



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

Submission by Africa Criminal Justice Reform (ACJR) to the Constitutional Review Committee

by

Lukas Muntingh

29 June 2021

Contents

INTRODUCTION	2
THE APPOINTMENT OF THE NDPP	3
REMOVAL OF THE NDPP	6
IN TANDEM	10

Introduction

1. This submission is made with reference to section 45(1)(c) of the Constitution and the call for submissions issued by Parliament.¹ The submission deals with the National Prosecuting Authority (NPA) and in particular the appointment and dismissal of the National Director of Public Prosecutions (NDPP) and other senior officials of the NPA.
2. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute in the Faculty of Law at the University of the Western Cape. We engage in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. Our work supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. Our work is anchored in international, regional and domestic law. We promote policy, law and practice reform based on evidence. We have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty.
3. In recent years we have paid particular attention to the NPA and produced a number of research reports and related publications.²
4. Section 179(1)(a) of the Constitution provides that the President appoints the NDPP. The Constitution does, however, not deal with the removal from office of the NDPP; this is done in the National Prosecuting Authority Act 32 of 1998.³
5. It is the core mandate of the NPA to institute criminal proceedings against persons and companies on behalf of the state.⁴ It is the only state entity mandated to so⁵ and it can thus be argued that the NPA stands in a very special relationship to the constitutional principle of accountability, and one may even argue that the NPA is the custodian of this principle. The

¹ PMG website, <https://pmg.org.za/call-for-comment/1060/>

² Muntingh, L. and Redpath, J. (2020) *Recommendations for reform of the NPA*, ACJR Research Report.; Muntingh, L., Redpath, J., and Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, ACJR Research Report.; Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in the South African law enforcement agencies*, ACJR Research Report.; *The appointment and dismissal of the NDPP - Instability since 1998* (2018) ACJR Fact sheet Nr. 7.; *NPA Performance* (2018) ACJR Fact sheet Nr. 8.; *Failing to discipline in SAPS - Fostering a culture of impunity* (2018) ACJR Fact sheet Nr. 9.; *NPA Accountability, trust and public interest* (2019) ACJR Fact sheet, 10.; *The History and structure of the NPA* (2019) ACJR Fact sheet Nr. 12.

³ *National Prosecuting Authority Act, 1998, sec. 12.*

⁴ *Constitution of the Republic of South Africa, 1996, sec. 179(2).*

⁵ It should be noted that the NDPP can delegate this authority to another entity as provided for in law, for example to municipalities enforce traffic violations. Private prosecutions are also possible once the NDPP has declined to prosecute and issued a certificate of *nolle prosequi*.

central issue is that the NDPP's position is immensely powerful and with this power comes real risk that, at least, (a) an unsuitable candidate be appointed; (b) the person is beholden to the President (or persons close to the President).

The appointment of the NDPP

6. From the history of the NPA since 1998 five key points concerning the appointment of the NDPP can be taken to inform proposals for reform. This has been described extensively in the literature and case law and is summarised below:

- There has been *perpetual instability* at the top of the and not one NDPP has served the full term of ten years. Since 1998, when the NPA came into being, there have been six permanently appointed NDPP's and three acting NDPPs.⁶
- The entire top echelon of the NPA (at least 14 positions) is appointed by the President and Minister of Justice without any input from other key stakeholders, such as Parliament, professional bodies or the public in general.⁷ This *centralisation and lack of transparency* pose significant risks for the NPA's independence and integrity.⁸
- The skills and experience *requirements* for the NDPP are rather slim when compared to those of the Public Protector and Auditor General of South Africa (AGSA). In the case of the NDPP it is required merely that the person be fit and proper and 'possess legal qualifications that would entitle him or her to practice in all courts in the Republic'.⁹ There is no requirement of specialist knowledge or numbers of years of experience.¹⁰ In appointing the AGSA and the Public Protector specialist knowledge in the case of the

⁶ Ngcuka hands in resignation, *News24*, 24 July 2004, <https://www.news24.com/SouthAfrica/News/Ngcuka-hands-in-resignation-20040724> ; *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018); 'Shaun Abrahams tells Zuma why he is fit to remain in his post as NDPP' *M&G*, 28 Nov 2016, <http://mg.co.za/article/2016-11-28-shaun-abrahams-tells-zuma-why-he-should-keep-his-job> ; Silas Ramaite appointed as acting NPA head, *News24*, 14 August 2018, <https://www.news24.com/SouthAfrica/News/breaking-silas-ramaite-appointed-as-acting-npa-head-20180814> ; Adv Smalia Batohi, NPA website, <https://www.npa.gov.za/content/adv-shamila-batohi>

⁷ Ss 11(1), 13(1), 15(1)(a and c) NPA Act.

