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**The State Capture of Independent  
Institutions:  
An analysis of the National Prosecuting  
Authority, 1998-2017**

**Supervisor: Dr. Fiona Anciano**

**02/10/2018**

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## Abbreviations

ACDP:	African Christian Democratic Party
AIDC:	Alternative Information Development Centre
ANC:	African National Congress
CASAC:	Council for the Advancement of the South African Constitution
CEO:	Chief Executive Officer
CGE:	Commission for Gender Equality
CoCT:	City of Cape Town
CODESA:	Convention for a Democratic South Africa
COPE:	Congress of the People
CPLO:	Catholic Parliamentary Liaison Office
CRL:	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
DA:	Democratic Alliance
DDPP:	Deputy Directors of Public Prosecutions
DG:	Director General
DNDPP:	Deputy National Director of Public Prosecutions
DPCI:	Directorate for Priority Crime Investigations
DPP:	Directors of Public Prosecutions
DSO:	Directorate for Special Operations
EFF:	Economic Freedom Fighters
GNU:	Government of National Unity
HRC:	Human Rights Commission
IEC:	Electoral Commission
IFP:	Inkatha Freedom Party



IPID:	Independent Police Investigative Directorate
ISS:	Institute for Security Studies
MP:	Member of Parliament
NDPP:	National Director of Public Prosecutions
NP:	National Party
NPA:	National Prosecuting Authority
PMG:	Parliamentary Monitory Group
SABC:	South African Broadcasting Commission
SAPS:	South African Police Service
SARS:	South African Revenue Service
SSA:	South African State Security
TRC:	Truth and Reconciliation Commission
UN:	United Nations





## **Title**

The state capture of independent institutions: an analysis of the National Prosecuting Authority, 1998 – 2017.

## **Keywords**

Independent, state capture, Constitution, democracy, independent institutions, political executive, separation of powers, accountability, political influence, factions, infighting.



## Abstract

This thesis focuses on the National Prosecuting Authority (NPA) of South Africa between 1998 and 2017, by looking at whether it acts as an independent institution and if it strengthens the quality of democracy in the country. The research addresses various sub-research questions such as, what is independence? What is a quality democracy? Is the NPA able to foster democratic accountability? It further assesses to which extent executive influence and leadership instability affect the independence of the NPA, by looking at the relationship between the executive – the state Presidents’ and government officials – and the NPA, over the years, in terms of the law practiced. And lastly, whether the role of ANC has affected the NPA.

These questions arise out of my interest to understand the NPA in terms of its constitutional mandate and how it impacts democracy. The principal concepts used to date indicates that democracy comprises several procedural norms. These democratic norms – accountability, the constraint of executive power, the separation of powers, and the rule of law form the bases for my research study; while other integral factors include independence, state capture, and dominant party systems. The research methodology for this thesis incorporated qualitative research, a case study, and triangulation. The research also included interviews, with Advocate Shaun Abrahams, Dr Silas Ramaite, Advocate Vusi Pikoli, Advocate Glynnis Breytenbach, Mr Steven Swart, Mr Lawson Naidoo, Mr Paul Hoffman, Dr Jeff Rudin, Professor Lukas Muntingh, Professor Lovell Fernandez, Mr Gareth Newham, and Advocate Mike Pothier as the interviewees.

The data analysis and synthesis suggest that the lack of oversight of the NPA alongside the political dominance of the ANC has allowed for an infiltration of political influence within the institution resulting in the selective prosecution of high-profile cases. The data highlights the blurring of lines as a result of state capture which has tainted the NPA’s independence. The importance of this research study lies in the relationship of the NPA and democracy, as an erosion of the NPA essentially correlates with the weakening of democracy. Therefore it is vital to protect our independent institutions, like the NPA, as they strengthen our democracy, assist in upholding the rule of law and the Constitution.

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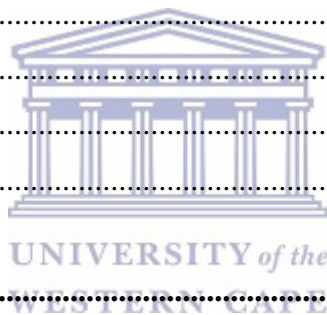
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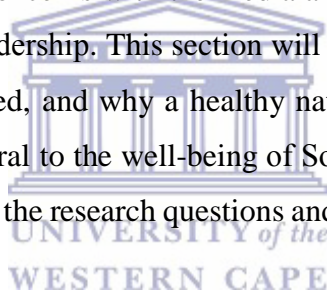
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# Chapter One: Introduction and Outline of Research Problem

