be set aside by judicial review. The obligation to prosecute is subject to the conduct of the prosecutor, which is measured against the principle of legality. For such a duty to be set aside on judicial review, there must be sufficient proof that the prosecutor breached the law in exercising their constitutional duty to the extent that an ulterior motive detrimental to parties before the court was exposed.[597] The principle of legality requires diligence, rationality, lawfulness, and good faith in the exercise of prosecutorial authority. A minimum requirement applicable in prosecutorial function is the test of rationality. Prosecutors are expected to discharge their authority consistent with due legal process. Anything short of this breaches the very law they stand to protect.[598] The essence of compliance with the law is to safeguard the independence of the prosecuting authority in conjunction with the protection of public interest and policy.[599]

The constitution provides the legal framework for the prosecutor to exercise their functions impartially and independently,[600] without fear, favour, or prejudice.[601] Other judicial mechanisms complementing the constitution in this regard include the Prosecution Policy of the NPA (subsequently referred to as the Prosecution Policy),[602] the National Prosecuting Authority Act 32 of 1998 (subsequently referred to as the NPA Act),[603] and the Code of Conduct for Members of the National Prosecuting Authority

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[596] Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit (2000), 2 SACR 349 (CC) para. 53.

[597] David Broughton (2020), PELR, 23, 1-36.

[598] Freedom Under Law v National Director of Public Prosecutions (2014), 1 SA 254 (GNP); Democratic Alliance v Acting National Director of Public Prosecutions (2016), 2 SACR 1 (GP); Zuma v Democratic Alliance (2018), 1 SA 200 (SCA); Freedom Under Law v National Director of Public Prosecutions (2018), 1 SACR 436 (GP).

[599] National Director of Public Prosecutions v Freedom Under Law (2014), 4 SA 298 (SCA) para. 25-26.

[600] Section 179(4) of the constitution (1996).

[601] For instance, National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development (2016), 1 SACR 308 (SCA) para. 24.

[602] National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development (2016), 1 SACR 308 (SCA) para. 24.

[603] The National Prosecuting Authority Act 32 of 1998 (hereinafter the NPA Act), Sections 32(1) (a) and

(subsequently referred to as the Code of Conduct for Members of the NPA).[604] It is worth noting that the prosecutor's discretionary authority cannot be exercised above the limit provided by the constitution and the law. In light of this constitutional limitation to prosecutorial authority, De Villiers has stated that the decision on whether to prosecute must be impartial and fair, with proper attention to the demands of the law.[605]

The Supreme Court of Appeal, in the *State v Van der Westhuizen,* alluded to the concept of prosecutorial impartiality as understood under the South African legal system and international law.[606] The court clarified that prosecutorial impartiality does not necessarily imply the prosecutor may not act adversarial. Instead, it notes that s/he may "act even-handedly, i.e. avoiding discrimination. Therefore, the duty to act impartially is part of the more general duty to act without fear or prejudice."[607] The court's decision emphasised the need for prosecutors to perform their duties free from political, religious, cultural, social, and other forms of discrimination that may obstruct the course of justice.[608] Any conduct improperly affecting the functions of the prosecutor, whether committed by a state official, Member of Parliament, employee affiliated with a state organ or other government official, is considered a breach of the legal obligations on which the NPA operates.[609] It is the duty of the state to ensure this vision is achieved by instituting protective measures and setting up judicial frameworks that protect prosecutors against arbitrary actions intended to limit or misdirect their professional performance.[610] The law is instructive about this important aspect of a prosecutor's assignment. The Code of Conduct for Members of the NPA provides that the exercise of prosecutorial discretion

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(b) and (2).

[604] Section 179(4) of the constitution (1996).

[605] Section 32(1)(a) of the NPA Act.

[606] The State v Van der Westhuizen (2011), 2 SACR 26 (SCA).

[607] The State v Van der Westhuizen (2011), 2 SACR 26 (SCA) para. 9.

[608] The Porritt case para. 12, read along with Section 13(a) of the UN Guidelines on the Role of Prosecutors.

[609] In the Constitutional Court case of Democratic Alliance v President of South Africa and Others (2012), CCT 122/11. The court stated that dishonesty was inconsistent with the conscientiousness and integrity required for the proper execution of the responsibilities of an NDPP.

[610] The UN Guidelines on the Role of Prosecutors, Section 4; The IAP Standards of Professional Responsibility, Section 6.

ought to be free from interference.[611]

Both the constitution[612] and the NPA Act[613] provide protective frameworks to guide the independence of members of the NPA. This duty is double-fold as prosecutors, in return, have the mandate to perform their functions in the interests of the public.[614] The functions of the National Director of Public Prosecutions (NDPP), including those of members affiliated with their office, are protected by the constitution to the extent that their freedom from religious, political, and social interference and other influences is guaranteed.[615] The constitution and the NPA Act restrict all branches of government from interfering with decisions in the domain of the prosecuting authority. Therefore, it is the constitutional right of the accused to demand the services of a prosecutor, who is considered independent from political influence.[616]

In the context of South African law, the independence of the prosecutor implies that prosecutorial discretion must not be subjected to the authority of the government.[617] The idea that the prosecutor may be considered part of the executive has been nullified by the Supreme Court of Appeal, which stated that the functions of the NPA are covered by Chapter 8 of the constitution dealing with "Courts and Administration."[618] Therefore, it is considered inappropriate for the executive to instruct the NPA to either prosecute, decline prosecution, or terminate any prosecution already in progress.[619] The independence of the prosecuting authority constituting the fabric of Section 32(1)(b) of the NPA Act provides the basis for limiting external interference with the due processes of

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[611] Code of Conduct for Members of the NPA, para. B; The IAP Standards of Professional Responsibility Section 2.

[612] Section 179(4) of the constitution; The State v Basson (2004), 1 SACR 285 (CC) para 33.

[613] Section 32 of the NPA Act; Nkabinde v Judicial Service Commission (2016), 4 SA 1 (SCA) para 92 (hereafter the Nkabinde case).; The State v Tshilidzi (2013), JDR 1356 (SCA) para 8.

[614] *Carmichele v Minister of Safety and Security* (Centre for Applied Legal Studies Intervening) (2002), 1 SACR 79 (CC) para 72 (hereafter the Carmichele case). Self-evidently, it would ordinarily be in the public interest that crime be prosecuted, and indeed, conscientiously, and vigorously so.

[615] Broughton (2020), *PELR,* 23, 1-36.

[616] Ibid.

[617] Ibid.

[618] The Nkabinde case para 88.

[619] National Director of Public Prosecutions v Zuma (2009), 1 SACR 361 (SCA) para 32.

prosecution. Persons accused of contravening the relevant sections of the NPA Act are liable to a fine, imprisonment not exceeding ten years, or both fine and imprisonment.[620] The constitutional mechanisms and related judicial framework stated herein constitute the basis on which the National Prosecuting Authority functions.

5.4 The politics of prosecution associated with the office of the NDDP

Despite the relevant judicial framework instituting the mandate of the National Prosecuting Authority, as discussed in previous sections, successive NDPPs have faced tremendous challenges resulting from political interference. This prosecution dilemma is revealed in the historical timeline of successive NDPPs who have held the highest office of the NPA. The first NDDP, Bulelani Ngcuka, appointed by Thabo Mbeki in 2003, brought corruption charges against Schabir Shaik and then Deputy President Jacob Zuma but refused to prosecute the Deputy President.[621] He [Ngcuka] argued inter alia that, although a *prima facie* case of corruption had been instituted against Zuma, the prospects of the NPA prosecuting a winnable case remained doubtful.[622]

In an affidavit filed in the Kwazulu-Natal High Court, Ngcuka explained the possibility of an unsuccessful prosecution. He stated that members of the advisory team, including himself and McCarthy, concluded that "while there was prima facie evidence of corruption by Mr Zuma, it was doubtful the NPA would be able to prove the charges of corruption against him as opposed to against (fraudster Schabir) Shaik, his Nkobi companies and the Thales Company".[623] Ngcuka further stated that the decision to prosecute Zuma would worsen the already tense political atmosphere, possibly stimulating violence. Contrary to these views, Zuma argued that Ngcuka had conspired with McCarthy to

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[620] Section 41(1) of the NPA Act.

[621] Jean Redpath "Failing to prosecute? Assessing the State of the National Prosecuting Authority in South Africa" (2012), *ISS,* 186.

[622] News24, "I was not sure NPA's prospects of success were strong enough for a winnable case against Zuma" Ngcuka says in court papers https://www.news24.com/news24/southafrica/news/i-was-not-sure-npas-prospects-of-success-were-strong-enough-for-a-winnable-case-against-zuma-ngcuka-says-in-court-papers-20190313 (Accessed: 10 November 2021).

[623] S v Zuma and Another; Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and Others (2019), CCD30/2018, D12763/2018, ZAKZDHC 19.

manipulate and align the prosecution process to a targeted political agenda to limit his chances of becoming the ANC president.[624] Zuma also pointed out that he was a victim of prosecutorial misconduct, where the well-publicised spy tapes attest to the worst political manipulation and interference ever experienced in the post-apartheid criminal justice system.[625]

The above analysis explains why Ngcuka announced a prima facie case but not a winnable one. Charges brought against Zuma were the most controversial in Ngcuka's tenure and were flagged as politically motivated.[626] Ngcuka resigned six years after his appointment following a statement by the Public Protector, Lawrence Mushwana, stating that Ngcuka's press briefing, in which corruption charges were invoked, violated Zuma's right to human dignity. Subsequently, the ANC-dominated Committee chaired by Zuma refused to grant Ngcuka a hearing, yet it adopted the Public Protector's report.[627]

After Ngcuka left office in 2005, judge Hilary Squires found Schabir Shaik guilty of corruption in collaboration with Zuma based on their interactions. At this time, Zuma was also relieved of his duties by Mbeki. According to corruption commentator Hennie van Vuuren, Ngcuka's willingness to prosecute the arms deal supported the constitutional vision of the NPA. However, his interactions with former Justice Minister, Penuell Maduna, to announce a prima facie case against Zuma were indicative of political controversies followed by calculated actions, including failing to charge Zuma while continually invading his residence for evidence from 2003 onwards. Consequently, the

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[624] News24, https://www.news24.com/news24/southafrica/news/i-was-not-sure-npas-prospects- of-success-were-strong-enough-for-a-winnable-case-against-zuma-ngcuka-says-in-court- papers-20190313 (Accessed: 10 November, 2021].

[625] News24, https://www.news24.com/news24/southafrica/news/i-was-not-sure-npas-prospects- of-success-were-strong-enough-for-a-winnable-case-against-zuma-ngcuka-says-in-court- papers-20190313 (Accessed: 10 November, 2021].

[626] Report of the Hefer Commission of Inquiry into Allegations of Spying against the National Director of Public Prosecutions, Mr BT Ngcuka, 19 September 2003 – 07 January, 2004. https://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf (Accessed 1 August 2021).

[627] Helen Suzman Foundation *An Inauspicious End to Ngcuka Saga* (2004), http://www.hsf.org.za/resource-centre/focus/issues-31-40/issue-35-third-quarter-2004/an-inauspicious-end-to-ngcuka-saga (Accessed: 1 August, 2021].

Scorpions were trapped in this saga and dismantled within six years.[628]

Although he was in office for only six years, Ngcuka remains one of the longest-serving NDPPs, with strong prosecutorial decisions amid competing political challenges. After Ngcuka's exit, Ramaite was appointed acting NDPP in September 2004.[629] During his tenure as an acting NDPP, he maintained a relatively low profile, especially considering the low morale of the office of the NPA following the exit of Ngcuka. Ramaite held the position of acting NDPP for less than a year, and in February 2005, President Mbeki appointed Vusumzi Pikoli as the new NDPP.[630] Without enough time to conduct the office properly, he was suspended by Mbeki in September 2007 and subsequently dismissed. The action by the president raised questions regarding the extent to which the NDPP can hold office and successfully prosecute high-profile politicians within the context of the law.[631]

Without a doubt, Pikoli's short term as NDPP resulted from the high-profile politicians such as Zuma and Jackie Selebi, then commissioner of police that he prosecuted.[632] After the conviction of Schabir Shaik in mid-2005, Pikoli charged Zuma on associated charges, which were subsequently dismissed on the grounds that the prosecution was not ready to proceed.[633] Similarly, rape charges brought against Zuma in December 2005 were hastily prosecuted, and he was acquitted in less than a year. Following authorising a warrant of arrest against then commissioner of police Jackie Selebi in 2007, Mbeki suspended Pikoli on the grounds of a broken relationship with state officials, including

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[628] Van Vuuren "Who Prosecutes the Powerful?" *Mail & Guardian Online*, 28 May 2010, cited in Redpath (2012), *ISS,* 186; see also Van Vuuren*, Democracy, Corruption and Conflict Management, Centre for Development and Enterprise*, Legatum Institute (2014).

[629] Jean Redpath (2012), *ISS,* 186.

[630] Ibid.

[631] Redpath (2012), *ISS*, 186.

[632] Martin Schonteich "A Story of Trials and Tribulations: The National Prosecuting Authority, 1998 – 2014", (2014), *SACQ,* 50.

[633] Letsoala and Basson " NPA Suffers Haemorrhage of Staff" *The Mail and Guardian,* Available at: https://mg.co.za/article/2007-09-28-npa-suffers-haemorrhage-of-staff/
(Accessed 1 August 202)].

Bridget Mabandla, then Minister of Justice.[634]

A commission of enquiry headed by Frene Ginwala to investigate Pikoli's fitness to hold office and determine the state of his relationship with Justice Minister Mabandla found that most of the allegations levelled against the NDPP were unfounded.[635] However, Ginwala noted that Pikoli faltered by refusing to adhere to Mbeki's request that two weeks be given before proceedings were instituted against Selebi in the interest of National Security. She also noted that the drafting of a letter by Simelane instructing Pikoli to abort the imminent arrest of Selebi was contrary to the law.[636] Based on numerous challenges and the negative comments in the Ginwala report, the successor to the president, Kgalema Motlanthe, terminated Pikoli's function as the head of the NPA.[637] Although Pikoli challenged his dismissal in court, he accepted monetary compensation before the commencement of the case, and consequently, the case was terminated. Political pressure was summarily identified as contributing to poor leadership during Pikoli's reign in office as NDPP.

Mbeki appointed Mokotedi Mpshe, then head of the National Prosecuting Authority Service – an entity within the NPA responsible for public prosecutions – as acting NDPP after Pikoli's dismissal.[638] Due to political challenges affecting the NPA, Mpshe adopted a conservative approach to limit prosecutions during his tenure. He also publicly announced his decision to withhold prosecution against Jacob Zuma, with reference to an unfettered discretion for NDPPs to choose not to prosecute. He further explained that such decisions were not subject to judicial review.[639] His position regarding the Zuma case raised concerns regarding the link between independence, impartiality, and the duty

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[634] Redpath (2012), *ISS,* 186.

