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The prosecution service and the provinces

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L M Muntingh[1]

> But in a flash, as of lightning, all our explanations, all our classifications and derivations, our aetiologies, suddenly appeared to me like a thin net. That great passive monster, reality, was no longer dead, easy to handle. It was full of a mysterious vigour, new forms, new possibilities. The net was nothing, reality burst through it.
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> *The Magus*, John Fowles, p. 309.

1. Introduction

In the last decade there has been a fairly rapid deterioration in law enforcement, resulting in declining trust in the overall criminal justice system. For the purposes of this paper 'law enforcement' refers to (a) the detection and investigation of crime done by the police and other agencies with similar mandates; (b) the prosecution service and the courts, and (c) the prison system. It is in particular the case that in the past ten years crime has not been brought under control and this requires a questioning of the current fundamentals and assumptions informing them.

The state's response to crime post-1994 has largely been driven from the centre with some features of devolution, such as provincial monitoring of police performance and effectiveness. However, where it concerns justice, including prosecutions, this is firmly a national responsibility. This paper takes a closer look at the centralisation and devolution of prosecutorial power. Historically, four major time-periods can be discerned based on the degree of centralisation of the prosecution function:

- until 1926, the four provincial Attorneys-General, as they were known, were free from legislated political control and had absolute autonomy;
- a change in government placed the Attorneys-General under the direct control of the Minister of Justice, a change subsequently entrenched in a 1935 amendment that gave the Minister the authority to reverse any decision of an Attorney-General and remained so until 1992;

[1] I wish to express my sincere gratitude to my colleagues Jean Redpath and Nico Steytler for their comments on earlier versions of this paper.

- in 1992 an amendment introduced by the De Klerk-government removed the Minister's power to interfere in the decision-making of the Attorneys-General and the Interim Constitution left the situation largely intact;[2]
- the 1996 Constitution created one prosecution service centrally controlled and the head of which is appointed by the President and this remains the case to date.[3]

The 1996 Constitution created for the first time a position for a single person overseeing the entire prosecution service to whom the immediate subordinates report; although noting there is some limitation on the powers of intervention by the National Director of Public Prosecutions (NDPP).[4] The NDPP, as head of the National Prosecuting Authority (NPA), and the top echelon of the NPA are appointed by the President with no requirement to consult Parliament or any other structure or person, save for the cabinet member responsible for justice.[5] It is also the case that under the previous dispensation that the four Attorneys-General, as they were, were appointed by the Minister of Justice even if there was no national Attorney-General. Structurally, the NPA sits somewhere between the executive and the judiciary, but is more associated with the executive than the judiciary.[6] The senior echelon of the NPA are fundamentally political appointments, not unlike the pre-1994 situation. The NDPP is explicitly accountable to the Minister of Justice[7] and ultimately Parliament, while the reviewability in the courts of its decisions to prosecute or not has been the subject of some controversy.[8]

A loss in credibility, declining prosecutions, high rates of violent crime and pervasive corruption in the public service are symptomatic of a prosecution service that is not performing optimally.[9] The highly

[2] Sections 108 and 241(4) Interim Constitution.
[3] Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR, p. 10.
[4] Section 22(2)(b-c) and 22(4)(a) National Prosecuting Authority Act 32 of 1998.
[5] Muntingh, L. and Redpath, J. (2020) Recommendations for reform of the National Prosecuting Authority, Bellville: ACJR.
[6] De Villiers, W.P. (2011) 'Is the Prosecuting Authority under South African law politically independent? An investigation into the South African and analogous models', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, No. 74, p. 248. See also Guideline 10 in *UN Guidelines on the Role of Prosecutors* (Adopted by 8th UN Crime Congress 1990): 'The office of prosecutors shall be strictly separated from judicial functions.' Wolf, L. (2015) The National Prosecuting Authority (NPA) in a Nimbus Between the Executive and the Judicature, *Administratio Publica,* Vol. 23 No. 4. *Nkabinde and Another v Judicial Service Commission and Others* (20857/2014) [2016] ZASCA 12; [2016] 2 All SA 415 (SCA); 2016 (4) SA 1 (SCA) □ (10 March 2016)
[7] Constitution s 179(6).
[8] Bennun, M. E. (2009). *S v Zuma*: The implications for prosecutors' decisions. *South African Journal of Criminal Justice*, 22(3), pp. 371-390. *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (771/2016, 1170/2016) [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017)
[9] Muntingh, L., Redpath, J. & Petersen, K. (2017), Muntingh, L. and Redpath, J. (2020), NPA (2020) *NPA Strategic Plan 2020-2025*, pp. 18-21; 23-38.

centralised structure, as is discussed further below, politicisation and loss of skills at the NPA[10] have all contributed to a criminal justice value chain that is weak, if not broken. In the 2020-2025 strategic plan of the NPA, the NDPP is blunt about a broken system:

> The people of South Africa continue to suffer intolerable levels of violence and crime and harsh socio-economic conditions and disproportionate inequality are the daily-lived realities of ordinary South Africans. Corruption has reached endemic proportions; revelations about "state capture" implicating state officials, including in the criminal justice system (CJS), and the private sector, lay bare the gravity of the situation. State institutions, including the National Prosecuting Authority (NPA), have been weakened; there is low public confidence in government entities, and a loss of trust in the NPA, and criminal justice system as a whole.[11]

The discourse on 'law enforcement' also seems to be focused largely on the police, giving less prominence to the prosecution service and this is to some extent reflected in the rhetoric by politicians and in particular from the Minister of Police.[12] There appears to be, at least in some sectors, an assumption that action by the police (especially large numbers of arrests) will not only reduce crime, but it will be objective, fair and build trust in the police, and government more widely.[13] There is also a general expectation that arrests should result largely in prosecutions and convictions. The evidence points in the other direction since of the 1.6 million arrests by SAPS, only some 300 000 cases result in prosecutions.[14] The massive attrition of cases from arrest through to conviction and imprisonment is indicative of a lack of harmonisation between the police and prosecution service. The attrition of cases also raises questions about resource utilisation despite an increase in the NPA budget.[15]

Constitutionally speaking, crime and safety are dealt with in an inconsistent manner when comparing the police and prosecution service. The aspirations of a young constitutional democracy emerging from

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[10] NPA (2020) *NPA Strategic Plan 2020-2025*, p. 4.
[11] NPA (2020) *NPA Strategic Plan 2020-2025*, p. 4.
[12] Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in the South African law enforcement agencies*, CSPRI Research Paper, Bellville: Community Law Centre, p. 27.
[13] The SAPS annual reports provide detail on totals arrests per year and SAPS press releases also detail localised actions resulting in arrests. See for example: Media Statement: South African Police Service - Office of the Provincial Commissioner Northern Cape. 20 Dec 2020: " More than 7200 suspects were arrested [between Oct and dec 2020] for various offences that include driving under the influence of alcohol, dealing in drugs, unlicensed firearms and ammunition, possession and dealing in drugs, illicit alcohol, murder, attempted murder, robberies, burglaries, assault, theft, sexual offences, stock theft, possession of suspected stolen properties, illegal Immigration Act, wanted suspects, etc. Several other persons were also arrested for less serious crimes such as drinking in public, public nuisance and riotous behaviour.
https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=29979
[14] Muntingh, L., Redpath, J. and Petersen, K. (2017) p. 32.
[15] Muntingh, L., Redpath, J. & Petersen, K. (2017) pp. 30-35.; The National Prosecuting Authority – Performance, *ACJR Fact Sheet*, No. 8, pp. 1-2, https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf

a past characterised by specifically police excesses (such as extra-judicial killings, torture and impunity) are clearly visible in the recognition given to the need for police accountability and devolved oversight, albeit limited, to the provinces over the police.[16] The Interim Constitution provided for a significantly closer relationship, compared to the 1996 Constitution, between a provincial government and the police.[17] The Constitution also makes provision for a civilian oversight structure[18] and an independent body to investigate police misconduct.[19] Community Police Forums (CPF), as set out in the SAPS Act, give further recognition to a principled position that the police need to be close to the people, and thus accountable and transparent as well as responsive to their needs.[20] The CPF powers were originally described in the Interim Constitution, and these powers largely allocated to the provinces in the Constitution.[21] Nonetheless, this is in line with general thinking on democratic policing, as opposed to regime policing, in that the police, must, at a minimum, uphold the rule of law; be accountable; and act in service of the public in a procedurally fair manner.[22]

However, as noted already, the police are only one part of the criminal justice value chain and the next important player in the chain is the prosecution service. As much as the Constitution tries to build in transparency and accountability for the police, the opposite is the case for the prosecution service. As will be set out below in more detail, the NPA is highly centralised with the entire top echelon appointed by the President and no formal scope for interaction, let alone monitoring and accountability, between the provinces and the NPA. In the criminal justice value chain, the two main players (police and prosecution), then have constitutionally-speaking very different characters - the one purposefully more transparent (even if contested and constrained) and the other, opaque and distant.[23]

This paper starts off by describing the negotiations for a new prosecution service following the Interim Constitution which laid the foundation for the centralised prosecution service to be enacted in 1998, paying particular attention to the pleas for greater provincial recognition in the distribution of powers. The next section describes in brief the path of the National Prosecuting Authority Act 32 of 1998 (NPA

[16] Section 206 Constitution.
[17] Section 219(1) Interim Constitution read with sections 214 and 218.
[18] Section 208 Constitution.
[19] Section 206(6) Constitution.
[20] Chapter 7, South African Police Service Act 68 of 1995.
[21] Interim Constitution section 221
[22] Muntingh, L. with Redpath, J., Faull, A. and Petersen, K. (2021) Democratic policing – a conceptual framework. *Law, Democracy and Development,* Vol 25*,* pp. 121-155.
[23] Also see: MacFarlane, B. A. (2001) "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency." *Criminal Law Quarterly*, vol. 45, no. 3, November, pp. 272-302.

