COURT ROOM WARRIORS FOR JUSTICE: HISTORY OF THE SOUTH AFRICAN PROSECUTION SERVICE

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1. INTRODUCTION

This article explores the historic evolution of the prosecution service at the Cape under both Dutch and British control, the two Boer republics, and its twentieth century role - first in the Union and then the Republic of South Africa. Emphasis is given to the struggle the prosecution service waged over the centuries to assert its independence against an interfering executive.

A focus of the article is the establishment and role of South Africa's first centralised National Prosecuting Authority in 1998. The political controversy surrounding the promulgation of the National prosecuting Authority Act, in terms of which the National Prosecuting authority was established, and the appointment of the first national director of public prosecutions are discussed. The powers of the national director, and the degree of independence the position enjoys are analysed. The structure of the National Prosecuting Authority, and the legislative provisions governing investigating directorates, through which the prosecuting authority is granted formal investigative powers, are explained.

2. EARLY BEGINNINGS AT THE CAPE

At the initiative of the Dutch East India Company, which set up a permanent supply station at the Cape in 1652 for its ships travelling between the Netherlands and the East, the Dutch office of a "fiskaal" was imported to the Cape. The fiscal was responsible for conducting prosecutions as well as investigating crimes and punishing civil servants who were corrupt or neglected to perform their duties.[2]

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2 The first fiscal at the Cape to be trained in law was Meester Pieter de Neijn who came to the Cape in 1672. Though his predecessors had the standard legal literature of those days at their disposal, none of them had any legal training.

The fiscal sat on the Council of Policy, the governing body at the Cape. Other members of the Council of Policy were the commander or governor at the Cape, his deputy, the commander of the soldiers at the Cape, and other senior officials. When any transgressions occurred, the members of the Council of Policy would act as a Council of Justice which could pass sentence on those it had convicted. Whenever free burghers appeared before the Council of Justice as accused they could be represented on the council by someone of their choice, who had to be "one of the oldest and most honest of the free burghers".[3]

3. STRUGGLE FOR INDEPENDENCE

In 1688, the fiscal received the title of "Fiskaal Independent" and was made directly accountable to the Council of Seventeen, the directors of the Dutch East India Company.[4] While the fiscal sat on the Council of Policy he did not have to account to the council for his actions. The governor at the Cape could neither give him orders nor silence him.[5] The position of fiscal was a powerful one in the Cape administration:

> "The only official whose power approached that of the Governor was the Independent Fiscal, who in addition to acting as a public prosecutor in criminal trials, prevented smuggling, and controlling the police, was in 1688 given vast powers to punish officials for dereliction of duty, including the right to report the Governor to the Council of Seventeen, with whom he corresponded directly."[6]

Before 1783 the executive and the judiciary at the Cape were in practice synonymous. This made an independent bench impossible and negatively impacted on the independence and credibility of successive fiscals at the time. When the governor gained the support of his senior officials there was no check on the executive. For example, in 1705 a group of colonists at the Cape drew up a memorial against official malpractice and smuggled it to Batavia. When the governor of the time at the Cape, WA van der Stel, discovered the conspiracy, its leaders were arrested and a special commission was set up to try the dissenting colonists. The prosecutor was not the independent fiscal, who should have taken charge, but a Stellenbosch landdrost (magistrate), who had organised a counter memorial praising Van der Stel. He falsified the record of the interrogation, while imprisonment without bail,

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3 CFJ Muller (ed.), **500 years. A history of South Africa** (Academica, Pretoria, 1981), p. 63.
4 F Welsh, **A history of South Africa** (Harper Collins, London, 1998), p. 53. The first Independent Fiscal was Meester CJ Simons.
5 Muller, p. 64.
6 M Wilson and L Thompson (eds), **The Oxford history of South Africa. South Africa to 1870** (Oxford University Press, London, 1969), p. 217.

threats of banishment, and torture were used to get the governor's opponents to retract their allegations:[7]

> "Clearly no force in the constitution was strong enough to uphold justice against the illegal proceedings of the Governor and his clique. Even the Independent Fiscal, whose office was intended as an independent focus of power, was ousted from his proper functions without protest. The Independent Fiscalate did not guarantee that the executive would respect fundamental rights of the individual, such as freedom of speech or freedom from arbitrary arrest, without which justice in cases involving individuals against the state is difficult to achieve. Indeed, a powerful fiscal might become as tyrannical as a powerful governor, as the burghers' complaints against successive fiscals in the late eighteenth century show."[8]

In 1783 the Council of Seventeen created a new high court of justice. The court - also called the Council of Justice - had jurisdiction over criminal and civil cases at the Cape. The Batavian Council of Justice was the final court of appeal from its judgements. The members of the council were appointed by the Council of Policy, subject to the approval of the Council of Seventeen. The fiscal acted as public prosecutor in criminal cases which harmed the Dutch East India Company, and in all other serious criminal cases unless they had occurred in the countryside outside Cape Town. In the latter case, a district official, the landdrost, arrested the criminal and arraigned him before the Council of Justice, thereby acting as a prosecutor before the council.[9]

In addition to his fixed salary, the fiscal had the right to claim a commission on all fines he imposed on offenders to entice him to pursue all law breakers. When fines could not be paid it was not uncommon for the fiscal to confiscate the property of transgressors of the law. Some fiscals were also entitled to tax agricultural produce which was delivered to foreign ships by the burgher community at the Cape.[10] This rapidly led to an abuse of the position and the fiscal became a despised official among the early settlers at the Cape.[11] In fact, the settlers gave the shrike the name *fiskaal*. A shrike, or butcher bird, is a small bird of prey with a strong hooked and toothed bill with the habit of impaling its prey of small birds and insects on thorns.

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7 L Fouché (ed.), **The diary of Adam Tas** (Longmans, Green and Co., London, 1914), pp. 221-43.
8 Wilson and Thompson (eds), p. 222.
9 **Ibid**, pp. 220-3.
10 C Beyers, **Die Kaapse patriotte 1779-1791** (Juta & Co., Johannesburg, 1929), pp. 15-6.
11 **Ibid**, pp. 132-9.

