UNIVERSITY of the WESTERN CAPE

DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

Prosecutorial Independence and the Prosecution of Corruption

Dr Jean Redpath
2024

Copyright statement

This publication was made possible with the financial assistance of the Open Society Foundations. The content of this document is the sole responsibility of the Dullah Omar Institute and can under no circumstances be regarded as reflecting the position of the Open Society Foundations.

Dullah Omar Institute
University of the Western Cape
Private Bag X17
Bellville
7535
South Africa

www.dullahomarinstitute.org.za

The Dullah Omar Institute, formerly the Community Law Centre, at the University of the Western Cape ('the Institute'), established in 1990, works to realise the democratic values and human rights enshrined in South Africa's Constitution. It is founded on the belief that our constitutional order must promote good governance, socio-economic development and the protection of the rights of vulnerable and disadvantaged groups.

Given the need for regional integration to encourage development in Africa, the Institute also seeks to advance human rights and democracy in this broader context. Based on high quality research, the Institute engages in policy development, advocacy and educational initiatives, focusing on areas critical to the realisation of human rights and democracy in South Africa and Africa in general.

Table of Contents

1 Introduction

This paper argues that the legislation providing for the National Prosecuting Authority (NPA) in South Africa neither encourages independence of the prosecution nor ensures prosecution of corruption. This is partly because the key determinants of prosecutorial independence, suggested empirically in the literature by cross-country data, are absent from the legislative framework. This paper discusses this literature and proposes significant changes to the National Prosecuting Authority Act to improve independence and to increase the prosecution of corruption.

2 Independent Prosecution in South Africa?

The South African Constitution requires prosecutorial independence: section 179(4) provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. This implies that all must be treated equally before the law in respect of the functions exercised by the prosecuting authority, and national legislation must ensure that this is so. The phrasing "without fear, favour or prejudice" is frequently equated with independence from government interference, but clearly encompasses independence from improper influence no matter what the source.

In practice, the National Prosecuting Authority (NPA), since its establishment through the National Prosecuting Authority Act 121 of 1998, has not demonstrated an ability to act without fear, favour or prejudice. It has largely failed to prosecute matters involving state actors and those who are politically or otherwise powerful. This includes more than 300 persons referred to it by the Truth and Reconciliation Commission (TRC), against whom the evidence suggested were guilty of crimes and who had failed to apply for amnesty.[1] Indeed, in 2005 the NPA attempted the formalisation of a policy which would have seen these persons not be prosecuted despite their failure to account before the TRC.[2] After litigation, the policy was overturned[3], but prosecutions have not occurred, although recently, there has been verbal commitment to do so.

The NPA prosecutes only a small fraction of the police officers referred to it each year by the Independent Policing Investigative Directorate (IPID).[4] Referrals for prosecution by the Special Investigating Unit (SIU), which, in a civil process, recovers funds lost to corruption in government primarily through wrongdoing by government officials, are in the main not prosecuted.[5] The prosecuting authority has as yet failed

[1] Maughan, K 'Long-awaited NPA report gives no answers on ANC govt's alleged blocking of apartheid trials' *News24* 21 February 2024

[2] NPA Prosecution Policy 'Annexure A: Prosecuting Policy and Directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994' Revision Date 1 December 2005.

[3] *Nkadimeng and Others v National Director of Public Prosecutions and Others (2008)*.

[4] According to the IPID Annual Report, In 2022/23, some 56 criminal convictions and 39 criminal acquittals arising from IPID referrals were reported, suggesting 94 matters were prosecuted to verdict. In the same year there were 2093 referrals to the NPA for a decision, of which in only 53 there was a decision to prosecute (2%).