Act) through the legislative process. The Constitution and NPA Act provide that the NDPP, with the concurrence of the Minister of Justice, develop a prosecution policy, and this is the focus of the following section together with the directives flowing therefrom. The role and powers of the National Council of Provinces (NCOP) is assessed with reference to the relationship between the NPA and the provinces. The last substantive section deals with the opportunities and potential benefits of closer relations between the NPA and provinces with reference to general principles applicable to the public service as well as the Intergovernmental Relations Framework Act 13 of 2005 (IRFA). The paper concludes with a number of observations.

It is a central argument of this paper that despite expectations for the recognition of provincial interests in prosecution policy and strategy, this did not materialise. Centralisation, a one-shoe-fits-all approach, a lack of formal opportunity for interaction, the absence of performance monitoring, and some measure of accountability exercised by the provinces in relation to the NPA has resulted in increasing frustration with national government's response to crime. There is at present a range of substantive issues that could populate the agenda for closer cooperation between the provinces and the NPA. Some possible issues are: provincial (e.g., abalone in the W-Cape) or multi-province crime and safety needs and priorities (e.g., stock theft in the Free State, E-Cape and KZ-Natal); improvements in policing (especially investigations) to increase impactful prosecutions (e.g., local government); policy review and development; and improved reporting and monitoring.

2. Overall constitutional obligations on the public service

Before embarking on a discussion on the intricacies of national-provincial relations concerning crime and safety, it is perhaps useful to reflect briefly on constitutional requirements for the public service. Section 195(1) of the Constitution articulates nine principles governing the public administration. As noted already, the NPA forms part of the public administration although it occupies a somewhat unique position somewhere between the judiciary and the executive, but closer to the executive. The principles governing the public administration does not confer rights upon individuals, it seems from the jurisprudence, but it does set a standard of service and behaviour for the public administration.[24] There

[24] Bodasing, A. (2013) *Public Administration* 23A-14 to 15 IN Woolman, S. and Bishop, M. (2013) *Constitutional Law of South Africa*, 2nd Edition, Juta, https://constitutionallawofsouthafrica.co.za/

is thus scope to look at the NPA through the lens of these principles and raise questions about the current lack of a (statutory) relationship between the provinces and the NPA and the implications this has for the credibility of and trust in the NPA. As part of the public administration[25] the NPA is bound by the duties and responsibilities bestowed on it by the Constitution, as articulated by Chaskalson P in *SARFU II*:

> [133] Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.[26]

Bodasing distinguishes between three types of public administration entities, being *Administrative agencies* (e.g., Department of Public Service and Administration) providing a service to other national departments and provincial administrations, but not directly to the public; *Service delivery agencies*, (e.g. departments of Health or Home Affairs) which deliver services directly to the public; and *Statutory agencies*, (e.g. Public Service Commission and Auditor-General) established in terms of the Constitution or other legislation as entities independent from the executive with regulatory and monitoring functions in respect of the public service.[27] The NPA is, on the one hand, a service delivery agency in the sense that it, by proxy, represents the victim (and broader society)[28] and, on the other hand, as far as it concerns criminal matters, the entity that can call individuals and companies to account by means of a criminal

[25] Sections 17 to 19 NPA Act 32 of 1998. Even though the remuneration of prosecutors are different, their employment is governed by the Public Service Act 103 of 1994. See also section 239 Constitution.
[26] Para 133 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).
[27] Bodasing, A. (2013) 23A-5 to 6.
[28] The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner. (Prosecution Policy p. 4.)

prosecution.[29] If it fails in exercising this duty in an objective and accountable manner, it places the constitutional value of accountability itself in jeopardy. The NPA therefore has a special relationship with the constitutional principle of accountability.

Reflecting on the 'Basic values and principles governing public administration' highlights a few issues pertinent to the NPA and the provinces. The first is that services must be provided 'impartially, fairly, equitably and without bias'.[30] One implication is that the NPA must apply its policies and render service everywhere in an equal manner, regardless of who governs, or who is suspected of a crime. Secondly, 'People's needs must be responded to, and the public must be encouraged to participate in policy-making.'[31] As will be discussed later, the lack of opportunity for public consultation with the NPA is evidently at odds with this principle. The somewhat protected status of the Prosecution Policy and the confidential nature of the accompanying directives are also falling short of this requirement (see discussion below). There is indeed no opportunity in law for public consultation between the NPA and the public, save for what is provided for in Parliament. It is not clear how the drafters of the Constitution set a requirement for public participation in policy-making on the one hand, and on the other hand, ensured that the NPA is as far removed from the very people it must serve and their needs.

The next two requirements governing public administration are transparency and accountability,[32] of which much has been written and said, and it suffices to confirm that that there can be no accountability without transparency.[33] It is in particular in the past decade that the NPA had become increasingly insular, defensive and adverse to any form of external oversight or advice (although under new leaderships since 2019 there have been some changes). There is little information in the public domain on the performance of the NPA, save for what is in its annual reports and those of SAPS, which is typically aggregated data at a national level. Crime and prosecution data are not disaggregated to provincial (or lower) level and in the absence of such data it becomes difficult to ask penetrating questions about how the NPA is implementing the Prosecution Policy and whether it is in line with what the public requires, or a provincial government has identified as a crime and safety priority. Apart from not being transparent, the NPA is also positioned in such a way that it does not account for its strategic decisions in a meaningful way. To this should be added that internal or horizontal accountability in the NPA is

[29] Section 20 NPA Act 32 of 1998.
[30] Section 195(1)(d) Constitution.
[31] Section 195(1)(e) Constitution.
[32] Section 195(1)(f and g) Constitution.
[33] De Maria, W. (2001). Commercial-in-Confidence: An obituary to transparency? *Australian Journal of Public Administration*, 60(4), p. 92.

seemingly weak and it is only recently that moves are afoot to establish an internal ethics and integrity unit.[34] As much as the NPA needs to be independent, independence and accountability are mutually reinforcing values and *sine qua non* for legitimacy. Independence means in essence free from bias and basing decisions on fact, but it does not mean that the principled reasons for the decision need not be explained when asked.

3. Constitutional negotiations on the prosecution service

To place the highly centralised nature of the NPA in context, it is helpful to turn to the drafting history of the Constitution and the views emanating from there. The Interim Constitution, as already noted, left the Attorneys-General, as they were, intact by mandating them to institute criminal prosecutions on behalf of the state.[35] The Interim Constitution did establish the nine provinces as they still are,[36] but it seems that the jurisdictions of the respective Attorneys-General subsumed for the time being the new provinces and changed boundaries.[37] The Interim Constitution left the details of jurisdiction, powers and requirements for the position to subordinate law as there was clearly law reform *en route*. The Constitutional Principles did not deal with the prosecution service directly. Nonetheless, Principle V dealt with equality before the law; Principle VI addressed the separation of powers bolstered with 'accountability, responsiveness and openness'. Principle XIX established the principle of exclusive and concurrent powers and functions with reference to national and provincial government.