[635] Ginwala Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions (23 September 2007), 090120pikoli1.

[636] Ginwala Report, 23 September 2007.

[637] *Mail & Guardian* "ANC Interferrence Promts Pikoli's Sacking". Available at: https://mg.co.za/article/2012-05-24-anc-forces-pikoli-sacking/ [Accessed 20 August 2021].

[638] ACJR Factsheet, The Appointment and Dismissal of the NDPP (2018).

[639] *News24*, Decision not to prosecute Zuma on 783 charges 'clouded by emotion' – DA, Available at: https://www.news24.com/news24/southafrica/news/decision-not-to-prosecute-zuma-on-783-charges-clouded-by-emotion-da-20170703 (Accessed: 1 August 2021).

to prosecute. Among other factors, this posed questions regarding the abuse of process *vis-à-vis* decision-making in discharging prosecutorial responsibilities.[640] The allegations of abuse of process were anchored on leaked intelligence recordings of telephone conversations between Leonard McCarthy, the then head of the Scorpions, and responsible for proceedings against Zuma and former NPA boss Bulelani Ngcuka.[641]

The announcement by Mpshe to withhold prosecution against Zuma paved the way for his presidency. Following an ANC majority during the national elections of 22 April 2004, the National Assembly elected Zuma, and he was inaugurated as president in May 2009.[642] It is worth noting that Zuma never pleaded and was not entitled to an acquittal, so it was possible to reinstate prosecution against him later. At the end of November 2009, President Zuma appointed Simelane NDPP after Pikoli withdrew his application for the nullification of his dismissal.[643]

Simelane reportedly intervened with the Assert Forfeiture Unit (AFU) in 2010 to block the properties of Fana Hlongwane, a businessman who previously worked as an adviser to the late former Defence Minister, Joe Modise. Before this action, the AFU sought to finalise a preservation order blocking Hlongwane's properties in the tax haven of Lichtenstein following an initial preservation order granted by the High Court in Pretoria.[644] He labelled his intervention as part of the arms deal investigation. It is also important to point out that Simelane was the NDPP when SAPS absorbed the Directorate of Special Operations (DSO).[645] He informed parliament's Standing Committee on Public

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[640] Redpath (2012), *ISS,* 186.

[641] Mail & Guardian, "Top Cop Scuttled Zuma Case", Available at:
https://mg.co.za/article/2010-05-21-top-cop-scuttled-zuma-case/ (Accessed: 1 August 2021).

[642] *Zuma v Democratic Alliance* (771/2016); *Acting National Director of Public Prosecution v Democratic Alliance* (1170/2016) [2017] ZASCA 146 (13 October 2017). Telephonic conversations between NPA officials were intercepted by the intelligence gathering authorities in 2008. Their content (allegedly showing a political conspiracy) was relied on to justify the decision not to prosecute Mr Zuma. The Supreme Court of Appeal later explained why the conversations where irrelevant for the purposes of deciding whether to prosecute or not.

[643] Redpath (2012*), ISS,* 186.

[644] *Times Live* "How Arms-deal Man Escaped with R200m" (21 March 2010).
http://www.timeslive.co.za/sundaytimes/article365912.ece. (Accessed: 1 August 2021).

[645] Redpath (2012), ISS, 186.

Accounts in May 2010 that the NPA was no longer involved in any arms deal investigation. He further indicated that such responsibilities had been channelled to the Directorate of Priority Crimes Investigation (aka the Hawks), which functions within the police service.[646] Simelane's career was marred by political controversies, based on which the opposition party, the Democratic Alliance, brought a case before the High Court, which was moved to Appeal in November 2011 challenging Simelane's fitness to hold the office of the NPA.[647] Nomgcobo Jiba was appointed by Jacob Zuma as acting NDPP in December 2011 after the dismissal of Simelane. Her term of office was short as she held the position until 4 August 2013, when Mxolisi Nxasana took over.[648] The incumbent's reign was marred by controversies linked to undisclosed charges for which he was previously acquitted on the grounds of self-defence. Although he argued that two of the said charges had already been disclosed, President Zuma announced an enquiry to determine his fitness to hold office in terms of Section 12(6)(a)(iv) of the NPA Act 1998.[649] In 2015, Nxasana resigned while testifying to the State Capture Enquiry that political interference undermined the integrity and effectiveness of the NPA. Consequently, public confidence in the organisation was eroded.[650] He also blamed the Portfolio Committee of parliament for failing to intervene in the matter between Nomgcobo Jiba and Lawrence Mrwebi.[651] Nxasana was replaced by Shaun Abrahams in 2015. Before his appointment, Abrahams was challenged by Freedom Under Law for his

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[646] Ibid.

[647] Democratic Alliance v President of the Republic of South Africa and Others (2010), 59628/2009, ZAGPPHC 194 (10 November 2010).

[648] Redpath, (2012), *ISS,* 186.

[649] Corruption Watch, Record of 1st and 8th Respondents Part 2, https://www.corruptionwatch.org.za/wp-content/uploads/2015/08/Record-of-1st-and-8th-Respondents-Part-2.pdf (Accessed 20 August 2021).

[650] *News24, "*Failure to Act Against Jiba, Mrwebi Harmed NPA - Nxasana tells State Capture Commission", https://www.news24.com/news24/SouthAfrica/News/failure-to-act-against-jiba-mrwebi-harmed-npa-nxasana-tells-state-capture-commission-20190902 (Accessed: 20 August 2021).

[651] Report of the Portfolio Committee on Justice and Correctional Services on whether or not to restore Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi to their positions of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions at the National Prosecuting Authority, in terms of Sections 12(6) of the National Prosecuting Authority Act 32 of 1998, dated 27 November 2019.

alleged complicity in helping Zuma avoid corruption charges.[652]

On 8 December 2017, Abrahams' appointment to office was questioned based on irregularities, following which a full bench of the High Court set aside his appointment. The court also ruled that Zuma had been conflicted in the appointment of the NDPP and instructed that the appointment be made by then Deputy President Cyril Ramaphosa within 60 days.[653] Although the NPA appealed the ruling, a final verdict by the Constitutional Court in August 2018 instructed Abrahams to vacate his position as NDPP and President Cyril Ramaphosa to appoint a new NDPP within 90 days.[654] Silas Ramaite was appointed in an acting capacity to replace Abrahams.[655] His successor, Shamila Batohi, was appointed NDPP on 4 December 2018, and she assumed duties in February 2019.[656] The analysis record indicates a compromised prosecuting authority integrally involved in political events, creating the perception of a politically dependent prosecuting authority.

5.4.1 **The independence of the NPA compromised**

The above analysis indicates that the constitutional vision of the NPA has been embroiled in politics. Personal and party-political interests have been identified as significant challenges among the obstacles confronting this institution. How political whims divert or subdue constitutional and statutory principles indicates that the rule of law has been subverted to arbitrarily politicising the office of the NDPP.[657] The events chronicled in this

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[652] Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana *v Corruption Watch NPC and Others* (2018), CCT 333/17; CCT 13/18, *ZACC*, 23.

[653] Corruption Watch NPC and Others v President of the Republic of South Africa and Others. Nxasana v Corruption Watch NPC and Others.

[654] Corruption Watch NPC and Others v President of the Republic of South Africa and Others (2018), ZACC 23.

[655] *Business Day*, President Picks Silas Ramaite to Hold Fort at NPA Again, https://www.businesslive.co.za/bd/national/2018-08-14-breaking-silas-ramaite-appointed- acting-ndpp/ (Accessed: 20 August 2021).

[656] *Business Day,* Shamila Batohi Appointed as New NPA Boss, https://www.businesslive.co.za/bd/national/2018-12-04-shamila-batohi-appointed-as-new- npa-boss/ (Accessed: 20 August 2021).

[657] Selabe Busani, The Independence of the National Prosecuting Authority of South Africa: Fact or Fiction? (2015). Master's thesis, Department of Criminal Justice and Procedure, University of the

chapter present hard evidence showing that the office of the NDPP is dependent on political will and not the rule of law. A further example showing a clear indication of inhibition affecting the NPA was the apprehension of former President Jacob Zuma, the circumstances surrounding the charging and prosecution, and the subsequent withdrawal of the charges. This fact was compounded by the NPA's role in obstructing the process of handing the spy tapes to the Democratic Alliance (DA), which constituted contempt of the court order.[658] Consequently, the general public's trust in the activities of the NPA was eroded, including its seriousness in the fight against crime and corruption.

There is a lack of political and executive will to allow or support the functions of the NPA without undue interference. Previous experiences in which the ANC-led government failed to comply with court orders are instructive. These orders descended from the Constitutional Court[659] and Western Cape High Court to ensure the Directorate for Priority Crime Investigation (DPCI) is adequately protected from executive and political interference to the extent that it is allowed to function without fear or favour by amending the NPA Amendment Bill of 2008 (NPAA Bill, B23-2008).[660] It is also a fact that the ruling party's overwhelming majority in parliament has triggered negative feedback as it continues to dictate the political agenda and government priorities. Consequently, the independence of the prosecution service is undermined. Most often, pressure from civil society stimulates the government's response to ensure the integrity of the administration of justice.[661]

5.5 Contentions stemming from executive control of the NPA

No NDPP has completed their term of office (ordinarily ten years) since the NPA was

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Western Cape, South Africa.

[658] Selabe Busani (2015).

[659] Hugh Glenister v the President of the Republic of South Africa and Others (2011) (CCT 48/10) ZACC 6 (17 March 2011) and Helen Suzman Foundation v the President of the Republic of South Africa and Others Case No 23874/2012.

[660] National Prosecuting Authority Amendment Bill (B 23D—2008) to amend the National Prosecuting Authority Act, 1998, to repeal the provisions relating to the Directorate of Special Operations, and provide for matters connected therewith.

[661] Selabe Busani (2015).

instituted in 1998.[662] Successive NDPPs have either resigned or been dismissed, with political interference being the sole motivating factor.[663] The reason for this negative feedback could be hinged on the fact that the top executive members of the NPA, occupying approximately 14 positions, are appointed by the president and Minister of Justice without consultation with relevant stakeholders, including parliament, professional bodies, and the public as a whole.[664] The centralisation of power in the NPA Act exposes the NPA to risk regarding its independence and integrity.[665] Even if the act does not spell out the objective process of appointments, the president is expected to be objective and rational and consider moral integrity and fitness to hold office as the NDPP when selecting the candidate.[666]

The requirement of fitness and properness in the character of the NDPP is relevant in both appointment and dismissal.[667] This criterion was tested by the Supreme Court of Appeal when Menzi Simelane was considered for appointment as NDPP.[668] In the opinion of the court, "Consistent honesty is either present in one's history or not, as are conscientiousness and experience." The court further said conscientiousness is defined as "wishing to do what is right and relating to a person's conscience."[669] The court concluded that, to meet the constitutional objective of the State and protect and preserve the NPA and the NDPP as servants of the rule of law, the appointment of the NDPP

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[662] Africa Criminal Justice Reform (ACJR) Factsheet, The Appointment and Dismissal of the NDPP: Instability since 1998 (2018), *DOICLHR*.

[663] Ngcuka hands in resignation, News24, 24 July 2004, https://www.news24.com/SouthAfrica/News/Ngcukahands-in-resignation-20040724; *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*.

[664] Sections 11(1), 13(1), 15(1) (a and c) of the NPA Act.

[665] The appointment of Adv Batohi as NDPP in both the appointment of an interview panel and opening the interviews to the public is a remarkable precedent. "High Court Orders NDPP Interviews Open to Media" Mail & Guardian, 13 November 2018, https://mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviewsopen-to-media/ (Accessed 1 August 2021).

[666] Democratic Alliance v President of the Republic of South Africa and others (2011), (263/11)

ZASCA 241; Report of the enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions (Ginwala report), November 2008.

[667] Section 9(1)(b) of the NPA Act; Section 12(6)(a) NPA Act.

[668] Democratic Alliance v President of the Republic of South Africa and Others (2011), (263/11) ZASCA 241.

[669] Democratic Alliance v President of the Republic of South Africa and Others, para. 117.

cannot rest entirely on the subjective judgement of the president.[670] The Constitutional Court went on to say that, while the "fit and proper" requirement does involve a value judgement, "it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the president", which may imply s/he is free from objective scrutiny.[671]

Identifying a "fit and proper" person is difficult and should, therefore, not rest on the judgement and approval of a single individual behind closed doors. Moreover, the phrase "in the president's view" or a similar expression is not used under Section 9(1)(b) of the NPA Act. The Supreme Court of Appeal clarified that the act merely requires an objective assessment.[672] The requirement of being fit and proper implies that the appointee ought to be a fit and proper person, with qualities such as integrity being assessed objectively, and such assessment of a person's personal and professional life revealing whether s/he has integrity.[673] Based on these assessments, successive NDPPs have been removed from office for failing to meet the relevant standards prescribed by law.[674] The question, therefore, rests not solely on the integrity criteria but on the fact that parliament gets involved in the suspension and dismissal of NDPPs who were neither appointed by them nor brought under their scrutiny before their appointment.[675] The dilemma of parliament's involvement in the activities of the NPA is reflected further in the sections below relating to the dismissal of the NDPP and serious crimes committed by state personnel.

5.5.1 **Dismissal of the NDPP**

This section does not delve into the details and procedures for the dismissal of the NDDP but highlights the position of parliament and the Constitutional Court concerning the

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[670] Ibid.

[671] *Democratic Alliance v President of South Africa and Others* (2012), (CCT 122/11) ZACC 24 (5 October 2012) para. 23.

[672] Democratic Alliance v President of the Republic of South Africa and Others.

[673] Democratic Alliance v President of the Republic of South Africa and Others, para 116.

[674] ACJR Factsheet, The Appointment and Dismissal of the NDPP (2018).

[675] Ibid.

relevant procedure.[676] It is compelling to point out that the ad hoc committee created for the suspension and dismissal of Advocate Pikoli as NDPP noted that:

It may be an anomaly that Parliament plays no role in appointing the NDPP, but have the final say in his or her removal. The review of the legislation should also consider whether Parliament should play any role in the appointment of the NDPP.[677]

So far, no legislation has been instituted to this effect. Instead, to date, it is still the standing rule that suspension with the intention to dismiss the NDPP is a right reserved for the president alone. This unique advantage is evidence of the president's authoritative command over the legislature.

Parliament's ability to act objectively remains questionable, especially given that one party dominates both houses. There is ample evidence that single‐party dominance was used to remove Pikoli from office.[678] Consequently, the Constitutional Court invalidated two sub-sections of the NPA Act, which relate to the appointment and dismissal of the NDPP.[679] In the first instance, the court found that the president's power to terminate the NDPP's term of office undermines the independence of the office, given that the incumbent's decision could be influenced by political considerations to favour the president to stay in office as the NDPP.[680] Second, the president enjoys the unique authority under Section 12(6) of the NPA Act to suspend the NDPP indefinitely, with or without pay. The court elaborated that the law provides no guidance on the discretion to continue remuneration and its quantum.[681] Subsequently, the declaration of the

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[676] Muntingh et al, "An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future", Bellville: African Criminal Justice Reform (2017), *DOICLHR*.