⁸ An important precedent was set with the appointment of Adv Batohi as NDPP in both the appointment of an interview panel and opening the interviews to the public. 'High court orders NDPP interviews open to media' *Mail & Guardian*, 13 November 2018, <https://mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviews-open-to-media/>

⁹ S 9(1) National Prosecuting Authority Act 32 of 1998.

¹⁰ *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, para. 35.

AGSA, years of experience and specialist knowledge in the case of the Public Protector are set as explicit requirements in addition to being a fit and proper person.¹¹

- Even if the legislation itself is not particularly helpful in guiding the President to appoint the correct person, the duty rests with the President to be as *thorough, rational and objective* as he or she could possibly be. In appointing the NDPP, the President:
 - must take all information into consideration,
 - the appointment process has to be rational, and
 - the President cannot cherry-pick the information on which he or she bases the decision to make an appointment.¹²
- The requirement that the NDPP be a *fit and proper person* is relevant in both the appointment and dismissal of the NDPP.¹³ The Supreme Court of Appeal (SCA) placed the issue of fit and proper under scrutiny when it considered the appointment of Menzi Simelane as NDPP.¹⁴ The Court stated ‘Consistent honesty is either present in one’s history or not, as are conscientiousness and experience.’ The Court added that ‘conscientious’ is defined as ‘wishing to do what is right and relating to a person’s conscience’.¹⁵ On this point the Court concluded that there is no doubt that the appointment of the NDPP is not to be left to the subjective judgment of the President but needs to be ‘objectively assessed to meet the constitutional objective to preserve and protect the NPA and the NDPP as servants of the rule of law’.¹⁶ When the Simelane-case

¹¹ S 193(2-3) Constitution; s 1A(3) Public Protector Act 23 of 1994.

¹² *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011). *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008.

¹³ S 9(1)(b) NPA Act. S12(6)(a) NPA Act. *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, paras 14 and 18.

¹⁴ *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011). The judgment lists several synonyms and antonyms for integrity to support the Court’s interpretation. The term ‘integrity’ is therefore an objective requirement existing in law guiding the determination of ‘fit and proper’. The Court further drew upon the *Oxford Dictionary* to clarify ‘integrity’: ‘unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity’. Further clarification was sought in the *Collins Thesaurus*: ‘honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, and reputability’. The following were noted as antonyms: ‘corruption, dishonesty, immorality, disrepute, deceit, duplicity’. *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 116.

¹⁵ *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 117.

¹⁶ *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 117.

reached the Constitutional Court, the Court acknowledged that while the ‘fit and proper’ requirement does involve a value judgment, ‘it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President’ and is therefore immune from objective scrutiny.¹⁷ Identifying a ‘fit and proper’ NDPP is thus not a simple task and it would be appropriate that it not be done by one person behind closed doors. In summary, the SCA concluded that:

- Section 9(1)(b) of the National Prosecuting Authority Act does not use the expression “in the President’s view” or some other similar expression but requires an objective assessment.
- The requirement of being fit and proper is couched in imperative terms, stating that the appointee “must” be a fit and proper person.
- Qualities like “integrity” can be objectively assessed and that such an assessment of a person’s personal and professional life ought to reveal whether he or she has integrity.¹⁸

7. The Constitution sets nine values and principles for the public administration¹⁹ and for the purposes of appointing an NDPP or other senior position in the NPA, guidance must be taken from these. The emphasis is placed here on assessing the suitability of candidates to be appointed as NDPP and not on what structural arrangement should or could exist to make such a decision, or at least make a recommendation to the President, or the body responsible for the appointment of the NDPP. We argue that regardless of who is tasked with making the appointment, the requirements raised in section 195(1) of the Constitution must be thoroughly and objectively applied when assessing candidates for the position of NDPP (and other senior positions in the NPA).

¹⁷ *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para. 23.

¹⁸ *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 116.

¹⁹ Section 195(1) (a) A high standard of professional ethics must be promoted and maintained. (b) Efficient, economic and effective use of resources must be promoted. (c) Public administration must be development-oriented. (d) Services must be provided impartially, fairly, equitably and without bias. (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making. (f) Public administration must be accountable. (g) Transparency must be fostered by providing the public with timely, accessible and accurate information. (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated. (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

8. An important precedent was set with the appointment of Adv Batohi as NDPP in both the appointment of an interview panel and opening the interviews to the public.²⁰ The appointment of a panel by the President to select a suitable candidate(s) and the subsequent public hearings were crucial steps in rebuilding trust in the NPA. As much as this is laudable, it should not be left to a sitting President to decide how the NDPP will be appointed. It is our submission that the Constitution should provide for such a procedure.
9. **Recommendation:** The appointment of the NDPP (and other senior positions in the NPA) must be clearly described in the Constitution requiring an open, transparent process that relies on evidence, is based on merit and protected from political interference and assesses candidates objectively against the criteria set in section 195(1) of the Constitution.