Following the adoption of the Interim Constitution, work towards the Final Constitution continued and one of the outputs was a paper by a Panel of Constitutional Experts to the Chairpersons of the Constitutional Assembly on the "Attorney-General/Prosecutorial Authority".[38] Three issues for debate emerged from the Panel of Experts, namely, centralisation versus devolution; the appointment of the head(s) of the prosecution service; and, the importance of balancing independence and accountability. The Panel of Experts did some comparative research and articulated five models emanating from Commonwealth countries, concluding that in general the power to prosecute is vested in an independent

[34] NPA (2020) *NPA Strategic Plan 2020-2025*, p. 19.
[35] S 108 and 241(4) Interim Constitution.
[36] Section 124 Interim Constitution.
[37] Sections 108, 241 and 242 Interim Constitution.
[38] Panel of Constitutional Experts (1995) *Memorandum on Attorney-General/Prosecutorial Authority*, 20 September 1995. https://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF

public servant or a member of government. The Panel also noted that justice as a national competency is never exercised on a provincial level only.[39] In the end the Panel formulated four recommendations:

- there should be a single independent, impartial and accountable prosecutorial authority
- the prosecutorial authority could be structured at national and provincial level, but need not be (details of structures could be left to legislation);
- the national and provincial heads of this prosecutorial authority should be appointed by the Judicial Service Commission (JSC) (or another such body) and should have appropriate security of tenure;
- the Minister of Justice could issue policy guidelines and should also be accountable for such guidelines and related policy decisions.[40]

From the four recommendations the Panel proposed three drafts for the Constitution on the prosecution authority. Drafts A and B (as they were termed) proposed a significant role for the JSC in identifying a suitable candidate as National Director for appointment by the President, and in Draft A, also covered the dismissal of the National Director. The JSC was a creation of the Interim Constitution which, amongst other matters, removed from the President the sole discretion in appointing judges and some stakeholders saw an opportunity for an enhanced role for the JSC.[41] Looking at the Constitution now it seems that the minimalist and open-ended approach of Draft C survived, since the JSC does not feature now in the selection, appointment or dismissal of the NDPP. Draft C did three things: it granted the authority to prosecute; it guaranteed independence and impartiality, and left the rest to be regulated through national legislation.[42] The open-ended nature of Draft C and ultimately section 179 of the Constitution then left the door wide open to structuring the prosecution authority as the ruling party saw fit. Important considerations at the time may have been that, firstly, the Truth and Reconciliation Commission (TRC) had not completed its work and there was a risk that liberation struggle leaders may be exposed to prosecution for human rights violations by a too-independently minded prosecutor.[43] The lack of prosecutions following the TRC lends credence to this view.[44] Secondly, and more speculatively,

[39] Panel of Constitutional Experts (1995) p. 9.
[40] Panel of Constitutional Experts (1995) p. 23.
[41] Section 105 Interim Constitution.
[42] DRAFT C: "Prosecutorial Authority. 1. The authority to institute criminal prosecution on behalf of the state shall vest in the Director of Public Prosecutions of the Republic. 2. The prosecutorial authority/DPP shall be independent and impartial and shall function without fear, favour, or prejudice and no person or authority shall interfere with the performance of its/their functions. 3. The jurisdiction, powers and functions, accountability, appointment and tenure of the DPP/prosecutorial authority shall be regulated by national law."
[43] For example, “Torture was daily occurrence in Quatro: victim” *SAPA*, July 22 1997, https://www.justice.gov.za/trc/media/1997/9707/s970722f.htm
[44] CSVR (2007) *Submission by the Centre for the Study of Violence and Reconciliation to the United Nations Human Rights Council Universal Periodic Review (UPR) pertaining the situation of human rights in South Africa*, Prepared by Dissel, A, Bruce, D. Ernest, C. and Pino, A.

the JSC may not have had the desired profile at the time creating a risk that if it was responsible for selecting suitable candidates for appointment to the prosecution service, it may appoint individuals not necessarily sensitive to political realities and friendly to the interests of the ruling party.

The Panel of Experts had to respond to a number of submissions made concerning the possibility of one National Attorney-General (as it was termed at the time) versus Provincial Attorneys-General. Those arguing against one National Attorney-General "link this position to the fear that a national AG would in some way render that office more susceptible to political manipulation and compromise the independence of the office of the AG. There are also differences in regard to the person or body to whom such an AG should be accountable."[45]

A further critique was that the appointment of a National Attorney-General would result in malfunction in the criminal justice system (if not chaos, as some submissions termed it), as all decisions to prosecute or not will then have to be taken nationally. The assertion was somewhat guilty of hyperbole as there was in place an effective system of delegation within the provinces under the Attorneys-General. The Panel replied that there was fundamentally no reason why this could not continue with a National Attorney-General in place providing guidance on a national level through policy. More importantly, the Panel argued, the National Attorney-General would set national minimum standards for prosecutions throughout the country.[46] The Panel also reflected on Constitutional Principle XXI(6)[47] referring to powers allocated to the provinces and the specific socio-economic needs of the community and the general well-being of the population.[48] It was, however, quick to dismiss the notion that provincial interests are important and in hindsight the reasoning seems out of touch with the reality of crime trends: "It is true that effective prosecutions do contribute to the general well-being of the inhabitants but it is difficult to see how this aspect of crime control would contribute to the well-being of the

https://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/CSVR_ZAF_UPR_S1_2008_CentrefortheStudyofViolenceandReconciliation_uprsubmission.pdf ; *Thembisile Phumelele Nkadimeng et al v National Director of Public Prosecutions et al*, High Court of South Africa, Transvaal Provincial Division, Case No 32709/07, 12 December 2008.

[45] Panel of Constitutional Experts (1995) p. 15. See also Goredema, C. (1997) "The Attorney-General in Zimbabwe and South Africa: Whose Weapon - Whose Shield," *Stellenbosch Law Review* 8, no. 1, p. 50. Bekker, P. (1995) National or Super Attorney-General: Political Subjectivity or Juridical Objectivity? *Consultus*, April, pp. 27-31.

[46] Panel of Constitutional Experts (1995) p. 18.

[47] CP XXI(6) 6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia- (a) for the purposes of provincial planning and development and the rendering of services; and (b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

[48] Panel of Constitutional Experts (1995) p. 19.

inhabitants of a province as distinct from the well-being of the inhabitants of the country as a whole."[49] The issue is further emphasised in the Panel's memorandum with reference to prosecution policy, essentially minimising the need for provincial prosecution policies, and importantly placing the responsibility of a prosecution policy formulation in the sole hands of the prosecution service:

> Differences regarding crime patterns and geographical factors (such as proximity to national borders) could be taken into account in the formulation of a national policy regarding national crimes, or even in regional policies on matters not covered in national guidelines. Relevant differences could furthermore also exist on a local level. These should be taken care of by prosecutorial discretion within the context of a national policy and surely does not necessitate the independence of local prosecutors from provincial AGs.[50]

The Constitutional Court also had little hesitation to affirm the provisions regarding the prosecuting authority in the second certification judgement.[51]

On the one hand the Panel of Experts seems to have been alive to the fact that provinces may have different crime and safety considerations, but was, on the other hand, also firm that there needs to be consistency and noted that Constitutional Principle V commanded an equitable legal system.[52] The scope for differentiation was thus limited and to achieve this, centralisation was required. Decentralising the authority of the prosecution service could open the door for very different approaches in prosecutions at a time when 'nation building' and 'unity' were the mantras.[53] It seems that it was an either-or situation in the sense of the options being, either one National Attorney General, or nine Provincial Attorneys-General. Seemingly an exploration of bringing provincial participation and input into the work and policy formulation of the prosecution service was not palatable, or simply not pursued in any depth. The political reality was also that the Inkatha Freedom Party was in charge in KwaZulu-Natal and the National Party in the Western Cape, and the ANC was deeply reluctant to give two opposition parties control over (or even say in) such an important portfolio as prosecutions.

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[49] Panel of Constitutional Experts (1995) p. 19.
[50] Panel of Constitutional Experts (1995) p. 20.
[51] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), paras 140-146.
[52] The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender. (Principle V, Schedule 4 Interim Constitution, Act 200 of 1993.)
[53] See Steytler, N. (2011) Co-operative and coercive models of intergovernmental relations – a South African case study, IN Courchene, T.J., Allan, J.R., Leuprecht, C. and Verelli, N. (Eds) *The Federal Idea – Essays in Honour of Ronald, L. Watts*, Institute for Intergovernmental Relations, Montreal, p. 415.

The need for a centralised prosecution service in 1996 was perhaps understandable at the time, but it must also be asked if, firstly, such justifications still exist, and secondly, at what cost did centralisation come? The politicisation of the NPA and its 'hollowing out' were indeed enabled to a large extent by its centralised structure, proximity to the President, and protection against oversight and accountability. There is of course no guarantee that the previous dispensation of provincial Attorneys-General with no National Attorney-General would have necessarily been better, but history did prove the vulnerability of the centralised structure to political patronage. The question centres perhaps not so much on whether or not the previous system of Attorneys-General would have been any better or not, but rather why the sensitivities expressed to provincial concerns and interests did not play out as intended. They were acknowledged but, in the end, there is little recognition given in policy and practice to provincial issues concerning prosecutions, especially where crime has a particular provincial character.

