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Protecting the public or politically compromised?

South Africa's anti-corruption bodies

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The National Prosecuting Authority and the Public Protector were intended to operate in the interests of the law and good governance but have they, in fact, fulfilled this role? This report examines how the two institutions have operated in the country's politically charged environment. With South Africa's president given the authority to appoint key personnel, and with a political drive to do so, the two bodies have at times become embroiled in political intrigues and have been beholden to political interests.

Key findings

- Historically, the National Prosecuting Authority (NPA) has had a tumultuous existence.
- The impulse to submit such an institution to political control is strong.
- Its design – particularly the appointment process – makes this possible but might not in itself have been a fatal flaw.
- Various presidents have seen the NPA and Public Protector as subordinate to themselves and, as a result, have chosen leaders that they believe they could control to the detriment of the institution.
- The selection of people with strong and visible political alignments made the danger of politically inspired action almost inevitable.
- The Public Protector's office has fared somewhat better overall but its success ultimately depends on the calibre of the individual at its head.
- Overall, the knock-on effect of compromised political independence is that it is felt not only in the relationship between these institutions and outside forces, but within the institutions themselves.
- The Public Protector is currently experiencing a crisis of public confidence. This is because various courts, including the Constitutional Court have found that she is dishonest and incompetent.

Recommendations

- Funding: Separate, distinct budgets (in this case, specifically for the NPA) would set the bodies apart from the departments and ministers to which they are linked.
- Recruitment processes should be designed to ensure that strong, assertive, ethical and skilled incumbents are appointed to lead independent institutions.
- Presidential discretion in the appointment process must be constrained through law. Parliamentary hearings are a good idea , however, not improve the overall outcome without substantial improvements to the process. Appointments must only be made based on clear criteria of the skills and characteristics that are required for the post.
- A formula that allows for civil society involvement in the interview and appointment process would add a valuable perspective, although such an option must be carefully considered.
- It is important for an independent body to have clear and regular procedures for interacting with the executive and political office bearers. This establishes the ethical parameters of these relationships and mitigates the prospects of undue influence.

Few issues evoke more anger in South Africans than corruption and, in the past few years, this fury has been heightened by the extent to which it has brazenly penetrated public life. It evokes shock at the violation of the law, frustration at the lost opportunities it signifies and anger at the moral failings it demonstrates – not to mention outrage at the impunity alleged perpetrators seem to enjoy. It has been responsible for what has become known as state capture, commandeering and appropriating the very institutions of government.

> The combating of corruption must be undertaken on a rational and rule-governed basis

South Africa should never have reached this point. During its transition to democracy, safeguarding the state and society at large from corruption[1] was a widely recognised and uncontroversial objective of the system of governance that was being negotiated. Indeed, revelations of the underhand dealings of officials in the previous government (on top of political oppression and the general brutality of the system) helped to underscore the importance of doing so. As Nelson Mandela put it during the halcyon days following the transition: 'To achieve these [various developmental] objectives requires, among other things, rapid and systematic restructuring of the apartheid state structures, to ensure that the public service is representative of society as a whole and to eliminate wastage, mismanagement, duplication and corruption.'[2]

This report examines two agencies in South Africa's anti-corruption system, the National Prosecuting Authority (NPA) and the Public Protector (PP), each designed to fulfil different functions and to intervene against malfeasance in different ways. And each has, at times, been the subject of criticism for failing to live up to their mandates. What follows is an examination of the independence inherent in their design and an interrogation of how this has manifested in reality.

The need for independence

A cornerstone of effective anti-corruption agencies (ACAs) is independence. Since corruption is almost always intrinsically bound up with the manipulation of political power, there is an ever-present danger that bodies established to fight it will themselves be compromised or reined in. In other words, can the state be trusted to manage its own pathologies?

Ensuring the independence of such bodies provides a solution of sorts. In broad terms, the intention is to keep them insulated from political pressure. Conceptually, this is comparable to the principle of judicial independence. The combating of corruption – like the administration of justice – must be undertaken on a rational and rule-governed basis. Political power or personal connections should not afford anyone impunity.

The National Prosecuting Authority

The concept of the National Prosecuting Authority was set out in terms of Section 179 of the Constitution.[3] This reads as follows:

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

  (a) National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

  (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions—

  (a) are appropriately qualified; and

  (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions—

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

The constitutional position might best be described as geared towards impartiality in the NPA's work rather than independence in its operations. Certainly, terms like 'independence' and 'autonomy' are absent. It empowers the president to appoint the head of the NPA – the National Director of Public Prosecutions (NDPP) and places 'final responsibility' for the prosecuting authority in the hands of the responsible Cabinet minister. This is in stark contrast to the courts and to the so-called Chapter 9 institutions, which are unambiguously described as 'independent'.

The Act establishing the NPA[4] codified this arrangement in law. The president also has the power to suspend the NDPP, and, following an 'inquiry', to remove the person from office.[5] The president is further empowered to establish investigating directorates within the NPA.[6]

The minister, meanwhile, has a significant number of responsibilities, including engaging in consultation with the NDPP to formulate prosecutions policy.[7] Perhaps more important is the minister's 'responsibility' over the NPA. Section 33 of the Act states:[8]

(2) To enable the Minister to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of the Constitution, the National Director shall, at the request of the Minister -

(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

(c) furnish the Minister with information with regard to the prosecution policy referred to in section 21 (1) (a);

(d) furnish the Minister with information with regard to the policy directives referred to in section 21 (1) (b);

(e) submit the reports contemplated in section 34 to the Minister; and

(f) arrange meetings between the Minister and members of the prosecuting authority.