4. BRITISH INFLUENCE AND THE BATAVIAN REPUBLIC

In 1795 the British assumed control at the Cape. The administration of justice remained in the hands of the Council of Justice. The fees and additional earnings which had previously made up a large and obscure part of many officials' income were eliminated. Only the fiscal was still entitled to a part of the fines imposed by the supreme court. However, the fiscal lost the independence he had enjoyed before 1795, and his position was made subordinate to that of the governor at the Cape. His role remained the same, namely to ensure that the colony's laws were carried out, that transgressors of the law were punished, and to act as prosecutor in criminal trials in the Council of Justice.[12]

In 1803 the Batavian Republic (as the United Netherlands had become known) took possession of the Cape, giving it the status of a Dutch colony. Important changes were undertaken in the colony's administration of justice. Its judicial and executive authority were separated with the former being entrusted to the Council of Justice, consisting of six members with legal qualifications, a secretary and an attorney-general who replaced the fiscal, and who was no longer entitled to a part of the imposed fines.[13]

In 1806 the British successfully invaded the Cape for a second time. The new British governor at the Cape was granted extensive powers. All legislative and executive power was vested in him and the Council of Policy was abolished. The judicature was subordinate to the governor in that he could appoint and dismiss all members of the Council of Justice except the president, and all authority in both criminal and civil courts was vested in him. The office of the fiscal as crown prosecutor was reintroduced. The fiscal held a position in the Council of Justice and could claim a commission of one-third of all fines imposed.[14] The rule of successive governors at the Cape became increasingly autocratic. With the arrival of British settlers in the Cape in 1820, the voices in opposition to the governing structures at the Cape grew in influence. After a commission of inquiry had reported on the settler's complaints in the late 1820s the governor lost his judicial powers, thereby ensuring an independent judiciary at the Cape. The Council of Justice was replaced by a High Court of Justice, consisting of a Chief Justice and three judges, all appointed from Britain. The office of the fiscal was replaced by that of the attorney-general.[15]

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12 HJ van Aswegen, **Geskiedenis van Suid-Afrika tot 1854** (Academica, Pretoria, 1989), p. 164.
13 Muller, p. 111.
14 Van Aswegen, p. 184.
15 **Ibid**, p. 184.

5. BOER REPUBLICS

The two Boer republics initially did not have an office like that of a chief prosecutor or attorney-general. In the Zuid-Afrikaansche Republiek (ZAR) accused persons were tried by elected officials such as magistrates and members of the legislature. In 1858 the office of staatsprokureur (state attorney), which was responsible for conducting prosecutions, was established in the ZAR. The state attorney or his representatives were responsible for investigating and prosecuting all crimes committed in the ZAR. In addition to his prosecutorial functions the state attorney had to provide legal advice to the state, draft legislation, represent the state in civil trials, and consider trademark applications.[16]

The office of the state attorney was largely independent of executive interference.[17] Thus, a 1864 law stated explicitly that the right of power to prosecute is vested exclusively in the state attorney who alone is responsible for controlling and managing prosecutions.[18] The state attorney was entitled to decline to prosecute anyone against whom there was insufficient evidence. A decision not to prosecute by the state attorney opened the door for interested parties to institute a private prosecution against suspected wrongdoers.[19] An accused had a right to claim compensation directly from a prosecutor where the latter had failed to appear without good reason on the day of a trial.[20] The state attorney or his representatives could conduct preliminary investigations to establish whether there was a case to be made against an accused.[21]

In 1867 clerks of the magistrates' courts were appointed as prosecutors. They were responsible for conducting prosecutions in the magisterial districts where they were based.[22] A decision by the ZAR legislature in 1883 laid down that the position of state attorney could be filled only by a person properly qualified for the position who had completed a legal degree.[23]

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16 H Kuipers and C de Bruijn Prince, **Staats-almanak voor de Zuid-Afrikaansche Republiek 1898** (Staatsdrukkerij, Pretoria, 1897), p. 54.

17 C Heyns and P Coetser, "Die ontstaan en ontwikkeling van die amp van die Prokureur-generaal van Transvaal", **Nuntius**, 16, November 1986, p. 61.

18 Ordonnantie no. 5-1864, paragraph 12, as contained in **De locale wetten der Zuid Afrikaansche Republiek 1849-1885** (JF Celliers (publisher), Pretoria, 1887), p. 273.

19 **Ibid**, p. 274.

20 Section 9, Wet no. 1, 1874, Regelende de manier van procederen in crimineels saken voor de geregtshoven van landdrosten en heemraden in de Zuid-Afrikaansche Republiek, as contained in **De locale wetten der Zuid Afrikaansche Republiek 1849-1884**, p. 558.

21 Ordonnantie no. 5-1864, paragraph 46, p. 280.

22 Gouvernments kennisgewing no. 70 of 1867, as contained in **De locale wetten der Zuid Afrikaansche Republiek 1849-1885**, p. 302.

23 Section 570, Wet no. 11, 1883, Volksraadsbesluit of 4 July 1883, as contained in **De locale wetten der Zuid Afrikaansche Republiek 1849-1885**, p. 1216.