[5] In February 2022 the NPA reported to the Standing Committee on Public Accounts (SCOPA) that since 2014, the SIU had referred 1,515 cases to the NPA and of those, 41 were before the courts, 41 guilty verdicts were obtained

successfully to prosecute the majority of those implicated in the Zondo Commission of Inquiry into State Capture.[6] The multiple attempts at prosecution of former President Zuma in respect of the arms deal matter illustrate the difficulty the institution has experienced in attempting to prosecute those in high office; the matter remains unresolved almost two decades later. [7]

Even in the post-2019 era, with the appointment of a new National Director of Public Prosecutions (NDPP) via a transparent process, the prosecution of corruption in general remains far below what is required to address the problem, with, in the latest year, just over 300 convictions for complex commercial crime. Furthermore, in an echo of its failed 2005 Truth and Reconciliation Policy, the NPA has published directives for "Non-Trial Resolutions" which would see corporations not being prosecuted, via a mechanism called "Deferred Prosecution Agreements", which essentially involve the payment of amounts to recompense the state, granting payees a conditional withdrawal.[8] It grounds this policy in its existing directives relating to mediation, which has been used even in respect of relatively serious crimes such as assault or rape, often on the payment of damages to the victim. Such accused are all essentially buying their way out of prosecution.

To what extent do these facts indicate that the national legislation in question, the National Prosecuting Authority Act 32 of 1998, has failed to ensure that the NPA exercises its functions without fear, favour or prejudice, as required by the Constitution? This paper will argue that the NPA Act is flawed in the light of international empirical evidence on the determinants of prosecutorial independence in relation to the prosecution of corruption, and should be amended to ensure greater independence and the prosecution of corruption.

2.1 The importance of prosecution and criminal convictions

A criminal conviction has a crucial function. Greg Lamond explains that the criminal law "serves an important condemnatory function in social life – it marks out some behaviour as especially reprehensible, so that the machinery of state needs to be mobilised against it."[9] Mark Dsouza argues that a conviction communicates to the public that the conduct is criminal "with all the socially expressive content of the

(3%), NPA declined to prosecute in 253 (17%), with the remainder still under investigation. Nkosa, N. 'SIU cases still need investigation before prosecution — NPA' *The Sowetan* 16 February 2022 available at <https://www.sowetanlive.co.za/news/south-africa/2022-02-16-siu-cases-still-need-investigation-before-prosecution-npa/> accessed 20 August 2024.

[6] Cruywagen V 'Lack of State Capture prosecutions ignites fiery debate — it's 'unacceptable', panellist declares' *Daily Maverick* 14 March 2024 available at <https://www.dailymaverick.co.za/article/2024-03-14-lack-of-state-capture-prosecutions-ignites-fiery-debate/> accessed 20 August 2024.

[7] Imray G 'The legal woes of former South African president Jacob Zuma' *Associated Press News* 1 February 2023 available at <https://apnews.com/article/politics-legal-proceedings-crime-jacob-zuma-africa-5107230f76bb2ada8593a285d2a0e12a> accessed 20 August 2024.

[8] NPA Prosecution Policy Directives (sic) 'Annexure A: Corporate Alternative Dispute Resolution' Version Date (sic) 2 February 2024.

[9] Lamond, G. What is a crime? *Oxford Journal of Legal Studies* 27(4) (2007) 609-632 @ 610.

term."[10] While the civil law can result in redress (usually in monetary terms) for the victim of a wrongdoing, only a criminal conviction serves the public function of social condemnation and the consequences which flow from that. Crimes are prosecuted by the state because the harms caused by a crime extend beyond a particular victim or the direct harm caused to the victim. The condemnatory function of prosecution is undermined if prosecutions are selective. This occurs when people guilty of equally condemnatory acts are not equally subject to prosecution. The condemnatory function is also undermined if the process of prosecution is actually or perceived to be used illegitimately where the accused in fact has no case to answer.