## Introduction

The state capture of independent institutions became a prominent issue under President Jacob Zuma. Multiple independent institutions<sup>1</sup> and parastatals have come under threat either through factions, infighting, or unwarranted changes in leadership (with some leaders deemed not ‘fit and proper’ for the job). One institution significant to the health and integrity of South Africa’s constitutional democracy, which too is under looming threat, is the National Prosecuting Authority (NPA). In 2015, when President Zuma appointed Advocate Shaun Abrahams as the National Director of Public Prosecutions (NDPP), he was the ninth NDPP in the organisation’s 18 years of existence. This was an alarming trend in the NPAs leadership, as the institution should have only been on its second NDPP. An NDPP has an assured tenure of ten years as a measure to safeguard the organisation’s independence. The inability of the NPA to hold an NDPP for their full term raised concerns with the media and the public, signalling instability within the prosecuting body’s leadership. This section will look at a brief history of the NPA, how it has potentially been eroded, and why a healthy national prosecuting body and more importantly its leadership is integral to the well-being of South Africa’s democracy; the latter section of this chapter will look at the research questions and objectives for this research study.



### 1.1 Independent institutions

When South Africa was declared a democracy in 1994, the country recognised the need for independent institutions to protect and uphold its new found democracy. Independence is defined as “free from outside control; not subject to another’s authority” or “self-governing” (Oxford Dictionary, 2018, n.p.). Independent institutions act as sovereign bodies or watchdogs on behalf of the state, however, they operate independently of government and partisan politics. These independent institutions vary from regulatory bodies, commissions, and investigating bodies. In South Africa, most independent institutions form part of Chapter 9 in the Constitution. According to Murray (2006, p. 122), the Constitution makes provision for six independent state institutions to support its constitutional democracy – the Public Protector (Ombudsman), South African Human Rights Commission (HRC), Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the

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<sup>1</sup> This thesis will use the words independent institution, democratic independent institution, and independent state institution interchangeably.

CRL Commission), Commission for Gender Equality (CGE), Auditor-General, and the Independent Electoral Commission (IEC).

The role of independent institutions in South Africa differ depending on the task of its office, but each office has the same core features. For example, the Chapter 9s are state institutions, which operate outside of the government and are not a branch of the government. Similar to the courts, the Chapter 9s are expected to be independent and impartial, however, to varying degrees they are intermediary institutions that provide a link between people, on the one hand, and the Executive and Parliament on the other. This is done through their investigatory and certain administrative powers. The Chapter 9s independence is a mechanism to depoliticise the institutions from government, partisan politics, and other interferences (Murray 2006, p. 126). The NPA, however, differs from the Chapter 9 institutions. Although the NPA and Chapter 9s are both independent state institutions, the two vary significantly.

The NPA, unlike the Chapter 9s, forms part of the Criminal Justice System and is legislated by the NPA Act (1998, No.32). The criminal justice system is made up of a range of sectors including the South African Police Service (SAPS), HAWKS, judiciary and courts, prisons, and the NPA. The aim of the Criminal Justice System is to prevent crime and provide law enforcement in order to create a safe environment and ultimately protect human rights. Similarly, the NPAs vision is to ensure justice in South Africa so that South African's can live in freedom and security, while it undertakes to ensure justice for the victims of crime by prosecuting without fear, favour, or prejudice. Because it forms part of the criminal justice system, it is an extension of the Executive branch of government. So even though the NPA is an independent institution, it is not immediately outside of government. It should, however, remain free from partisan influence and be impartial. The unique position of the NPA allows the institution to prosecute criminal cases on behalf of the state and carry out any necessary tasks incidental to instituting criminal proceedings, as well as discontinue criminal proceedings. Additionally, the Minister of Justice oversees the NPA with constitutional limitations. The constitutional limitations on political influence legally guarantee the NPAs independence.

