The unsuccesful constitutional transition of the NPA

Loammi Wolf
specialises in constitutional and related public law. She has a master's degree from the University of Virginia and completed her doctoral research in Germany. She was a member of the Wits law school before she emigrated to Germany. Today she runs the independent research organisation 'Democracy for Peace'.

In practice, the Westminster model's criminal justice system has been perpetuated once the new Constitution was adopted although there are major differences between the Westminster and the constitutional state model. Historically the prosecuting authorities in each of these two systems developed in different contexts and that affected their constitutional status.

The Westminster model is characterised by an uneven distribution of state power due to the doctrine of parliamentary sovereignty, no clear separation of powers as a result of class-based power-sharing constructs, little constraints to limit an abuse of power and no bill of rights guaranteeing fundamental rights.

The constitutional state concept stands for the opposite: the three branches of state power hold each other in equilibrium of power; there is a clear and definite separation of powers; and these powers must be exercised within the parameters set by the Constitution.

The establishment of prosecuting authorities

The constant evolutionary evolvement of constitutional practice is often ahead of theoretical precepts that are inadequately formulated or updated in constitutions.

The ideal of democracy that crystallised in the 18th century initially foresaw a separation of powers between the judiciary (courts), legislature, and executive. This is still the way most constitutions refer to it, although another important state organ had meanwhile developed.

The unsatisfactory outcome is that state prosecutors are often treated as a useful state organ –yet, as one that occupies an undefined space somewhere between the executive and the judiciary.

The Anglo-American prosecuting model

The attorney-general, whose office dates back to the 15th century in Great Britain, acted as law officer of the Crown and was a member of cabinet. Sir William Blackstone recorded that the attorney-general was 'the king's immediate officer and the king's nominal prosecutor'.

The office of director of public prosecutions was first established in 1879. He was appointed by the attorney-general to oversee prosecutions by the police. Criminal investigations and prosecutions developed as an accusatory function of the police

in 19th century England. Prosecutors were introduced only in more recent history to split those police functions into criminal investigations (police) and taking the matter to court (legally trained prosecutors).

The dominant model in the Anglo-American tradition is that prosecutors are part of the justice department. Prosecuting authorities in these systems have varying degrees of functional independence, but are subject to oversight of the justice minister.

Conflict between prosecutors and political office bearers relating to the instigating of criminal proceedings arose early on. The doctrine of independent aloofness took root in the UK during the 1920s to counter that. Yet, political interference in the domain of state prosecution is no rarity even today.

The disadvantage of this model is that the boundaries of executive state administration and the administration of justice are blurred. It makes it easy for politicians to exercise undue influence on prosecutors to shield politicians or executive office-bearers from criminal prosecution.

In 1985, the British prosecution system was reformed by the Prosecution of Offences Act in an attempt to strengthen the independence of prosecutors. However, until today the decision lies initially with the police to decide if evidence justifies a prosecution. Only once they do so decide, do the police refer the case to the Crown Prosecution Service. The Act also did not abolish the right of the police to prosecute.

This might explain why prosecutors tend to be regarded as the extended arm of the executive in Great Britain and many Commonwealth countries, where a similar system was implemented during colonial times.

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Continental European models

In criminal justice, the path taken by Continental European states over the last 200 years is very different from that in Anglo-American countries. Despite the slow evolutionary process, prosecutors are, for all practical purposes, regarded as the second organ of the third branch of state power next to the judiciary. In other words, they are structurally independent and do not merely have some degree of functional independence from the executive branch.

The different constitutional status of prosecutors has legal-historical grounds. The judiciary was split into two to separate inquisitory adjudication from criminal investigations and prosecution. This development started in France and was subsequently endorsed by most European states in the aftermath of the Napoleonic conquests.

The French model with its emphasis on inquisitory procedures is no longer predominant. Most European countries now tend to follow the so-called German model, which has incorporated many accusatory elements. What all these systems have in common, though, is a distinct separation from the executive branch.