[677] Ad hoc joint committee to consider matters in terms of Section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), Annexure 1 para. 7.

[678] Muntingh et al (2017).

[679] Section 12(4) and 12(6) of the NPA Act; Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others (2018), (CCT 333/17.CCT 13/18) ZACC 23 (13 August 2018).

[680] Section 12(4) of the NPA Act.

[681] Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana *v Corruption Watch NPC and Others* (2018), (CCT 333/17; CCT 13/18) ZACC 23 (13 August 2018).

constitutional invalidity of Section 12(6) was suspended for 18 months to enable parliament to fix the problem.[682] The third concern concerns removing the NDPP by a simple majority vote in the National Assembly as indicated in the NPA Act.[683] Owing to the vast powers of the NDPP, this position is relatively odd when compared with the Public Protector and the Auditor General of South Africa (AGSA), whose removal from office for misconduct, incapacitation, or incompetence requires a two-thirds majority in the National Assembly.[684]

5.5.2 **Serious crimes committed by state personnel**

The African Justice Reform (ACJR) stated in its research on torture that serious human rights abuses escape prosecution from the NPA. This statement is based on the feedback on the progress of cases referred to NPA by agencies such as the Independent Police Investigative Directorate (PID).[685] Despite the scale of corruption exposed by the Zondo Commission,[686] including cases referred by the Special Investigation Unit (SIU) to the NPA, the curve of prosecution continues to decline, especially when high-profile state officials are concerned. Such selective application of criminal sanctions by the NPA brings the entire accountability architecture of the state into disrepute, especially when strong evidence is available in favour of the prosecution. Such manoeuvring implies the system is promoting the politics of the strong, and high-profile state officials continue to avoid prosecution. This lack of fairness and objectivity subjects the rule of law to serious scrutiny and attack.

The prosecution policy directives of the NDPP require prosecutors to make requests and be granted approval by senior prosecutors for certain serious prosecutions concerning

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[682] The court went a step further, ruling that, during this period, the suspension of an NDPP or Deputy NDPP shall not exceed six months and a suspended NDPP or Deputy NDPP shall receive their full salary. The court further stated that if parliament does not fix the problem within the 18-month period (by February2020), the interim relief will become final.

[683] Section 12(6)(c) NPA Act.

[684] Sections 194(1) and (2)(a) of the constitution, 1996.

[685] Muntingh et al, An Assessment of the National Prosecuting Authority (2017), DOICLHR.

[686] Commission of Inquiry to Investigate Allegations of State Capture, Corruption, and Fraud in the Public Sector Including Organs of State. GG 632 No 41436 of 9 February 2018.

specific categories of officials working in the criminal justice system, including law enforcement officers, prosecutors, magistrates, and police.[687] The Prosecution Policy Directives determined by the NDPP without public consultation impose a duty of compliance on prosecutors under Part 8. Due to this requirement, prosecutors obtain authorisation only for the prosecution, not withdrawal of cases against certain government officials, including senior members of the SAPS and the prosecuting authority itself. It is arguably the case that this provision places prosecutors in a dilemma over whether to prosecute or not, depending on the challenges that accompany the prosecution of certain officials. For example, only 760 complex commercial crime investigations were conducted in 2018/19 concerning cases which were not high profile.[688] Similarly, only 210 government officials were convicted, and half emanated from outside the Specialised Commercial Crime Unit (SCCU).[689] The above statistics of convictions involving such low-profile cases indicate compromises within the prosecutorial system.

5.6 Conclusion

The above analysis provides the relevant jurisprudential framework regulating the functions of NDPPs within the South African criminal justice system. This framework is a combination of constitutional provisions read along with the NPA Act, the Prosecution Policy of the NPA, the Code of Conduct for Members of the NPA, well-established case laws and other legislation instituted to achieve similar objectives.[690] An analysis of the relevant legislation identified and discussed here justifies the aims and objectives of the thesis and answers the major questions raised in the introductory chapter about the challenges confronting South Africa's NPA.

An assessment of contemporary literature and academic debate regarding the role of the

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[687] Part 8, Prosecution Policy Directives NPA (2014, as amended).

[688] Annual Report of the National Director of Public Prosecutions in terms of the NPA Act 32 of 1998, 2018/19 pp. 37-39.

[689] Annual Report of the NPA Act 32 of 1998, 2018/19 p. 69.

[690] Muntingh et al (2017), DOICLHR.

NDPP revealed that the independence of the NPA is not guaranteed. This results from insufficient checks and balances set up to regulate the abuse of power by senior executive officials. Political interference in the affairs of the NPA and the subsequent dismissal of successive NDPPs explains the absence of an independent NPA. Additionally, the challenge of meeting the high standard required for incumbent NDPPs, as prescribed by the constitution and the NPA Act, continues to inhibit the functions of the NPA as an agent of justice.[691] The conduct of successive NDPPs dismissed from office and the president's unique authority to appoint and dismiss NDPPs help to identify the current challenge. Based on these limitations, the role of the NPA acting as dominus litis is barely achieved.[692] Therefore, there is a critical and compelling need to revisit and augment the relevant portions of the NPA Act. Policy analysis based on contemporary literature about prosecutorial discretion can provide guidance to that effect. This brings the current chapter to a close. The following chapter adopts a comparative approach to discussing the exercise of prosecutorial discretion in the USA and Australia and the subsequent inclusion and application of the doctrine in South Africa.

[691] Redpath (2012), *ISS,* 186.

[692] Muntingh et al (2017), DOICLHR.

CHAPTER SIX

COMPARATIVE ANALYSIS OF THE CONCEPTS AND PRACTICES APPLICABLE TO PROSECUTORIAL DECISION-MAKING IN THE USA, AUSTRALIA, AND SOUTH AFRICA

6.1 Introduction

This chapter compares and analyses the similarities and differences in prosecutorial responsibilities prevailing in the US, Australia, and South Africa. At the core of these debates, concepts such as plea bargaining, double jeopardy and sentencing will be revisited to determine how they influence prosecutorial decision-making in the various jurisdictions. Even though plea bargaining and double jeopardy concepts were discussed in Chapter Three of this thesis, such discussions only clarified their scope of application in criminal law. Their inclusion in the current chapter goes beyond the mere application, providing a basis for an extended dialogue regarding a comparative analysis among jurisdictions in the USA, Australia, and South Africa.

Since prosecutorial discretion is the definitive power enjoyed by prosecutors in wielding the authority to charge a suspect, plea bargaining offers a standard method for securing a conviction. Plea bargaining allows suspects to plead guilty to charges brought against them to avoid the trial process and sustain legal resources in exchange for a minimum sentence to be determined by the prosecutor.[693] By extension, plea bargaining opens a window for the exercise of prosecutorial authority regarding charging and conviction.[694] Additionally, double jeopardy prohibits reprosecution in cases where the defendant has already been convicted or acquitted for the same offence by a court of law.[695] Subsequent reprosecution of defendants previously convicted or acquitted may result in

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693 Jennifer Reinganum "Plea Bargaining and Prosecutorial Discretion" (1988), *AER,* 78, 4, 713-728.

694 Malcolm Feeley "Plea Bargaining and the Structure of the Criminal Process" (1982), *JSJ,* 7, 3, 338-354.

695 Steven DeBraccio "The Double Jeopardy Clause, Newly Discovered Evidence, and an 'Unofficial' Exception to Double Jeopardy: A Comparative International Perspective" (2013), *ALR,* 76, 3, 1821.

a miscarriage of justice because such defendants may lack the necessary stamina to prove their case in a second trial.[696] Reprosecution might jeopardise the defendant's interest, particularly when the prosecutor has full knowledge of the defence case before the subsequent trial. This knowledge may allow the prosecutor to discharge their traditional burden of proof. Under such circumstances, the chances that the defendant might be convicted during a second trial are high.[697]

The essence of the double jeopardy doctrine is to protect against wrongful convictions and preserve the moral integrity of the criminal justice system. The principle limits multiple prosecutions by avoiding subsequent trials for cases already tried. In this regard, prosecutorial authority is kept in check due to limitations on exercising discretion imposed by the double jeopardy clause.[698] The relationship between prosecutorial discretion and double jeopardy provides checks and balances, which strive to limit multiple prosecutions for the same offence.[699] Except for plea bargaining and double jeopardy, sentencing is another factor consistently visible in the exercise of prosecutorial authority. Sentencing involves the punishment accorded to criminal defendants after a trial where the prosecutor pronounced the defendant guilty.[700] The penalty is deemed appropriate when the relevant legal protection and constitutional guarantees are afforded to defendants in the criminal justice process. Sentencing is a tool prosecutors use to issue punishment when discharging prosecutorial authority.[701] All three principles introduced so far (plea bargaining, double jeopardy, and sentencing) will be examined comparatively to establish the similarities and differences prevailing in prosecutorial discretion in the USA, Australia and South Africa.

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[696] Gavin Dingwall "Prosecutorial Policy, Double Jeopardy and the Public Interest" (2000), *MLR,* 63, 2, 268-280.

[697] Ibid.

[698] Ibid.

[699] Ibid.

[700] William Schwarzer, Judicial Discretion in Sentencing, 3 *Federal Sentencing Reporter* (1991), 339. Available at: https://repository.uchastings.edu/faculty_scholarship/1184 (Accessed: 1 May 2021).

[701] Ibid.

6.2 Please bargain

Among the concepts regulating prosecutorial authority discussed in Chapter Three of this thesis, the differences in prosecutorial discretion in the USA and Australian jurisdictions are conspicuous in the plea-bargaining process. The following section analyses the interplay between the US and Australian jurisdictions regarding plea and charge bargaining.

6.3 United States

In the American criminal justice system, plea bargaining allows for disposing of over 90% of cases before a jury is even constituted.[702] Therefore, plea bargaining is considered a negotiated and mutually satisfactory agreement between the council for the accused and the prosecutor in compliance with the rules and regulations of the court holding jurisdiction over the matter. The process involves moral suasion, in which both parties are prevented from going to trial. Plea bargaining, commonly referred to in the American criminal justice system as an alternative to trial by jury and symbolising a favourable justification for the disposition of criminal cases, has faced tremendous opposition over the years.[703] The school of thought advocating plea bargaining observed that all parties involved (prosecutors, judges and defendants) enjoy mutual benefits ranging from managing resources to disposing of less serious cases with insufficient evidence to convict the accused.[704] For their part, criminal defendants enjoy sentence-related concessions from the prosecutor for pleading guilty. Such concessions may result in dismissing some of the charges for which the accused was initially indicted. Due to resource constraints, the quick disposition of cases allows judges to manage fewer cases efficiently and ensure trial by jury at a lower cost.

On the other hand, critics of plea bargaining have raised the possibility of compromises

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[702] Felony Sentences in State Courts (2004), *Bureau of Justice Statistics Bulletin*, US Department of Justice, Washington, DC, July 2007, 1.

[703] Douglas Smith "Plea Bargaining Controversy" (1986), *JCLC,* 77, 949.

[704] John Gleeson "The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains" (2008), *HLR,* 36, 641-642.

with the criminal justice system due to the bargain. The consequence is that criminals may escape appropriate and harsh punishments reciprocal to the gravity of their offence.[705] For example, an accused indicted of assault occasioning grievous bodily harm and in possession of a deadly weapon may plead guilty and receive a negotiated charge synonymous with simple assault with no weapon mentioned. The new charge resulting from his plea would have removed the possibility of conviction for the most severe sanction defined by law.[706] Other critics argue that plea bargaining allows the circumvention of constitutionally protected safeguards against government oppression. The US Constitution and Supreme Court interpretations provide "Explicit rules for the determination of guilt and the establishment of punishment."[707] Plea bargaining eliminates such possibilities and disregards the essential proof required during trial.[708]

The most disturbing question surrounding the concept of plea bargaining in the US is the possibility of innocent defendants pleading guilty for fear of a maximum sentence, which may result from the trial verdict. Under such circumstances, the defendant is overwhelmed by the fear of going to trial, which is often negotiated to plead guilty to a lesser charge and sentence.[709] Despite the odds, proponents of plea-bargaining, particularly prosecutors, have pushed hard for it in the US. In the US Supreme Court case of *Bordenkircher v Hayes*, a state grand jury accused Hayes of issuing a forged instrument.[710] The measurable punishment for this offence was two to ten years imprisonment. In a plea bargain negotiation between Hayes' lawyer and the Commonwealth attorney, the prosecutor recommended a five-year imprisonment term should Hayes plead guilty.[711] The prosecutor's recommendation was accompanied by a threat, stating that, if Hayes refused to plead guilty, he would be charged in line with the

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[705] Douglas Guidorizzi "Comment, Should We Really 'Ban' Plea Bargaining? The Core Concerns of Plea Bargaining Critics" (1998), *ELJ,* 47, 38.

[706] Paul Marcus and Vicki Waye "Australia and the United State: Two Common Criminal Justice Systems Uncommonly at Odds" (2010), *TJICL,* 18, 2, 335-401.

[707] William Stuntz "Unequal Justice" (2008), *HLR,* 121.

[708] Guidorizzi (1998), *ELJ,* 47, 38.

[709] Stuntz (2006*), HLR,* 119, 780.

[710] *Bordenkircher v Hayes* (1978), 434 US 357, 98 S Ct 663.

[711] Bordenkircher v Hayes (1978).

Kentucky Habitual Criminal Act with a mandatory life sentence based on his previous felony convictions.[712] After Hayes refused to agree to the plea bargain, the outcome of the trial verdict was a life sentence pursuant to the Kentucky Habitual Criminal Act, as mentioned above.[713]

The US Supreme Court verdict was criticised on the grounds that Hayes was exercising his constitutional rights and could not be punished for doing so.[714] The ruling was interpreted based on the understanding that Hayes's conviction resulted from his refusal to concur with the terms and conditions of the plea bargain. Although the deal was engaged in a negotiated agreement, Hayes had a constitutional right to be tried before a jury. In the face of competing claims, the Supreme Court engaged a review process to assess the constitutionality of a practice common in plea bargaining, namely "The state prosecutor's threat to indict a defendant on a more severe charge if the defendant chooses to exercise the right to a trial by jury instead of pleading guilty."[715]

Given that the US justice system has encouraged the negotiation of pleas, "it follows that the Supreme Court has necessarily accepted as constitutionally legitimate the reality that the prosecutor's interest in plea bargaining is to persuade the defendant to forgo the right to plead not guilty."[716] *Bordenkircher* sent a strong message on the enormous discretionary powers exercised by prosecutors in the system. They can charge and possibly threaten criminal defendants to prosecute the case successfully.[717] In conclusion, the court held that the prosecutor's threats enhanced with severe punishment to ensure a guilty plea and serve the state's best interests, were not inherently unfair.[718] Although the judgement favoured the concept of a plea bargain concerning prosecutorial discretion, questions linger as to whether American prosecutors have the legal authority

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[712] Marcus and Waye, Australia and the United States (2010), 335-401.