In the Orange Free State, the right and power to prosecute was also vested in the position of the state attorney. If the state attorney was unable to conduct a prosecution a clerk of the magistrates' court could do so. Alternatively the state attorney could appoint any person of his choosing to conduct a prosecution on his behalf.[24] Most prosecutions in the lower courts were conducted by clerks of the magistrates' courts. Minor offences such as brawls, disturbances of the peace and transgressions of municipal by-laws could be prosecuted by any municipal officer or police constable, without the consent of the state attorney.[25] Private prosecutions were generally permitted once the state attorney declined to prosecute a matter. A man also had an unfettered right to institute a private prosecution against anyone who had committed a crime or offence against his wife. The same right was granted to the legal guardians of minors who had fallen victim to the criminal actions of another.[26]

6. UNION AND THE LOSS OF INDEPENDENCE

After the second Anglo-Boer War (1899-1902), in the first decade of the twentieth century, the four territories that were later to make up the Union of South Africa had attorneys-general who prosecuted criminals in the name of the English crown. All attorneys-general were members of the colonial cabinets. Having elected politicians fulfilling the role of chief prosecutors was not without its dangers. The decisions of elected attorneys-general - who are accountable to the electorate - whether to prosecute or not could be influenced by their desire to increase their popularity in the eyes of the voting public.

At the formation of the Union of South Africa in 1910, the post of minister of justice was created in the national cabinet. In each provincial division of the newly established Union-wide Supreme Court, an attorney-general was appointed with the authority to prosecute.[27] The attorneys-general prosecuted on behalf of the state, or delegated this authority to others. At the lower level these delegates were police officers, and in the Supreme Court trial advocates in private practice. An attorney-general was responsible for all the prosecutions that took place in his area of jurisdiction, and he had control over all the persons who conducted prosecutions on his behalf in that area. The attorneys-general were the final arbiters of who should be

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24 Ordonnantie no. 4-1856, ordonnantie wijzigende de manier van procederen in crimineele zaken in den Oranjevrijstaat, paragraph 3 and 4, as contained in **Ordonnantie boek van den Oranjevrijstaat 1854-1877**, Bloemfontein.

25 **Ibid**, Ordonnantie no. 4-1856, paragraph. 71.

26 **Ibid**, Ordonnantie no. 4-1856, paragraph 12.

27 Section 139 of the **South African Act of 1909**. See also section 7 of the **Criminal procedure Act no. 31 of 1917**.

prosecuted. They were independent civil servants and no provision for ministerial control existed.

Concern about such wide powers in the hands of public officials, who were legally free from ministerial constraint and parliamentary responsibility, prompted the government to promulgate legislation in 1926 to give the minister of justice "all powers, authorities and functions to the prosecution of crimes and offences".[28] As a result the attorneys-general lost their independence, and their authority to prosecute had to be assigned to them by the minister of justice. Tielman Roos, the justice minister at the time, motivated the government's decision to curtail the independence of attorneys-general as follows:

> "The chief reason why it is necessary to put this bill [i.e. the 1926 legislation] on the statute book is, in my opinion, that there is no authority whatsoever over, and no responsibility of the Attorney-General. Parliamentary responsibility is completely absent."[29]

While Roos gave the assurance that the traditional independence of the attorney-general would be respected, two attorneys-general resigned to protest against the infringement of their independence.[30]

The 1926 legislation imposed an intolerable managerial and administrative burden on the minister of justice.[31] In 1935 the power of prosecution was once again vested in the attorneys-general, but subject to the control of the minister of justice. Thus, while prosecutions were again formally instituted by attorneys-general, the minister was given the power to issue directions to attorneys-general and to exercise their powers directly in any specific matter:

> "Attorneys-General shall exercise their authority and perform their functions ... subject to the control and directions of the Minister [of Justice] who may, if he thinks it fit, reverse any decision arrived at by an Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function."[32]

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28 Section 1(3) of the **Criminal and Magistrate's Courts Procedure** (Amendment) **Act no. 39 of 1926.**

29 Heyns and Coetser, p. 63.

30 Namely, Charles de Villiers (Transvaal) and EW Douglas (Eastern Cape).

31 PM Bekker, "National or Super Attorney-General: Political subjectivity or judicial objectivity?", **Consultus**, 8(1), April 1995, p. 27.

32 Section 7(4) of the **General Law Amendment Act no. 46 of 1935**, as amended.

The essence of this passage in the 1935 legislation was incorporated into later versions of the **Criminal Procedure Act**.[33] The effect of the 1935 legislation, and the subsequent versions contained in the **Criminal Procedure Act** until the early 1990s, was that there was no formal or substantive separation of powers between attorneys-general and the executive, and that direct or indirect political influences were possible.[34]

While ministers seldom interfered with the decision of attorneys-general in practice, the aforementioned provision in the law ensured that the minister of justice had ultimate control over prosecutions.[35] Attorneys-general and their staff were civil servants and subject to the public service laws and regulations. This further impacted on the independence of these positions, for as civil servants they were ultimately subject to ministerial control.[36]

7. REGAINED INDEPENDENCE

Starting in the mid-1980s, attorneys-general and their staff began to lobby for the removal of their positions as civil servants and thereby regain some of their lost independence. Legislation promulgated in 1992 complied with this request. The legislation granted attorneys-general a measure of independence they had not enjoyed since 1926.

In 1992 the **Attorney-General Act** was promulgated to take attorneys-general out of the control of the Public Service Commission, and to entrench the non-interference of the minister of justice.[37] The legislature, however, decided to leave deputy attorneys-general, state advocates and prosecutors under the control of the Public Service Commission.

The memorandum on the Attorney-General Bill (which preceded the Act), stated that the community demands that every attorney-general should function independently of any possible interference from the executive, and that the purpose of the

33 Section 5(3) of the **Criminal Procedure Act no. 56 of 1955**, and section 3(5) of the **Criminal Procedure Act no. 51 of 1977**.

34 JA van d'Oliveira, "The office of the Attorney-General", **Nuntius**, 23, December 1993, p. 70.

35 According to two previous attorneys-general, they never experienced any real interference from the ministers of justice at the time. See P Yutar, "The office of Attorney-General in South Africa", **South African Journal of Criminal Law and Criminology**, Vol. I, 1977, p. 136; and Van d'Oliveira, p. 70.

36 D Van Zyl Smit and E Steyn, "Prosecuting authority in the new South Africa", paper prepared for **Workshop of experts on the review of criminal justice in Northern Ireland**, Belfast, 9 June 1999, p. 4.