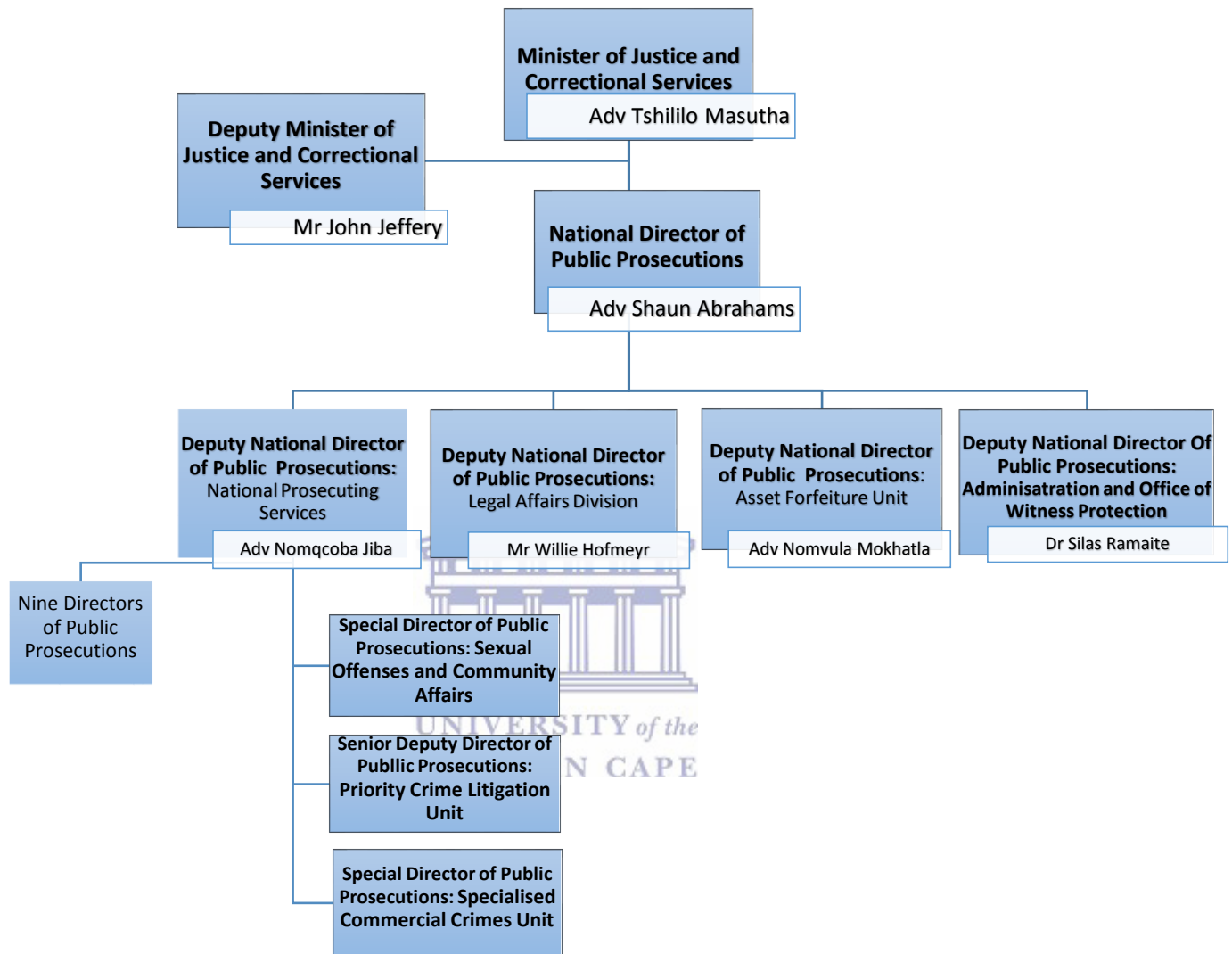
According to the preamble of the NPA Act, in terms of Section 179 of the Constitution provides for the establishment of a single National Prosecuting Authority, the appointment of an NPA head, namely an NDPP, by the President. It further constitutes for the appointment of Directors



of Public Prosecutions and prosecutors, and the cabinet member responsible for the administration of justice to exercise final responsibility over the NPA. It ensures the DPPs are appropriately qualified and are responsible for prosecutions in specific jurisdictions. The Constitution safeguards the need for the NPA to exercise its functions without fear, favour or prejudice. It further provides the NDPP, with the concurrence of the Minister of Justice and Correctional Services, must decide the administration of justice, consult on the DPPs, and prosecution policy which must be practical in the prosecution process. It affords the NDPP with the power to intervene in the prosecution process when policy directives are not abided by, as well as the power to review a decision to prosecute or not to prosecute. It provides the NPA with the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions essential to instituting criminal proceedings. Lastly, it provides for all other matters relating to the NPA to be set by national legislation (NPA Act 32, 1998, p.1-2).

It is important to compare the NPA and the Chapter 9 institutions because of their differentiation. Both institutions are independent but differ in their mandate, functions, and duties. Furthermore, it also sheds light on why the NPA cannot be more autonomous in their functioning like the Chapter 9s, as the former prosecutes on behalf of the state and is part of the executive, while the latter acts as a watchdog of government (departments and parastatals) and government officials on behalf of the people. See **Figure 1**.