[713] Bordenkircher v Hayes (1978).

[714] *United States v Jackson* (1968), 390 US 570, 583; *Griffim v California* (1965), 380 US 609, 614.

[715] *Bordenkircher v Hayes* (1978), 434 US at 364.

[716] Bordenkircher v Hayes (1978).

[717] Marcus and Waye, Australia and the United States (2010), 335-401.

[718] Michael O'Hear " The End of Bordenkircher: Extending the Logic of Apprendi to Plea Bargaining" (2006), WULR, 84, 835.

to undermine well-established constitutional rights during a plea bargain.[719] Therefore, it is argued inter alia that US prosecutors have excessive power regarding prosecutorial decision-making.

6.4 Australia

While the US prosecutors' absolute authority is visible from the plea bargaining phase, their Australian counterparts invoke plea negotiations in what is referred to as "charge bargaining". A charge bargain involves negotiation in which there is an exchange of guilty pleas to some offences and the withdrawal from prosecution of others.[720] In charge bargaining, prosecutors are responsible for determining which criminal charges are prosecuted and the method used to ensure prosecution. Australian prosecutors are considered gatekeepers of the criminal justice system by this unique characteristic.[721] However, this consideration is not intended to undermine the role played by USA prosecutors. The prosecutor's role in the US and Australia is central to the proper functioning of the criminal justice system.[722] This notwithstanding, significant differences are visible in how the American and Australian prosecutors discharge their responsibilities. For instance, two prosecutor categories exist in the Australian criminal justice system. The first category concerns legal practitioners employed by statutory Directors of Public Prosecution (DPP), with the mandate to prosecute serious crimes at the level of superior courts operating at the federal level of government.[723] At the lower sphere, where any minor offences, including minor assaults, drunk driving, and theft, are categorised, prosecutions are managed by specialised police officers equipped with the relevant skills in law.[724]

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[719] Stuntz (2006), *HLR*, 119, 780.

[720] Marcus and Waye, Australia and the United States (2010), 335-401.

[721] Ibid.

[722] John McKechnie "Directors of Public Prosecutions. Independent and Accountable" (1996), UWALR, 271-72.

[723] Richard Refshauge Prosecutonial Discretion - Australia in the Convergence of Legal Systems in the 21st Century: An Australian Approach (2002), A Gabriel and Rodolphe Biffot (eds), 358-359.

[724] Marcus and Waye, Australia and the United States (2010), 335-401.

The role of specialised officers in prosecution raised concerns owing to the categorisation of prosecutorial functions stated above. Deploying non-lawyers in the form of police officers to prosecute complex criminal cases does not satisfy the standard advocacy requirements observed by prosecutors. It may be difficult, if not impossible, for specialised police officers to apply sophisticated legal reasoning to prosecute a suspect. Consequently, the purported prosecutions will not legally canvas the challenges confronting the criminal justice system, especially when dealing with corruption cases.[725] This administrative deficit exhibited by the second category of prosecutors is a stumbling block in most Australian jurisdictions, resulting in the transfer of most prosecutions to the DPP. The high volume of cases forwarded to the DPP opens the possibility for politicised prosecutions, including the DPP's enormous challenges resulting from the fact that the institutional separation of power between the DPP and related government officials is not clearly defined.[726] The DPP's challenges are further exacerbated by poor judicial review of prosecutorial discretion[727] and limited or no parliamentary oversight.[728] Police officers and special investigation units conduct investigations of serious crimes to address the challenges associated with the office of the DPP.

For reasons of the poor prosecutorial framework entrenched in the Australian criminal justice system, prosecutors are seen to be remote from victims of crime and the community at large.[729] Consequently, a charge bargain in Australia, synonymous with the concept of a plea bargain in the US, has been undermined.[730] Studies have reported that more than 50% of defence counsels engage in charge bargaining. However, many Australians believe the process is riddled with selective application of criminal sanctions, with defence lawyers seeking to minimise the time and resources required to prosecute

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[725] Ibid.

[726] Ibid.

[727] *Maxwell v The Queen* (1996), 184 CLR 501, 513-14.

[728] Richard Refshauge *Prosecutonial Discretion* (2002), 358-359.

[729] Robyn Holder and Nicole Mayo, "What Do Women Want? Prosecuting Family Violence in the Act" (2003), *CICJ,* 15, 12.

[730] Robert Seifman and Arie Freiberg "Plea Bargaining in Victoria: The Role of Counsel" (2001), *CLJ,* 25, 64.

cases to their logical conclusion.[731] There is growing concern that charge bargaining undermines the interests of victims and promotes undeserved sentencing of the guilty, all of which stem from unchecked prosecutorial discretion in charge bargaining.[732]

Guidelines have been developed to direct charge bargaining. However, they only regulate negotiations regarding the severity of the sentence and the interests of the public to include factors such as the seriousness of the offence and the attitude of the alleged victims and community to the offence. Such claims, however, do not disregard the relevance of the concept of a charge bargain to the Australian criminal justice system. Some states have engaged in charge bargaining to enhance efficacy in the criminal justice process. For instance, the New South Wales Parliament adopted a mandatory trial measure with compulsory plea negotiations to complement charge bargaining.[733] Other Australian jurisdictions have adopted informal sentencing guidelines to provide discount sentencing where a criminal defendant pleads guilty before the trial commences.[734] Therefore, the US plea bargaining and the Australian charge bargaining concepts use the theory of utilitarianism by avoiding costly and unnecessary trials and mismanagement of resources.

6.5 Double jeopardy

Double jeopardy is another area where the US and Australia share similar characteristics in prosecutorial functions. While the US enjoys constitutional guarantees about the double jeopardy concept established centuries ago, their Australian counterparts have moved away from that commitment. The illustrations below provide insight into the difference between the two criminal justice systems.

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[731] NSW Revamps Sentencing Guidelines. Australian, 10, January 2008. http://www.theaustralian.news.com.au/story/0,25197,23032363-5006784,00.html (Accessed: 20 March 2021).

[732] Ibid.

[733] Marcus and Waye (2010), 335-401.

[734] Ibid.

6.5.1 Australia

In Australia, double jeopardy is not linked to any constitutional commitment. Although US jurisprudence promotes the principle of finality of the verdict as stipulated under the Fifth Amendment, the New South Wales Court of Criminal Appeal contradicts this position by stating the principle falls outside the protection of the Australian Constitution.[735] The court further instructs that the finality of a verdict is a common law principle subject to statutory limitation. Although Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) complements the USA's position on the finality of a verdict,[736] retrials for acquittals have been allowed in Australia, particularly under circumstances where new and reliable evidence is brought before the court. The Australian approach to double jeopardy enjoys support from relevant international instruments, and recommendations for reforms at the federal level have been made.[737] The jurisprudence regulating double jeopardy in Australia evolves from the autrefois convict/acquit doctrine, which involves criminal charge defences under common law and statute.[738] The Queensland Criminal Code provides that:

> It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged.[739]

The autrefois convict/acquit is a blend of two doctrines striving to regulate inconsistent

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[735] *R v JS* (2007), 230, *ELR,* 275, 306-09.

[736] The International Covenant on Civil and Political Rights (ICCPR) entered into force on November 13, 1980. 1980 Austl TS No 23.

[737] Model Criminal Code Officers Command (MCCOC), Australia Attorney General's Department of Double Jeopardy (2004). http://www.ag.gov.au/www.agd/wpattach.nsf/VAP/CCFD7369FCAE9B8F32F341DBE097801FF)-ouble+Jeopardy+Report+25+Mar.pdf/$file/Double+Jeopardy+Report+25+Mar.pdf. (Accessed: 20 March 2021).

[738] Jill Hunter "The Development of the Rule Against Double Jeopardy" (1984), *JLH,* 5, 1, 4, 1984.

[739] Criminal Code Act (1899), 17.

verdicts and ensure finality. However, both principles aim to achieve different purposes. On the one hand, the purpose of autrefois convict is to prevent double punishment; autrefois acquit constitutes a form of estoppel striving to limit multiple prosecutions.[740] Both doctrines require that the basis of the offence for which the accused was previously convicted or acquitted remain the same. In *R v P*, NJ (No 2),[741] the court held that, although the defendant was charged and sentenced for wounding with intent, and acquitted of murder, retrial for murder based on the autrefois acquit/convict principle was not possible. Such pleas could not hold for decisions the law does not approve to ensure that the defendant is not in jeopardy. In *Island Maintime Ltd v Filipowski*, the court also held that the autrefois acquit rule did not apply. The decision was informed by the dismissal of prosecution because of a no-case submission based on a faulty summons.[742]

Based on the quest to limit multiple prosecutions and double convictions, the double jeopardy principle has been extended beyond the limits of autrefois acquit/convict to be considered within the doctrine of abuse of process.[743] Abuse of process is the inherent power exercised by superior courts to ensure the integrity and efficacy of their process. The doctrine of abuse of process is hardly defined as a single piece under Australian law. It is reflected in the expression of various processes, including, among others, activating the court's jurisdiction for a wrong purpose[744] or engaging the court process oppressively.[745] Where either of the above processes obstructs the course of justice, the prosecutor uses discretionary authority to stay criminal proceedings to balance the

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[740] *The Queen v Carroll* (2002), HCA. 55, para. 30.

[741] *R v P,* (2007), *NJ* (No 2) SASC 135; 99 SASR 1.

[742] Island Maritime Limited v Filipowski (2006), HCA 30.

[743] Marcus and Waye, Australia and the United States (2010), 335-401.

[744] *PNJ v R* (2009), HCA 6, para. 3.

[745] *The Queen v Davis* (1995), 57 ECR. 512, 520; *R v Benbrika* (2008), 182 A Crim R 205, 223-24, where the court threatened to stay proceedings because the conditions under which the accused were held on remand led to impairment of mental function such that the accused were not able to properly instruct their legal counsel nor participate in their trial. The stay was granted until the conditions of incarceration were ameliorated. See also *Rogers v The Queen* (1994), 181 CLR 251, at 268 (finding that multiple prosecutions for the same offence were an abuse of process because they were contrary to the need for judicial determinations to be treated as incontrovertibly correct, which would tend to bring the administration of justice into disrepute).

interests of the community and the applicant. In *The Queen v Carrol*, the court held that, although the defendant committed perjury by denying his guilt under oath in a previous murder trial, the resulting perjury indictment was an abuse of process. Based on this, the judge was bound to stay criminal proceedings,[746] even though the autrefois acquit plea could not be established because perjury was not a verdict available in his trial for murder, and a verdict of murder was not available in his trial for perjury.[747] The New South Wales Court of Criminal Appeal also established in *Gilham v The Queen* that the prosecutor enjoys discretionary authority to stay proceedings where there are contradictions between a prior conviction and a new criminal prosecution.[748] These are the circumstances under which the prosecutor exercises the discretionary authority to stay proceedings under Australian law according to the autrefois convict/acquit doctrine.

6.5.1 United States

Unlike in Australia, the double jeopardy doctrine is a constitutional principle enshrined under the Fifth Amendment Act of the US Constitution,[749] stipulating that "No person shall be subject for the same offence to be twice put in jeopardy of life or limb…."[750] Although it may seem straightforward to say the clause protects against double punishment, US jurisprudential development has extended the scope to include charges in the sphere of punishment ranging from misdemeanours to felonies and fines.[751] The US Constitution merely reinforced this legal position by noting that the double jeopardy principle prohibits criminal defendants from being tried or punished twice for the same offence.[752] Double jeopardy was incorporated into the American Bill of Rights as a check and balance mechanism against mischievous prosecutions.[753] The essence of the Fifth Amendment

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[746] The Queen v Carroll (2002), HCA, 55, para. 51.

[747] Ibid.

[748] *Gilham v The Queen* (2002), 178 A Crim R 72, para. 88.

[749] *Benton v Maryland* (1969), 395 US 784, 795.

[750] USA Constitutional amendment v double jeopardy protection applies to persons both federally, and in the states as per incorporation by the Fourteenth Amendment. See Marcus and Waye (2010), 335-401.

[751] Marcus and Waye, Australia and the United States (2010), 335-401.

[752] Ibid.

[753] Stephen Limbaugh "The Case of *ex parte* Lange (or how the Double Jeopardy Clause Lost Its 'Life or

within the US constitutional framework was to ensure that the double jeopardy clause guarantees more protection for citizens in the USA than in other common law jurisdictions.[754] The doctrine strives to regulate excessive government power and misuse of State resources to convict persons previously acquitted.

The need to protect the defendant from prosecution for a previous offence for which they were convicted or acquitted has provoked a range of reforms in Australia and other jurisdictions which strive to regulate the double jeopardy principle.[755] According to US constitutional developments in double jeopardy, litigation primarily focuses on what constitutes an acquittal. Whether it is an acquittal of a charged offence or a particular punishment, double jeopardy protection applies to a bench trial and the jury verdict.[756] In cases where acquittal is based on the dismissal of an offence, it is treated as final.[757] Where the court or jury establishes a no-case submission based on insufficient evidence, subsequent prosecution of the same case is barred. No exception limits this rule irrespective of the reasons for insufficiency. Contrary to the position in Australia, South Africa and elsewhere, double jeopardy in the US bars subsequent prosecution of the same case, even if new evidence emerges to justify the guilt of the criminal defendant.[758]

In the US criminal justice system, it is significant that courts are serious about the finality of an acquittal despite the exception, defect, or error. A US justice explained that, once the criminal defendant has been acquitted, retrial is not permitted, no matter how faulty the judgement.[759] In this case, the determinant factor is not the amendment of the ruling

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Limb')" (1999), *ACLR,* 36, 62-63.

[754] *People v Paulsen* (Colo 1979), 601 P 2d 634, 636. "Retrial is precluded (under the Colorado Constitution) even when the trial court erred as a matter of law in granting the judgment of acquittal"; *State v Lessary* (Haw 1994), 865 P 2d 150, 156. Holding that "the same conduct test" bars a second prosecution under state principles; *Derado v State* (Ind 1993), 622 NE 2d 181, 184. Ffinding more protection than the federal standard regarding conspiracy and the substantive offense; *State v Hogg* (NH 1978), 385 A 2d 844, 846. Holding that estoppel-limiting sovereignty rules under the federal constitution are inapplicable under state law.

[755] *North Carolina v Pearce* (1969), 395 US 711, 717.

[756] *Smith v Massachusetts* (2005), 543 US 462, 467; *Heath v Alabama* (1985), 474 US 82, 88.

[757] Marcus and Waye (2010), 335-401.

[758] *United States v Martin Linen Supply Co* (1977), 430 US 564, 571-72.