Another difference, compared to Anglo-American criminal justice systems, concerns the organs conducting criminal investigations. In England, Wales

and Ireland the police conduct criminal investigations, whereas prosecutors lead criminal investigations in Germany, France, Italy, Sweden, Finland, Scotland, and the Netherlands.

Although prosecutors may make use of police assistance to investigate criminal offences, they always lead criminal investigations. The rationale behind this arrangement is twofold: first, it underscores that criminal investigations and prosecutions are not executive functions, and secondly, it ensures procedural fairness and respect for fundamental rights by trained lawyers in pre-trial criminal investigations.

The police are not the only civil servants of the executive branch who function as the helping hand of prosecutors. Prosecutors may also require tax, customs, and intelligence officers or civil servants from other state departments as the case may be, to assist them. It is the responsibility of the justice minister to keep these channels for assistance open. The oversight responsibilities of the justice minister are different in nature from the Anglo-American systems.

In Germany, prosecutors are regarded as guardians of the rule of law and have the duty to exercise their powers benevolently, in the service of justice and not as pawns of the executive.

The primary function of the police is to secure public safety and order. These functions are administrative in nature and must be distinguished from prosecuting functions that focus on the investigation and prosecution of crime. The latter is regulated by criminal law, not administrative law.

In specialised and complex areas of corruption and commercial criminality, prosecuting authorities usually have their own forensic teams, which – apart from prosecutors – include chartered accountants, commercial and financial experts, and IT specialists, who help to investigate such offences. Such units are comparable to the now defunct Scorpions.

In Germany, prosecutors are regarded as guardians of the rule of law and have the duty to exercise their powers benevolently, in the service of justice and not as pawns of the executive. Unlike accusatory systems, prosecutors are obliged to be neutral in their search for the truth and must conduct criminal investigations objectively. They have to consider both incriminating and exculpatory evidence, honour the binding force of statutes (the principle of legality), and prosecute all cases with sufficient evidence in order to secure equal treatment in criminal justice.

This explains why corruption allegations in high profile cases such as former Chancellor Helmut Kohl and former Federal President Christian Wulff were not spared from criminal investigations. It also explains the strong position of prosecutors in Italy, who fearlessly prosecuted former Prime Minister Berlusconi.

On the balance

In a comparative study, Yale law professor James Whitman has come to the conclusion that procedural fairness and equal treatment under US and UK criminal law lag far behind European counterparts. Two major factors that influence this outcome are how the ideal of equality before the law is understood, and the location of the prosecuting authority in the separation of powers.

Whereas Anglo-American law generally requires that all people should face an equal threat of punishment, Continental European law additionally demands that all

people face an equal threat of criminal investigation and prosecution. The normative quality of pre-conviction equality is therefore much higher in the constitutional states of Europe.

Furthermore, the structural independence of a prosecuting authority, as state organ in its own right in the third branch of state power, is better suited to secure quality criminal justice than mere functional independence of prosecutors who are located in the executive branch.

The awkward transition in South Africa

The status of the National Prosecuting Authority (NPA) is regulated ambivalently by section 179 of the Constitution. It hovers somewhere between the constitutional state and the Westminster model.

One would therefore presume that their institutional independence should be guaranteed – not merely some degree of functional independence where the prosecutors can still be pressured or manipulated by the executive.

The prosecutors and the judiciary have been classified in Chapter 8 of the Constitution as the state organs responsible for the administration of justice, thus following the model of two state organs in the third branch of state power. Three provisions of section 179 unquestionably favour the constitutional state model:

> Section 179(2) confers the power 'to institute criminal proceedings on behalf of the state' and 'to carry out any necessary functions incidental to instituting criminal proceedings' upon the prosecuting authority – not upon the department of justice or the police.
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> Section 179(5) further indicates that the national director of public prosecutions is on a par with the justice minister because he determines prosecuting policy 'in concurrence' with the minister. It does not signal a relationship of subordination typical of an internal executive hierarchy. In that case, the wording of the provision would have determined that the minister should determine prosecuting policy 'in consultation with' or 'on advice of' the national director. The liaising of the national director with the justice minister is on a horizontal level, similar to the relation of the justice minister vis-á-vis the judiciary.