Parliament is accorded a complementary role. In terms of Section 25, the NDPP must account to Parliament, notably through an annual report.[9] The president is to inform Parliament of a decision to suspend or dismiss the NDPP and Parliament has the authority to reverse this.[10] Parliament may, itself, move for the removal of the NDPP

and, if a resolution is passed by both houses in the same session, the president must act accordingly.[11]

In operational terms, the Act places most responsibility in the hands of the leadership of the NPA. Prosecutions policy is (subject to concurrence with the minister)[12] to be determined by the NDPP and decisions on whether or not to prosecute are in his or her hands.[13]

In design, therefore, the NPA has a qualified independence. It has been called a 'hybrid institution'.[14] Countervailing powers – the president, the minister and Parliament – prevent authority from being concentrated in any one source. While policy is not entirely outside the influence of politicians, the day-to-day business of prosecutions – in other words, bringing particular offenders to court – is a matter entirely for the professionals in the institution. Arbitrary removal and the denial or revocation of pay is not possible. The law protects the personal interests of the staff of the NPA.

Martin Schönteich, a legal scholar associated with the Open Society Foundations, has cautioned that there is 'room for ambiguity' in interpreting the constitutional position in respect of the minister's relationship with the NPA. The Constitution places the prosecutorial functions in the hands of the NPA, but then, in Section 179(5), places the NDPP and the minister on an 'equal footing', since the former must determine policy 'in concurrence' with the latter. Thus, says Schönteich, 'while the minister has to consent to any policy that is to come into effect, the minister cannot unilaterally impose his will on the NDPP'. Section 179(6), meanwhile, makes the minister 'responsible for the administration of justice' and enjoins him or her to 'exercise final responsibility over the prosecuting authority' – which would seem to undermine the independence of the NPA.[15]

The Act also includes stipulations that the NDPP and his or her subordinates must be 'fit and proper' for their roles, 'with due regard to his or her experience, conscientiousness and integrity'.[16]

Prof Wium de Villiers of the University of Pretoria argued in a 2011 paper that, in design, the independence of the NPA compares favourably with that of other jurisdictions (specifically Canada and Australia). However, he cautioned that there are both threats and problems. He drew attention to the fact that senior office bearers of the institution are political appointees and are influential in the appointment of others within the system.[17] The implication here is that a great deal hinges on the personal attributes of the senior leadership of the NPA and, specifically, its fortitude in warding off pressure or encroachments by political officer bearers.

The words of University of Cape Town law lecturer Jameelah Omar are worth bearing in mind.[18]

> The law has struggled to create the independence necessary for prosecutors to pursue charges against prominent members of the executive. South Africa isn't alone in this. The US has struggled too. The real problem is that political pressure can get in the way of prosecution. Members of the executive, including the president, can interfere with the head of the prosecuting authority – the national director of public prosecutions. Two examples stand out: the case brought against South Africa's former police commissioner Jackie Selebi which eventually resulted in a trial and a prison sentence. The second is the Zuma arms deal case.

Interestingly, when the NPA was established concerns were expressed not only that pressure might be brought to bear on a politically appointed NDPP (a 'super attorney-general', as some phrased it), but also about the role the NDPP might play in exerting pressure on prosecutorial decisions.[19]

A great deal hinges on the personal attributes of the senior leadership of the NPA

As Schönteich's analysis[20] showed, initial reactions to the appointment of the first NDPP – Bulelani Ngcuka – were mixed. The fact that he had been the ANC's Chief Whip in the National Council of Provinces confirmed the fears of many that he would not be independent. However, he was also respected as a hard worker and consensus builder and set to work diligently, expanded the NPA's specialist services and secured more funding (something Schönteich attributes in part to his direct access to then President Thabo Mbeki). These efforts resulted, however, only in rather modest improvements in the NPA's success in dealing with crime.

The latent potential for politicisation of the institution came to the fore with allegations of corruption in a large arms procurement deal concluded in 1999 which implicated members of the ruling party,[21] most embarrassingly, the then deputy president of the country, Jacob Zuma. In 2003 Ngcuka announced that, although there was a *prima facie* case, no charges would be brought against Zuma. Zuma's financial advisor, Schabir Shaik, however, was charged with fraud and corruption and convicted in 2005. From a rational legal perspective it is difficult to understand why Zuma was not charged alongside him, since the charges against Shaik related largely to the relationship between the two.

In the absence of a better explanation, it was clear that political calculations were being made. Bringing charges against a senior member of the ruling party and government would have caused extensive fallout, of which Ngcuka was aware and which he wished to avoid. (He was alleged to have remarked that 'I will charge the deputy president only if my president agrees.'[22]) Zuma's supporters believed that Ngcuka had entered the political fray, smearing Zuma without having to substantiate the claim in court.