37 The **Attorney-general Act no. 92 of 1992** came into operation on 31 December 1992.

proposed Act would be to "meet the need to place the independence of the Attorney-General beyond any doubt".[38]

In terms of the **Attorney-General Act**, the authority to institute prosecutions became the sole responsibility of the attorneys-general and their delegates, free of ministerial interference.[39] The independence of the position of attorney-general was further enhanced by measures which took the reduction of an attorney-general's salary out of the hands of the executive,[40] and entrenched their security of tenure of office.[41]

The function of the minister of justice was reduced to that of a co-ordinator: to ensure that the reports of the attorneys-general were submitted to parliament. At most the minister could request an attorney-general to furnish him with a report and to provide reasons regarding the handling of particular cases:

> "In terms of the Act attorneys-general enjoyed absolute independence. They were accountable only to parliament and then only in the limited sense that parliament could question them about their annual reports or dismiss them in very exceptional circumstances."[42]

8. INDEPENDENCE CURTAILED

South Africa's new post-1994 ruling party, the African National Congress (ANC), viewed the 1992 Act with suspicion. The reasons for this were, inter alia, the unfettered discretion the 1992 Act afforded attorneys-general and their lack of accountability to parliament. The ANC also regarded the legislation as "an attempt by the old order prosecutors to protect their entrenched positions".[43] Moreover, on ideological grounds the ANC favoured a centralized prosecutorial structure to that which was in essence a federal and decentralized one.

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38 Attorney-General Bill 69-92 (GA).

39 The **Attorney-General Act of 1992** repealed section 3(5) of the **Criminal Procedure Act no. 51 of 1977**, whereby the minister of justice could reverse any decision arrived at by an attorney-general.

40 According to section 1 of the **Attorney-General Act of 1992**, the president determined the salary of attorneys-general, provided that the salary payable to a particular attorney-general "shall not be reduced except by an Act of Parliament".

41 In terms of section 4 of the **Attorney-General Act of 1992**, an attorney-general needed to vacate his office on attaining the age of 65 years. An attorney-general could be suspended and removed from office by the president or at the request of both houses of parliament in the same session, only on the grounds of misconduct, on account of continued ill-health, or on account of incapacity to carry out his duties of office efficiently. In the instance where the president suspended an attorney-general, both houses of parliament could overrule the president's decision.

42 Van Zyl Smit and Steyn, p. 5.

43 Ibid.

In 1994 the then minister of justice, Dullah Omar, set up a National Consultative Legal Forum on the Administration of Justice to give effect to the government's commitment to the transformation of the legal administration. Speaking at the first meeting of the forum in November 1994, Omar asked to whom the attorney-general was accountable, and said that its office had been an instrument of the apartheid state which had applied repressive legislation with vigour and enthusiasm. In "the dying days of apartheid" the independence of the office of the attorney-general was introduced. This, Omar concluded, was not done so much to guarantee independence but to entrench the status quo.[44]

The ANC, which was the majority party in the Constitutional Assembly (the body which drew up South Africa's 1996 constitution), successfully pushed for the introduction of a section into the 1996 constitution dealing specifically with a prosecuting authority for South Africa. The section contains detail on the form the prosecuting authority would take in the new constitutional order. The section provides, inter alia, that:[45]

- there should be a single national prosecuting authority structured in terms of an act of parliament. The national prosecuting authority must consist of a national director of public prosecutions as head of the prosecuting authority who is appointed by the president, and directors of public prosecutions and prosecutors;
- the prosecuting authority has the power to institute criminal proceedings on behalf of the state;
- national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice;
- the national director must determine, with the concurrence of the minister of justice, and after consultation with the directors of public prosecutions, prosecution policy which must be observed in the prosecution process;
- the national director must issue policy directives to be observed in the prosecution process, and the national director may intervene in the prosecution process when policy directives are not complied with;
- the national director may review a decision to prosecute or not to prosecute, after consulting the relevant directors of public prosecutions;
- the minister of justice must exercise final responsibility over the prosecuting authority.

44 "Omar plaas vraagteken oor 'PG's van apartheid'", **Die Burger**, 14 November 1994.
45 Section 179 of the **Constitution of the Republic of South Africa Act No. 108 of 1996.**

The constitutional provision dealing with the prosecuting authority was controversial at the time. Its constitutionality was challenged on the grounds that it impeded on the separation of powers between the legislature, executive and judiciary.[46] The Constitutional Court rejected this objection, ruling that the prosecuting authority is not part of the judiciary, and that the appointment of the national director of public prosecutions by the president does not contravene the doctrine of the separation of powers.[47] Moreover, the court noted that the constitutional provision that an act of parliament had to ensure that the prosecuting authority "exercises its functions without fear, favour or prejudice", was a guarantee of prosecutorial independence.

In 1998 parliament passed the **National Prosecuting Authority Act** to give effect to the constitutional provision dealing with the prosecuting authority, and to spell out the details of a new prosecutorial system for the country.[48] With the promulgation of the act, South Africa's first centralized National Prosecuting Authority (NPA), headed by a national director of public prosecutions with the power to direct prosecutions throughout the country, came into existence.

9. AUTHORITY OF THE NATIONAL DIRECTOR

As head of the prosecuting authority, the national director of public prosecutions has "the authority over the exercising of all powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the constitution, the National Prosecuting Authority Act or any other law".[49] The Act provides that "the national director shall with the concurrence of the minister of justice, and after consulting the directors of public prosecutions, determine prosecuting policy and issue policy directives which must be observed in the prosecution process".[50]

The precise meaning of this provision is important. The "concurrence" of the minister means that the national director requires his approval; expressed differently the minister can veto policy proposals of the national director. Conversely the words "after consultation" mean that the national director can go ahead and ignore the input of the directors of public prosecutions if he disagrees with it.[51]

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46 ZB du Toit, "Groot agterdog heers oor die 'super-prokureur-generaal'", **Rapport**, 9 February 1997.