4. The NPA Bill in Parliament

Following the finalisation of the Constitution in 1996, draft enabling legislation was introduced and in February 1998 the Portfolio Committee on Justice started dealing with the National Prosecuting Authority Bill [B 113 of 1997] when it commenced with public hearings on the submissions received.[54] On 4 June 1998 and 13 meetings later, the Portfolio Committee approved the Bill, albeit with a changed number, now being B51 of 1998, and submitted it to the National Assembly as a bill under section 75 of the Constitution (i.e., ordinary bills not affecting the provinces). The possible role or interests of the provinces seems to be absent from the deliberations and was also not raised in the 17 submissions received on the Bill. Deliberations in the Portfolio Committee clearly reflect an acceptance that justice is a national competency and that the prosecuting authority must be a centralised structure. The discussions by and large focussed on the internal organisation of the prosecuting authority and scant attention was paid to its relations with other organs of state or the public for that matter. The theoretical position that the prosecution represents the state on behalf of the victim seems to have played an inaudible role.

[54] Submissions were received from Attorney-General: Transvaal; Attorney-General: Witwatersrand; Attorney-General: Eastern Cape; Attorney-General: Transkei; Attorney-General: Mmabatho; Attorney-General: Bisho; Amnesty International; Human Rights Committee; South African Human Rights Commission; General Bar Council; Office for Serious Economic Offences; South Peninsula Municipality; Public Servants Association; City Legal Advisor; Chief Justice: Braamfontein; Society of State Advocates; and the Vera Institute. (*PMG Report on the Meeting of the Portfolio Committee on Justice*, 16 February 1998, https://pmg.org.za/committee-meeting/5961/)

The day before, on 3 June 1998 the Bill was placed informally before the Standing Committee on Security and Justice (SCSJ) in the National Council of Provinces (NCOP).[55] The SCSJ was under great pressure to pass the Bill as quickly as possible and when this urgency was questioned by MPs the reply was that in the absence of a new act that prosecutors were treated as ordinary public servants and subject to increases determined at the General Bargaining Council and not enjoying the separate, and more advantageous dispensation, proposed in the Bill.[56] The explanation for this urgency did not sit well with the SCSJ, as they were of the view that the Portfolio Committee had been busy with the bill for some six months by then and it was now expected of the SCSJ to adopt the bill without interrogating it and consulting its constituencies, and that this would undermine trust in the NCOP. Despite these protestations, five days later, on 8 June 1998, there were reportedly some very brief deliberations on the bill and on 10 June 1998 the SCJS adopted the Bill [B 113 of 1997].[57] On 24 June 1998 the National Prosecuting Authority Act was assented to and became operational on 16 October the same year.

From this brief history it then appears that by the time the Bill came to Parliament a number of fundamental issues were already settled from the point of view of the ruling party. The first being that the prosecution service is a national and centralised function, and there will be no deviation or compromise. This would then pave the way for national minimum standards and uniformity. Secondly, and following from this, that the provinces (the NCOP, provincial governments and provincial legislatures) have no role to play in the strategic direction, operations and accountability of the prosecuting authority.

[55] *PMG Report on the Meeting of the Standing Committee on Justice and Security*, 3 June 1998, https://pmg.org.za/committee-meeting/6576/

[56] For more detail see the submission regarding the NPA Bill by the Attorney-General for the Witwatersrand to the Portfolio Committee on Justice, PMG *Report on the Meeting of the Portfolio Committee on Justice*, 16 February 1998, https://pmg.org.za/committee-meeting/5961/ .

[57] *PMG Report on the Meeting of the Standing Committee on Justice and Security*, 8 June 1998, https://pmg.org.za/committee-meeting/6577/ ; *PMG Report on the Meeting of the Standing Committee on Justice and Security*, 10 June 1998, https://pmg.org.za/committee-meeting/6581/ .

5. The National Prosecuting Authority Act, Prosecution Policy and Policy Directives

The NPA is primarily governed by the NPA Act, Prosecution Policy and the accompanying directives; the latter two being constitutional requirements.[58] There are dealt with in turn in this section. These are noteworthy since they give effect to the centralised character of the NPA having their roots in the Constitution.

5.1. National Prosecuting Authority Act

The NPA Act makes provision for the appointment of Directors and Deputy Directors of Public Prosecutions based at High Courts seats as determined by the Superior Courts Act.[59] Such an office (based at a High Court seat) is headed by a Director or a Deputy Director, the latter reporting to a Director as per written authorisation from the NDPP.[60] The offices of the NPA are currently distributed as listed below as per High Court seats:

- Eastern Cape
  - Bhisho*
  - Grahamstown*
  - Mthatha
  - Port Elizabeth*[61]
- Free State
  - Bloemfontein
- Gauteng
  - North Gauteng (Pretoria)
  - South Gauteng (Johannesburg)
- KwaZulu-Natal
  - Durban
  - Pietermaritzburg*
- Limpopo
  - Thohoyandou
  - Polokwane Circuit Court of the North Gauteng High Court
- Mpumalanga
  - Mbombela
- Northern Cape
  - Kimberley

[58] Section 179(5)(a-b).
[59] NPA Act Section 6, Superior Courts Act 10 of 2013 Section 6.
[60] NPA Act Section 6(3).
[61] According to the NPA website Bhisho, Grahamstown and Port Elizabeth fall under one Director and Mthatha under another. Similarly, in KZ-Natal, Pietermaritzburg is the seat of the Provincial Director of Public Prosecutions. https://www.npa.gov.za/sites/default/files/contacts/DPP%20Contact%20List.pdf

- North West
    - Mafikeng (Mmabatho)
- Western Cape
    - Cape Town

The last provincial High Court division established was Mpumalanga and became operational in 2019.[62] The structural arrangements seem to be a mixture of historical and practical reasons. While the NPA is structured along provincial lines, even when there are sub-areas, this seems to be superfluous to the functioning of the NPA in relation to provincial governments.

The NPA Act requires the NDPP to submit an annual report to the Minister and that the Minister must table this in Parliament. The Act also requires the DPPs to report on the NPA activities in their provinces[63] and submit these to the NDPP for his or her annual report as required by the Act.[64] The guidance provided by the Act with reference to the content of the annual report is by and large inward-looking, save for a catch-all phrase, being "any other information which the National Director deems necessary".[65] There is no requirement in law that the provincial government (or any of its structures), the Provincial Commissioners of Police or any other entity should or must be consulted for its views and inputs on the annual report. The interactions provided for in law between the NPA and Provincial Commissioners of Police are also restricted to the Directors of Public Prosecutions giving directions and guidelines to the latter, with the latter needing to comply with such directions and guidelines as far as is practicable.[66]

This insular and inward-looking approach in the legal framework is at odds with the constitutional principles of transparency and accountability. Even if justice is a national competency, crime is a problem at all levels of society and the state has a clear constitutional obligation to promote the right to dignity and the right to freedom and security of the person. Where it concerns the prosecution of

[62] President Cyril Ramaphosa: Official opening of Mpumalanga High Court, Address issued by The Presidency, 8 Nov 2019, https://www.gov.za/speeches/president-cyril-ramaphosa-opening-mpumalanga-high-court-8-nov-2019-0000

[63] Section 24(4)(b) NPA Act.

[64] NPA Act Section 22(4)(g) [the National Director, as the head of the prosecuting authority-] shall prepare a comprehensive report in respect of the operations of the prosecuting authority, which shall include reporting on - (i) the activities of the National Director, Deputy National Directors, Directors and the prosecuting authority as a whole; (ii) the personnel position of the prosecuting authority; (iii) the financial implications in respect of the administration and operation of the prosecuting authority; (iv) any recommendations or suggestions in respect of the prosecuting authority; (v) information relating to training programmes for prosecutors; and (vi) any other information which the National Director deems necessary;

[65] Section 22(4)(g)(iv) NPA Act.

[66] Section 24(4)(c)(i) NPA Act.

suspected perpetrators of crime, and more particularly the implementation of the prosecution policy as provided for in the Constitution,[67] this legal chasm between the NPA and anything provincial is deliberate, seemingly rooted in the deliberations on the Final Constitution as alluded to above and the desirability of centralisation for the ruling party.