Removal of the NDPP

10. The current procedure for the dismissal of the NDPP has run into two major critiques – the one from Parliament itself and the other from the Constitutional Court. It is not necessary to describe the existing procedure here as it has been done elsewhere.²¹ Firstly, it is important to note that the parliamentary *Ad Hoc* Committee that dealt with the suspension and dismissal of Advocate Pikoli as NDPP observed that ‘it may be an anomaly that Parliament plays no role in appointing the NDPP, but has the final say in his or her removal. The review of the legislation should also consider whether Parliament should play any role in the appointment of the NDPP.’²² It is common cause that this review has as yet not happened. The initiative to suspend with the intention to dismiss the NDPP is one coming from the President and not Parliament or any other authority and can create the impression of the legislature rubber-stamping the President’s intentions. In the case of Pikoli there was more than enough evidence that Parliament was being used to remove Pikoli.²³
11. Secondly, in August 2018 the Constitutional Court declared two sub-sections of the NPA Act dealing with the appointment and dismissal of the NDPP unconstitutional.²⁴ The first provided for the extension by the President of the term of office of the NDPP or a Deputy NDPP which

²⁰ ‘High Court Orders NDPP Interviews Open to Media’, *Mail & Guardian*, 13 November 2018

<<https://mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviews-open-to-media/>>.

²¹ Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR.

²² *Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)*, Annexure 1 para. 7.

²³ Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR.

²⁴ S 12(4) and 12(6) *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).

must normally come to an end at age 65 years.²⁵ It empowered the President to extend the term of office of the NDPP (or DNDPP) for a period of two years or shorter periods which in the aggregate do not exceed two years, provided that an NDPP's term of office shall not exceed 10 years. The Court found that this power to extend an NDPP's term of office undermines the independence of the office as it may influence the incumbent's behaviour and decision-making to curry favour with the President in order to remain in the position of NDPP. This affected the independence of the office of the NDPP and is thus unconstitutional. Section 12(6) of the NPA Act empowered the President to suspend indefinitely with or without pay the NDPP. The Court further noted that there is no guidance in law on the discretion to continue remuneration and its quantum.²⁶ The declaration of invalidity of section 12(6) was suspended for 18 months to enable Parliament to fix the problem.²⁷ The issue has now been addressed in an amendment to the National Prosecuting Authority Act.²⁸

12. Third, as the situation currently stands, the NDPP can be removed by a simple majority vote of the National Assembly as provided for in the NPA Act.²⁹ Given the vast powers of the NDPP this seems rather odd compared to the Public Protector and AGSA for which a two thirds majority in the National Assembly is required to remove them from office for misconduct, incapacity or incompetence.³⁰
13. Following from the preceding, it is then proposed that the decision and procedure to dismiss the NDPP should also be covered by a procedure similar to the procedures dealing with the removal of the President³¹ and Chapter 9 office holders.³² In both instances there is now provided for a factual enquiry of some sort, following from which a recommendation is put to the vote in the National Assembly for which a two thirds majority is required to remove the President, Public Protector, or Auditor-General as the case may be.

²⁵ S 12(4) National Prosecuting Authority Act.

²⁶ Para 45 This tool is susceptible to abuse. It may be invoked to cow and render compliant an NDPP or Deputy NDPP. The prospect of not earning an income may fill many with dread and apprehension. The possibility of this enduring indefinitely exacerbates the situation. This is not a tool that should be availed to the Executive. It has the potential to undermine the independence and integrity of the offices of NDPP and Deputy NDPP and, indeed, of the NPA itself. *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).

²⁷ The court went a step further ruling that during this period the suspension of an NDPP or Deputy NDPP shall not exceed six months and a suspended NDPP or Deputy NDPP shall receive their full salary. The Court further stated that if Parliament does not fix the problem within the 18-month period (by February 2020), the interim relief will become final.

²⁸ Judicial Matters Amendment Act 12 of 2020.

²⁹ S 12(6)(c) NPA Act.

³⁰ Ss 194(1) and (2)(a) Constitution.

³¹ Section 89 Constitution.

³² Section 194 Constitution.