**Figure 1: High-Level Organisational Structure of the NPA** (Source: adapted by the author, derived from: NPA Annual Report 2015/2016, p.19)



It is important to mention that this research study will specifically address the NPA senior leadership, although look at the constitutional mandate and the NPA Act in accordance with the institution in its entirety. The NPA operates in two levels, the lower level – ordinary court prosecutors, and the senior level – senior NPA prosecutors and officials. The NPA prosecutes all crime on behalf of the state on a day-to-day basis. These crimes range from petty theft to high-profile cases. On the lower level, the NPA ostensibly functions normally. However, it is at the more senior level that we find the NPA to seemingly be politically captured causing its independence to be questioned, due to the alleged biases of its leadership when prosecuting high-profile cases. As a result, over the

last few years, it has become increasingly evident that independent institutions, like the NPA in South Africa, are under the looming threat of state capture

## **1.2 State capture**

The term state capture, Chipkin (2016, p.1), expresses is an extreme form of corruption, whereby the rule-making process itself is apprehended by government officials who regulate their business to favour private interests. State capture is traditionally defined as “the process through which firms make private payments to public officials to influence the choice and design of laws, rules, and regulations” (Matei, n.d. p.2). This thesis will use Matei’s definition of state capture. The concept of state capture is not new, but to most South Africans it is new and has often become synonymous with the Zuma administration. More particular regarding President Zuma’s relationship with the Gupta family. The term state capture, in this research study, therefore refers to captured government officials who adjust their business to align with or influence their private interest. State capture firmly finds its roots in the ideology of the separation of powers. For example, according to Roelf (2008, n.p.), in October 2008, the President signed the disbandment of the Scorpions into legislation after the Scorpions were accused by the African National Congress (ANC) of abusing their power in political cases as too many government officials were being arrested or found guilty of corruption. According to Ndlangisa (2014, n.p.), in a statement by the Public Protector, Thuli Madonsela, accused the government of interfering in the functioning of her work in office. More recently has been the removal and golden handshake of the national HAWKS boss, Anwar Dramat, for the alleged illegal rendition and killing of two Zimbabwean citizens (Davis 2015, n.p.). It is important to question if the abovementioned instances of the alleged political interference in independent institutions by government officials are unconstitutional and overstep their mandate as set out by the Constitution. These examples highlight the infringements by government officials that have occurred in independent state institutions in South Africa. For this thesis, it is important to determine whether the executive is overstepping its role in the NPA, by examining its mandated role in the Constitution and the NPA Act.

According to Paton (2015, n.p.), since his inauguration in 2009, President Zuma placed an array of supporters in key positions, from the cabinet and state-owned enterprises to the police and the national broadcasting station – SABC. These adherents were usually individuals with a close relationship to the President and deployed as either ministerial advisers in government departments, parastatals or democratic independent institutions. The President’s hold on the