In addition, subsection (4) obliges the legislature to ensure that the prosecuting authority can exercise its functions 'without fear, favour or prejudice'. It implies that the prosecutors are not subject to ministerial orders and that this should be ensured statutorily. One would therefore presume that their institutional independence should be guaranteed – not merely some degree of functional independence where the prosecutors can still be pressured or manipulated by the executive.

If the drafters of the Constitution intended the NPA to fall under the control of the executive branch, its status would have been regulated in Chapter 5. There are two provisions of section 179, however, which create difficulties.

Subsection (6) states that the minister of justice is 'responsible for the administration of justice' and 'must exercise final responsibility over the prosecuting authority'. This provision could be interpreted to favour the Westminster model of functional independence of prosecutors where they form part of the executive branch. That would be in conflict, however, with the rest of the Constitution which endorses the constitutional state paradigm. The Constitutional Court has consistently applied the rule of harmonious interpretation of constitutional provisions and it could

therefore be expected that the Court will interpret this provision to be in line with the constitutional state paradigm.

In Germany a similar provision has been interpreted restrictively. The courts held that ministerial responsibility for the prosecuting authority cannot be equated with ordinary executive ministerial responsibility. It is a sui generis power which implies that 'responsibility' must be interpreted to mean that the justice minister has oversight to ensure that the channels for executive assistance in prosecutor-led criminal investigations are open and function properly.

Although concerns were raised during the certification procedures of the Constitutional Court that the head of the prosecuting authority should not be a political appointee of the executive if the independence of the NPA should be guaranteed, they were brushed aside.

The real difficult nut to crack is section 179(1)(a). It provides that the national director of the prosecuting authority should be appointed by the president in his capacity as 'head of the executive'. The wording of the provision has cast this exercise of power as a straightforward act of executive power. It was taken over directly from section 2(1) of the Attorney-General Act of 1992 which was tailored to suit the Westminster model's articulation of the separation of powers.

This provision clearly constitutes an anachronism in the separation of powers typical for a constitutional state. One could have understood it if it were merely an official act of inauguration by the president acting in his or her capacity as head of state. Although concerns were raised during the certification procedures of the Constitutional Court that the head of the prosecuting authority should not be a political appointee of the executive if the independence of the NPA should be guaranteed, they were brushed aside.

The Constitutional Court reasoned that the separation of powers only distinguishes between the legislature, the executive, and judiciary. Without considering the logical option that the prosecuting authority is a state organ in its own right in the third branch of state power, the Court rather bluntly argued that the prosecutors were not part of the judiciary, and consequently, they must be part of the executive branch. The Court continued that '…even if it were part of the judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the president does not in itself contravene the doctrine of separation of powers'.

In fairness it must be said that there was hardly any research available in South Africa at the time about the differences in state organisation between the constitutional state and the Westminster model. The Court was clearly unaware of it.

Despite this drawback, it is hard to overlook that the Court basically negated the fact that one state organ can indirectly control another with such appointments and compromise the independence of such appointees. A factor that probably cannot be ruled out is that the judges were influenced at a subconscious level by the imposing stature of former President Mandela. Unfortunately his successors have not shown the same kind of executive restraint and respect for the independence of the state prosecutors.

Catch 22 position of the NPA

Although section 179(1)(a) only foresees that the president can appoint the national director, the legislature has interpreted this as a carte blanche for the executive to have an input in every single appointment to the prosecuting authority. Such

appointments ought to be made by an independent personnel department in the prosecuting authority and not by the justice department.

The NPA has, therefore, effectively been turned into an executive pawn. This explains why presidents in the past construed the prosecuting authority as a part of the executive and subject to orders of the cabinet. The outcome has been most unsatisfactory. It has politicised the prosecuting authority and has undermined the rule of law and the neutrality of criminal justice.