[759] *Fong Foo v United States* (1962), 369 US 141, 143.

on acquittal but the validity of a substantive resolution granting acquittal in the interest of protecting the jeopardy clause.[760] While the double jeopardy clause seems overprotective in the USA, it is marked by significant limitations. One of the major limitations is the "dual sovereign rule". It is understood that double jeopardy is invoked to bar the reprosecution of the same criminal offence by the same jurisdiction. This implies that a criminal defendant can be tried and convicted twice for the same offence under different jurisdictions. The logic accompanying this double jeopardy limitation is that each sovereign is governed by its laws and can therefore be prosecuted under such laws, irrespective of whether another sovereign has prosecuted the offence. Consequently, limiting reprosecution and multiple punishments by imposing the double jeopardy clause does not apply when the dual sovereign rule is invoked. What constitutes different sovereigns in this regard includes a federation and a state,[761] two states,[762] or the military and the state.[763]

It is essential, therefore, to acknowledge that the double jeopardy clause is a crucial tool protecting reprosecution in the US. Except for challenges and limitations, the fabric of the double jeopardy clause constituting the authority to bar reprosecution is well established under the US Constitution.[764] The principle is constitutionally guaranteed to ensure consistency. Similarly, the Australian rule on double jeopardy conferring more powers to prosecutors is consistent and has not been challenged.

6.5.2 Sentencing

Sentencing is another area that reveals visible differences between the US and Australian criminal justice systems. Both jurisdictions share uncommon characteristics regarding punishment, rehabilitation programmes and the overall treatment of criminals. The following section details sentencing policies applicable to the US and Australian criminal

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[760] *Price v Georgia* (1970), 398 US 323, 329.
[761] *Abbate v United* States (1959), 359 USA 187, 192.
[762] *Heath v Alabama* (1985), 474 US 82, 88.
[763] *United States v Ragard* (2002), 56 MJ 852, 856, A Ct Crim App.
[764] Marcus and Waye (2010), 335-401.

justice systems.

6.6 United States

Criminals are severely punished in the US, which has been the case over the past decades.[765] The severity of punishment is linked to defendants enjoying enormous protection in the criminal justice process.[766] Despite the protection afforded to criminal defendants, the US recorded the highest number of incarcerations in previous decades. With an estimated 5% of the world's population in detention, the USA alone reported 25% of the world's incarcerated persons.[767] This explains why the US recorded the highest number of prisoners worldwide in 2008, with a soaring increase of 762 per 100 000 people.[768] The massive incarceration rate attracted considerable losses in the economic sector, including significant disruption of families and communities across the nation.[769] Consequently, many children were isolated from their parents, who remained behind bars.[770] The dynamics of imprisonment and punishment stem from America's colonial rule of incarceration.

During colonial administration under British mandate, the US adopted the colonial practice of "determinate sentencing", which imposed terms for offences such as felonies. The practice was considered detrimental because felony defendants could determine their punishment from the charging phase. Furthermore, judges were given limited discretion over punishing defendants because penalties were based on a fixed sentence prescribed by law. Critics later argued that the practice was unfair because the individualised determination of punishment by judges depending on the nature and

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[765] Paul Marcus "Capital Punishment in the United States and Beyond" (2007), *MULR*, 31, 837.

[766] Ibid.

[767] Jim Webb, Why We Must Fix Our Prisons, *PARADE*, 29 March 2009. http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html. (Accessed: 20 March 2021).

[768] Heather West and William Sabol, US Department of Justice, Prison Inmates at Midyear 2008-Statistical Tables 2, March 2009.

[769] The Sentencing Project, Facts about Prisons and Prisoners, April 2009. http://sentencing project.org/doc/publications/inc-factsaboutprison.pdf. (Accessed 22 March 2021).

[770] Schirmer et al, The Sentencing Project, incarcerated parents, and their children: Trends 1991-2007. Available at http://www.sentencingproject.org/Admin/Documents/publications/inc incarceratedparents.pdf. (Accessed 20 March 2021).

circumstances of a case was not allowed.[771] By the beginning of the 19th century, congress and individual states began moving away from determinate sentencing policies to prescribed ranges of punishments stipulated in their legislative frameworks, allowing judges to enjoy greater sentencing discretion.[772] This development was accompanied by a rehabilitation plan in which the idea of imprisonment was re-conceptualised from punishment centres to institutions to convert offenders into law-abiding citizens.[773] By 1930, The United States Parole Commission was formed, constituting a Board of Parole and mandated to parole federal prisons.[774] The function of the Parole Board was to determine when a prisoner's sentence would be allowed to end based on behavioural improvements and progress to rehabilitation.[775]

The rehabilitation model of punishment subsequently gained popularity, even though its efficacy was questioned because an effective corrective treatment programme was absent, and crime rates remained high.[776] Another pitfall of the rehabilitation model was that it resulted in punishments far less severe than the nature of the crime demanded, where the degree of participation of the offender vis-à-vis the sentencing requirement was prescribed by law.[777] Based on such negative feedback, reformers began advocating for severe punishments that corresponded more closely to the gravity of the given offence and insisted that punishment should address the risk posed to the community.[778] Based on the quest for reform, some states introduced regulatory legislation alongside the

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[771] Susan Klein "The Return of Federal Judicial Discretion in Criminal Sentencing" (2011), *VULR,* 39, 693-740.

[772] Ibid.

[773] Hofer et al, US Sentencing Commission, fifteen years of guidelines sentencing 41 (2004). http://www.ussc.gov/15_year/15-year-study-full.pdf. (Accessed: 20 March 2021).

[774] US Parole Commission, History of the Federal Parole System 1 (2003). http://www.usdoj.gov/uspc/history.pdf. (Accessed: 20 March 2021).

[775] Hofer et al, http://www.ussc.gov/15_year/15-year-study-full.pdf. (Accessed 20 March 2021).

[776] David Yellen "Saving Federal Sentencing Reform after Apprendi, Blakely and Booker" (2005), *VLR,* 50, 163.

[777] Hofer et al, http://www.ussc.gov/15_year/15-year-study-full.pdf. (Accessed 20 March 2021).

[778] The approach practiced in the USA was also adopted by other countries. See Stephan Terblanche and Geraldine Mackenzie "Mandatory Sentences in South Africa: Lessons for Australia" (2008), *ANZJC,* 41, 402.

Federal Sentencing Reform Act (FSRA) of 1984, which was the fundamental reform.[779]

The FSRA brought about new reforms, including establishing the United States Sentencing Commission (USSC), which was charged with drafting Federal Sentencing guidelines.[780] The Federal Sentencing guidelines issued in 1987 by the USSC created a system under which sentencing was fixed after considering many factors.[781] The USSC also abolished the Federal Parole Commission, where an appellate reversal or presidential pardon was unavailable, and the fixed sentence issued by the district judge concurring with the guidelines was served in full by the offender.[782] In conclusion, the overall effect of the FSRA was the reduction in judicial discretion on federal sentencing decisions.[783] Due to such developments in judicial discretion, states began adopting legislative measures to regulate determinate sentencing.[784] States also embraced and expanded treatment programmes, parole and probation systems reform, and the introduction of alternatives to imprisonment for non-violent offences.[785]

During the period covering the sentencing reform agenda in the US, the nation experienced severe economic hardship due to the high cost associated with incarceration and catering for millions of people. Between the years 2007 to 2010, over half the incarcerated men and women were parents whose children endured the harsh reality of living outside parental care.[786] By implication, the dynamics involved in the sentencing and incarceration procedures in the US often deeply and irrevocably disrupted the social order of society.[787] As a result of such egregious disruptions, many states began to adopt

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[779] Marcus and Waye, Australia and the United States (2010), 335-401.

[780] Ibid.

[781] Ibid.

[782] Ibid.

[783] Families against Mandatory Minimums Found (FAMMF), History of Mandatory Sentences 1 (2005). http://www.famm.org/Repository/Files/Updated%20short/20HISTORY.pdf. (Accessed: 20 March 2021).

[784] Ryan King, The Sentencing Project, Changing Direction? State Sentencing Reforms 2004-2006, at 3 (2007), http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf (Accessed 20 March 2021).

[785] Marcus and Waye (2010), 335-401.

[786] Schirmer et al (2009).

[787] Todd Clear, The effects of high imprisonment rates on communities. In: *37 Crime and Justice: A*

new sentencing laws to combat the rise of incarceration and to regulate the economic and social effects of these sentencing procedures.[788] As it stands, these innovative measures have carried with them many reform initiatives aimed at instituting a degree of control over sentencing in the US.

6.7 Australia

While the US continues to witness executive and legislative constraints due to unstructured judicial discretion that aligns sentencing with community expectations, the Australian sentencing model relies solely on judicial discretion. Australian judges enjoy the authority to exercise control over the sentencing process, where mandatory sentencing and the relevant guidelines are not applicable.[789] However, public participation in sentencing is relatively greater, with more punitive sentencing measures applicable in the Australian criminal justice system.[790] It is worth noting that the incarceration rate in Australia is far below that of the US. This comparison is premised on a figurative assessment according to which Australia recorded an imprisonment rate of 162.6 prisoners per 100 000 adults in 2008,[791] compared to the USA, which recorded 762 prisoners per 100 000 adults in the same period.[792] Additionally, within the same time frame, Canada recorded 129 prisoners per 100 000 adults, New Zealand recorded 230 prisoners per 100 000 adults, and England recorded 167 prisoners per 100 000 adults.[793] According to the percentage per 100 000, the US has higher numbers than Australia, which falls within the range observed in other common law jurisdictions. However, the Northern Territory in Australia shows incarceration figures similar to the percentage in

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Review of Research (2008), Michael Tonry (ed) 97-98.

[788] Marcus and Waye (2010), 335-401.

[789] Ibid.

[790] http://www.abs.gov.au.AUSSTATS/abs@.nsf/PreviousProducts/4517.OMedia%20Releani 2004?opendocument&tabname-summary&prodno=4517.0&issue=2004&num=view=(Accessed:20 March 2021).

[791] Steering Committee for the Review of Government Services Provision, Productivity Commission, Report on Government Services 2009, at 8.5 (2009).

[792] Marcus and Waye (2010), 335-401.

[793] Trends in the Use of Full-Time Imprisonment, Sentencing Trends, and Issues (November 2007), Judicial Commission of New South Wales, Sydney, Australia, p. 1, 3 Figure 2.

the US, with a recorded imprisonment rate of 697 per 100 000 adults.[794] The difference in number is because this territory in Australia has a local population whose access to social facilities is relatively low, including no supportive correctional services and rehabilitation programmes catering to prisoners.[795]

Another critical factor illustrating a significant difference is that the criminal justice system in Australia is notably moderate, with average imprisonment terms generally shorter than in other jurisdictions. According to 2008 statistics, sentencing was approximately three years, with the expectation of life, indeterminate and periodic detention sentences.[796] The statistics further reflect a 5% imprisonment rate for life sentences or related indeterminate sentences, while 58% of prisoners across the national territory served fewer than five years in prison.[797] In addition to the moderate sentencing practices exhibited by Australian courts, judicial discretion aligns with sentencing. It is governed by legislation specifying the purpose of sentencing and the relevant factors to consider.[798] The purpose of sentencing includes punishment, rehabilitation, community protection, balancing community dynamics, strengthening social cohesion, and promoting community participation in sentencing.[799] Although the factors listed so far are classified as domestic legislation, they all receive the same attention in terms of application. Therefore, no single approach to a specific purpose is prioritised over another. Instead, judges enjoy the privilege of deciding which purpose and factors best address individual cases, as explained in *Veen v The Queen* (No 2):

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[794] Australia Bureau of Statistics, 4512.0 Corrective Services 4 (March Quarter, 2009).

[795] Office of Crime Prevention, N Terr, Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience (2003), 2, 13. Available at: http://www.nt.gov.au/justice/policycoord/docuinents/statistics/mandatory-sentencing-nt~experience_20031201 .pdf. (Accessed: 20 March 2021).

[796] Marcus and Waye (2010), 377.

[797] Office of Crime Prevention (2003).

[798] Marcus and Waye (2010), 378.

[799] Jeffries Samantha and Bond, “Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia Higher Courts” (2009), *ANZJC,* 42, 64-65.

> [The sentencing purposes] are guideposts to the appropriate sentence, but sometimes they point in different directions. And so, a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.[800]

The sentencing practice in Australia has been criticised for insufficient data and limited studies conducted to address issues related to deterrence and rehabilitation. Other mandated sentencing whose aims and objectives in sentencing hearings are not clearly defined have further exposed Australian sentencing practices to criticism for an apparent lack of efficiency.[801] Based on such criticisms, the Australian Law Reform Commission Report (ALRCR) entitled *Same Crime, Same Time* recommended adopting new federal sentencing laws to address unequal sentencing practices across criminal jurisdictions in Australia.[802] In addition to the Commission's recommendations, administrative, judicial and legislative reforms have been introduced. These include the creation of sentencing databases to track a range of sentences applicable to specific offences,[803] the formation of advisory bodies in the form of sentencing councils to advise the courts and the attorney general,[804] and the institution of guiding principles by appellate courts to set punishment for particular types of offences.[805] Although the suggested reforms are similar to sentencing practices in the US, as exemplified in *United States v Booker*,[806] they are not binding due to the absence of a defined legislative framework that fast-tracks implementation. Contrary to sentencing practices in Australia, USA sentencing guidelines are legislated.

Appellate Courts in Australia are equipped with legislation to handle issues relating to

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[800] *Markarian v The Queen* (2005), 228 *CLR*, 357.

[801] Mirko Bagaric "Strategic (and Popular) Sentencing" (2006), *IJPS,* 2, 121, 126.

[802] Australia Law Reform Commission, Report No 103, "Same Crime, Same Time": Sentencing of Federal Offenders (2006).

[803] Marcus and Waye (2010), 378.

[804] Victoria Sentencing Advisory Council, Welcome to the Sentencing Advisory Council. http://www.sentencingcouncil.vic.gov.au/ (Accessed: April 6 2021).

[805] Arie Freiberg and Peter Sallmann (2008), LC, 26, 43, 56.

[806] *United States v Booker* (2005), 543 US 220.

sentencing decisions and guidelines, unlike their US counterparts, whose appellate sentencing laws are generally considered ineffective.[807] This explains why discussions concerning indeterminate sentencing laws are neither entertained by US policymakers nor embraced by the judiciary in Australia. Therefore, the Australian appellate courts have discretionary authority to guide sentencing judges.[808] Notwithstanding this, the court's ability to set standards for sentencing remains questionable, given that appellate decision-making is undertaken ad hoc and is guided by the facts of the case and the arguments presented by parties to the suit.[809] While appellate reviews could form a good platform for developing sentencing policies, they may deliver a weaker system for achieving coherence and consistency. Consequently, appellate reviews cannot provide a valid explanation for the difference in sentencing outcomes observed between Australia and the US.