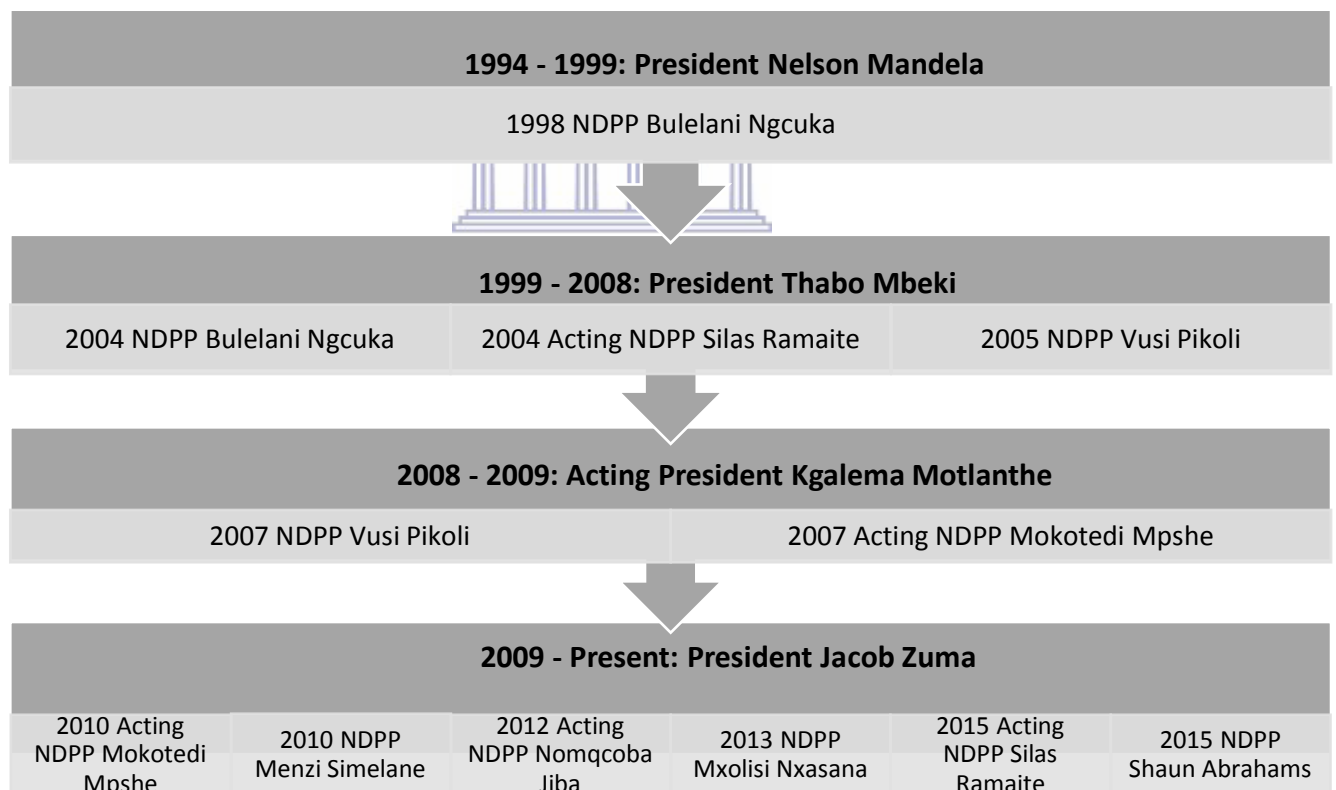
government and state institutions has effectively been done mostly through the appointment process. According to Paton (2015, n.p.), President Zuma used his powers of appointment more cynically than his predecessors, as the President extended his authority to make appointments beyond those allowed for in the Constitution. According to Buys (2016, n.p.), President Zuma used his powers of appointment to his advantage by “deploying” loyal cadres and personal friends as the heads of the abovementioned institutions. Furthermore, Buys (2016, n.p.), states that the President used this network of personal appointments as a mechanism to control the country, instead of through the official institutions.

Paton (2015, n.p.), further suggests that the President had a hand in picking individuals for the SABC and boards of state-owned enterprises. The role of selecting individuals for these positions is under the authority of the minister and confirmed by the cabinet. The influence in the selection process of the heads of these institutions has occurred on several occasions. For example, the president ensured the ANC committee on communications included Ellen Tshabalala on the SABCs candidates list, the President advised the Minister of Public Enterprises to retain Dudu Myeni at South African Airways (SAA), the President lobbied for Ben Ngubane as chairman of Eskom, and although three insiders had been tipped for the job at SARS the President petitioned for Tom Moyane as successor (Paton, 2015, n.p.). The influence of politics in independent institutions has seen the resignation and dismissal of the various heads of these integral institutions. The NPA, unfortunately, is no different, in the institutions 18 years of existence there were nine different NDPPs and Acting NDPPs, with five of the appointments being during Zuma’s administration.

The NPA has been troubled since the appointment of its first National Director of Public Prosecutions (NDPP), Advocate Bulelani Ngcuka. Here is a brief timeline of the NDPPs over the last 18 years of the NPA’s existence. Advocate Bulelani Ngcuka was first appointed NDPP of the NPA in 1998. During his tenure, he was labelled, by the media, as an affiliate of the ANC. In 2004, Advocate Ngcuka resigned as NDPP, citing personal reasons as the basis for his decisions, However, it was alleged that Advocate Ngcuka’s decision to step down as NDPP was based on his failure to prosecute former Deputy President Jacob Zuma on corruption charges relating to the ‘Arms Deal’ saga. Advocate Silas Ramaite then became the Acting NDPP from 2004 – 2005. In 2005, Advocate Vusi Pikoli succeeded Acting NDPP Advocate Ramaite as NDPP, but this was short-lived as President Mbeki suspended Advocate Pikoli on the grounds of an ‘irretrievable breakdown’ between Advocate Pikoli and the then Justice