> From a legal perspective it is difficult to understand why Zuma was not charged alongside Shaik

This train of developments suggests that the NDPP made political calculations and entered politically fraught territory. This was probably quite predictable as he had been brought into this role directly from active partisan politics. He was quite probably appointed with the implicit understanding that he would act in a manner compatible with the political interests of the government (and specifically the president). It should be noted, by way of context, that his appointment could be seen as an expression of the ruling African National Congress's (ANC's) policy of cadre deployment. An initiative of the late 1990s, this sought to place party loyalists in key positions in the state and civil society and has been criticised for having damaged the principle of professionalism and impartiality set out in the Constitution and creating a situation in which the merits of candidates were subordinated to their political loyalties.[23] Rather than being pressured by anyone outside the NPA, Ngcuka had – wittingly or otherwise – involved the institution in the politics of the country and of the ANC. What happened next should be seen in the context of this politicisation.

Ngcuka resigned as head of the NPA in 2004 (four years short of the ten-year term he might have served). He was replaced by Vusi Pikoli, widely respected as a person of high personal and professional integrity. Pikoli proceeded with charges against Zuma, no doubt encouraged by the successful case against Shaik. However, his undoing would arise from an attempt to press corruption charges against then National Police Commissioner Jackie Selebi.

The nature of Selebi's misdeeds need not be reiterated here, except to note that corruption at the top level of the police (and Selebi was, at that point, also the president of Interpol) was both an enormous threat to the security of the country's people as well as an embarrassment to its government. But Selebi was close to Mbeki and was seen as an ally in staving off the growing challenge from Jacob Zuma. For Zuma, meanwhile, a political challenge for the leadership of the ANC and for the presidency of the country was key to staving off the corruption charges he faced. For Zuma's supporters, having their leader dodge the corruption charges would pave the way to his ascent to the presidency and thereby secure for them the patronage and policy positions they coveted. Corruption was becoming very much part of the country's politics, something many (not least some who were piously vocal about the imperatives of dealing with it) were willing to tolerate in service of broader political objectives. The NPA would ultimately fall to this drive.

Matters came to a head in mid- to late 2007 when Pikoli attempted to have Selebi arrested. In September Mbeki suspended Pikoli on the grounds that his relationship with the justice minister had broken down 'irretrievably'.[24]

The background[25] to this was that Mbeki and the then Minister of Justice and Constitutional Development, Brigitte Mabandla, had been angered by Pikoli's actions in the matter and had demanded that he explain himself, share the docket and, ultimately, resign. Mabandla had apparently taken umbrage at not having been consulted about the decision to charge Selebi. Pikoli had responded that her understanding of the constitutional relationship and obligations between their offices was faulty and that she might be making herself guilty of obstructing justice.

The decision to suspend Pikoli was justified largely by an allegation that his conduct stood to undermine national security.[26] By implication, this meant that he was not a 'fit and proper' person to hold the office.

This was a decisive point in the history of the NPA. An institution that was meant to operate impartially and professionally, but which had already been politicised, had its independence fatally compromised. Perhaps this may be understood as the logical conclusion of the view that the NDPP was always subordinate to the executive and thus the executive would not tolerate its attempts to assert itself. The fact that the executive had shown a willingness to intervene in operational matters was noted at the time. 'If the president suspended Mr Pikoli on the grounds that he had issued a warrant for the commissioner's arrest, then it suggests that an invasion is being made into an independent institution's operations,' said Prof Adam Habib.[27]

A spokesman for the small African Christian Democratic Party summed up the issue eloquently: 'We could understand it if the suspension related to incompetence or incapacity. However, merely to allege a breakdown of relationship is very drastic and draws into question the degree to which the NDPP can act impartially and without fear or favour.'

An investigation by former Speaker of Parliament Frene Ginwala found Pikoli to have been a 'fit and proper' person for his role. However, she criticised him for not having been sensitive to security concerns, notably a request from Mbeki for two weeks to prepare the country for Selebi's removal. She said that had this been presented as a reason she would have supported the suspension. On this basis, Kgalema Mothlanthe, who had become president after Mbeki's recall by the ANC, dismissed Pikoli.[28]

Meanwhile, acting NDPP Moketedi Mpshe was confronted with the conundrum of what to do about Zuma, by then clearly in the ascendant and likely to become president in the forthcoming election. In April 2009 he announced that it was 'neither possible nor desirable for the NPA to continue with the prosecution of Mr Zuma'. The ground for this concerned abuse of process by Ngcuka and head of the Directorate of Special Operations, Leonard McCarthy, where the timing of charging Zuma discussed.[29] Embarrassingly, the legal reasoning was taken from a judgment in Hong Kong a few years previously – one which was subsequently overturned on appeal.[30]

Mpshe has denied he came under pressure.[31] And McCarthy's conduct was certainly politically partisan. But given the environment, the choice they faced was inevitably politically loaded – no choice they made would be without political implications (in fact, it is probably worth noting that, if anything, delaying the pressing of charges would have reduced the likelihood that the action was partisan). What was in action here is probably best described in terms similar to those relevant to the latter part of Ngcuka's incumbency – the NPA had been swept into a political vortex and choices were being made with reference to the politics of the day.

> The NPA was meant to operate impartially, but had been politicised and its independence compromised

Later in 2009 Zuma was elected as the country's president. Being deeply invested in the actions of the NPA as they related to himself, he appeared fully prepared to use his prerogative to appoint candidates who would act in alignment with his interests. This meant, in the first instance, that they had to be willing to fight to keep him out of court. This was by no means theoretical, as the Democratic Alliance was intent on pursuing a legal course to reinstate the charges.