2.2 The discretion to prosecute or not in South Africa

The National Prosecuting Authority is empowered by section 179(2) of the Constitution "to institute criminal proceedings on behalf of the state, and to carry out any functions incidental to instituting criminal proceedings." However, South Africa does not have a compulsory prosecution regime. The exercise of discretion in compulsory prosecution regimes is notionally limited only to an assessment of whether or not there is sufficient evidence to support a prosecution. Compulsory prosecution is however in line with the value of equality – persons carrying out similar criminal acts for which there is similarly sufficient evidence, should be similarly prosecuted. Some refer to compulsory prosecution as the "legality principle" while countries which permit a greater degree of discretion follow the expediency or "opportunity" principle. The non-compulsory nature of the South African prosecution regime may be inferred from sections 179(5)(a) to (d) of the Constitution, which provides that the NDPP must determine, together with the Minister, *prosecution policy* which must be observed in the prosecution process. Furthermore, the NDPP alone may issue *policy directives* which must be observed in the prosecution process and she may intervene in the prosecution process when directives are not complied with. In addition to this power to intervene, the NDPP may review *a decision to prosecute or not*, after taking representations from the accused, the complainant and any other relevant person. In the South African context, it is largely accepted that in addition to the sufficiency of evidence ("reasonable prospects of success") public interest considerations may rule out a prosecution. Policy and directives further expand on "the public interest". The NDPP's power to overrule a decision to prosecute or not is not, however, an unfettered discretion. Perhaps most famously, the NDPP's decision not to prosecute former President Jacob Zuma has been subject to judicial review and overturned on rationality grounds. [11] In practice, however, Directors of Public Prosecutions (DPPs) are responsible for decisions in their respective Divisions of the High Court and largely determine the trends in their divisions. The extent to which the legislation ensures that they and prosecutors under them act without fear, favour or prejudice, is accordingly crucial. This in turn, is influenced by whether or not they are independent of influence by government.

[10] Dsouza, M. "The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification" *The Cambridge Law Journal* 79(1) (2020) 91 – 119.
[11] Zuma v DA (771/2016); ANDPP v DA (1170/2016) [2017] ZASCA 146 (13 October 2017).

3 International literature on the determinants of prosecutorial independence

Anne Van Aaken and others (2010) conduct the first cross-country study of the effects of prosecutorial independence on public-sector corruption. They argue that crimes such as corruption committed by government officials are more likely to be prosecuted if the prosecutors enjoy independence from influence by the government. The non-prosecution of crimes increases the attractiveness of committing them, which is why they expect a clear association between high levels of prosecutorial independence and low levels of public-sector corruption in their analysis of the data.

3.1 De jure and de facto independence and the prosecution of corruption

Unsurprisingly, their regressions show that de facto independence of prosecution agencies robustly reduces corruption of officials. However, in Van Aaken et.al.'s analysis, de *jure* and *de facto* independence of prosecutors are distinguished and they find, in cross-country comparison, that they are (weakly) *negatively* correlated with each other.[12] In other words, the greater the independence of prosecutors in a country according to the law, the *less i*ndependent they actually are likely to be in practice. On the face of it this finding seems to be a blow to the ambitions of civil society seeking greater *de jure* independence for a prosecuting authority, in South Africa too. However, it is important to note that in this analysis, *de facto independence* refers to the tendency of government not to instruct, fire, discipline or underpay prosecutors toward influencing their behaviour, rather than on actual biased actions of the prosecution.

Further, Van Aaken et.al. speculate that this counter-intuitive result may be a function of that subset of countries experiencing governance problems attempting to modernize their criminal procedural law (as a result of pressure from, for example, civil society) leading to high levels of *de jure* independence for prosecutors, but despites such reforms, it remains the case that government still interferes in the prosecution, implying low levels of *de facto* independence. The cross-country nature of the data means the dataset cannot answer the question of whether in spite of current low *de facto* independence, a move to greater *de jure* independence has nevertheless improved the situation for the country in question – compared to the situation prior to the reforms. The dataset can only compare the situation amongst countries. Low levels of *de facto* independence (i.e. high levels of interference in the prosecution by the state) are, as expected, correlated with a tendency not to prosecute corruption.