Minister. Parliament then supported former President Mbeki’s decision to suspend Advocate Pikoli. Advocate Pikoli was ultimately fired by Acting President Kgalema Motlanthe even after the Ginwala inquiry cleared him of any wrongdoing causing the NPA to take a knock. Thereafter, Advocate Pikoli was replaced by Acting NDPP Advocate Mokotedi Mpshe from 2007 – 2010. In 2010, Advocate Mpshe was replaced by NDPP Advocate Menzi Simelane. In 2012, Advocate Simelane was replaced by Acting NDPP Advocate Nomqocoba Jiba, who in turn was replaced by NDPP Advocate Mxolisi Nxasana from 2013 - 2015, after his fitness in office was questioned by the President despite previously knowing of his checkered past. In May 2015, Advocate Nxasana was then replaced by Advocate Shaun Abrahams as the new NDPP while Advocate Jiba became the deputy NDPP. See **Figure 2**.

**Figure 2: NDPP Timeline** (source: author)



Since the NPA’s establishment, it has played a significant role as South Africa’s prosecuting body. According to the NPA (2014, para.1), it is mandated by the Constitution to afford all citizens the right to enjoy a better quality life free from fear and crime, by ensuring that perpetrators of crime are held responsible for their criminal activities. Despite this, the

leadership of the NPA has come under scrutiny from the media, opposition political parties, and subject experts alike for the seemingly outright politicization of the institution.

The NPA plays a major role in the investigation and prosecution of high-profile and difficult cases. When investigating high profile cases, regardless of the subject of investigation, the NPA should remain impartial as an independent institution and follow its mandate by prosecuting without fear, favour, or prejudice. However, the dropped corruption charges against President Zuma suggests otherwise. Prior to being elected as the President of the ANC at the 2007 ANC elective conference, President Jacob Zuma was first served with 783 corruption charges by the NPA head Bulelani Ngcuka. For example, according to the Sunday Times (2016, n.p.), Zuma's corruption charges spanned from racketeering, corruption, fraud, money laundering, and making false statements in income tax returns among others. Shortly after Advocate Ngcuka instated the charges against Zuma, he withdrew them. The charges were then reinstated during Advocate Pikoli's tenure as NDPP, but in 2009 Acting NDPP Mokotedi Mpshe dropped the criminal charges against the then-aspiring ANC President Zuma. This was before Zuma was elected as the President of South Africa in the 2009 national elections. The Sunday Times (2016), states that Jacob Zuma's charges were dropped on the basis that it was deemed irrational and should be set aside for review. In 2009, Mail and Guardian (2009, n.p.), explains how then Acting NPA head Mokotedi Mpshe stated charges against ANC presidential candidate, Jacob Zuma, were being dropped. The dropped charges were received with some suspicion as it occurred eight years into the NPA's case and two weeks before the ANC presidential elections. Jacob Zuma won the ANC presidential election and the ANC won the 2009 national government election, where he became the President of South Africa.

In addition, there are various other incidences of irregularities in the NPA that have come afore. For example, according to Sole (2015, n.p.), the appointment of Nomgcobo Jiba – an alleged firm favourite of the President – as Acting NDPP in 2012, who in was replaced by Mxolisi Nxasana in 2013. Shortly after Nxasana's appointment, Advocate Jiba was charged with perjury and faced disbarment from the General Council of the Bar. A year into his tenure Advocate Nxasana's fitness in office was questioned and he was given a golden handshake. In 2015, Advocate Jiba's perjury charges were dropped by current NDPP Shaun Abrahams. And lastly, Grootes (2016, n.p.), the criminal charges against former NPA prosecutor and now Democratic Alliance (DA) Member of Parliament (MP), Glynnis Breytenbach, for defeating and obstructing the ends of justice that were later dropped by the court. Advocate Breytenbach



was also charged with four counts of contravening the NPA Act – one of which relates to the wiping of files from Breytenbach’s NPA laptop (Grootes, 2016, n.p.). Other possible political influences that face the NPA are the issues of factionalism and infighting, which can create instability within the institution. According to Grootes (2014, n.p.), Gauteng HAWKS head, Prince Mokotedi, admitted to a ‘Zuma’ faction within the NPA during a phone call conversation on Talk Radio.

The seeming politicisation of the NPA arguably hinders its integrity as a prosecuting body, an independent institution, and its role in supporting a free and safe South Africa. In addition, it hinders the NPA’s ability to actively contributing to the growth of the South African economy, freedom from crime, social development, a culture of civic morality, reducing crime, and ensuring the public’s confidence in the criminal justice system (NPA, 2014, para. 4). However, unlike media reports surrounding the NPA, my research hopes to establish the effects that the alleged political influence could have on the future of the NPA as an independent institution, as well as democracy in post-apartheid South Africa.