The courts in Australia also consider economic factors in dealing with sentencing challenges. For example, courts do not encourage expenditure related to extended imprisonment terms, even if it includes rehabilitation plans or related health care services.[810] The Australian government's total spending in 2007-2008 was $2.6 billion on prisons, compared to $0.3 billion on community-based corrections.[811] The reason for the casual approach is that no law reform agency has provided scientific evidence showing a link between increasing the severity of sentencing and reduced crime rates.[812] The rise of alternative restorative approaches in sentencing aligns with the level of dissatisfaction associated with the growing imprisonment rate and a search for a more judicious, evidence-based sentencing policy and practice.

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[807] Arie Freiberg and Peter Sallmann (2008), LC, 26, 43, 56.
[808] *Wong v The Queen* (2001), 207 CLR 584, 10.
[809] Arie Freiberg and Peter Sallmann (2008), LC, 26, 43, 56.
[810] *Western Australia v BLM* (2009), 526 ALR, 129, para. 20.
[811] Steering Committee (2009), 83.
[812] Tasmania Law Reform Institute, Sentencing Final Report No 11, at 2.1.25-.30 (2008).

6.8 Between the US and Australian prosecutorial systems

Australian and US justice systems form criminal jurisprudence that has influenced the South African prosecutorial system through the prosecuting authority. The Australian model is characterised by an uneven distribution of state power and the absence of a clear separation of power between the organs of government, including a bill of rights to guarantee fundamental liberties.[813] The US prosecutorial system is influenced by Anglo-American culture and characterised by a constitutional state concept that sharply contrasts the Australian model. Under the US model, the three branches of government are designed to function independently yet interdependently to ensure checks and balances and regulate one another's function. While the US criminal justice system exhibits constitutionally structured prosecutorial functions and judicial discretion, the Australian system encompasses unstructured judicial discretion and poor parliamentary oversight.[814]

In the US, plea bargaining is appropriately enhanced by a constitutionally entrenched process of judicial discretion. In contrast, the absence of a structurally defined constitutional framework regulating judicial discretion has undermined the concept of charge bargaining in Australia.[815] Consequently, the application of charge bargaining in prosecution often promotes undeserved sentencing, which, in turn, neglects the interest of victims. Regarding the double jeopardy doctrine, Australian law relies on the autrefois acquit/convict principle, which strives to limit inconsistent verdicts and ensure finality. Australian law does not establish any constitutional commitment to the double jeopardy clause. On the other hand, US jurisprudence provides constitutional guarantees to the double jeopardy doctrine as stipulated under the Fifth Amendment Act of the Constitution. The constitutionality of the double jeopardy doctrine is enforced so that a defendant is protected against a double trial for the same offence.[816] This constitutional guarantee

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[813] Loammi Wolf "The Unsuccessful Constitutional Transition of the NPA" (2013), *JHSF,* 71.

[814] Marcus and Waye (2010), 335-401.

[815] Ibid.

[816] Marcus and Waye (2010), 335-401.

gives US citizens more protection under the double jeopardy clause than their Australian counterparts.

Even though both jurisdictions exhibit different characteristics in terms of judicial discretion about US plea bargaining and Australian charge bargaining, they share the same standards in discharging prosecutorial responsibilities. See, for example, the adoption of mandatory trial measures with compulsory plea negotiations by the Australian New South Wales Parliament to complement charge bargaining.[817] Additionally, both plea and charge bargaining in the US and Australian jurisdictions uphold the theory of utilitarianism to minimise cost and mismanagement in prosecution. Owing to developments in prosecutorial decision-making, the South African criminal justice system seems to be influenced by the US and Australian models, which have evolved over time.

6.9 The South African prosecutorial model

The South African model focuses primarily on the role of the NPA as defined by the constitution and the NPA Act. The functions of the NPA are discussed in Section 179 of the constitution and loom between the US constitutional model and the Australian approach.[818] Chapter 8 of the constitution classifies prosecutors and the judiciary as state organs responsible for administering justice.[819] This classification aligns with the model of two state organs in the third branch of government under a constitutional state. The model is entrenched by three provisions under Section 179 of the constitution. Sub-section (2) of Section 179[820] grants authority, not to the department of justice, but to the prosecuting authority "to institute criminal proceedings on behalf of the state" and "to carry out any necessary functions incidental to instituting criminal proceedings." Under this provision, the relevant functions, including plea bargaining, sentencing, and the protection against double jeopardy, have become the sole responsibility of the

[817] Ibid.
[818] Wolf (2013), *JHSF*, 71.
[819] The Constitution, Act 108 of 1996.
[820] Ibid.

prosecuting authority in compliance with the constitutional state model.

Furthermore, sub-section (5) of Section 179[821] provides that the National Director of Public Prosecutions (NDPP) exercises equal authority as the Minister of Justice, given that he determines prosecution policy "in concurrence" with the minister. This provision does not favour a relationship of subordination typical of an internal executive hierarchy. Otherwise, the provision would have stated that the minister should determine prosecution policy "in advice of" the national director.[822] The aspect of aligning the director with the Justice Minister is horizontal, as is the relationship between the Minister of Justice and the judiciary. Additionally, sub-section (4) of Section 179[823] calls on the legislature to ensure that the prosecuting authority exercises its function "without fear, favour or prejudice." This provision implies a need for a statutory pronouncement to ensure prosecutors are protected against ministerial orders when exercising their authority.

Obviously, the NPA's authority would have formed part of Chapter 5 had the constitution's drafters intended to institute control of the executive branch over the prosecuting authority.[824] Chapter 8 of the constitution merely clarifies the constitutional guarantees afforded to the prosecutor. However, two provisions in Section 179[825] contradict the necessary independence of prosecutors. Sub-section (6) stipulates that the Minister of Justice is "responsible for the administration of justice" and "must exercise final responsibility over the prosecuting authority."[826] This provision is interpreted in favour of functional independence, where prosecutors are considered part of the executive branch, as in Australia. This, however, contradicts the Anglo-American model, which approves of a constitutional state's paradigm.[827]

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[821] Ibid.
[822] Wolf (2013), *JHSF,* 71.
[823] The Constitution, Act 108 of 1996.
[824] Wolf (2013), *JHSF,* 71.
[825] The Constitution, Act 108 of 1996.
[826] The Constitution, Act 108 of 1996.
[827] Wolf (2013), JHSF, 71.

Another provision that poses a challenge is Section 179(1)(a) of the constitution, which provides that the national director of the prosecuting authority should be appointed by the president in his capacity as "head of the executive".[828] Going by the construction of Sections 179(6) and 179(1)(a), the exercise of authority has been cast as straightforward executive powers, which places constraints on independent judicial authorities. Under such circumstances, the independence of the prosecuting authority is not absolute due to executive control.[829] The pattern of executive control advanced by the two constitutional provisions stated herein has been criticised for politicising the functions of the prosecuting authority and undermining the rule of law and neutrality of criminal justice.[830] Such criticisms have excited public interest and debates on the question of the independence of the prosecuting authority, which, in turn, impacts the functioning of the criminal justice system.[831]

Under South African law, the independence of the prosecutor implies that prosecutorial discretion must not be subjected to the authority of the government.[832] The idea that the prosecutor may be considered part of the executive has been nullified by the Supreme Court of Appeal, which stated that the functions of the NPA are covered by Chapter 8 of the constitution dealing with "Courts and Administration."[833] For this reason, it is presumed inappropriate for the executive to instruct the NPA to either prosecute, decline prosecution, or terminate any prosecution already in progress.[834] The independence of the prosecuting authority constituting the fabric of Section 32(1)(b) of the NPA Act provides limitations regarding external interference with the due processes of prosecution. Persons accused of contravening the relevant sections of the NPA Act are

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[828] Section 179(1)(a) of the constitution, 1996.

[829] The Constitution, Africa Act 108 of 1996.

830 Re: Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR, 1253, 1273 (CC) para. 146; Glenister v President of the Republic of South Africa and Others (2011), (7) BCLR, 651 (CC).

[831] Wolf (2013), JHSF, 71.

[832] David Broughton (2020), PELR, 23, 1-36.

[833] The Nkabinde case para. 88.

[834] National Director of Public Prosecutions v Zuma (2009), 1 SACR 361 (SCA) para. 32.

liable to a fine or imprisonment not exceeding ten years or both.[835]

6.9.1 The role of the prosecuting authority in administering justice

Even though Section 179(1)(a) authorises the president to appoint the national director, the legislature has interpreted it as farcical because it is inappropriate for the executive to exercise control on every single appointment to the prosecuting authority.[836] In this regard, there is a need for an independent personnel department within the prosecuting authority charged with the responsibility of ensuring appointments rather than shifting such critical functions to the Department of Justice. This action undermines the independence of the prosecuting authority, and consequently, the NPA has been turned into an executive pawn.[837] Executive control over appointments to the prosecuting authority has further politicised the administration of justice, undermining the rule of law and the neutrality of criminal justice.

Reference will be made to recent history to illustrate the danger associated with the position of the NDPP. President Mbeki unjustifiably brought an action against two NDPPs and ordered a commission of enquiry to investigate and consider their fitness to hold office.[838] At the same time, it seems the Constitutional Court engaged in damage control after realising the burden the approval of Section 179(1)(a) of the constitution places on the prosecuting authority.[839] Additionally, the Democratic Alliance (DA) challenged President Zuma's appointment of Menzi Simelane as the NDPP.[840] The Supreme Court of Appeal subsequently ruled that the president does not enjoy an unrestrained discretionary power to make such an appointment and must appoint someone fit to hold the office. President Zuma later pondered the appointment of a successor for

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[835] Section 41(1) of the NPA Act.

[836] Wolf (2013), JHSF, 71.

[837] Ibid.

[838] See Sidiropoulos, South Africa's Changing Role in Global Development Structures: Being in Them but not Always of Them. Discussion Paper, No 4/2019. https://www.econstor.eu/bitstream/10419/199556/1/die- dp-2019-04.pdf (Accessed: 20 March 2021).

[839] Ibid.

[840] Democratic Alliance v The President of the RSA and Others (2011), (263/11) ZASCA 241 (1 December 2011).

Simelane.[841] During the same period, a court ruled that the acting NDPP (advocate Jiba) must hand over the document constituting the nolle prosequi in the corruption trial of President Zuma.[842] President Zuma was, therefore, placed in the awkward position of appointing the next NDPP, who then possessed the authority to act "without fear, favour and prejudice" to institute criminal proceedings against him. Zuma's quest to avoid criminal prosecution has lasted for over a decade, seriously impacting the criminal justice system.[843]

In *Glenister v President of the Republic of South Africa and Others*, the Constitutional Court contested the abolition of the Scorpion special investigative unit. It stated that such decisions further complicate the difficult position of the NPA.[844] The court was expected to defend the integrity and independence of the NPA when there was a clash between parliamentarians and the executive. Most members instead attacked and discredited the Scorpions for fear of criminal prosecution.[845] Instead of advocating for a specialised anti-corruption forensic unit within the NPA mandated to enforce the rule of law, the court insisted on a sufficient distance of such a unit from executive control. Since the abolition of the Scorpions, corruption has continued to rise.[846]

Another controversy associated with its successor, the anti-corruption unit the Hawks, is that it is located within the South African Police Service (SAPS). Because of being part of the police, it is seen to exercise executive power.[847] Under these circumstances, criminal law is invoked as a form of administrative action, which automatically minimises the boundaries between criminal and administrative law. This decay of justice resulted in a selective application of criminal sanctions, whereby cases which merit prosecution are

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[841] Ibid.

[842] National Director of Public Prosecutions and Others v Freedom Under Law (2014), (1) SA 254 (GNP).

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[844] Glenister v President of the Republic of South Africa and Others (2011), (CCT 48/10), ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

[845] Wolf (2013), JHSF, 71.

[846] Berning Joey and Montesh Moses "Countering Corruption in South Africa: The Rise and Fall of the Scorpions and Hawks" (2012), SACQ, 39.

[847] Ibid.

filtered off the prosecution table.[848] It is left to the Constitutional Court to save essential institutions of the constitutional state, which include an independent anti-corruption unit within the NPA.

6.10 Conclusion

The role of the prosecuting authority in discharging judicial discretion was analysed in the three jurisdictions stated above. The similarities and differences inherent in exercising discretion by prosecutors in the US and Australian jurisdictions were discussed to form the relevant background on which South African prosecutors discharge their responsibilities. In all three jurisdictions, two models were identified by which prosecutorial functions are discharged. The first model is characterised by unstructured judicial discretion and poor parliamentary oversight due to the absence of a defined constitutional commitment directing prosecutorial functions. This practice, common in Australia, has been criticised for inefficiency.

The second model, defined by Anglo-American culture and based on a constitutional state paradigm, provides constitutional guarantees in prosecutorial responsibilities. This model, applicable to the US and other Anglo-American jurisdictions, has influenced the role of the prosecuting authority in South Africa. However, the success of the Anglo-American model is not absolute, given that executive interruption defined by constitutional mechanisms continues to frustrate the independence of the prosecuting authority. There is a need to strengthen the independence of the prosecuting authority to relieve prosecutors from undue political pressure and provide a conducive space for them to function without fear or favour.

[848] Wolf (2013), *JHSF,* 71.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

After accessing prosecutorial discretion from a comparative perspective, this researcher observes that the independence of the NPA is essential to the proper functioning of the judiciary and the maintenance of the rule of law. This thesis traces the historical origins of prosecutorial discretion in the US and Australia and the subsequent inclusion of the doctrine into South Africa's constitutional framework. The preliminary sections of the thesis provide a historical foundation regarding prosecutorial discretion and create a platform to analyse the content of the subsequent chapters.

Concepts of prosecutorial discretion, such as plea bargaining, double jeopardy, prosecutorial accountability and immunity, have been elaborated to provide the legal basis for exercising prosecutorial discretion. In Chapter Four, the theory of utilitarianism propounded by Jeremy Bentham and John Stuart Mill[849] and exemplified by Kant[850] was analysed as the baseline for prosecutorial decision-making. Criticisms raised by Williams[851] hypothesise the moral strength of utilitarianism as a drive to exercise prosecutorial discretion. The hypothetical construction of utilitarianism was evaluated by the exercise of prosecutorial discretion by the South African prosecutor.

Chapter Five presented a comprehensive survey on the exercise of discretion by the NDPP and the effect of political interference on the functions of the NPA. The chapter reveals the critical challenges hindering prosecution and stemming from the control of the NDPP by senior executive government officials. The consequence of such interference is reflected in the dismissal and resignation of successive NDPPs. Poor

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[849] Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (1907), Oxford: Clarendon Press, 1.

[850] Wood Allen *Kantian Ethics* (2008), Cambridge University Press, Chapter 14.

[851] Dryer "Utilitarianism, For and Against" (1975), *CJP,* 4, 549-559.

legislative response to limit the undue exercise of executive power has also been identified among the numerous challenges discussed herein. After noting a plethora of issues raised in the text, Chapter Six provides a comparative analysis of essential functions performed by prosecutors in the US and Australia, including the specific role of the NPA in promoting criminal justice in South Africa. This chapter concludes the thesis by adopting a comprehensive analytical approach to a discussion of the exercise of discretion by the prosecutor and limitations thereof in the US, Australian, and South African criminal justice systems.