3.2 Determinants of de facto independence in cross-country data

Stefan Voigt and Alexander Wulf (2017) also use cross-country quantitative data to attempt to answer the question "What makes prosecutors independent?"[13] In their cross-country analysis, de jure independence

[12]Van Aaken, A. 'Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-eight Countries' American Law and Economics Review 12(1) (2010) 204–244

[13] Voigt S. Wulf AJ What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence *Journal of Institutional Economics* 15(1) (2017) 1-22

has no impact on de facto independence – unlike the earlier finding of Van Aaken et.al. al. Voight and Wulf find that the key determinants conducive to a high level of independence are:

1) common law as legal origin,
2) a free press, and
3) regulations granting Parliamentarians immunity from prosecution.

Other factors included in their model are degree of federalism, per capita income, level of democratization, and ethnic, religious and linguistic fractionalization. Voight and Wulf note that independence is not a *sufficient* condition for the prosecution of corruption. They note that a prosecutor who is independent of the state may nevertheless still be susceptible to incompetence, bribery or malicious acts – in other words act with favour or prejudice for reasons other than lack of independence (from the state).

In the South African context, it may also be remarked that *de jure* independence has in some instances operated to insulate corrupt and incompetent prosecutors from accountability for their actions. In the section below, the three factors most strongly associated with independence, and their possible applicability in South Africa, are discussed below.

3.2.1 Common law tradition

It is intriguing that Voight and Wulf do not discuss in detail why it should be that prosecutions originating in common law traditions appear to be associated with greater prosecutorial independence, remarking only that while this is an interesting artefact, it is not "amenable to policy considerations". In my view the finding can indeed be explored in more detail toward the development of policy considerations.

Voight and Wulf do spend some of their paper discussing the different ways in which prosecution agencies are structured, they do not link this discussion with their findings on common law tradition, and consequently to the implications for the prosecution of corruption. It may be argued that prosecution agencies emanating from a common law tradition tend to share aspects of organisational structure which are amenable to greater independence, greater competence, and greater transparency, which support the prosecution of corruption. Three factors spring to mind.

First, common law countries tend to have one of two mechanisms which may impact on independence: either they are structured in a way which separates out decision-making from prosecution, or they permit a non-state prosecutor in political matters. Thus, Australian states and England and Wales, have a structure in which there is a state prosecution agency which acts in a manner analogous to a firm of solicitors or attorneys (frequently called the Office of the Director of Prosecutions). This agency provides advice to investigative agencies and briefs professional, independent barristers or advocates, who are pre-approved by the state for this role, who serve for a fixed term (frequently called King's or Queen's Counsel). This arrangement 1) separates out the decision to prosecute from the persons conducting the prosecution 2) ensures quality in the prosecution, as the state is in a position to select the best available

barristers for a defined time-period (who may not be amenable to permanent employment) – or to not re-appoint those who produce poor quality work.

By contrast in European and socialist traditions the decision-making process around prosecutions and actual prosecutions tend to be conflated, and the prosecutor has a far more investigative role. Although South Africa has historical links to the common-law tradition, the structure of the NPA is more European–like in that it comprises permanent employees of the state who essentially decide on their own work-load via decisions to prosecute or not. While there is a mechanism for the NPA leadership to hire in specialist skills via section 38 of the NPA Act, this is subject to political gate-keeping by the Minister, who must approve these, with the result that serious cases of corruption must be prosecuted by state employees who may not be the most skilled available, and who must split their time between court and case preparation.

Meanwhile, Canadian provinces and the United States tend to have provision in law for the appointment of Special Counsel whenever persons in high office face prosecution. Such Special Counsel tend to have decision-making power on whether to prosecute or not, and are also responsible for carrying out the actual prosecution. South Africa has neither mechanism (neither split bar for prosecutions nor a provision for Special Counsel.)