Zuma's initial choice was Menzi Simelane. A former director of the Justice Department, he had been condemned in Ginwala's investigation. She wrote:[32]

> I must express my displeasure at the conduct of the DG: Justice in the preparation of Government's submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv Pikoli were without foundation. These complaints related to matters such as the performance agreement between the DG: Justice and the CEO of the NPA; the NPA's plans to expand its corporate services division; the DSO dealing with its own labour

relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA. All these complaints against Adv Pikoli were spurious, and are rejected without substance, and may have been motivated by personal issues. With regard to the original Government submission, many complaints were included that were far removed in fact and time from the reasons advanced in the letter of suspension, as well as the terms of reference. This further reflects the DG: Justice's disregard and lack of appreciation and respect for the import for an Enquiry established by the President.

Simelane was reported at the time to be indifferent to the NPA's independence and had apparently told staff that he had been appointed deputy NDPP in order to implement the ANC's vision for the institution.[33] In other words, Zuma had opted for someone of very doubtful fitness for the office, and with a clear political alignment. It is difficult to imagine a choice less inclined to assert the independence of the NPA.

Zuma justified his decision with reference to the discretionary powers he claimed were accorded him: 'Whether a person is fit or proper to be entrusted with the responsibilities of the office concerned is my subjective decision. I am the person, as the president of the Republic, to be satisfied that the person is fit and proper.'[34]

Constitutional law expert Prof Pierre de Vos argued at the time of Pikoli's dismissal that the concept of fit and proper – read in the context of the Constitution and the legislation governed by it – should be based on some sort of objective measure, one element of which was the willingness and determination to act without fear or favour, in other words, independently of political pressure. He added that the willingness of Parliament to go along with Zuma raised questions about how conscientiously it was fulfilling its duties.[35]

Ultimately, in 2012 the Constitutional Court ruled that the failure by Zuma and the then Minister of Justice Jeff Radebe to consider relevant evidence in Simelane's appointment (such as Ginwala's inquiry) rendered the appointment irrational.[36] This at least demanded the reintroduction of objective standards to the procedure for appointment, however hazy they may have been.

The NPA remained in a state of perpetual insecurity and compromise throughout Zuma's term of office. The terms of each of the subsequent appointments – Nomgcobo Jiba (acting), Mxolisi Nxasana and Shaun Abrahams – showed up some glaring problems. Jiba was accused of using her office to shield the controversial crime intelligence head (and perceived Zuma ally) Richard Mdluli – it was she who suspended Glynnis Breytenbach, who was building a case against Mdluli.[37] Mxolisi Nxasana appeared to be doing better but was effectively paid to resign. A commission into his fitness to hold office was in the offing and there was speculation that he had made 'unpopular decisions' and was wavering on whether to re-charge Zuma.[38] In the event, he was offered a settlement of some R17.3 million to vacate the office. The arrangement was subsequently found to have been constitutionally irregular and he was ordered to repay the money.[39] Zuma's conduct in this matter was harshly criticised: 'The facts set out above point to one thing and one thing only: former President Zuma was bent on getting rid of Mr Nxasana by whatever means he could muster. His was an approach that kept on mutating: it was first a stick; then a carrot; a stick once more; and eventually a carrot.'[40]

> The NPA remained in a state of perpetual insecurity and compromise throughout Zuma's term of office

Shaun Abrahams, for whom particular public cynicism was reserved, was given the moniker Shaun the Sheep. His term came to an abrupt halt when Nxasana's exit from office was ruled invalid. He was succeeded – in an acting capacity – by Silas Ramaite.

Throughout this period the possibility of Zuma facing charges hung over the NPA. In 2009 the Democratic Alliance (DA) sought a record of the NPA's decision to drop charges against Zuma and the taped conversations that Mpshe had referred to – the so-called 'spy tapes'.[41] The application was opposed by both the NPA and Zuma's team. (Zuma's legal strategy has been likened to the Soviet defence strategy in the Battle of Stalingrad

in the Second World War, during which buildings and obstacles were routinely used to play for time, delay the German advance and bleed their forces.)

In 2014 Zuma's lawyers admitted that there was no real reason to keep the tapes out of the DA's possession. In September 2017 the legal teams representing Zuma and the NPA conceded that the decision to drop the charges had been irrational.[42] The NPA declared that it was not embarrassed to have made that concession.[43] The following month the Supreme Court of Appeal ruled that Mpshe's decision to drop the charges was 'irrational'. In March 2018 Shaun Abrahams reinstated the charges.

The accession of Cyril Ramaphosa to the presidency raised hopes that he would bring greater stability and integrity to the NPA. He committed to doing so in his first State of the National Address in February 2018. In October 2018 he convened a panel comprising representative of selected organisations (the General Council of the Bar of South Africa, the Law Society of South Africa, the Black Lawyers Association, the National Association of Democratic Lawyers, Advocates for Transformation, the Auditor General of South Africa and the South African Human Rights Commission) to assist in choosing a new NDPP.[44] This was an innovative move, which gave the impression of a thorough vetting process even if questions could be asked about the partiality and special-interest orientation of some of the groups involved and even though, constitutionally, the choice would remain the president's alone.