5.2. Prosecution Policy

The Constitution requires that the NDPP must, with the concurrence of the Minister of Justice and in consultation with the Directors of Public Prosecutions develop a prosecution policy.[68] In effect it means that the Minister holds veto power over the prosecution policy. The NPA Act further requires that the first prosecution policy must be tabled in Parliament within six months after the appointment of the first NDPP and thereafter only amendments to the policy in the NPA annual reports to Parliament.[69] The first NDPP, Bulelani Ngcuka was selected as NDPP on 16 July 1998 and the Prosecution Policy served before Parliament in a joint sitting of the Portfolio Committee on Justice and the SCSJ on 1 March 1999.[70] Ngcuka was Deputy Chairperson of the NCOP prior to his appointment as NDPP and was also a former colleague at the University of the Western Cape of the then Minister of Justice, Adv. Dullah Omar.

From the available record it does not appear as if there was much deliberation on the policy and there is also no record that the SCSJ looked at the policy independently. The Prosecution Policy featured again on the parliamentary agenda in 2006 when the NPA briefed the Portfolio Committee on Justice regarding amendments to the policy to deal with criminal matters arising from pre-1994 conflicts.[71] After that there is no record that Parliament was again consulted on the Prosecution Policy. The latest version of the Prosecution Policy available from its website is dated November 2014 and there are notable differences between the 2014-version and the 1999 version, relating to for example the discretion exercised by

[67] Section 179(5)(a) Constitution.
[68] Section 179(5)(a) Constitution.
[69] NPA Act Section 21 (2): The prosecution policy or amendments to such policy must be included in the report referred to in section 35 (2) (a): Provided that the first prosecution policy issued under this Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Director.
[70] *PMG Report on the joint meeting of the Portfolio Committee on Justice and the Select Committee on Security & Justice*, 1 March 1999, https://pmg.org.za/committee-meeting/6555/
[71] *PMG Report on the joint meeting of the Portfolio Committee on Justice*, 17 January 2006, https://pmg.org.za/committee-meeting/6030/

prosecutors dealing with plea and sentence agreements, and diversion.[72] It is possible that Parliament was merely informed by means of the submitted annual reports that amendments were made to the Prosecution Policy and that there was no formal engagement or opportunity for consultation with Parliament or the public. Given the prominence that crime, violence and safety occupy in the public discourse, it is indeed a peculiarity that the NPA constructed a barricade around its policy. There is or was, as far as could be established, no opportunity for public consultation on the Prosecution Policy.

The Prosecution Policy itself makes no reference to the provinces or provincial governments or legislatures. It should be added that the policy itself is of such a general and bland nature that it can hardly be used to give strategic direction, or be used to hold the NPA accountable. Any expectation that the Panel of Experts had in 1995 that the Prosecution Policy would in some way accommodate and allow for provincial needs did not materialise. The impression gained is rather that the Prosecution Policy is a document developed by the NPA for the NPA and that the NDPP oversees compliance with it.[73] The NPA Act gives the NDPP the power to intervene if he or she is of the view that that there has been a transgression of the Prosecution Directives (see below for discussion on the Directives).

The manner or method of policy development has a substantive, if not decisive, impact on the quality of the policy itself and its implementation potential.[74] In the case of the Prosecution Policy, it seems this was developed internally with an inward-looking agenda, yet proclaiming to be the representative of the public.[75] There is nothing in the policy itself to suggest that it was based on evidence or that it had any particular aim in mind, or that it was consulted on widely. It is argued that the policy is there to guide prosecutors' discretionary decision-making, but does not articulate with what aim in mind discretion is to be used. The policy also asserts that since it is a public document, it will "inform the public about the principles governing the prosecution process and so enhance public confidence.".[76] The language and overall orientation of the policy is of such an abstract and general nature that the ordinary person will find it incomprehensible. Moreover, public confidence in the NPA will only be strengthened based on results against clear standards, but such standards, or even substantive targets are not described. In the

[72] Prosecution Policy (Final as Revised in June 2013, 27 Nov 2014), https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf
[73] Section 179(5)(d) Constitution. Section 21(1) NPA Act.
[74] Bullock, H, Mountford, J, and Stanley, R (2001) *Better Policy-Making*, London: Centre for Management and Policy Studies.
[75] The NPA is a public, representative service, which should be effective and respected. [Prosecution Policy (Final as Revised in June 2013, 27 Nov 2014), p. 13.]
[76] National Prosecuting Authority (2014) *Prosecution Policy* (Final as Revised in June 2013, 27 Nov 2014), p. 3.

end the Prosecution Policy does not only ignore the provinces, it also makes it impossible for the provinces to find an entry point into the policy discourse to engage the NPA on. There is no formal mechanism in law or desire expressed in the Prosecution Policy to enable or mandate interaction between the NPA (or DPP in the province) and the provincial government or legislature.

5.3. Prosecution Policy Directives

While the Prosecution Policy is a 13-page document available to the public, the Prosecution Policy Directives (the Directives) is some 150 pages long, but is a confidential document.[77] It is thus not a document that Parliament or the public has had sight of, or were consulted on. The copy seen is dated 2014 and it is not known if there are later versions. It should be added that there are other directives dealing with specific issues which are publicly available.[78] Nonetheless, the Directives seem to touch on important policy issues, or issues resulting from policy decisions and priorities, but it also deals with operational matters in the sense that Standing Orders or Regulations would do in other departments. The Constitution (and consequently the NPA Act) mandates the NDPP to intervene in a prosecution if the prosecution directives are not complied with.[79] The directives are thus a constitutional requirement without the Constitution setting explicit boundaries for its aim or content. Since there are no explicit constitutional prescripts for the directives and, as it stands now, the directives are classified as confidential, this leave the NDPP with considerable discretion and little accountability.

The Directives make no mention of the provinces, but do refer to delegations under the NPA Act, with particular reference to traffic offences.[80] The Directives also place a limitation on the discretion of a prosecutor if he or she wants to pursue a criminal matter against certain government officials and in such instances the prosecutor would require the permission of the DPP.[81] These officials are the following:

- SAPS officials

[77] National Prosecuting Authority (2014) *Prosecution Policy Directives - Policy Directives issued by the National Director of Public Prosecutions*.
[78] The following are listed on the NPA website: Directives in terms of Protection from Harassment Act, 17 of 2011; Trafficking in Persons Directives submitted to Parliament 4 May 2016; Plea and sentence agreement directives as tabled in Parliament 2 September 2014; Directive on Child Justice Act; Criminal Procedure Act - Mental Observation Directives; Plea and Sentence Agreement Directives with effect from 2010 10 22; Sexual Offences Directives tabled in Parliament 23 September 2010 final < https://www.npa.gov.za/content/prosecution-policy-and-policy-directives >
[79] Section 179(5)(c) Constitution. Section 22(2)(b) NPA Act.
[80] NPA Act Section 22(8)(a-b)
[81] National Prosecuting Authority (2014) *Prosecution Policy Directives - Policy Directives issued by the National Director of Public Prosecutions*, Part 8 p. 25.

- Members of South African National Defence Force (SANDF) where they assist in law enforcement activities.
- Department of Correctional Services (DCS) members
- Municipal law enforcement officers (including traffic officers).
- Officials and employees of the Department of Justice and Constitutional Development.
- Prosecutors, magistrates and judges.
- Any person who is entitled to immunity in terms of the Diplomatic Immunities and Privileges Act, 37 of 2001, or foreign consuls-general.

This list is further defined by listing a range of offences for which prior authorisation from a DPP is not required if the official concerned holds a rank below that of brigadier in SAPS and SANDF, Director in DCS or equivalent in other departments.[82] The list of offences from which senior officials enjoy some measure of additional protection, but not immunity, is important because it points to preferential treatment, a double standard and the possible politicisation of the NPA since the DPPs are appointed by the President. It is perhaps because the Directives are not available in the public domain that these provisions have not been challenged since they do raise constitutional issues regarding equality before the law. Even if a province wished, for example, to see the prosecution of police officials (SAPS and municipal) prioritised, the Directives would at least not facilitate it, if not actively preventing it.

A further limitation on the independence and discretion of the prosecutor is placed with the requirement in the Directives that "In sensitive or high-profile matters, the DPP needs to be consulted and/ or informed.".[83] It, however, leaves it open to interpretation what is 'sensitive' or 'high-profile', and whether the DPP needs to be consulted and/or informed.