### **1.3 Research questions and objectives**

This dissertation will look at the importance of the NPA as a democratic independent state institution, especially as the prosecuting body of South Africa. According to the NPA (2014, para.1-2), the institution was established on the basis of freedom and security, and to provide prosecution without fear, favour, or prejudice. However, various incidences surrounding and within the NPA, as mentioned above, suggests otherwise. Therefore it is important to question if the NPA has been plagued by political opportunism that prevents it from effectively doing its job as the prosecuting body of South Africa. As a result, my main research question and sub-questions are as follows;

#### **1.3.1 Primary research question:**

Does the NPA act as an independent state institution and does it strengthen the quality of democracy in South Africa?

##### **1.3.1.1 Secondary research questions:**

- What does it mean to be independent and why is it integral to democracies?
- What is a quality democracy?

- Does the NPA foster democratic accountability?
- To what extent does leadership instability in the NPA affect the independence and effectiveness of the NPA?
- What is the relationship between the political executive and the NPA in terms of the law?:
  - In practice, how has the political executive and their political party influenced the NPA between the years 1998 to 2017?
  - How has the NPA's relationship with state Presidents been affected since 1998?

As an independent institution, the NPA upholds South Africa's democracy through its mission to prosecute without fear, favour, or prejudice. By its goals in contributing to the growth of the South African economy, freedom from crime, social development, promoting a culture of civic morality, reducing crime, and ensuring public confidence in the Criminal Justice System. And finally, its lengthy list of values – integrity through ethical conduct, high moral standards, honesty, principles and values, zero corruption and fraud; accountability through responsibility and answerability; service excellence; professionalism; and credibility.

This thesis has six chapters, each discussing the various aspects relating to the NPA and the research questions. Chapter one: introduction, is the introductory chapter provides background on the importance of doing research on the NPA, as the country's prosecuting body it has had quite a troublesome history. Chapter two: principal concepts, will look at the principle theories relating to the NPA. The principle theories accountability, the constraint of executive power, separation of powers, and the rule of law centres on the theory of democracy, while state capture and dominant party systems are often the consequences for when democratic norms go awry. Chapter three: research methodology, explains the research tools used to conduct the research for this study, for example, qualitative study, case study, and triangulation. Chapter four: framing the National Prosecuting Authority, describes the findings of the conducted research gathered by secondary source and interviews conducted with senior NPA officials, Portfolio of Justice Committee Members, and subject experts. Chapter five: analysing the National Prosecuting Authority, is an analysis of the research findings with comments from the interviews, and Chapter Six the concluding chapter of the thesis. For this thesis I have interviewed subject experts, members of the portfolio committee of Justice and Correctional Service and senior NPA officials both former and current, namely Advocate Shaun Abrahams, Dr Silas Ramaite, Advocate Vusi Pikoli, Advocate Glynnis Breytenbach, Mr Steven Swart, Mr



Lawson Naidoo, Mr Paul Hoffman, Dr Jeff Rudin, Professor Lukas Muntingh, Professor Lovell Fernandez, Mr Gareth Newham, and Advocate Mike Pothier.

### **Conclusion**

Thus to establish if the NPA is an independent state institution as set out in South Africa's constitution, my theoretical framework will provide an outline with which to assess the NPA's independence and how it impacts our democracy. In my framework, four key themes are looked at on the subject of the NPA: theme one, democratic norms and the relationship of accountability and independent institutions; theme two, the idea of the constraint of executive power and the separation of power; theme three, the importance of the rule of law and effects of state capture; and theme four dominant party systems.



## Chapter Two: Principal Concepts

### Introduction

The NPA is an independent institution set up by the Constitution, under the Criminal Justice System, to safeguard the protection of human rights and to guarantee a constitutional democracy by ensuring its vision in order for justice prevails in society so that people can live in freedom and security. Since the formation of the NPA in 1998, it has played a significant role as South Africa's national prosecuting body to warrant justice, through its mission, for victims of crime by prosecuting without fear, favour, or prejudice (NPA, 2014, para.1-2). To establish whether the NPA is an independent state institution through the abovementioned, I need to establish a set of principal concepts. Therefore, the principal concepts in this chapter will set the framework for the overall thesis. This chapter will focus on two parts, part I will look at democracy as the main concept and its sub democratic norms. These sub-norms includes accountability, the constraint of executive power, the separation of powers, the rule of law. Part II will look at the concepts of independence, state capture, and dominant party systems.