His choice was Shamila Batohi, a former director of public prosecutions in KwaZulu-Natal and a Senior Legal advisor in the Officer of the Prosecutor at the International Criminal Court. Batohi, the first woman to hold the office of NDPP, had become a household name two decades earlier when she led the cross-examination of disgraced cricket great Hansie Cronje in an inquiry into match fixing. She has stated that she appreciates the scale of the task before her and has pledged to review high-profile corruption cases with an eye to dealing with impunity: 'It is all about solving the massive corruption problem we have in SA.'[45]

Much attention has been paid to the creation within the NPA of an investigating directorate, under Hermione Cronje, which will, in some respects, mirror the so-called Scorpions, an agency within the NPA that was abolished during President Zuma's ascendency. This would, in principle, provide the means to pursue powerful and politically connected suspects.[46]

What is there to learn from this? From early on the NPA was a politicised institution. Its design – particularly the appointment procedures – made this possible but might not, in itself, have been a fatal flaw. Rather, a particular perspective was adopted by various presidents who saw the NPA and its director as subordinate to themselves. From this flowed the conjunction of appointment procedures, the particular individuals chosen to head the institution and the decisions they made, which, together, compromised it. To place in this office people with strong and visible political alignments (in what is, after all, a fiercely politically contested society) made the danger of politically inspired action acute, if not inevitable. And perhaps that was the intention of both President Mbeki and President Zuma. How the most recent appointment, and the operation of the organisation under the administration of President Ramaphosa, will unfold, remains to be seen.

> Much attention has been paid to the creation within the NPA of an investigating directorate

Where the leading players are, themselves, compromised, this hazard was only heightened. And where the institution was central to the fate of the president it could only be expected that their performance in office would be measured by their willingness to support his cause.

Complementing the potential problems created by the appointment procedures is the ability of the president to remove the NDPP. The possibility of being removed on semi-arbitrary grounds would figure large in the minds of incumbent directors. So far, no NDPP has served out anything close to a full term.

In this sense, the politicisation of the NPA ultimately eroded its independence. While there may have been instances in which instructions were issued by the president, this may not have been necessary. The compromising of the independence of the NPA owed less to nefarious telephone calls than to the structuring of incentives and power relations within a particular

political context. It also raises some questions about the exercise of presidential authority in making such appointments and whether it is reasonable to hope that future presidents will not inevitably succumb to the temptation of appointing those they view as politically 'cooperative'.

The Public Protector

The Public Protector (PP) is one of the 'State Institutions Supporting Constitutional Democracy', described in Chapter 9 of the Constitution. Its governing principles – in common with the others named in that chapter – are:[47]

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

The PP's role is elaborated in Section 182, which reads:[48]

Functions of Public Protector

(1) The Public Protector has the power, as regulated by national legislation—

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

Tenure

183. The Public Protector is appointed for a non-renewable period of seven years.

As has been noted, the PP can – unlike the NPA – refer to a constitutional guarantee for its independence. Its remit is rather narrower, being confined to investigating malfeasance on the part of the state. It is also required to observe a high standard of transparency in its work, notably to release its findings to the general public.

The Public Protector's office traces its origins back to that of the Advocate-General, founded in 1979, which had the limited mandate of investigating the improper use of public funds.[49] In its current form the Office of the Public Protector was established in terms of the Public Protector Act of 1994.[50] This also stressed the imperative of independence of the office, requiring that any official there is to 'serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice' and serve in a full-time capacity without any other work commitments.[51]

Taking into account a few amendments, the Act defines the PP him- or herself as follows:[52]

(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who –

(a) is a Judge of a High Court; or

(b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or

(c) is qualified to be admitted as an advocate or an attorney and has, for a

cumulative period of at least 10 years after having so qualified, lectured in law at a university; or

(d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or

(e) has, for a cumulative period of at least 10 years, been a member of Parliament; or

(f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.

The Act, therefore, stresses both institutional independence and the character and professional qualifications and career experience of the eponymous head and those working for the body.

Moreover, the procedure for appointment is somewhat different from that of the NPA. While the president appoints the public protector, this is done on the advice of Parliament.[53] This should encourage greater deliberation and transparency in the appointment and removes, to some extent, the risk of the president making a choice based on a personal and subjective evaluation.

The first PP to be appointed was Selby Baqwa, who was widely endorsed for the position despite some misgivings about a perceived alignment with the ANC.[54] However, he had not held public office within the party and resigned from it upon his appointment. His tenure was concerned substantively with setting up the institution and ensuring that it responded to the large volume of complaints it received and was accessible across the country.

In general, Baqwa is positively regarded for having carried out his duties competently, but his legacy is also coloured by his having at times demonstrated an element of bias towards the ANC.[55]

On the one hand, he conducted a high-profile investigation into misconduct by the director general of home affairs, Albert Mokoena, following which the latter resigned. He also strongly condemned the conduct of the newly elected premier of Mpumalanga in 1999, after the premier had appeared to justify lying. Despite condemnation from the ANC in the provincial legislature and the apparent soft-soaping of the issue by President Mbeki, he stood his ground until a reprimand was forthcoming. ANC members of Parliament also threatened to censure him for criticising then Minister of Minerals and Energy, Penuell Maduna, who had attacked the then auditor general on the basis of allegations he knew to be false.

On the other hand, he was accused of caving into pressure (or at least of being unwilling to assert himself) in other cases. Among these was an inquiry into the *Sarafina II* affair, which involved the expenditure of a large sum of money on an AIDS awareness play that was ultimately found to be ineffective. He laid much of the responsibility on officials, thus sparing the minister of health much embarrassment, and, in the view of his critics, shielding her from accountability.