Second, in common law traditions it tends to be a requirement that prosecutors and counsel for the prosecution be qualified legal practitioners admitted to practice in the country concerned. In South Africa prosecutors need not be legal practitioners (only the NDPP, DNDPPs and DPPs are required to have legal qualifications that would entitle them to practise in all courts of the Republic, in terms of section 9 of the NPA Act). Many enter the prosecution service directly from university without any practical legal experience, as the requirement is limited to having a university degree. The practical result of this is that a prosecutor who is not a legal practitioner cannot easily exit the employment of the state into private practice without facing a period of requalification, which may come with a steep salary drop the more senior she or he is. The only possible route out without negative financial consequence is to enter the magistracy, which remains employment by the state. This has the effect of exerting subtle pressure on a prosecutor not to take decisions which may be politically unfavourable, as employment by the state is the only feasible option and she or he may fear facing unwanted transfer or lack of career progression within the service. Only those secure in their ability to earn an income outside of the prosecution service are free to make truly independent decisions. Furthermore, during practical legal training practitioners in South Africa are exposed to a number of different legal fields which may be of relevance to being able to prosecute corruption, including administrative law, commercial law, banking, and the like. Prosecutors not exposed to this may suffer a disadvantage in prosecuting commercial crime and corruption.

Third, there is the question of security of tenure. Security of tenure is frequently touted as being necessary to ensure that prosecutors are independent, in the same way that judges have security of tenure to ensure independence. However, in common-law origin countries, the most senior prosecutors who have overall decision-making power for their jurisdiction, tend to have terms of five, seven or 10 years only. In South Africa, the NDPP has a ten-year term, but the DPPs have lifetime security of tenure, serving until the age of 65, as do the Deputy NDPPs. A DPP or DNDPP appointed at a young age may accordingly serve for

multiple decades. The practical result of this is that an appointee of a corrupt administration may continue to serve for decades after that administration has changed; she or he may have lingering political loyalty or otherwise be allied to a previous administration.

This is particularly important for corruption because the NDPP's veto power, while notionally equally over decisions to prosecute and not to prosecute, is as a matter of practicality, stronger in relation decisions *to* prosecute. Decisions not to prosecute taken by a DPP may not ever come to the NDPP's attention, particularly if there is no single complainant, as is often the case in corruption cases, to question the matter. The DPPs have day-to-day decision-making power over all matters in their jurisdictions. Their long tenure is accordingly particularly significant for independence and consequently for the prosecution of corruption. By contrast, the more limited tenure that overlaps unevenly with political terms present in most common law systems means that an appointment who may have political loyalty, will only serve for a limited period. A corrupt politician or political grouping may accordingly only enjoy protection from a DPP loyal to it for a limited period of time. In South Africa, questions marks have long hung over the DPP of Gauteng South (Johannesburg), Andrew Chauke, appointed in 2011. According to NPA data, the prosecution of corruption and commercial crime in this division is anomalously low compared to the number of prosecutors employed there.[14] Had a five-year or even a 10-year term applied, he would no longer be DPP in that division.

A further consideration is that long tenure means that up-and-coming prosecutors probably cannot aspire to be DPP during their lifetimes; the career path in the prosecution service is accordingly relatively flat and does not incentivize excellence or risk-taking. Accordingly, it seems plausible that these qualities of common law systems might encourage both independence and the prosecution of corruption.

Finally, it is worth noting that in South Africa, the question of independence of the NPA has tended to focus on the *financial* independence of the institution, with its status as a programme in the Department of Justice argued to work against true independence. Yet in many common law countries the DPP falls under the Attorney-General who is also the Minister of Justice. Obtaining a separate budget for the NPA would be of little impact if provisions such as s38 continue to give the Minister veto power over the hiring of specialists' skills, and salaries are still primarily determined by the Minister, rather than an independent body such as the Independent Remuneration Commission, which also determines the salaries of Magistrates and Judges.