47 See Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC).

48 **National Prosecuting Authority Act no. 32 of 1998**.Most of the Act came into operation on 16 October 1998.

49 Section 22(1) of the **National Prosecuting Authority Act no. 32 of 1998**.

50 **Ibid**, section 21(1).

51 Van Zyl Smit and Steyn, p. 9.

The national director may intervene in any prosecution process when policy directives are not complied with,[52] and review a decision to prosecute or not to prosecute, after consulting the relevant director of public prosecutions, and after taking representations from the accused person, the complainant and any other person whom the national director considers to be relevant.[53]

According to Van Zyl Smit and Steyn, the power to review a decision to prosecute or not to prosecute "appears to exist even where policy directives are being followed. It is limited, however, to review decisions on whether to prosecute or not and would not include a direct intervention in the way a case is presented in court, for example".[54] To assist the national director in exercising these power, he may conduct any investigation he may deem necessary in respect of a prosecution or a prosecution process. The national director may further direct the submission of, and receive report from, a director of public prosecutions in respect of a case or a prosecution.[55]

10. APPOINTMENT OF THE FIRST NATIONAL DIRECTOR

In July 1998, the president appointed Bulelani Ngcuka as South Africa's first national director of public prosecutions. Ngcuka was an ANC insider. In 1988, Ngcuka and Dullah Omar formed part of an interim committee to prepare the relaunch of the United Democratic Front in the Western Cape.[56] At the time of his appointment Ngcuka was an ANC member of the National Council of Provinces, a position he had held since 1994 when he was elected to the Senate (as it was then known) to become the ANC's chief whip. In 1990 he became a member of the ANC's Constitutional Committee. He represented the ANC at the Codesa negotiations and the multiparty talks in Kempton Park where he served on the working group of the transformation of the judiciary.

The General Council of the Bar expressed its reservations about Ngcuka's appointment: "The appointment of Ngcuka underscores our objections to the [National Prosecuting Authority] Bill. It is clear he is a party-political man who could be susceptible to political influence."[57] Opposition parties expressed their concern about Ngcuka's close political affiliations with the ruling party. One opposition party spokesman on justice stated that "to place the national control of prosecutions in the hands of a committed ANC member will compromise the independence of the

52 Section 22(2)(b), **Act 32 of 1998**.
53 **Ibid**, section 22(2)(c).
54 Van Zyl Smit and Steyn, p. 9.
55 Section 22(4)(a), **Act 32 of 1998**.
56 M Cato, "ANC captures the judiciary", **Finance Week**, 23-29 July 1998, p. 34.
57 H Barrell and M Soggott, "Nice guy, but can he do the job?", **Mail and Guardian**, 17 June 1998.

judicial process in the eyes of the public". The spokesman did, however, add that Ngcuka "is a talented parliamentarian as well as being a very capable lawyer".[58] This was the general response of opposition politicians at the time: that Ngcuka's close ties to the ruling party were a cause for concern but that he was a hard-working and able individual.

Ngcuka sought to allay the concerns about his appointment, and vowed that he would not tolerate the political interference he was expecting. "I will tell them [politicians] to back off because I must protect the integrity of my office."[59] Ngcuka stressed that his main objective was to improve the effectiveness and efficiency of the prosecution service:

> "Prosecutors are lawyers for the people. They represent the victims of crime but they are seen, particularly in the community that I come from, as representing the past oppressive system. My role will be to legitimise the system."[60]

11. INTERFERENCE BY THE NATIONAL DIRECTOR?

The point has been made that the power to review a decision to prosecute poses a "potential danger that the National Director could prevent a prosecution that would be politically embarrassing".[61]

Concerns that a national director of public prosecutions could misuse his power to prevent a prosecution were accentuated by comments made by the then minister of justice, Dullah Omar, at the time when the National Prosecuting Authority Bill was being discussed in parliament. Upon the return to South Africa of Allan Boesak, a prominent ANC member, Omar - who was also the Western Cape leader of the ANC at the time – questioned the decision of the Western Cape attorney-general to prosecute Boesak for fraud and theft of Danish aid money. Defending Boesak as having engaged in "struggle bookkeeping", Omar said that

> "neither the president, the cabinet, nor the minister of justice were asked for their views with regard to the possible prosecution [of Boesak] ... and when

58 D Gibson, "The independence of the judiciary compromised?", DP press release, 16 July 1998.
59 T Lamberti, "New legal chief vows to fight off politicians", **Business Day**, 17 July 1998.
60 A Koopman, "Super AG promises faimess and unity", **Cape Argus**, 29 July 1998.
61 J Sarkin and S Cowen, "The draft National Prosecuting Authority Bill: A critique", **South African Criminal Journal**, 10(1), 1997, p. 70.

> the attorney-general after his own investigation decided to prosecute, again we had no say in the matter".[62]

Omar's statement raised the suspicion that the Bill, once promulgated, oculd be used as a tool by the ruling party to interfere in the prosecution process.

In December 1998, Judge van der Walt of the Transvaal Provincial Division of the high court refused bail to three cadres of the ANC (known as the "Eikenhof three"), who were convicted and sentenced in 1994 for the murder of a woman and two children at Eikenhof near Johannesburg. The three brought an appeal on the basis of new evidence which suggested that members of the Pan Africanist Congress (PAC) were responsible for the murders. The state indicated that it would oppose the appeal. Prior to the hearing of the appeal the national director, Bulelani Ngcuka, instructed the prosecutor of the case to withdraw his opposition to the bail application. Judge van der Walt said that Ngcuka's decision was "unfortunate, ill-considered, and unwise" in the light of his connection to the ANC.[63]

12. APPOINTMENTS AND TERMS OF OFFICE

According to the **National Prosecuting Authority Act**, and as decreed by the constitution, the president appoints the national director. Moreover, the president - in consultation with the minister of justice and the national director - appoints the (provincial) directors of public prosecutions and up to four persons as deputy national directors of public prosecutions.[64] Unlike the directors, the deputy national directors have concurrent country-wide prosecutorial jurisdiction. Both the deputy national directors and the directors are subject to the control and directions of the national director.