The president appoints the public protector on the advice of Parliament

Perhaps more than anything his reputation was tarnished by his association with the so-called Joint Investigation Team, which, along with the NPA and the Auditor General were probing the arms deal. The fact that the report it produced was effectively edited by people within government and failed to assign any real blame was a major dereliction of duty. Gary Pienaar, a one-time senior investigator in the office, later said:

> The reputation of the office was dented by the joint investigating team's misplaced trust in [then president Thabo Mbeki's] credibility when some findings were adjusted slightly. The team's willingness to give the benefit of the doubt to the integrity of the leadership of the democratic struggle turned out to be an error of judgement. The result was that identified evidence of misconduct could not be completely pursued and verified, and full responsibility could not be apportioned.[56]

Constitutional Law Professor Richard Calland has suggested that much had to do with managing the politics of the time and getting the institution onto a firm footing. Baqwa was painstakingly careful 'not upset too many political apple carts too early in the life of a new institution. Prudence was the watchword of his investigations.'[57]

The PP has experienced problems similar to those of the NPA in its formative years. Rather than an overbearing executive attempting consciously to rein in a bothersome institution, the narrative that emerges is of the politicisation (albeit partial) of the work of the institution as a result of the willingness of the incumbent to cede political space and align the office with the government and the government's imperatives.

This may have been made easier by the fact that Baqwa shared a political background with those in government, although, in Bawqa's defence, he made a conscious effort to distance himself at the time of his appointment. Or perhaps it was merely a case of viewing discretion as the better part of valour.

> Madonsela is generally regarded as South Africa's most effective and diligent public protector to date

Baqwa's successor was Lawrence Mushwana, former chairman of the National Council of Provinces for the ANC. He was severely criticised for having shown a lack of firmness in dealing with politically sensitive cases. He is, perhaps, best remembered for his conduct in the 'Oilgate' matter. Briefly, funds had been diverted to the ANC from PetroSA through a private company, as part of a supposed oil transaction. The PP's report on the matter exonerated PetroSA and effectively argued that his office had no jurisdiction, since neither the company nor the ANC was a public entity.[58] This was an extraordinarily narrow interpretation of the matter, since it was only the conduct of a public entity that made the payments possible. The government, however, accepted the report and declared the 'Oilgate' matter closed.[59] The report was later overturned by Judge Ntsikelelo Poswa in the Gauteng North High Court.[60]

Richard Calland and Gary Pienaar, a researcher in public ethics, have jointly argued[61] that Mushwana's appointment was, in fact, an attempt to weaken the institution (the first, they claim, of similar attempts aimed at other Chapter 9 bodies). He appeared deferential to the executive and made common cause with 'old-guard officials', making the posture of the office 'more docile and less independent – and less predictable'.[62]

The remedial actions he proposed tended to be mild and administrative. Thus, when then Deputy President Phumzile Mlambo-Ngcuka used an airforce aircraft to fly her family overseas for a holiday and failed to declare free accommodation his key recommendation was merely to finalise the *Ministerial Handbook* to define acceptable and unacceptable conduct.[63]

It should also be said that the decay of the independence of the PP coincided with the high watermark of the ANC's rule in South Africa. Despite political turbulence Thabo Mbeki was, for a time, unassailably in charge of the country. The economy was growing and the ANC secured close to 70% of the vote in 2004. It was largely favourably covered by the media and academia and received applause (some of it contrived, certainly) from business. Mbeki could declare – apparently without any sense of irony – that 'the ANC remains the *most important moral voice* of the country'.[64] It was also openly pursuing a policy of cadre deployment, in terms of which important positions were to be occupied by people loyal to the ruling party. It is remarkable just how little resistance this policy encountered at this time.

In a sense it was not unexpected that such institutions would seek to position themselves in cooperative, even subservient, relations with the executive. This was what the general political climate encouraged.

Mushwana was succeed by Thuli Madonsela. A former member of the South African Law Reform Commission, she is generally regarded as South Africa's most effective and diligent public protector to date. She was unafraid to tackle complicated and sensitive cases. In the public mind the most prominent of these would probably have been the investigation into the upgrades to then President Zuma's residence in Nkandla.[65] She also made powerful findings against former Police Commissioner Bheki Cele, former Cooperative Governance and Traditional Affairs Minister Sicelo Shiceka, erstwhile SABC CEO Hlaudi Motsoeneng, former Passenger Rail Association of SA head Lucky

Montana and then IEC head Pansy Tlakula.66 Perhaps most importantly, she took seriously allegations of 'state capture' – that is, the commandeering of the state to suit private (and corrupt) interests.[67]

Her willingness to challenge powerful figures made her unpopular in some quarters. In one memorable case Deputy Minister of Defence and Military Veterans Kebby Maphatsoe, an ardent Zuma loyalist, stated publicly that she was a spy for the Central Intelligence Agency.[68]

There were fierce standoffs between the PP and the ANC over the spending on the Nkandla residence.[69] Reporting in 2014 the PP was highly critical of Zuma's conduct and recommended that he repay a portion of the money. Zuma, however, indicated that he would wait for a number of other, parallel investigations before responding.[70] In effect, he denied that the PP's recommendations were binding and maintained they could be diluted or avoided by encouraging competing probes. This had the distinct odour of a drive to defang the PP.