3.2.2 Free press

The finding regarding press freedom sees Voight and Wulf arguing that countries should aim to implement transparency policies for all institutions in the criminal justice value chain, and particularly the

[14] According to the NPA Annual Report 2023/24, the Gauteng Local Division: Johannesburg Division has among the largest complements of prosecutors in its Specialised Commercial Crime Unit, but managed only 46 convictions for complex commercial crime in the three years to 2023/24. The Gauteng Division: Pretoria managed 80 with a similar complement.

prosecution. They theorise that press freedom works to support prosecutorial independence, because of the political costs when the failure to prosecute wrongdoers or abuse of the prosecutorial process is exposed in the press. Accordingly, the authors argue that comprehensive and prompt disclosure of information relating to the prosecution or dismissal of cases with a political dimension is needed.

Unfortunately, the obvious corollary of this is that a prosecution service which is unwilling or unable to prosecute wrongdoers or which is abusing the process will not voluntarily seek greater transparency, unless compelled to do so by legislation or oversight institutions, to avoid such political costs. In South Africa, the NPA has tended to operate in an explicitly secretive fashion. A positive development is that until recently, there existed a provision in the NPA legislation which makes it a criminal offence for any person to reveal any and all information emanating from within the institution, even that which might otherwise be harmless or in the public domain. This was removed from the legislation only recently via an Amendment Act, which also made permanent an Investigating Directorate for the NPA.[15]

However, in South Africa there is an absence of specificity in the legislation and regulations regarding the extent to which the NPA must report. Indeed, it is only since 2019 that the NPA has begun to provide performance information for each Division, as required by the legislation, in their Annual Report to Parliament. On the other hand, other information such as detailed Human Resource information, is no longer included in their report, and the Annual Report of the Department of Justice and Constitutional Development does not disaggregate this data sufficiently for information about the NPA to be apparent. The extent of information provided from year to year seems to some extent to be arbitrarily determined. Contrast this with the Annual Report of the Director of Public Prosecutions of Ireland, which provides detailed information in particular on decisions not to prosecute, timelines to such decision-making, and expenditure on counsel hired, with disaggregation down to district level.[16] Such detailed information is to some extent dependent on functioning electronic datasets, rather than the manual aggregate statistics kept by the NPA. However, such detail is necessary for true transparency.

Commonwealth jurisdictions are frequently exemplary in the transparency provided, particularly around the policy and directives they apply. For example, the Public Prosecution Service of Canada 'Deskbook' – a compilation of the directives and guidelines that provide instruction and guidance to federal prosecutors in the exercise of their discretion – is a public document[17] and in Australia, legislation provides that directions and guidelines by the Attorney-General *must* be published in the Government Gazette.[18] The NPA, by contrast, has tended to treat the directives under which it operates as not in the public domain, and has only recently begun to provide more detailed information to Parliament on progress of high profile corruption cases.[19] As this information has tended to indicate lack of progress, arguably there has

[15] National Prosecuting Authority Amendment Act 10 of 2024.
[16] Office of the Director of Public Prosecutions *Annual Reports* available at <https://www.dppireland.ie/publications/corporate-publications/> accessed 20 August 20024.
[17] Public Prosecution Service of Canada *Deskbook* available at <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> accessed 20 August May 2024.
[18] Section 8(3) (Australia) Director of Public Prosecutions Act 1983.
[19] Parliamentary Monitoring Group Follow-up meeting with law enforcement agencies regarding collaboration on SOE cases referred by SIU and update on State Capture cases

been the political cost theorised by Voight and Wulf, with the ruling party losing its outright majority in the 2024 election. Indeed, the will to implement transparency depends to a great degree on a confidence that such transparency will not have political costs. This suggests compulsory transparency is likely to be the last of any reforms to be adopted, unless the prosecution is already making good-faith decisions and progress, in which case a lack of transparency is counter-productive.

3.2.3 Immunity from prosecution

Voight and Wulf hypothesise that the executive may want to exert pressure on the prosecution to end a legitimate criminal case against a member of its own government, or to initiate an illegitimate criminal case against the opposition, and accordingly attempt to influence the prosecution to do so. The authors consider immunity from prosecution for Parliamentarians (those in the legislature) important in preventing misuse of the prosecution against political rivals of the government of the day, and thus such immunity would protect the prosecution from interference. Their analysis of their data supports this theory.