The president may also appoint - in consultation with the minister of justice and the national director - one or more directors of public prosecutions as "special directors" to exercise certain powers, carry out certain duties and perform certain functions conferred on them by the president.[65] Prosecutors are appointed on the recommendation of the national director.[66]

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62 Statement by Dullah Omar, chairperson, African National Congress, Western Cape, 6 March 1997.

63 **South Africa Survey 1999/2000** (South African Institute of Race Relations, Johannesburg, 1999), p. 341. See also, W Hlongwa and S ka 'Nkosi, "Judge blasts 'ANC' Super AG", **Mail & Guardian**, 11 December 1998; "Politics subverts justice system" (Citizen Comment), **The Citizen**, 14 December 1998.

64 Sections 11(1) and 13(1), **Act 32 of 1998**.

65 **Ibid**, section 13(1)(c).

66 **Ibid**, section 16(1).

The national director holds office for a non-renewable period of 10 years, or until attaining the age of 65 years. Deputy national directors and directors of public prosecutions serve unrestricted terms until the age of 65 years.[67] The grounds on which the national director, his deputies, or directors may be suspended or removed from office are limited. Such suspension or removal can be done by the president only, and is subject to ratification by parliament. However, the president is obliged to remove the national director, his deputies or a director from office if requested to do so in an address from each of the houses of parliament.[68]

The remuneration and terms and conditions of service of the national director, the deputy national directors and the directors is determined by the president, provided that the salary of the national director is at least that of a high court judge.[69] Deputy directors, state advocates and prosecutors are largely subject to public service rules in relation to their appointment and dismissal. Salaries below director level are determined by the minister of justice, after consultation with the national director and the minister of public service and administration and with the concurrence of the minister of finance.[70] The effect of these arrangements is that such prosecutors are structurally far less independent than their more senior colleagues.[71]

Every member of the NPA is obliged to "serve impartially and exercise, carry out or perform their powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the constitution and the law".[72] The Act further stipulates that, "subject to the constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his of her powers, duties and functions".[73]

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67 The president may, under certain circumstances, extend the terms of office of a national director and deputy national directors who have attained the age of 65 years for up to two years. See section 12(4), **Act 32 of 1998**.

68 Sections 12(6) and (7), and 14(3), **Act 32 of 1998**.

69 **Ibid**, section 17(1).

70 Sections 18 and 19, **Act 32 of 1998**.

71 Van Zyl Smit and Steyn, p. 9. The salary payable to a deputy director or a prosecutor may, however, only be reduced by an act of parliament. See section 18(6), **Act 32 of 1998**.

72 Section 32(1)(a), **Act 32 of 1998**.

73 **Ibid**, Sections 32(1)(b) and 41(1).

13. STRUCTURE OF THE NPA

The office of the national director is supported by deputy national directors of public prosecutions. Legislation limits the number of deputy national directors to a maximum of four.[74] At the discretion of the national director, any of the deputy national directors may exercise or perform any of the powers, duties and functions of the national director.[75] At the time of writing three deputy national director posts were in existence and responsible for the following components of the NPA:

13.1 National Prosecution Service

The National Prosecution Service (NPS) is responsible for co-ordinating and assisting the traditional prosecuting structures throughout the country.[76] There are offices of the NPS at the seat of each of the ten divisions of the high court in South Africa, and one for the Witwatersrand local division of the high court. Every office is headed by a director of public prosecutions or deputy director of public prosecutions.[77] Offices are staffed by one or more deputy directors of public prosecutions, prosecutors and administrative staff.[78] The head of the office supervises, directs and co-ordinates the work and activities of all deputy directors, chief prosecutors and prosecutors attached to the office.[79]

The NPS is also responsible for two units of the NPA: the Policy and Representations Unit, and the Court Management Unit. The objective of the Policy and Representations Unit is to develop and co-ordinate policy for the prosecution service, and to deal with representations made to the national director. The Court Management Unit monitors and manages the performance of prosecutors. The Unit also promotes the quality of professional work, conduct and discipline of prosecutors, and identifies training needs of the NPA.[80]

13.2 Directorate of Special Operations

The Directorate of Special Operations (DSO) - nicknamed "the Scorpions" - was launched in September 1999. The objective of the DSO is to combat organized crime, corruption within the criminal justice system, serious economic crimes, and

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74 **Ibid**, section 11(1).
75 **Ibid**, section 23.
76 http://www.ndpp.org.za/ProsAuth/
77 The directors of public prosecutions are appointed by the president after consultation with the minister of justice and the national director of public prosecutions. See section 13(1)(a), **Act 32 of 1998**.
78 Section 6(2), **Act 32 of 1998**.
79 **Ibid**, section 24(1)(b).
80 http://www.ndpp.org.xa/ProsAuth/

crimes against the state such as terrorism.[81] In October 2000, parliament approved legislation to formally establish the DSO as an investigating directorate of the National Prosecuting Authority.[82]

The rationale behind the DSO is the integration of three traditionally separate functions: intelligence, investigations and prosecutions. Consequently, intelligence operatives, investigators and specialist prosecutors work together in project teams. Investigators work in a prosecution-driven and intelligence-led environment. Experienced prosecutors direct investigations to ensure that the investigations of the DSO are court directed. Prosecutors working for the DSO prepare and adduce evidence in the prosecution of offences and crimes which the DSO investigates.