The ANC concurred with Zuma and Parliament passed a resolution stating that he was not liable for any payment, endorsing instead a report presented by Police Minister Nathi Nhleko.[71] Senior ANC MP Mathole Motshekga further recommended that the PP's powers be amended.[72] His rhetorical remark that it was inconceivable that the PP should have powers exceeding those of elected MPs reflected a populist rather than a constitutional view of South Africa's democracy.[73]

> The accession of Mkhwebane has produced a sharp spike in pessimism about the office

A challenge in the Constitutional Court in 2016 resulted in a very significant ruling that the PP's recommendations were, in fact, binding.[74] This was, by implication, a major statement of the independence of the office.

In addition, Madonsela embarked on an ambitious investigation into so-called 'state capture' by the controversial Gupta brothers. Her report required, among other things, a commission of inquiry into the matter.[75] An attempt by Zuma to challenge this was rejected by the North Gauteng High Court.[76]

Madonsela's departure and the accession of Busisiwe Mkhwebane has produced a sharp spike in pessimism about the office. Although she was supported by all parties (bar the DA) on the relevant committee, there were some concerns expressed about her background in Intelligence and her failure to provide proper reasons for having left a position at the Department of Home Affairs.

An early straw in the wind, practically minor but symbolically important, was a request to have the televisions in the office show the Gupta-owned television news channel ANN7 – an odd choice, given that their conduct had come under negative scrutiny by her predecessor.[77]

Her reputation was severely tarnished when she reported on an investigation into financial 'lifeboats' given to Bankorp (since acquired by Absa) by the Reserve Bank in the late 1980s and early 1990s. She found that they were unlawful, that Absa should repay some R1.125 billion and that the Constitution should be amended to require the Reserve Bank to promote 'balanced and sustainable economic growth'.[78]

Both Absa and the Reserve Bank challenged the report before the courts and won. It emerged that Mkhwebane had had meetings with Zuma and with officials of the State Security Agency which were not initially disclosed. Setting aside her remedial measures, the North Gauteng High Court questioned her conduct and impartiality in the matter:

> The Public Protector did not conduct herself in a manner which would be expected from a person occupying the office of the Public Protector … She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and that a higher standard is expected of her … In the matter before us it transpired that the Public Protector does not fully understand her constitutional duty to be impartial and perform her functions without fear, favour and prejudice.[79]

In addition, there was what can only be described as ignorance of the law and of her powers (or something more disturbing) – ordering a change to the Constitution was far in excess of what the PP is empowered to do.

Her appeal to the Constitutional Court resulted in a finding that the, "Public Protector was, essentially,

dishonest, misrepresented to Court what material she had relied on, had failed to disclose meetings with the Presidency and other parties, had failed to disclose what was discussed at such meetings, was reasonably suspected of bias and had acted in bad faith and in a one-sided manner."[80] She was consequently ordered to personally pay part of the costs of the litigants as a sign of the deep displeasure with which the Constitutional Court judges viewed her conduct.

The fallout and reputational damage of the scathing judgement were extensive, especially in the light of the heights reached by Madonsela during her term. Prof Jannie Rossouw of the University of the Witwatersrand put the problem succinctly: 'It is unclear whose agenda the Public Protector is serving in pronouncing in matters outside her mandate.'[81]

> Even with robust guarantees of its independence an anti-corruption body can be suborned

The PP is currently experiencing a crisis of public confidence. The sense that the incumbent is doing the bidding of someone other than the public she was appointed to serve weighs heavily and concern about it has ramped up considerably in 2019. At issue have been investigations into President Ramaphosa and Pravin Gordhan, Minister of Public Enterprises (and one-time finance minister and primary figure of hate for those perceived to be sympathetic to former President Zuma). In respect of Gordhan, Mkhwebane probed his conduct as minister of finance and found that he had acted improperly in approving the pension payout of an employee at the South African Revenue Service. The decision was taken on review but it provided Gordhan's detractors with considerable ammunition to use against him.[82] In respect of President Ramaphosa, the PP has indicated an intention to investigate alleged money laundering relating to the president's campaign for the presidency of the ANC. Pierre de Vos has argued convincingly that it is not within her powers to do so as this is a matter between two private parties.[83] Within the ANC and its alliance angry voices have denounced the PP's actions as being tainted by politics.[84]

In addition, the incumbent PP has raised some eyebrows by appealing to divine powers to justify herself. She stated on her Twitter platform: 'I know some of you may not be Christian but I strongly believe I was placed in this position by the God that I serve and I believe that only He can remove me if He is of the view that I have failed.'[85]

The actions of the PP show that even with robust formal guarantees of its independence an anti-corruption body can be suborned. The accounts above show that a combination of a highly politicised environment, a determined executive (and a party united behind him or her) and an incumbent willing to look beyond the formal strictures of his or her job, independence can be compromised.

Lessons

Pierre de Vos has commented, accurately, that institutions like the PP are 'often caught between Scylla and Charybdis, having to please the executive and the legislature while also having to act independently from them'.[86] Anti-corruption bodies must both rely on and cooperate with governments and stay at arms-length from them. They need to retain the goodwill of those who hold both power and resources and must, at times, be willing to take a highly adversarial stance against them. With the best will in the world, this is no easy task and when maintaining the support and goodwill of government may require being less than entirely consistent and diligent in the execution of duties it is a trade-off that might seem to make prudent – if not moral – sense.