On the face of it, immunity from prosecution is not useful for the South African context where it is precisely Members of Parliament (MPs) involved in acts of corruption that are amongst those in need of prosecution. Granting MPs immunity for all acts in order to assist the prosecution to be more independent seems akin to cutting off one's toe to prevent oneself from stubbing it. Nevertheless, it useful to explore the mechanism by which immunity appears to work to understand what elements might achieve a similar objective in the South African context.

Wide immunity tends not to be afforded to MPs in common-law origin countries, which tend to limit the immunity of MPs to that which is said in Parliament: MPs can vote and speak freely in Parliament or Congress without worrying about potential lawsuits or criminal charges (Parliamentary privilege). In such countries immunity seldom extends beyond this, although the United States' Supreme Court recently held that the nature of presidential power entitles a former President to absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority, and he is entitled to presumptive immunity from prosecution for all his official acts, but there is no immunity for unofficial acts.[20]

The court recognised that determining whether an act is official or unofficial becomes determinative, with the court citing authority that the President's official responsibilities cover all actions that are "not manifestly or palpably beyond [his] authority."[21] A 2017 research report by the US Library of Congress found that it was usual for heads of state to enjoy immunity from criminal prosecution for acts done in

[20] *Tump v. United States Certiorari to the United States Court of Appeals for the District of Columbia* No. 23–939. Argued April 25, 2024—Decided July 1, 2024 (pp 5-43).
[21] *Blassingame v. Trump*, 87 F. 4th 1, 13 (CADC).

the exercise of the functions of the office except, in cases of "high treason" or other grave crimes.[22] However, the report notes that in some countries such as Kazakhstan, Kyrgyzstan, and Turkmenistan, presidents enjoy absolute immunity from prosecution for any acts committed during office, including after leaving office. Such countries are not generally considered bastions of anti-corruption.

There is no such immunity in law in South Africa, save for Parliamentary privilege. There is no doubt that the attempts in South Africa to prosecute former President Jacob Zuma for alleged corrupt acts committed when he was Deputy President ultimately led to interference in the NPA and disastrous undermining of its independence, which have led to *de facto* immunity for him thus far, and a disastrously weakened NPA. In particular, Zuma's firing of NDPP Vusi Pikoli, and questionable senior appointments, including that of the short-lived NDPPs Menzi Simelane, Mkoxolisi Nxasana and Shaun Abrahams, as well as a number of other senior prosecutors, some of whom still serve, are amongst the most notable acts undermining the independence of the NPA.

Less well-known is the "botched"[23] Occupational Specific Dispensation (OSD) applicable to the NPA. OSDs for various occupations are intended to be adjustments in the public service so that public service salaries become as or more attractive than equivalents in the private sector. Senior Management in Public Service (SMS) is subject to a separate salary structure and cost of living adjustments; OSDs apply to non-management. An OSD for legal professionals in the public service was published in 2010, and subsequently made applicable to the NPA[24] and an amendment to the NPA legislation was made in 2012, which *inter alia* altered the provisions regarding cost-of-living increases, and left salary decisions in the hands of the Minister of Justice only.[25]

Arguably, the OSD was insufficiently generous, given the particular stresses on prosecutors compared to office-bound legal professionals. The current turnover rate in the NPA of 17 percent is higher than any other Department of Justice legal occupation.[26] More importantly, however, the combined effect of the OSD coupled with the amendment, and how it was interpreted, had the effect of putting Chief Prosecutors and Deputy Directors of Prosecutions – the most senior prosecutors below those appointed directly by the President – on a scale of remuneration with SMS cost of living (COL) adjustments and not that of legal professionals via the OSD. The overall effect is that they have ended up earning less than prosecutors just

[22] US Library of Congress *Immunity from Prosecution for Former Presidents in Selected Jurisdictions* (2017) available at <https://maint.loc.gov/law/help/immunity-from-prosecution/presidential-immunity-from-prosecution.pdf> accessed 20 August 2024.