[82] National Prosecuting Authority (2014) *Prosecution Policy Directives - Policy Directives issued by the National Director of Public Prosecutions*, Part 8 Para 3: No prior authorisation or instruction is required for the prosecution of persons in the SAPS, SANDF or Correctional Services below the rank of brigadier (in the SAPS – formerly director) or equivalent rank in respect of the following categories of offences: (a) All traffic offences. (b) All contraventions under the *South African Police Service Act, 68 of 1995*, or regulations promulgated in terms thereof. (c) All assault (common). (d) Malicious injury to property belonging to the State. (e) Possession of cannabis (dagga) in contravention of section 4 of the *Drugs and Drug Trafficking Act, 140 of 1992.* (f) *Crimen injuria*. (g) Offences in terms of the *Maintenance Act, 99 of 1998.* (h) Contraventions of the *Firearms Control Act, 60 of 2000,* other than those cases involving the - (i) unlawful possession of a firearm or ammunition; (ii) unlawful trading in firearms or ammunition; (iii) unlawful manufacturing of firearms or ammunition; (iv) unlawful import or export of firearms or ammunition; or (v) performance of unlawful work contemplated in section 59 of the said Act. (i) Cheque and credit card fraud, where the total amount involved does not exceed ten thousand Rand (R10 000). (j) Theft, where the total value involved does not exceed ten thousand Rand (R10 000).

[83] National Prosecuting Authority (2014) *Prosecution Policy Directives - Policy Directives issued by the National Director of Public Prosecutions*, Part 8 p. 26.

It then seems that the major risk to be managed is the discretion of the prosecutor and this requires curtailing the independence of the prosecutor. Firstly, there is the requirement that prosecutions against government officials, especially above a certain rank, needs permission from the DPP. Secondly, and to ensure a catch-all risk management approach, sensitive or high-profile matters also require the consultation of the DPP. The individual independence of prosecutors can then be seen as being fundamentally undermined from the inside.

The Directives give no scope for provincial crime and safety priorities, and the only crime types identified are: maintenance matters, sexual violence, domestic violence, traffic offences and occupational safety.[84] It is a constitutional inconsistency that provision is made on the one hand for provincial policing priorities[85] and it is important for the functioning of the police and effective policing that it does so,[86] yet there is no similar recognition with regard to the prosecution service. It is indeed as if the drafters of the Constitution saw policing as an end in itself, or assumed that the prosecution service will naturally prosecute what is policed. The Prosecution Directives, and less so the Prosecution Policy, then place clear checks on who may be prosecuted as opposed to what should be prosecuted and this has implications for a provincial government.

Seen together, the Prosecution Policy and the Directives form an effective bulwark to protect a civil service and political elite against prosecution by centralising prosecutorial discretion in the hands of presidential appointees guided by internally-developed directives hidden from public (and Parliamentary) oversight or input. It also protects the NPA from provincial pressure to prosecute certain crimes and this may indeed involve crimes having a bearing on provincial responsibilities.

[84] See Parts 26 to -28 and 34 of National Prosecuting Authority (2014) *Prosecution Policy Directives - Policy Directives issued by the National Director of Public Prosecutions*.
[S] Sections 205(2) and 206(3 to 9) Constitution.
[86] See, for example, the *Western Cape Policing Needs and Priorities Plan for 2019/20* as presented to the Legislature, PMG Report on the meeting of the Committee on Community Safety, Cultural Affairs and Sport (WCPP), Policing Needs and Priorities Report 2019/20: briefing & stakeholder input 18 November 2020 . https://static.pmg.org.za/201118WC_PNP_REPORT_2019-20.pdf

6. The NCOP, the provinces and the NPA

The NCOP is there to give the provinces the opportunity for 'more effective national representation for provincial interests than was provided by the Senate under the Interim Constitution', but it is also true that the executive accounts to the National Assembly and not to the NCOP.[87] The powers of the NCOP cover, firstly, Bills affecting the provinces, with reference to concurrent competencies between national and provincial governments. Secondly, it can also "consider, pass, amend, propose amendments to or reject any legislation" before it as provided for in Chapter 4 of the Constitution.[88] The only area of concurrent competence in Schedule 4 relating to crime and safety is policing, and then this only in as far as it is enabled by Chapter 11 of the Constitution. The first issue is that the national policing policy may make provision for different policies for different provinces with reference to their respective needs and priorities.[89] The Constitution further empowers the provinces to monitor police conduct, oversee effectiveness and efficiency and liaise with the Minister of Police with regards to crime and policing in the province.[90] The Constitution also gives a provincial government the power to investigate any complaints of police inefficiency or a breakdown of relations between the police and the community and it may also make recommendations to the Minister of Police.[91] The Constitution also require the establishment of what is now known as a Minmec for police.[92] There is thus potential for a significant role for the NCOP in relation to policing.

The role of the NCOP, through the SCSJ, in relation to the NPA following the passing of the NPA Act has, however, been minimal: over a period of 23 years (from 1998 to 2021) the SCSJ has on only nine occasions dealt formally with the NPA on its agenda, according to PMG.[93] More significant is that these nine engagements happened between 1998 and 2009; after 2009 to date there is no record that the SCSJ has engaged the NPA formally. Oversight visits by the SCSJ to provinces seem to focus on the police and there is little sense of an integrated approach emphasising cooperation in the Justice, Crime

[87] Bishop, M. and Raboshakga, N. *National legislative processes*, pp, 17.4-17.5. IN Woolman, S. and Bishop, M. (2013) *Constitutional Law of South Africa*, 2nd Edition, Juta, https://constitutionallawofsouthafrica.co.za/ Compare the powers of the National Assembly and the NCOP as set out in sections 55(2) and 68 of the Constitution.
[88] Section 68 Constitution; Schedule 4 (Part A) of the Constitution and S 76 Constitution.
[89] Section 206(2) Constitution.
[90] Section 206(3) Constitution.
[91] Section 206(5) Constitution
[92] Section 206(8) Constitution
[93] See relevant records from the *PMG* Website on the NCOP Committees, SCJS. 6 Nov 2000; 22 Mar 2006; 30 may 2007; 15 May 2008; 21 May 2008; 10 Nov 2008; 11 Nov 2008, and 31 Aug 2009. It should be noted that the engagements of 10 and 11 Nov 2008 focussed on the closure of the Scorpions.

Prevention and Security Cluster (JCPS) and giving expression to provincial crime and safety priorities.[94] The NCOP has significant powers to summon any person or entity to appear before it and provide evidence, yet it seems to have been very shy of the NPA.[95] Even if the NPA does not account to the NCOP, there has in law been nothing preventing the NCOP to call the NPA (or specific DPPs) to provide information on how, for example, it has interpreted and applied the prosecution policy in the different provinces.

As noted by others, critiques of the NCOP as an intergovernmental relations structure are not in short supply.[96] In as far as the NPA is concerned, the NCOP, with its stated aims and not insignificant powers,[97] has had no meaningful impact. One should also hasten to add that the relationship between the National Assembly and the NPA has also not been characterised by rigorous oversight and robust debate. The friendly relations between the Parliament and the NPA can at least in part be ascribed to the dominance of the ANC in both houses.

[94] See for example table reports from the SCSJ: ATC170906: Report of the Select Committee on Security and Justice on an oversight visit to the Free State Province to conduct oversight of police stations in Masilonyana Local Municipality and to determine the effectiveness of the rural safety policing strategy in those areas, held from 14 – 18 August 2017, report dated 6 September 2017: https://pmg.org.za/tabled-committee-report/3089/ ; ATC170906: Report of the Select Committee on Security and Justice on an oversight visit to the Free State Province to conduct oversight of a police station in Mafube Local Municipality and to determine the effectiveness of the rural safety policing strategy in those areas, held from 14 – 18 August 2017, report dated 6 September 2017; https://pmg.org.za/tabled-committee-report/3090/ ; ATC170818: Report of the Select Committee on Security and Justice on an oversight visit to the Free State Province to conduct oversight of police stations in Masilonyana Local Municipality and to determine the effectiveness of the rural safety policing strategy in those areas, held from 14 – 18 August 2017, report dated 6 September 2017; https://pmg.org.za/tabled-committee-report/3085/ ; ATC170315: Report of the Select Committee on Security and Justice on an Oversight Visit to the Northern Cape Province to conduct oversight of the establishment of Community Police Fora and to determine the success of Community initiated neighbourhood watch structures, held on 31 January 2017, report dated 15 March 2017; https://pmg.org.za/tabled-committee-report/2937/ ; ATC160511: Report of the Select Committee on Security and Justice on an Oversight Visit to Diepkloof Police Station, dated 10 May 2016; https://pmg.org.za/tabled-committee-report/2766/ ; ATC160511: Report of the Select Committee on Security and Justice on an oversight visit to the Mthatha Remand Detention and Mthatha Medium Correctional Centre of the Department of Correctional Services, Mthatha Eastern Cape, dated 10 May 2016 https://pmg.org.za/tabled-committee-report/2765/ ; ATC191127: Report of the Select Committee on Security and Justice on whether or not to restore Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi, to their positions of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions at the National Prosecuting Authority, in terms of sections 12(6) of the National Prosecuting Authority Act 32 of 1998, dated 27 November 2019; https://pmg.org.za/tabled-committee-report/4022/ ; ATC191203: Report of the Select Committee on Security and Justice on the Oversight Visit to Limpopo Province, dated 3 December 2019; https://pmg.org.za/tabled-committee-report/4031/

[95] Section 69 Constitution.