The fact that the environment in South Africa is contested and politically polarised has served to aggravate this state of affairs. But more important, arguably, has been the fact that a strong strain of 'voluntarism' (for want of a better description) has run through this issue. Presidents have chosen to interfere, or to appoint those thought likely to deliver certain outcomes and, with some notable exceptions, occupants of these offices have been willing to accommodate their impulses.

Perhaps it is no surprise that the NPA has had an especially tumultuous existence. The stakes are high here. Even an unsuccessful prosecution can be damaging. The impulse to submit such an institution to political control is strong.

The PP has fared better overall than the NPA but is, by its nature, dependent on the calibre of the individual heading the office. One important element may be the individual's sense of political identity. The fact that Madonsela's background was in the South African Law Reform Commission and that she had little apparent affinity with any party contributed to the relative success and apparent fearlessness of her term.

A knock-on effect of compromised political independence is that it is felt not only in the relationship between these institutions and outside forces but within the institutions themselves. As independent researcher and writer David Bruce has argued, internal appointment processes in the criminal justice system 'have been abused by politically compromised senior officials … This legacy needs to be addressed urgently. All appointments made by politically compromised officials … need to be reviewed and, unless clearly justified, should be overturned.'[87]

Can anything be done to structure these bodies or the manner in which they function so as to bolster their independence? One source that offers some guidance is the report in 2007 of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions (the Asmal Committee).[88] While it dealt with the Chapter 9 bodies as a whole (beyond the scope of this study) and did not touch on the NPA (which is part of this study), it suggests some courses of action that might productively be considered.

Funding

Funding is central to any affirmation of independence. Where funds must be sourced through a political relationship the danger of pressure arises. Separate, distinct budgets (in this case, specifically for the NPA, though not the PP) would set these bodies apart from the departments and ministers to which they are linked.

Appointment

One of the most noticeable threads running through the accounts presented above is the importance of selecting the right candidate. Whatever checks and balances may be available there is simply no substitute for a strong, assertive, ethical and skilled incumbent. The risk that a poor candidate may be appointed – by design, as appears to have been the case – must be mitigated.

One obvious option is to reduce presidential discretion, which has allowed some highly questionable incumbents to take charge at the NPA. Parliamentary hearings are a good idea and should be introduced where they are not at present being held.

However, relying on Parliament as an alternative may not improve the overall outcome. To be sure, the presence of a committee implies superior opportunities for exploring strengths and weaknesses and for highlighting potential problems. This is particularly so given that representatives of different parties sit on these committees: in theory, this should funnel the decision towards a multiparty consensus based on fitness for purpose.

> There is simply no substitute for a strong, assertive, ethical and skilled incumbent

But it should not be forgotten that a parliamentary process recommended Busisiwe Mkhwebane. South Africa's dominant-party system and the closed list electoral system which promotes party discipline is a powerful obstacle in the way of individual conscience in these decisions. A decision by the ANC's leadership about a candidate is likely to be executed by its MPs. (Having established this precedent, there is a strong possibility that, in power, other parties might emulate this.) Reforms that encourage MPs to direct their attention away from party structures (such as a constituency system) might change these dynamics, but until that happens it remains speculative.

Civil society involvement has, until now, largely been confined to nominating candidates for such offices as the PP and none at all for the NDPP (with the exception of President Ramaphosa's advisory panel on the appointment of the institution's head in 2018 – something that was entirely discretionary and may or may not be repeated). A formula that allows civil society involvement in the interview and appointment process would add a valuable perspective – although the method of doing this would require very careful consideration. Such an option also raises the important normative question of whether an unelected civil society activist should have as much

influence on the selection of someone like the PP as an elected MP.

A related issue is whether any non-professional criteria might disqualify a potential candidate from office. This issue is recorded in the Asmal report, with specific reference to political party membership. On balance, the report's conclusion is that it would be unfair to bar politically aligned people given the highly politicised nature of the society. However, it is not unreasonable to require such a person to resign from his or her party upon assuming office.

In reality, this is unlikely to mitigate the potential influence of the informal links, relationships and sympathies that compromise independence as it is difficult to identify them.

Clear procedures

It is important for an independent body to have clear and regular procedures for interacting with the executive and political office bearers. This establishes the ethical parameters of these relationships and mitigates the prospect of undue influence.

An essential aspect of procedural certainty is setting out the conditions under which incumbents may be removed. As far as possible this must narrow the scope for arbitrary application. One issue that should be clarified is what is implied by the idea of 'fitness' for office. The incumbent's hold on office must be protected except in cases of severe and definable misbehaviour.

Ultimately, however, the greatest threat to the independence of South Africa's anti-corruption bodies is a failure on the part of government to respect that independence and a failure, at times, of the institutions' leaders to protect them. This is an expression of socio-political impulses and of the prevailing political culture – something that cannot be dealt with by regulation but must be enacted through personal commitment.

Notes

1 The broad parameters of corruption are well understood. For the purposes of this study it is defined – following Transparency International (TI), www.transparency.org/what-is-corruption#define) – as 'the abuse of entrusted power for private gain'. TI continues: 'Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies. Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision-makers, who abuse their position to sustain their power, status and wealth.'

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