13.3 Asset Forfeiture Unit

The Asset Forfeiture Unit (AFU) was established in May 1999. The AFU assists the DSO and the National Prosecution Service in the use and application of South Africa's asset forfeiture legislation.[83]

The AFU has adopted a multi-disciplinary approach and is staffed by criminal and civil lawyers, financial investigators and accountants. For the state to successfully combat organized crime it must pursue the assets belonging to organized crime groups and the proceeds such groups generate from engaging in illegal activities. This is done through "asset forfeiture" whereby the state or its law enforcement agencies investigate the assets surrounding the crimes committed by organized criminal groups and confiscate them. Asset forfeiture therefore targets assets rather than individual criminals. There are two forms of asset forfeiture: criminal asset forfeiture and civil asset forfeiture.

Criminal asset forfeiture is where the proceeds of crime are forfeited to the state through a civil action, *after* an accused has been convicted.[84] It works like a normal civil action whereby the state obtains a money judgement against a convicted accused for the amount of the benefit of the crime (for example, the money defrauded or the value of the cars stolen). The judgement can be executed against any assets of the accused.

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81 "Special priority crimes investigation agency established", press release issued by the ministry of justice and constitutional development, 8 July 1999.

82 **National Prosecuting Authority Amendment Bill**, B39B-2000.

83 http://www.ndpp.gov.za/AssetForfeit/

84 Chapter 5, **Prevention of Organised Crime Act no. 121 of 1998.**

The second and more drastic form of asset forfeiture is civil asset forfeiture. Civil forfeiture allows the state to confiscate the property of suspected criminals through a civil action against the property. For a successful civil forfeiture action it is not necessary that the suspected criminal is first convicted in a criminal trial, or there even being a criminal case.[85]

The state can approach civil asset forfeiture from two angles. First, the state can seek to prove that certain assets are the "proceeds of crime". This enables the state to get past the front companies set up by organized crime syndicates to hide the true owners of the assets. Second, the state can seek to show that the assets in question are the "instrumentality of crime". This is a broad concept, and can include assets peripherally involved in a crime, for example, a motor vehicle used by bank robbers to escape from the scene of a crime, or a hotel used (with the owner's knowledge) as a meeting place for drug dealers to sell their wares to drug users.

Money generated through the forfeiture of assets go to a Criminal Assets Recovery Fund to be used to render financial assistance to law enforcement agencies to combat organized crime, money laundering, criminal gang activity and crime in general, and to assist victims of crime.[86] As the previous head of the AFU, Willie Hofmeyr, put it: "One of the nice things about forfeiture law is being able to take the criminals' money and use it to fight them again afterwards."[87]

14. SUPPORT SERVICES

The National Prosecuting Authority is assisted by "support services", made up of a Specialised Commercial Crime Unit, Sexual Offences and Community Affairs Unit, and a Witness Protection Unit.

14.1 Specialised Commercial Crime Unit

The Specialised Commercial Crime Unit was established in August 1999, to investiate, prosecute and adjudicate serious commercial crime. The Unit seeks to speed up the investigation of commercial crime, and to complete complex and lengthy commercial crime trials without interruption.

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85 **Ibid**, chapter 6.
86 **Ibid**, chapter 7.
87 W Hofmeyr, "Asset forfeiture", transcript of a speech contained in a Report of the proceedings: **Empowering prosecutors for effective and responsive prosecutions in the new millennium**, 9-12 November 1999, Regency Hotel, East London, p. 79.

The Unit has been mandated to investigate and prosecute all commercial crime cases emanating from the various commercial crime units in Pretoria. This has brought about a more effective and efficient working team of commercial crime investigators and prosecutors. In November 1999, a specialized commercial crime court was opened in Pretoria.[88]

14.2 Sexual Offences and Community Affairs Unit

The Sexual Offences and Community Affairs Unit (SOCA Unit) was established in September 1999. The Unit aims to reduce levels of violence against women and children, and minimize the secondary victimization many victims of sexual offences experience in their dealings with the criminal justice system. The objectives of the SOCA Unit are to:[89]

- improve the conviction rate of gender-based crimes through effective prosecutions;
- reduce secondary victimization within the criminal justice system by establishing multi-disciplinary centers and adopting a victim-centred approach;
- protect the legal rights of women and children;
- provide a legal basis for the protection of children's rights; and
- develop the skills of all relevant role players on a multi-disciplinary level.

As part of its victim-centred approach, the Unit played a leading role in setting up the country's first "one-stop" centre for rape victims in June 2000. The Thuthuzela Rape Care Centre at the CF Jooste hospital in Cape Town is a multi-disciplinary centre in which all role players necessary for a successful rape investigation and prosecution are situated to provide a rape victim with an "integrated service strategy".[90]

14.3 Witness Protection Unit

In early 2001, the witness protection programme was placed under the direct control of the National Prosecuting Authority. The national director of public prosecutions welcomed this, as his staff - who will run the programme - will be the "most passionate about making sure that witnesses were available to give evidence for the state".[91]

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88 http://www.ndpp.gov.za/SCCU/SCCUDefault.asp

89 http://www.ndpp.gov.za/SOCA/SOCADefault.asp

90 Interview with Advocate Thoko Majokweni, director of the Sexual Offences and Community Affairs Unit, Pretoria, 25 July 2000.

91 "Ngcuka gets WPP. Witness protection moves after assassinations", **Sowetan**, 24 January 2001.

The NPA's Witness Protection Unit has undertaken steps to improve the witness protection programme by:[92]

- reviewing criminal cases with witnesses in the programme to determine which witnesses need to remain in the programme;
- fast-tracking cases involving witnesses that are in the programme;
- conducting a risk assessment for witnesses in the programme;
- meeting with other agencies such as the National Intelligence Agency, the police service, and the department of welfare to explore ways of improving the services the programme provides to witnesses; and
- investigating better ways of rehabilitating witnesses so that they are able to continue with their lives after the threat to them and their families is gone.