7.2 Major findings

7.1.1 *Analysing prosecutorial responsibilities in the US and Australia*

The analysis of prosecutorial decision-making herein has been structured into two strata. The first stratum considers prosecutorial decision-making in the US and Australia, particularly highlighting their divergence in plea bargaining, double jeopardy, and sentencing. In the subsequent analysis, the application of these concepts is set in the current judicial framework of South Africa by the exercise of prosecutorial discretion by the NPA. Before concluding on the exercise of discretion by the NPA, it is essential to analyse the gap in jurisprudence between the USA and Australia.

The actual difference in prosecutorial decision-making between the criminal justice systems of the USA and Australia can be explained in terms of a rights-oriented and an official-centric culture. Given that the protection of double jeopardy lies at the centre of due process and constitutes a well-acknowledged civil right,[852] the concept could serve as the basis for deliberations on rights- and centric-oriented cultures. In the US, protection from double jeopardy cannot be avoided by legislation because the individual's protection is a cultural requirement and is practised as a lifestyle.[853] Contrary to this cultural orientation, common law has permitted the Australian High Court to extend

[852] See The International Covenant on Civil and Political Rights (ICCPR) Art 14, opened for signature December 16 1966, 999 UNTS, 171.

[853] *Burks v United States* (1978), 437 US 1.

double jeopardy beyond the longstanding autrefois acquit/convict principle to embrace the broader concept of abuse of process.[854] However, this extension has not been applied as prescribed. In this regard, reference can be made to Australian jurisdictions adopting laws that permit the retrial of cases already acquitted or the subsequent trial of offences that question earlier acquittals based on fresh and compelling evidence, where a guilty verdict is a likely outcome. This deviation from the US concept is contingent on the belief that rights ought not to override the punishment of the guilty.[855]

The thesis unveils pertinent factors at odds regarding the difference between plea bargaining and the completely distinct approaches to sentencing. In Australia, charge bargaining has a limited scope compared to US plea bargaining. Charge bargaining in Australia limits itself to the number of charges subject to prosecution following uniform guidelines that portray the nature and extent of the defendant's criminality in the context of the national judicial framework. Sentencing judges in Australia neither participate nor are they bound by agreements concluded between defence counsel and prosecutors concerning recommended sentences.[856] Additionally, a policy concern in Australia is that negotiations between prosecutors and defence counsel always result in unjustified horse trading, undermining the rule of law.[857] Rather than protecting defendants' rights, Australian state-based legislation on charge bargaining is primarily designed to ensure that defendants receive punishment appropriate to their offence.[858]

The US, on the other hand, shares different concerns regarding plea bargaining. In the US system, policy concerns are geared to the adverse effects that may overshadow helpless defendants as a result of an offer made by an overzealous prosecutor to provoke harsh sentencing.[859] The fear attributed to coercive plea bargaining in the US exists due

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[854] *The Queen v Carroll* (2002), HCA 55, paras. 32-33.

[855] David Hamer "The Expectation of Incorrect Acquittals and the 'New and Compelling Evidence' Exception to Double Jeopardy" (2009), 63, 2.

[856] *R v Pugh* (2005), 158 A Crim R 302, 339-45.

[857] Flynn and Williams "Secret Deals and Bargained Justice - the Underworld of Victoria's Plea Bargaining System" (2007), *CICJ* 120.

[858] Dennis Miralis "Tougher Sentences for NSW Offenders Pleading Guilty" (2008), *LSJ,* 46, 69, 70-71.

[859] Douglas Smith "The Plea Bargaining Controversy" (1986), *JCLC,* 77.

to high punishment levels in the US mandatory sentencing frameworks. Also, as one of the effects of adopting tough mandatory sentencing, the US is concerned with a significant increase in the exercise of prosecutorial discretion and the extent to which mandatory sentencing-eligible charges can be pursued.[860]

In Australia, sentencing is determined by the discretion of trial judges and paves the way for individualised mercy where necessary. Australian judges are appointed to stay in office until retirement, except by an erroneous parliamentary process.[861] It may also require much judicial malaise to force an Australian judge off the bench. On the contrary, US judges are expected to seek re-election to remain in office.[862] It is commonly observed that sentences increase as elections within the judiciary draw nearer, and the tendency to promote under-punishment rather than overly harsh sentencing to secure re-election.[863]

US judges find it difficult to incorporate individualised mercy in their sentencing due to guidelines regulating mandatory sentencing. Instead, regimes in the US promote consistency in sentencing, thereby enforcing the principle of equality before the law. On the other hand, the retention of judicial discretion in Australian sentencing and the differences in sentencing exercise have been criticised for undermining the principle of equality before the law.[864] Although attempts have been made to introduce mandatory sentencing in Australia, all have been unsuccessful due to community outcry pointing to its harsh and discriminatory consequences. Public opinion in Australia perceives sentencing as lenient and therefore considers mandatory sentencing unjust,[865] contradicting the notion that criminal behaviour is often aligned with the victimisation of

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[860] Ulmer et al "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences" (2003), *RCD,* 44, 1, 427-28.

[861] Australia Constitution Act, 2003, Art 72(ii).

[862] Gregory Huber and Sanford Gordon "Accountability and Coercion: Is Justice Blind When it runs for Office", *AJPS,* 48, 247.

[863] Marcus and Waye (2010), 335-401.

[864] John Anderson "Indefinite, Inhumane, Inequitable - the principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agent" (2006), *UNSWLJ,* 29, 139.

[865] Penelope Oakes and Nolan Human Rights Concepts in Australian Political Debate, in Protecting Human Rights: Instruments and institutions (2003), 75, 83, Tom Campbell et al (eds).

the offender.[866]

Australian legislatures believe increased imprisonment rates lead to unnecessary government expenditure, which overstrains the limited state budget.[867] This conclusion is drawn from the views of American policy-makers, who consistently expose the adverse effects of high levels of incarceration and the fact that mandatory sentencing regimes may not be sustainable, especially during economic hardship. Therefore, it is proper to align with the conclusion of this thesis that the Australian criminal justice system is more official-centric. The structure of the Australian prosecutorial system serves to ensure the freedom of the judiciary from executive control.[868] On the contrary, the limits placed on discretionary sentencing in the US reflect a panel policy designed to capture common public opinion and prioritise it in sentence determination.[869] In this concluding chapter, important aspects of the US and Australian criminal justice systems introduced and discussed in previous chapters were analysed to show how the two nations approach problems from sharply different perspectives. In this regard, it can be concluded that, with all the differences articulated above, Australian jurisprudence is more official-centric. In contrast, the USA jurisprudence is more rights-oriented.

7.3 The role of the NPA in the promotion of criminal justice in South Africa

The NPA is pivotal in the criminal justice system and enhances the proper administration of justice under the framework of constitutional democracy. An extended discussion of this thesis analyses the NPA's independence, accountability, and performance concerning its core function of prosecution. We found that the tendency of unchecked dismissals, suspension, or both, from the NDPP and resignations tabled by previous NDPPs, constitute the central malaise affecting the office of the NPA. It is instructive to

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[866] Weisbrot "Homicide Law Reform in New South Wales" (1982), *CLJ, 6,* 248; Draine et al "Role of Social Disadvantage in Crime, Joblessness, and Homelessness among Persons with Serious Mental Illness", (2002), *PS,* 53, 565.

[867] Marcus and Waye, Australia and the United States, (2010), 335-401.

[868] Peter Sallmann "Mandatory Sentencing: A Birds Eye View" (2005), *JJA,* 14, 177, 183.

[869] Franco Aas "The Ad and the Form: Punitiveness and Technological Culture, in the new Punitiveness: Trend, Theories, Perspectives" (2015), 150, 151-53, John Pratt et al (eds).

point out that this challenge is neither a product of insufficient resources nor overburdening of the prosecution service. Instead, it stems from undue political interference in the functioning of the NPA by top executive officials exercising political authority who wield sufficient power to divert its workings NPA. The thesis has identified various reasons for such interference and proposed some recommendations to enhance the functioning of the NPA.

Based on available data, we deduce that the exercise of prosecutorial discretion by the NPA does not reflect the vision of South Africa's constitutional framework. It is also a sterling observation that the post-apartheid era has been dominated by political interference, diverting the mandate of the NPA and its duty to ensure effective prosecution. Although the current constitutional construct seems to accord protection to the judiciary as a whole, this rule appears not to apply to the prosecution service.[870] Existing policy guidelines, practices, and legislative measures fail to provide the necessary protection of prosecutorial discretion, where the independence of the prosecutorial services is evident in this regard.[871] These pitfalls have been cross-examined to improvise remedies to safeguard the prosecution service and reinstate public confidence in prosecutorial discretion.

The arguments advanced here are indicative of a compromised prosecutorial system. There is no proper safeguard against incorrect prosecutorial decisions, and the independence of prosecutors from political interference is not guaranteed.[872] As a consequence of this, prosecutorial discretion is under serious threat. A survey of the jurisdictions discussed in this thesis revealed that prosecutorial discretion is critical in the surveyed criminal justice systems.[873] It is also clear that the degree of prosecutorial discretion varies from country to country and from one legal system to another. Even

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[870] Luphondo "*An Analysis of Prosecutorial Discretion"* Master's thesis submitted to the University of Pretoria (201), 68.

[871] Redpath (2012), *ISS,* 186.

[872] Redpath (2012), *ISS*, 186.

[873] Hassan Jallow "Prosecutorial Discretion and International Criminal Justice" (2005), JICJ, 3, 1, 145–161.

though all jurisdictions surveyed provide guidelines and criteria that set limits to discretion, it is relevant to point out that the decisions to prosecute cannot be controlled by the rules alone but are also the result of the prosecutor's professional judgement and discretion.

In South Africa, the efficacy of the criminal justice system depends on the proper functioning of the NPA. This dependency is because the NPA has a monopoly over prosecuting crimes. Given that the constitution empowers the NPA to act as a gatekeeper, it alone decides which criminal cases go to trial. Many cases are transferred annually from the police to the NPA, among which common offences such as murder, robbery, and assault constitute the majority.[874] Very few of the annual submissions to the prosecuting authority involve state officials. Although it remains a fact that cases against executive members go to the authority for prosecution, the number of such cases constitutes the tip of the iceberg compared to ordinary cases, where they risk derailing the proper and effective functioning of the prosecuting authority.[875]

For practical reasons, the NPA is quasi-independent on two counts: First, the constitution does not clearly define the independence of this institution. Instead, it opens a corridor for executive interference by stating that the Minister of Justice and Constitutional Development is responsible for the prosecuting authority. Although case law provides that the minister cannot direct the NPA to prosecute,[876] the constitution requires that they be kept informed about cases in which public interest might ensue or perhaps involving important aspects of the legal authority.[877] Ministerial oversight continues to pave the way for undue interference by this constitutional leverage.

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[874] Jameelah Omar "How South Africa can Stop Political Interference in Who gets Prosecuted". https://theconversation.com/how-south-africa-can-stop-political-interference-in-who-gets- prosecuted-79442 (Accessed: 14 January 2022).

[875] Ibid.

[876] *Glenister v President of the Republic of South Africa and Others* (2011), (CCT 48/10) ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011).

[877] Constitution of South Africa, Courts and Administration of Justice Chapter 8, Sections 165-180; Neels Swanepoel "The Public-Interest Action in South Africa: The Transformative Injunction of the South African Constitution" (2016), *JJS,* 14, 1-18.

Another major flaw in the criminal justice system of South Africa is concerned with the possibility of politicisation in how the director is appointed. The constitution requires that the president appoint the director without consultation. The director has the authority to intervene in decisions to prosecute and may review decisions to prosecute after consulting provincial directors of public prosecutions. S/he is responsible for determining prosecution directives and policies. However, given that the president appoints the director, it makes it difficult for them to function effectively and enjoy complete independence.

The office of the Director of Public Prosecutions provoked controversial debates raised in the thesis concerning whether the prosecuting authority would prosecute certain political cases.[878] For example, then-President Thabo Mbeki removed Vusi Pikoli from office for prosecuting Jackie Selebi. This implies that the Director enjoys limited authority in some instances. Furthermore, it indicates possible political interference in the office, which interferes with the overall performance of the director as the head of the NPA. Discussions about improving the independence of the Office of the Director have focused on criteria for appointing and removing incumbents. It is generally recommended that a committee of different stakeholders be empowered to interview and shortlist candidates for the position. Furthermore, it is essential that the president's unique authority to suspend a director without consultation be removed. It is paramount that the appointment and removal procedures be re-visited in the interest of more broad justice.

Prosecutors are significant in developing and maintaining an independent judicial system, given that the performance of their duties ought to be free from political interference.[879] This means that the independence of the judiciary depends on the independence of prosecutors. The independence of the prosecuting authority is crucial to the just operation of criminal justice systems worldwide. However, prosecutorial independence is not absolute. Prosecutors are subject to accountability, and these measures are indicative of

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[878] Omar, https://theconversation.com/how-south-africa-can-stop-political-interference-in-who-gets-prosecuted-79442.

[879] Earl Silbert "Role of the Prosecutor In the Process of Criminal Justice" (1977), *ABAJ,* 63, 717-1720.

checks and balances regulating the criminal justice system to ensure impartiality, fairness, and effectiveness. For example, South Africa's National Prosecuting Authority is accountable to parliament. Despite the inevitability of power politics, the function of the Prosecuting Authority is subject to the consistency of control by the relevant constitutional framework.[880]

Besides accountability, the prosecutor's decision to further or decline prosecution is subject to control. There is a fundamental difference between the decision to prosecute and the decision not to prosecute. While the decision to prosecute is ordinarily tested in court to ensure accountability, the decision not to prosecute may not be tested according to a similar process. In responding to the DA's application requesting the review, correction and setting aside of the decision of 6 April 2009 to discontinue criminal proceedings against Jacob Zuma, Mpshe elaborated on the NPA's understanding of whether the decision to prosecute is ever subject to judicial review.[881] Mpshe argued that such decisions might only be reviewed on narrow grounds, such as bad faith, and not necessarily extended constitutional frameworks, such as rationality. Without necessarily referring to a particular authority, Mpshe stated, "this is the approach that our courts have always adopted in relation to prosecutorial decisions, and it is the approach adopted in their jurisdictions".[882] This argument, however, loses credibility because, under a constitutional order, exercising public power is constrained by the principle of legality and the dictates of the constitution. Furthermore, jurisdictions such as the UK have intervened to overturn decisions not to prosecute, particularly in situations where the original decision was not based on a sound application of the evidential test.[883]

Where the decision not to prosecute in politically sensitive matters is anchored on weak

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[880] Constitution of South Africa, Section 195. See also African Criminal Justice Reform Document, NPA Accountability, Trust and Public Confidence, February 2019, https://acjr.org.za/resource-centre/npa-accountability-trust-public-interest.pdf (Accessed 28 December 2021].