[96] Woolman S. and Roux, T. (2013) 'Co-operative government and intergovernmental relations', IN Woolman S. and Bishop, M. (Eds) *Constitutional Law of South Africa*, 2nd Edition, Juta, pp. 14:25-26

[97] Sections 68 and 69 Constitution.

7. Opportunities for closer relations between the NPA and provinces

The preceding described the constitutional and legal framework that created the centralised NPA. This section explores opportunities for closer coordination and cooperation between the NPA and the provinces with a view to enable impactful prosecutions that are beneficial to a province's economy, safety and general well-being. There is, unfortunately no immediate answer and the value lies perhaps in describing what is not there, or not properly utilised.

The Intergovernmental Relations Framework Act 13 of 2005 (IRFA) sets out four levels of structures to facilitate intergovernmental relations (IGR): President's Coordinating Council, National Intergovernmental forums (also referred to as Minmec); Provincial intergovernmental Forums and Municipal Intergovernmental Forums. The overall object of IRFA is to give expression to Chapter 3 of the Constitution (Co-operative government) by enabling the cooperation between all government entities to facilitate the implementation of policy and legislation, including coherent government; effective service delivery; monitoring implementation of policy and legislation and the 'realisation of national priorities'.[98] Flowing from this, all sectors of government are then enjoined to conduct their affairs in a particular manner. Although the whole section 5 of IRFA is relevant here, it is in particular sub-sections (b) and (c):

> 5. In conducting their affairs the national government, provincial governments and local governments must seek to achieve the object of this Act, including by -
>
> (b) consulting other affected organs of state in accordance with formal procedures, as determined by any applicable legislation, or accepted convention or as agreed with them or, in the absence of formal procedures, consulting them in a manner best suited to the circumstances, including by way of-
>
> (i) direct contact; or
>
> (ii) any relevant intergovernmental structures;
>
> (c) co-ordinating their actions when implementing policy or legislation affecting the material interests of other governments;[99]

[98] Section 4 Intergovernmental Relation Framework Act.
[99] S 5(b) and (c) IRFA.

In short, IRFA enables, firstly, structured, formal and established-by-precedent coordination between organs of state, and, secondly, opens the door for informal and innovative efforts at coordination between organs of state. In short, it implies that even when there is no formal structure through which coordination should occur, or even precedent, this lacuna should not stand in the way of effective coordination and that entities involved should address the issue at hand.

IRFA does, however, not present an immediate, obvious or formal mechanism for strengthening IGR between the provinces and the NPA as the NPA is not a political body. Nonetheless, even if the Minister of Justice wanted to establish a Minmec (or National Intergovernmental Forum), IRFAs definition of a Minmec restricts this, as justice is an exclusively national competency and there is thus no "similar" MEC portfolio at provincial level as worded in the Definitions of IRFA:

> "Minmec" means a standing intergovernmental body consisting of at least a Cabinet member and members of the provincial Executive Councils responsible for functional areas similar to those of the Cabinet member.[100]

Given that policing is a concurrent responsibility as per Schedule 4 of the Constitution, the Minister of Police is obliged to establish a Minmec.[101] This is enabled by means of the Civilian Secretariat for Police Act[102] providing for the establishment of a Ministerial Executive Committee chaired by the Minister of Police and consisting of the provincial MECs and any other person the Minister may consider necessary.[103] As an advisory body to the Minister, amongst other duties,[104] the Secretariat for Police is then tasked to enable the coordination and cooperation between the national and provincial governments concerning policing. The Secretariat also has offices in each province and thus the physical provincial presence to engage with the provincial government and SAPS in the province. Moreover, the Civilian Secretariat Act places a duty on SAPS and the Independent Police Investigative Directorate (IPID) to cooperate with the Secretariat.[105] While one may critique other aspects of the Secretariat and its ability to exercise oversight over the police, there is little to find fault with in as far as recognising in law that provinces have an important role to play in policing policy and practice, and that provinces need to have a straight line of communication to the Minister of Police.

[100] Definitions, IRFA.
[101] Section 206(8) Constitution.
[102] 2 of 2011.
[103] Sections 27-28 Civilian Secretariat for Police Act (2 of 2011).
[104] Section 5(b) Civilian Secretariat for Police Act (2 of 2011).
[105] Sections 31(3) and 32 Civilian Secretariat for Police Act (2 of 2011).

The same cannot be said for the NPA as there is no constitutional imperative nor any other explicit obligation to engage with the provinces. IRFA is therefore of limited value in enhancing interaction between the NPA and the provinces. It is then for other avenues to be explored and there are two possibilities; the first being informal coordination and the second, through concurrent responsibilities.

One example of informal coordination was identified in the Western Cape, referred to as the "Criminal Proceedings Coordinating Committee" (CPCC). The need for this committee is motivated by the existing mandates of two structures in the JCPS cluster, being the National Development Committee (DEVCOMM) and the National Joint Operational and Intelligence Structure (NATJOINTS) which is replicated at provincial level as PROVJOINTS. DEVCOMM is responsible for capacity improvement in the criminal justice system departments as well as enhanced sectoral integration, amongst others. NATJOINTS is tasked with developing and implementing operational safety plans, safety at large events, and general peace and stability. DEVCOMM is chaired by the Department of Justice and NATJOINTS by SAPS. According to the CPCC draft memo "The need therefore exists for a committee, led by the NPA, to coordinate the activities of the JCPS Cluster departments that impact on criminal prosecutions. This is adjunct to that assigned to the NATJOINTS and DEVCOMM.".[106] It is further stated that the CPCC functions are distinct from the structures created by the judiciary, i.e., the National Efficiency Enhancement Committee (NEEC) and Provincial Efficiency Enhancement Committee (PEEC).[107] The purpose of the CPCC is described as:

- The coordination and monitoring the various processes that contribute to and impact on and result in criminal prosecutions
- To improve the quality of investigations and prosecutions as well as efficiency in the criminal justice system
- Seek to address systemic challenges that "have plagued and negatively impacted the efficiency and effectiveness of the criminal justice system".
- Monitor initiatives to address priority crime areas.[108]

The purpose of the CPCC is thus delineated in such a manner that the independence of the DPP does not come into play, but rather that the focus is on factors outside of the decision-making process

[106] CPCC Memo para 10.
[107] CPCC Memo paras 11-14.
[108] CPCC Memo paras 17-20.

concerning a prosecution. The memo explicitly excludes members of the legal fraternity from membership of the committee. [109]

The CPCC will in addition to representation from the NPA as chair, also have representation from SAPS, Dept of Justice, Dept of Correctional Services, Office of the Chief Justice (Court Administration), Dept of Health (Forensic and Pathology Services), Dept of Community Safety - Western Cape (DoCS), Dept of Social – Western Cape (DSD), City of Cape Town - CoCT (Law and Traffic Enforcement) and three civil society organisations.[110]

The Judicial Inspectorate for Correctional Services reported in 2019 that it was also attending the CPCC meetings.[111] In 2019 DoCS reported that it was similarly attending the monthly meetings of the CPCC:

> To improve the quality of investigations and prosecutions the Department continued to participate in the Criminal Proceedings Coordinating Committee of the National Prosecution Authority (NPA), which meets on a monthly basis. The focus of the meeting is to improve the efficiency of the criminal justice processes relating to prosecutions.[112]

The way in which the CPCC memo crafted its functions appear to be reasonably clear and focussed, setting itself distinct from PROVJOINTS and DEVCOMM, as well as interference from the legal fraternity with the focus on factors impacting on prosecutions.

The second possible option then is through concurrent responsibilities. Schedule 4 to the Constitution lists 33 concurrent responsibilities. Table 2 below lists a selection of Schedule 4 concurrent functional areas and the relevant national ministry. This is done for illustrative purposes, indicating those functional areas that are commonly associated with crime and in need of more effective enforcement, especially prosecutions. For example, agriculture is a Schedule 4 functional area and it is commonly

[109] LASA, Cape Law Society and Bar Council. CPCC Memo para 25.
[110] NICRO, Khulisa and Business against Crime (BAC).
[111] Judicial Inspectorate for Correctional Services, Third Quarterly Report, 1 October - 31 December 2019, p. 34, http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS-QR-Oct-Dec-2019-1.pdf
[112] Treasury: *Western Cape, 2019/20 Budget Vote 4 Dept of Community Safety*, p. 128, http://www.treasury.gov.za/documents/provincial%20budget/2019/3.%20Estimates%20of%20Prov%20Rev%20and%20Exp/WC/2.%20Estimates%20of%20Prov%20Rev%20and%20Exp/WC%20-%20Vote%2004%20-%20Community%20Safety.pdf

known that farmers in the Eastern Cape, Free State and KwaZulu-Natal suffer significant and continuous losses due to stock theft, and that in some cases organised crime and police collusion in South Africa and Lesotho have been alleged. SAPS data indicate that, on average, 60% of all stock theft cases originate from these three provinces – see Table 1.