15. INVESTIGATING DIRECTORATES

In the past attorneys-general and their staff generally did not have the authority to investigate crime. At best they could monitor and guide police investigations. In fact, the police was not obliged to follow the instructions of an attorney-general or his staff. This changed with the promulgation of the National Prosecuting Authority Act, whereby directors of public prosecutions can oblige the police to conduct investigations and obtain statements.[93]

Formal investigative powers are granted to the NPA through the structure of investigating directorates. The head of an investigating directorate - an investigating director - and the persons authorized by him, can fill the role of investigator and prosecutor at the same time. Investigating directorates are empowered to have police officers and detectives seconded to them at their request. Investigative directorates - made up, inter alia, of prosecutors and police investigators - may conduct investigations and then prosecute on the result of such investigations.

An investigating director may be assisted by civil servants or employees of any public or other body seconded to the investigating directorate, and any person whose services the directorate requires for a particular inquiry.[94] This permits investigating directorates to be staffed with a multi-disciplinary team of people who can contribute their skills to fulfilling the mandate of the directorate.

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92 B Ngcuka, "Strategies for fighting crime in 2001". Address to the Pretoria News Press Club, Pretoria, 28 February 2001.
93 Section 24(4)(c), **Act 32 of 1998.**
94 **Ibid,** section 7(4).

Investigating directorates are granted considerable powers for the fulfillment of their mandates. If an investigating director has reason to suspect that a specified offence has been or is being committed, or that an attempt is being made to commit an offence, he may hold an inquiry on the matter. The inquiry may be extended to include any offence which might be connected with the subject of an inquiry.[95] An investigating director may summon any person, who can furnish information on the subject of an inquiry, or who has any document or other object relating to that subject, to appear before him. The summoned person may be questioned under oath, and any document or object may be examined or retained by the investigating director.[96] The summoned person may not refuse to answer any question on the ground that the answer could expose him to a criminal charge.[97]

16. THE WAY FORWARD

The short history of the National Prosecuting Authority has been a successful one. For example, the Directorate of Special Operations with its multi-disciplinary prosecution-driven approach to investigations, or the Asset Forfeiture Unit's strategy of targeting the assets of organized crime and channeling the proceeds of these to crime victims and the criminal justice system, are important positive developments in the state's war against crime.

Many problems remain, however. While the prosecution service succeeds to convict most offenders it prosecutes, the number of cases taken on by the service has declined at a time when recorded crime is increasing. In 1994/95, some 350 000 prosecutions and 261 000 convictions took place. This decreased to 271 000 prosecutions and 212 000 convictions in 2000. The number of serious crimes, as recorded by the South African Police Service, increased by 481 000 between 1994 and 2000.[98] In other words, while recorded serious crimes increased by 24% between 1994 and 2000, the number of prosecutions dropped by 23% and convictions by 19%. The chances of the average offender being caught and punished consequently declined after 1994.

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95 **Ibid**, section 28(1).

96 **Ibid**, section 28(6).

97 **Ibid**, section 28(8)(a). The law regarding privilege does, however, apply in relation to such a summoned person. Moreover, the answers such a person gives may - with a few minor exceptions - not be admissible against him in any criminal proceedings.

98 **The incidence of serious crime in South Africa between January and December 2000** (Crime Information Analysis Centre, Pretoria, 2001).

The main reason for the decline in the performance of the prosecution service is the lack of experienced personnel. Between 1994 and 1997, some 630 prosecutors resigned. Between them they had the equivalent of more than 2 000 years of work experience as prosecutors.[99] The number of new prosecutor posts created are not in proportion to the rise in the crime rate. Between 1987 and the end of 1999, the number of prosecutors increased by 79%. Over the same period the number of many serious crimes recorded by the police more than doubled. Assault with the intent to inflict grievous bodily harm rose by 112%, murder by 143%, rape by 182%, and robbery by 265%.

In October 2000, the national director of public prosecutions, Bulelani Ngcuka, revealed that there were 180 000 outstanding criminal cases in the country's courts. To deal with the outstanding cases a further 230 prosecutors had to be appointed, Ngcuka said.[100] Encouragingly, the NPA employed an additional 104 prosecutors in early 2002.

To speed up the trial process an amendment to the **Criminal Procedure Act** was promulgated in late 2001 to enhance the prosecution's ability to engage in plea bargaining.[101] Plea bargaining is a negotiation between the prosecution and an accused (or his legal representative) in which the accused agrees to plead guilty to a criminal charge in exchange for concessions by the prosecution. This formalized system of plea bargaining in South Africa should assist the prosecution service in the rapid finalisation of many cases, enabling it to allocate scarce resources more effectively elsewhere.

An initiative that promises to reduce the workload of the courts, especially in respect of minor and less serious cases, is diversion. Diversion is the channeling of cases from the formal criminal justice system, on certain conditions, to extra-judicial programmes.[102] A Child Justice Bill is expected to go before parliament in mid-2002. Once it has become law, the legislation will introduce a fundamentally new child justice system, whereby most young offenders can be diverted from the formal criminal justice system. That should substantially reduce the amount of energy and time the criminal courts generally, and prosecutors specifically, expend dealing with child offenders. This should permit the prosecution service to focus more of its energies on the prosecution of serious crimes and career criminals.

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99 Interview with Mr JJ Swart, president of the National Union of Prosecutors of South Africa, Pretoria, 7 April 1997; **Hansard** [NA:Q] 6, 16 April 1998, column 874.

100 G Chuenyane, "Prosecutors struggle with load", **Sowetan**, 12 October 2000.

101 Section 6 of the **Criminal Procedure Act no. 51 of 1977**, as amended by the **Correctional Services and Supervision Amendment Act no. 122 of 1991**.

102 LM Muntingh and R Shapiro (eds), **NICRO diversion options** (NICRO, Cape Town, 1997), p. 3.

The prosecution service is a crucial component in the South African criminal justice system. The best detective service and prisons system cannot function properly if those guilty of committing crimes are not prosecuted successfully. The consequences of a poorly performing prosecution service impact negatively on the police, the prison service and public perceptions about the effectiveness of the criminal justice system. Given its important role, research is needed to evaluate the performance of the prosecution service, identify its weaknesses and develop solutions to the problems inhibiting its effective performance.