Just how perilous the position of the national director of public prosecution (NDPP) is, has been illustrated in recent history. President Mbeki subjected two NDPPs on spurious grounds to commissions of inquiry to consider their fitness to hold office.

It appears that the Constitutional Court has meanwhile realised what serious repercussions the endorsement of section 179(1)(a) has had for the independence of the prosecuting authority and is doing some damage control.

One could have expected that the Court would come out strongly to protect the integrity and independence of the NPA when a clash escalated with parliamentarians and the executive. Many of them no doubt feared criminal prosecutions and tried to avoid that by snipping the tail of the Scorpions.

In the case where the Democratic Alliance contested the propriety of President Zuma's appointment of Menzi Simelane as NDPP, the Court ruled that the President does not have an unrestrained discretionary power to make such an appointment and must appoint a fit and proper person to hold this important office.

Since then President Zuma procrastinated appointing a successor for Simelane for almost a year. At about the same time a court ruled that Advocate Jiba, then the acting NDPP, must hand over the records on which the nolle prosequi in the corruption trial of Zuma was based. Zuma is therefore in the bizarre position that he could appoint the next NDPP who should then 'without fear, favour and prejudice' institute criminal proceedings against him if his umpteenth appeal to avoid prosecution fails.

Zuma's quest to avoid criminal prosecution has carried on for more than a decade and has seriously damaged criminal justice. Selective prosecutions in prima facie cases that would have merited a prosecution are obviously not in the spirit of the Constitution and undermine the rule of law. Unwarranted nolle prosequis also infringe upon judicial power because it has the effect of non-judicial acquittals.

The judgment of the Constitutional Court in the Glenister case which originally contested the abolition of the 'Scorpions' has further exacerbated the NPA's already besieged position. One could have expected that the Court would come out strongly to protect the integrity and independence of the NPA when a clash escalated with parliamentarians and the executive. Many of them no doubt feared criminal prosecutions and tried to avoid that by snipping the tail of the Scorpions.

Instead of endorsing the necessity of the NPA to have a specialised anti-corruption forensic unit to enforce the rule of law and secure a fair criminal justice system, the Court merely insisted on sufficient distance of such a unit from executive control. Since the 'Scorpions' have been abolished, corruption just snowballed out of control.

The constitutional dilemma that faces the location of the successor anti-corruption unit (the 'Hawks'), which is located in the SAPS, is that it is part of the police and is seen to exercise executive power. A criminal justice power to investigate and

prosecute criminal offences has therefore unconstitutionally been turned into an executive power. Criminal law is thus invoked as a form of administrative action. This blurs the boundaries between criminal law and administrative law completely.

It is of the utmost importance that these powers should be delineated properly if the constitutional state should not break down completely. The decay of justice is at a much deeper level. When state prosecution does not function properly, justice suffers because the prosecutors usurp judicial power with selective prosecutions that filter out cases that ought to have been prosecuted. This might lead to grand scale inequality in pre-trial criminal justice, which directly impacts on the capacity of the judiciary to deliver on their constitutional obligations.

If the carving away of the powers of the third branch of state power is not halted, South Africa might end up like the Weimar Republic. During the National Socialist dictatorship in Germany, one of the most modern constitutions of the time broke down because judicial and prosecuting independence was hollowed out.

It is not too late to change course yet. But then the Constitutional Court must set out to save important institutions of the constitutional state such as an independent anti-corruption unit of the NPA more deliberately.

As we have seen, the current appointment procedure of the NDPP is highly problematic in ensuring prosecuting independence from the executive branch. Former President Motlanthe made the worthwhile suggestion that the head of the prosecuting authority ought to be appointed in a similar fashion than judges. One can improve on this idea if the appointment of the NDPP is rather done by a panel consisting of senior judges, senior prosecutors and members of the justice committee of parliament that represent all major political parties in equal numbers, but execluding any members of the executive.