Table 1 Reported stock theft[113]

Year	Free State	KZ-Natal	E-Cape	Total	National	Percentage
2015	3627	5956	6086	15669	24955	62.8
2016	3466	5731	5806	15003	24715	60.7
2017	3677	5950	6023	15650	26962	58.0
2018	4032	6322	6217	16571	28849	57.4
2019	4066	6380	6735	17181	29672	57.9
2020	3785	6252	6797	16834	28427	59.2

The scale of stock theft has significant commercial implications in these three provinces and requires an integrated approach with reference to substance as well as spheres of government. It seems also to be the case that prosecutions are few and far between. In 2019 a total of 4066 stock theft cases were reported in the Free State, but the NPA reported that there was only a total of 107 prosecutions in Bloemfontein and Welkom courts together.[114] The numbers indicate that stock theft in the Free State is not a case of one or two cows going missing, but rather that it is organised, transnational and that there are systemic problems in enforcement with persistent allegations of corruption and collusion with the police. From the available data it is uncertain if stock theft is a priority for policing and prosecutions in the provinces. For example, the 2019 annual report of the relevant government department in the Free State makes one mention in passing about stock theft.[115]

Table 2

Functional area	National Ministry
Agriculture	Agriculture, Land Reform and Rural Development
Casinos, racing, gambling and wagering, excluding lotteries and sports pools	Trade, Industry and Competition; Small Business Development.
Environment	Forestry, Fisheries and the Environment

[113] Data from ISS Crime Hub https://issafrica.org/crimehub/facts-and-figures/crime-statistics-wizard
[114] NPA (2019) *NPA Annual Report 2018/19*, p. 61.
[115] Department of Police, Roads and Transport Free State Province (2019) *Annual Report 2018/19*, p. 8.

Functional area	National Ministry
Nature conservation, excluding national parks, national botanical gardens and marine resources	Forestry, Fisheries and the Environment
Pollution control	Forestry, Fisheries and the Environment
Provincial public enterprises in respect of the functional areas in Schedules 4 and 5.	Public Enterprises
Vehicle licensing	Transport
Welfare services	Social Development

A further example is abalone poaching in the Western Cape and it is reported as a priority issue in the provincial policing priority needs plan.[116] Although it is not reflected in the SAPS reported crime data, media reports indicate the scale of the problem with large quantities seized by the police[117] and in 2012 stock levels were already described by government as severely depleted and at risk of never recovering to healthy levels.[118] Abalone also feeds well into the illicit economy of guns, drugs and wildlife smuggling apart from the impact on marine life and the sustainable utilisation thereof.

In both examples, the effectiveness of the province in meeting its obligations under the Constitution with reference to Schedule 4 (agriculture and environmental protection),[119] are severely undermined, if not made impossible, by the extent of crime and presumably lack of enforcement and prosecutions. The nub of the issue is that the problem can no longer be fixed by the relevant departments, even if there is the best possible cooperation with the provincial and national departments dealing with respectively agriculture and environmental affairs. The problem requires the focussed intervention of the NPA through prosecution-guided investigations resulting in the prosecution and conviction of criminal king-pins. Given the localised nature of these two issues, it may indeed be the case that stock theft and abalone poaching are not regarded as national priorities by the NPA, as neither feature in documents reviewed such as the Prosecution Policy or Directives. Nonetheless, both impact on concurrent responsibilities that could or should be resolved through the Minmec by the relevant national minister in liaison with the Minister of Justice and the NDPP. There is nothing preventing

[116] Secretariat for Safety and Security (2019) *Policing needs and priorities – Western Cape*, pp. 99, 100 and 133.
[117] 'Abalone worth R2.7 million seized in Brackenfell, Cape Town' *The South Africa*, 23 Feb 2021, https://www.thesouthafrican.com/news/abalone-worth-r2-7-million-seized-in-brackenfell-cape-town/
[118] 'Depleted abalone stocks a concern for SA' *SA News*, 6 Nov 2012, https://www.sanews.gov.za/south-africa/depleted-abalone-stocks-concern-sa
[119] Section 125(2)(b – c) Constitution.

informal coordination and liaison. The risk, however, with informal coordination is that it is highly reliant on individuals and can thus simply be avoided.

8. Conclusion and proposals for a way forward

Expectations that the prosecution policy would reflect and be sensitive to provincial interests and concerns did not materialise. The post-1998 history of the NPA has clearly showed the shortcomings of its highly centralised and insular architecture resulting in an opaque, *de facto* unaccountable and politicised institution. The current architecture created by design a chasm between the NPA and the provinces with particular reference to the more devolved, even if limited, relationship between the provinces and the police. The criminal justice value chain is indeed broken and there is little evidence indicating that there is harmony between SAPS and NPA priorities, and that civil society interests are having an impact on the identification of these. This ultimately has consequences in respect of crime and safety concerns, but it goes deeper than that to the extent that it has consequences for concurrent functions as in the examples cited of stock theft and abalone poaching.

While some aspects of crime are universal it also needs to be acknowledged that there are local and provincial differences in crime and safety issues. This requires not only an approach sensitive to these differences, but also a more constructive, 'closer-to-the-ground' and transparent approach by the NPA in harmony with its partners in the criminal justice system. A key component of this is more detailed, disaggregated and frequent reporting by the NPA on its performance, especially where these concern prosecution priorities. Bland, national annual reporting obfuscating the realities of law enforcement failures is of little help in addressing the problems of structural violence, organised crime and endemic corruption.

While the longer-term view should be law reform to address structural weaknesses related to centralisation and lack of transparency and accountability, there are a number of measures to be taken in the short term that should make a positive contribution to crime reduction by promoting greater transparency and closer cooperation between the NPA and the provinces. It should be emphasised from the outset that there is no intention that a provincial government or other entity should interfere in the individual decisions of the NPA to prosecute or not, but rather that, with reference to the principles

and values applicable to the public service listed in the Constitution, the NPA has an obligation to be transparent and accountable at a strategic level for its performance and to be part of a coherent approach to addressing crime that is receptive to the needs of people and identified priorities. Such an approach would be compatible with internationally accepted guidance on the issue.[120]

The first short-term intervention is the production of up-to-date research and analysis findings on NPA performance, especially at lower and regional courts where the bulk of criminal matters start and are handled. There are present simply too many unknowns and it is argued that important information is lost, or deliberately not disclosed, dealing with crime and prosecution trends at local and provincial levels. The further exploration of this level of IGR needs to be based on evidence and reliable analysis.

Secondly, informal mechanisms of coordination and broader input into NPA strategic decisions at provincial level should be established if absent and used to identify needs and priorities and deal with factors impacting on prosecutions. Such fora should include civil society representation and provide opportunity for regular reporting.

Third, and following from the second, there needs to be a focus at provincial level on substantive priorities, especially where these have significant impact on other functions, such as agriculture described above, with a view to mobilise resources and political will to develop a coherent approach. Given the history and results to date, it is simply no longer a productive method of work that the NPA determines its own agenda seemingly without consultation of key players in the criminal justice value chain and the people affected by poor performance on the part of the NPA. The investigating directorates provided for in the NPA Act could be a productive mechanism to give expression to this approach.[121]

[120] 'Instructions to prosecutors from outside sources are particularly sensitive, as they can potentially give rise to actual or perceived abuse and improper influence. It is suggested that instructions given by the executive branch to the prosecution service be guided by the Constitution or by legislation. Legislation, guidelines and procedures must safeguard prosecutorial independence. If outside authorities are legally mandated to give general instructions (such as giving priority to certain types of crime) or specific instructions to prosecutors (including instructions to institute or terminate specific proceedings), such instructions must be consistent with lawful authority and be given in a transparent and accountable manner.' [UNODC – IAP (2014) *The Status and Role of Prosecutors - A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*, UNODC: Vienna, p. 12.]

[121] Section 7 NPA Act.

Fourth, a review is required of the Prosecution Policy and Directives to give recognition to provincial concerns and interests, but also to explore mechanisms for improved cooperation and ultimately impactful prosecutions.

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