[881] Redpath (2012), *ISS,* 186.

[882] Ibid.

[883] The European Court of Human Rights in *Armani da Silva v United Kingdom* (2016), 5878/08 ECHR 314, held that the evidential test for bringing prosecutions does not violate any rights of victims to have their crimes effectively prosecuted.

justifications, the appearance of a lack of independence of the prosecution service arises. Hence, the constitutional mandate of the NPA to prosecute requires the prosecuting authority to act without fear, favour, or prejudice. However, contemporary developments have proved that the current legislative framework of South Africa does not guarantee the relevant protection to safeguard the independence of the prosecution service.

7.4 The NPA's limited independence and accountability

The NPA is an anomaly among South Africa's criminal justice institutions. Unlike the police, prison service and judiciary, the NPA is not subject to dedicated external oversight. This omission in the country's criminal justice accountability architecture is particularly stark, given the NPA's influential role over other criminal justice agencies. For example, police investigations remain meaningless if they do not result in successful prosecutions. The criminal courts can generally only deal with matters prosecutors decide to place before them, and the effectiveness and efficiency of the prosecution service largely determine the number of remanded and sentenced prisoners.[884]

Analysis shows that, to a limited extent, the NPA is held to account by parliament[885] (in particular, the parliamentary Portfolio Committee on Justice and Constitutional Development), the Auditor-General, the National Treasury,[886] and the Minister of Justice and Constitutional Development, who "must exercise final responsibility over the prosecuting authority".[887] Additionally, the judiciary has reviewed and overturned NPA decisions on some occasions.[888] Although such safeguards exist to regulate the undue exercise of prosecutorial authority, they operate under significant limitations regarding the NPA. The staff composition is primarily a product of non-experts in prosecutorial issues. While employees in the Auditor-General's Office and the National Treasury may

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[884] Martin Schönteich (2014), ISS, 255, 1-24.

[885] South African National Prosecuting Authority Act. Section 35.

[886] In terms of the Public Finance Management Act (Act 1 of 1999) and the Public Finance Management Amendment Act (Act 29 of 1999); see National Treasury, Legislation – Public Finance Management Act (PFMA), www.treasury.gov.za/legislation/PFMA/ (Accessed 29 March 2022).

[887] The Constitution, Section 179(6), 1996.

[888]

be highly skilled in finance and budgetary issues, they generally do not understand the role, function, and performance of the NPA. Statutorily, their role is defined within the confines of financial management and compliance and not the performance in the judicial framework of the NPA. Thus, they are not competent to influence NPA matters.

Although it could be factually the case that performance goals create the environment for more effective parliamentary oversight, limited capacity among members of parliament (MPs) and their staff has meant that these roles are not always effectively fulfilled. Members of the committee, including research staff, have limited capacity to draft reports or track recommendations made to government officials.[889] For their part, parliamentarians have a limited understanding of the operations of the NPA. For example, although members of the Portfolio Committee on Justice and Constitutional Development are often lawyers, they typically do not have a prosecutorial background. There is also a knowledge deficit when it comes to the broad range of responsibilities accorded to members of the committee. This cuts across a wide range of justice-related issues and institutions, including the judiciary, legal profession, courts, Department of Justice and Constitutional Development, Legal Aid Board, South African Human Rights Commission, and the South African Law Reform Commission. Being one of parliament's busiest portfolio committees, it has complained that shortage of time and lack of funding hinders its oversight role.[890] It is also instructive to point out that members of parliament do not enjoy complete independence due to their allegiance to the parties to which they belong. Consequently, they exercise limited authority in discharging prosecutorial responsibilities.

Regarding the NPA's policy on the decision not to prosecute, the thesis has extensively addressed the subject in previous chapters.[891] For example, of the 517 101 new dockets the NPA received from the police in 2005/6, only 14% resulted in prosecutions. The

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[889] Du Plessis, Jean Redpath and Martin Schönteich, Report on the South African National Prosecuting Authority, in Promoting prosecutorial accountability, independence and effectiveness: Comparative research, Sofia: Open Society Institute (2008), 374.

[890] Open Society Foundation for South Africa, the Parliamentary Portfolio Committee on Justice and Constitutional Development: Shadow legacy report 2004–2009, Cape Town: Open Society Foundation for South Africa (2010), 4.

[891] Redpath (2012), *ISS,* 186.

prosecution declined to prosecute for a considerable portion of 60%. Also, while the NPA reports, for example, that the 2011/12 annual report reflected an 88.8% conviction rate, the number of cases prosecuted represented a small proportion of dockets passed on to the NDPP. It is thus obvious that only cases with a high probability of success and requiring the least effort to prosecute were pursued. This trend is not peculiar to South Africa but is common to most other jurisdictions worldwide.[892]

Therefore, the following conclusions have been reached. First, the NPA generally declines to prosecute a substantial proportion of ordinary criminal cases. This trend emanates from the discretionary powers held by the NDPP, and there is also little transparency when the NDPP declines to prosecute.[893] Second, where the NDPP does decide to prosecute, it appears to be a case of "selecting for success" to achieve conviction rate targets. The more complex cases, or cases that require more time and effort, are not pursued.[894] Thirdly, where law enforcement officials are implicated in rights violations, there appears to be an even greater reluctance to prosecute on the part of the NPA.[895] While the NPA has the authority and the resources[896] to conduct prosecutions, it appears to refrain in general from prosecuting law enforcement officials. The result is that the force of constitutionally enshrined rights is being eroded since violators do not suffer any consequences.[897]

7.5 Conclusion

Besides the standard of professionalism and ethics for the appointment of the NDPPs outlined in the NPA Act, there is historical evidence that candidates not meeting the high standard criteria have been appointed to the office of the NDPP. Such appointments have

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[892] Scott Krischke "Absent Accountability: How Prosecutorial Impunity Hinders the Fair Administration of Justice in America" (2010), *JLP,* 19, 1, 421.

[893] See Du Toit and Ferreir, Reasons for Prosecutorial Discretion, *Potchefstroom Electronic Law Journal, PER / PELJ,* 18, 2015, 5.

[894] Du Toit and Ferreir (2015), *PER / PELJ,* 18, 2015, 5.

[895] Redpath (2012), *ISS,* 186.

[896] Ibid.

[897] Lukas Muntingh and Gwenaëlle Dereymaeker "Understanding Impunity in the South African Law Enforcement Agencies" (2013), *CSPRI,* 30-32.

negatively impacted the activities of the NPA as an institution advancing the rule of law.[898] The absence of consistent judicial review in the appointment process indicates problems associated with transparency and power concentration in the hands of the president.[899] Given the seriousness and scope of responsibility of the NPA, the appointment of the NDPP must benefit from a broader spectrum of assessment and a wide range of information to determine the candidate's suitability for the position. The Constitutional Court affirmed the necessity of these requirements in the case of *Democratic Alliance v President of the Republic of South Africa.*[900] It stated that such duties must not be performed by the courts alone but also by other stakeholders/agencies, as was the case with the Ginwala Enquiry. It is relevant that the selection process is opened to multiple information sources to enable public participation[901] and accept input and submissions about specific candidates, as was the case in 2019 concerning the appointment of the Deputy Public Protector.[902]

After compliance with the relevant processes, it is guaranteed to a certain extent that persons who do not meet the high standard required of professional ethics will not be appointed. Unfortunately, the reverse seems to be the case because successive NDPPs have been challenged and dismissed for ethical misconduct.[903] The selection and appointment process should target persons who demonstrate knowledge of the criminal justice system and other relevant skills required to foster the activities of the NPA. The NDPP is an active player in criminal justice, and candidates applying for the position should be experts in their relevant fields and recognised as such. In this regard, when

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[898] L Muntingh et al, An Assessment of the National Prosecuting Authority (2017).

[899] Court Orders that Media be Allowed to Attend NDPP Interviews, IOL, (Accessed: 20 August 2021) from: https://www.iol.co.za/news/politics/court-orders-that-media-be-allowed-to-attend-ndpp-interviews-18102135.

[900] *Democratic Alliance v President of South Africa and Others* (2012), (CCT 122/11) ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012).,

[901] Section 59 Constitution; Doctors for Life International v Speaker of the National Assembly and Others (2006), (CCT12/05) ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

[902] PMG Call for comment, Portfolio Committee on Justice and Correctional Services, Suitability of Candidates for Deputy Public Protector, call for comments opened 26 September 2019, https://pmg.org.za/call-forcomment/861/ (Accessed: 20 August 2021).

[903] ACJR Factsheet. The Appointment and Dismissal of the NDPP (2018).

contemplating reform for the current NDPP, the appropriate guidelines for the appointment process of the Public Protector and Auditor General of South Africa should be considered.[904] In both instances, the positions are advertised, following which the president appoints the right candidate on recommendation by the National Assembly.[905] It is also relevant to reflect on the race and gender composition of the population.[906] In the appointment process, candidates should endeavour as a matter of responsibility to disclose all information linked to ethical and professional behaviour that might either promote or undermine the office of the NDPP and not shift the burden onto the selection committee. With these factors included in the appointment process, candidates with high standards of professionalism and ethical behaviour will be targeted.

Since transparency is a constitutional requirement, a transparent appointment process will instil trust and validate the legitimacy of the NPA.[907] To ensure compliance with transparency, the interviewing panel, including stakeholders with interest in respect of the NPA, must have access to basic facts and figures and insight into the mechanisms and processes of decision-making.[908] This requirement is premised on the fact that office bearers in the NPA must act visibly, predictably, and understandably. It is evident from these requirements that the South African criminal justice system requires significant transformation regarding how prosecutorial discretion is used to advance the course of justice. The current legal framework enabled the undermining and hollowing out of the NPA as an institution maintaining the rule of law. If the ship is to be turned around, the inescapable conclusion is that the legal framework needs to change.

7.6 Recommendations

It is proposed that Section 179 of the constitution dealing with the NPA is amended by providing a removal procedure along the lines of what has been developed regarding the

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[904] L Muntingh et al (2017).
[905] Section 193(4) of the constitution (1996).
[906] Ibid.
[907] L Muntingh et al (2017).
[908] Ibid.

removal of the president and functionaries of Chapter 9 institutions to improve on the South African prosecutorial model. This will bring consistency in the interpretation and application of constitutional principles and values outlined in the constitution.[909]

In light of the multiple limitations analysed in this chapter, there is a need to establish a dedicated prosecution service inspectorate complemented by an independent complaints assessor mechanism. Due consideration must be given to some form of prosecutorial review body, by which the public can scrutinise NPA decisions not to prosecute particular cases. Such a body should also have a general authority, limited by appropriate safeguards, to oblige the NPA to provide reasons for its decisions not to prosecute. South Africa's policymakers and criminal justice reformers ought to be aware of and able to draw from international good practice and experience.

The following standards can be used as guidelines to strengthen the requirement for transparency even further:

- the public is kept informed concerning vacancies, appointments, and dismissals, and the reasons for decisions not to prosecute;
- the public continues to receive updates on vacancies advertised and filled;
- requirements for the vetting process to be made clear and publicised;
- the public is kept informed of the processes concerning the dismissal of senior members;
- the CVs of long- and short-listed candidates be made open to the public;
- sufficient time is allowed for the review of the CVs of candidates; and
- recommendations for appointment are motivated and based on rational grounds.

[909] Section 195(1) of the constitution (1996).

- Following the appointment, there must be a published record of how the public was consulted and involved in the appointment.

7.6.1 The role of the NPA in targeting corruption

The role of the NPA as a watchdog against corruption and arbiter of punishment of the perpetrators of such acts has become critical, especially considering the importance of this unique function. Therefore, the selection procedure should go beyond technical criteria to articulate that, being a principal agent of the law, the NDPP must have a deep understanding of crimes, accountability, transparency, and the desire to transform South Africa into a conducive environment for peaceful habitation. To achieve this objective, the NDPP would have to show proof of a good understanding of the dynamics affecting the modern South African State and how such issues can be addressed using the office of the NPA as an agent advancing the course of justice. The appointment of the NDDP should also consider two main factors: whether there is a history of fair and equal treatment or whether the applicant's history is tainted with unfair discrimination; secondly, the importance of fairness and objectivity in assessing the applicant.

7.6.2 Compliance with public demands

To meet public demand, the appointment process of NDPPs must be transparent and encourage active public participation. Opportunities for stakeholder input through public records must be encouraged. The constitutional requirement of transparency must be advanced to build trust in the NPA (and NDPP), and rubber stamp its legitimacy. Prospective applicants are likely to be affected by the decisions of the selection panel by this unique requirement. Additionally, stakeholders with an interest or mandate regarding the NPA must have access to basic facts and figures, including insight into the mechanism and decision-making. Case law is instructive in this regard. In *Doctors for Life International*,[910] the court emphasised that a reasonable opportunity be given and that the principle remains applicable where such opportunity relates to the legislature's work.

[910] Doctors for Life Int'l v Speaker of the Nat'l Assembly (2006), (6) SA 416 (CC) (S Afr).

The court further pointed out that facilitating an appropriate degree of participation in the law-making process can have infinite variation. Ultimately, what matters is that a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have adequate input. What amounts to a reasonable opportunity will depend on the circumstances of each case.[911]

The Supreme Court of Appeal was more descriptive concerning public involvement in the work of the National Assembly:

'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one but in many ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard but then leaves Parliament significant leeway in fulfilling it.

Consequently, public involvement makes the process of appointments more transparent, reducing the risk of poor selection. Additionally, the burden of selecting and appointing qualified candidates always shifts to the Shortlisting Committee, which submits a list of preferred candidates to the president. The Shortlisting Committee is therefore expected to provide a rational explanation for its decision when called to do so. The committee must also take responsibility for its mistakes and make amends were necessary. By implication, the committee must understand the errors made and adopt corrective measures as safeguards for future recruitment processes.

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[911] Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae) (2006), (2) SA 311 (CC); 2006 (1) BCLR, 1 (CC) at paras. 111-3.

7.7 Promoting inclusivity in public administration

There is a need for inclusivity and equal representation of people at senior management and staff of the NPA as prescribed by the constitution. The constitution defines the variables of inclusivity to include, among others, race and gender. The following questions should be raised and answered in the affirmative to achieve this objective:

7.7.1.1 Do calls for applications and appointments to the position of NDPP reflect the requirement of equal representation?

7.7.1.2 Does the composition of the Shortlisting Committee reflect the requirement of equal representation?

7.7.1.3 Is there a clear plan to ensure equal representation at the NPA and the Shortlisting Committee?

7.7.1.4 Do candidates have a track record of promoting transformation and understanding the issues of representation and transformation?

While it is no less than essential that the above questions be answered in the affirmative, the appointment of NDPPs (and other senior positions in the NPA) must be legislated to include an open, transparent process that relies on evidence, is based on merit, protected from political interference, and assesses candidates objectively against the criteria stated in Section 195(1) of the constitution.

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