[23] This word was used to describe the OSD for the NPA by Advocate Glynnis Breytenbach, who resigned from the NPA in 2014 after being suspended and transferred out of the Specialised Commercial Crime Unit (SCCU), after she pursued the prosecution of Richard Mdluli, former head of the police's Crime Intelligence Division, on fraud and corruption charges. The charges against Mdluli were dropped by Lawrence Mrwebi, the head of the SCCU, a decision which was later found to have been unlawful. Breytenbach subsequently became a Member of Parliament for the political opposition.

[24] Determination of salaries of prosecutors under section 18(1) of the National Prosecuting Authority Act 1998 GN 1146 *Government Gazette* 33826 2 December 2010.

[25] Judicial Matters Amendment Act 2012 which amended section 18 of the National Prosecuting Authority Act 1998.

[26] Department of Justice and Constitutional Development *Annual Report 2022/23* Table 3.5.2 Annual turnover rates by critical occupation for the period 1 April 2022 to 31 March 2023 p 180.

below them in seniority, such as Senior State Advocates. The prosecutors concerned have litigated the matter repeatedly. This has remained an issue for more than decade, with the result that in 2022, it was reported that more than half of the posts at this level of prosecutor remained vacant.[27] This would clearly have had a negative impact on the morale of these prosecutors and effectiveness of the NPA.

A closely allied problem is resistance to and limitations on the hiring of outside skills in terms of section 38 of the NPA Act, which requires the concurrence of the Minister (who is appointed by the President in his sole discretion), and which has apparently been interpreted to require those hired to be aged under 65, severely limiting the participation of those who might be most experienced and motivated to assist the NPA at less-than-stratospheric costs usually associated with Senior Counsel in private practice.

Would an immunity law have prevented this weakening of the NPA, which has affected the prosecution of all corruption, and not only that by higher members of the executive? It is quite possible that it may have; however, there are other ways in which these particular ills could have been prevented. Lukas Muntingh has outlined in detail how the appointment and dismissal provisions of the senior members of NPA may be amended to reduce the influence of the President and the Minister.[28] In addition, the tenure of such persons should be standardised from "until age 65" to a 10-year term, preferably staggered in relation to the NDPP, as discussed in the section discussing the impact of Commonwealth origin, well as a system of pre-approved advocates in private practice who may briefed, preferably in all matters , but at least in politically sensitive matters.

4 Conclusion

The evidence strongly suggests that the national legislation in South Africa has failed to ensure the NPA operates without fear, favour or prejudice. This has had serious consequences for the country. Legislative reform is required, which, in the medium to long-term, will lead to greater independence and more effective prosecution of corruption. The discussion of the cross-country evidence above suggests that financial independence – a separate budget for the NPA apart from that of the Department of Justice – will be inadequate and possibly irrelevant to independence and the prosecution of corruption if the hiring of outside counsel remains *ad hoc* and it and the setting of salaries remains effectively in the control of the Minster. Furthermore, if the President alone continues to appoint the top 14 posts in the NPA, with only the NDPP on a limited term of 10 years, stagnation in the NPA will continue. The limiting and staggering of terms of the DPPs is crucial to ensuring not only independence, but quality and dynamism. In addition, it should be a legal requirement for prosecutors to be admitted legal practitioners; transitional provisions should assist current employees to qualify. Transparency requirements should be legislated in

[27] Venter Z 'NPA risks losing top legal minds over salaries, benefits, restrictions in career paths' *Pretoria News* 17 February 2022.

[28] Muntingh L and Redpath J *Recommendations for reform of the National Prosecuting Authority* Dullah Omar Institute Report available at https://dullahomarinstitute.org.za/acjr/resource-centre/npa-recommendations-2-11-2020-1.pdf.

detailed fashion and not left up to the decision of whomever is the incumbent NDPP. This should relate to both policy and directives, as well as decision-making in terms of that policy.

* * *