14. Section 89 of the Constitution deals with the removal of the President from power and following litigation, Parliament has now adopted rules in this regard as instructed by the Constitutional Court.³³ The amended Rule 129A of the Rules of the National Assembly sets out the procedure.
15. Any member of the Assembly may bring a substantive motion³⁴ for a section 89 enquiry, provided that the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in the Constitution,³⁵ showing *prima facie* that the President:
- committed a serious violation of the Constitution or law;
 - committed a serious misconduct; or
 - suffers from an inability to perform the functions of office.
16. The motion must include all the supporting evidence and the charge must relate to an action or conduct performed by the President in person. The motion must also be consistent with the Constitution, the law and these rules.³⁶
17. If the motion is compliant with the set requirements, the Speaker must appoint a panel consisting of 'three fit and proper, competent, experienced and respected South Africans, which may include a judge, and who collectively possess the necessary legal competence and experience.'³⁷ It is the task of this panel to make a recommendation to the Speaker, within 30 days, whether sufficient evidence exists to show that the President committed a serious violation of the Constitution or law; committed a serious misconduct; or suffers from an inability to perform the functions of office. Once the panel has concluded its work and reported to the Speaker, it must be tabled in the National Assembly for consideration. If the Assembly resolves that a Section 89(1) (removal of the President) enquiry be proceeded with, the matter must be referred to the Impeachment Committee established for that purpose. The Impeachment Committee is constituted by MPs in proportional representation and it is tasked with three things: establish the veracity of the charges; establish the seriousness of the charges, and report to the Assembly thereon.³⁸ If the Impeachment Committee's Report

³³ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47.

³⁴ "motion" means - (a) a proposal made by a member in the form of a draft resolution that the Assembly do something, order something to be done or express an opinion concerning some matter; or (b) a proposal made by a member that the Assembly discuss a subject presented by the member for that purpose;(Rules of the National Assembly 2016).

³⁵ Section 89.

³⁶ Rule 129A Rules of the National Assembly 2016.

³⁷ Rule 129 E.

³⁸ Rule 129 M.

recommends the removal of the President, this must be put directly to the vote in the Assembly, requiring a two thirds majority to remove the President from office.³⁹

18. A near identical procedure has subsequently been adopted by Parliament with reference to Chapter 9 institution office bearers.⁴⁰ The procedure covers the Public Protector, SA Human Rights Commission, Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, Commission for Gender Equality Auditor-General and the Electoral Commission.⁴¹ The differences being that the requisite majorities are different (two thirds for Public Protector and AGSA and simple majority for other Commissioners). The procedure for the removal of the President, AGSA, Public Protector and other Chapter 9 Commissioners, commencing with a motion tabled by an MP, a fact-finding mission (the panel of three as well as the Impeachment Committee or section 194 enquiry) and a two thirds majority or simple majority required, then seems like a reasonable procedure for the investigation and possible removal of the NDPP. Figure 1 (see at end of document) below summarises the two procedures as set out with reference to the removal of the President and Chapter 9 institution office bearers.
19. At present the Constitution does not provide for the removal of the NDPP, as this is regulated in the NPA Act and, as have been seen, is fraught with difficulties and in need of urgent repair.
20. **Recommendation:** It is proposed that the Constitution be amended at section 179 dealing with the NPA by providing for a removal procedure along the lines of what has now been developed in respect of the removal of the President and functionaries of Chapter 9 institutions. This will bring consistency in the interpretation and application of constitutional principles and values as outlined in the Constitution.⁴² A question that does arise, should this proposal be accepted, is if the substantial motion (as envisaged under the procedure for the President and Chapter 9 functionaries) can only be tabled by an MP or whether, in the case of the NDPP, such a motion (or similar communique) can be submitted to the Speaker by, for example, a judge or the President or a Premier etc, and that it be dealt with in the manner set out when submitted by an MP?

³⁹ Rule 129 O.

⁴⁰ PMG Report on the meeting the National Assembly Rules Committee of 9 November 2019, *Proposals and recommendations from Subcommittee on Review of Assembly Rules (incl chapter 9 office-bearers)*, <https://pmg.org.za/committee-meeting/29414/> Here's how Parliament might remove the Public Protector - step by step, *News24*, 27 November 2019, <https://www.news24.com/news24/SouthAfrica/News/heres-how-parliament-might-remove-the-public-protector-step-by-step-20191127>

⁴¹ S 181(1) Constitution.

⁴² S 195(1) Constitution.

In tandem

21. The appointment and removal of the NDPP (and other senior persons in the NPA) should be guided by the same set of principles as reflected in section 195(1) of the Constitution. From this it follows that both the appointment and removal procedures need to be addressed in reform.
22. There is little sense in having a rigorous appointment procedure to ensure that a candidate of the highest calibre is appointed as NDPP, but then making it easy for his or her removal if the incumbent steps on political toes in fulfilling the mandate of NDPP without fear, favour or prejudice. The NDPP needs security of tenure and not be vulnerable to political pressure.
23. Similarly, addressing only the removal procedures to be rigorous, as proposed, may result in having a poor incumbent who is difficult to remove.
24. The appointment and the removal procedures must work in tandem; rigorous selection should produce a high calibre candidate that is protected by the Constitution to fulfil the role of the NDPP as required by the Constitution.

Lukas M Muntingh
lmuntingh@uwc.ac.za
082 200 6395
29 June 2021