### 2.1 Part I

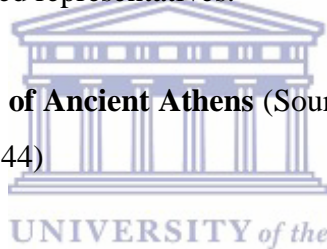
#### 2.1.1 Democracy

According to Hague and Harrop (2013, p.43), the key principle of democracy is the idea of 'self-rule'. The word democracy originally derives from the Greek word 'demokratia', 'demos' meaning by the people and 'kratos' meaning rule, in other words 'rule by the people'. In essence, democracy is a form of self-government whereby all adult citizens can participate in shaping the collective decision-making on equality and deliberation (Hague and Harrop, 2013, p.43). There are three forms of democracy; direct or participatory, indirect or representative, and liberal.

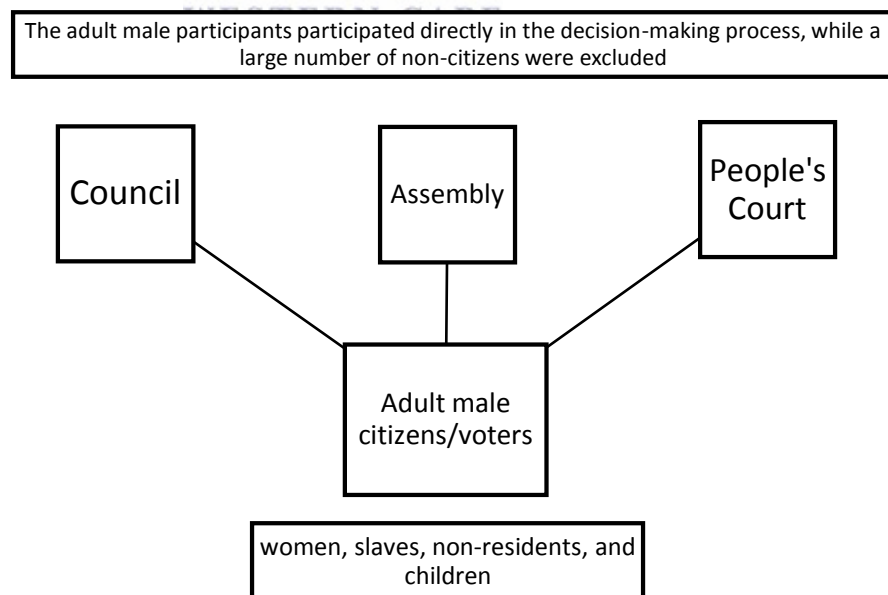
Direct democracy was the first form of democracy. It was developed in ancient Athens, Greece. At that time, Athens was the leading 'polis' or city-community. 'Poleis' or city-communities were small self-governing political systems, a city-community typically consisted of an urban core and a rural hinterland (Hague and Harrop, 2013, p.43). City-communities operated on the democratic principles of:

“all to rule over each and each in his turn over all; appointment to all offices, except those which require skills and experience; no property qualification for office holding, or only a very low one; tenure of office should be brief and no man should hold office twice – with the exception of military positions; juries selected from all citizens should judge all major causes; the assembly should be supreme over all causes; those attending and serving the assembly as jurors and magistrates should be paid for their services” (Aristotle in Hague and Harrop, 2013, p.44).

In ancient Athens direct democracy was flawed as citizenship was restricted to men over the age of 20, participation was not extensive as citizens did not always attend assembly meetings, the system of direct democracy proved time-consuming and self-governing did not always translate into decisive and coherent policy (Hague and Harrop, 2013, p.45). However, modern democracy, in comparison to the direct democracy of ancient Athens, differs greatly as indirect democracy operates through elected representatives.



**Figure 3: The direct democracy of Ancient Athens** (Source: adapted by the author, derived from: Hague and Harrop, 2013, p.44)



Indirect or representative democracy is the principle of elected government. The elected government stands as a representative for the group that elected him or her to govern. In an indirect democracy, various political parties vie for a vote by competing in elections. Usually, the political party that receives the most votes wins the election and thus becomes the people's representative. According to Hague and Harrop (2013, p.47), in an indirect democracy, political life is available to those who want it, while those with no political agenda can focus their attention to monitoring government and voting at elections. In so doing, the elected rulers remain accountable for their decision-making (Hague and Harrop, 2013, p.47). Another type of democracy is a liberal democracy.

A liberal democracy “is a regime in which a ‘liberal’ commitment to limited government is blended with a ‘democratic’ belief in popular rule” (Heywood, 2017, p.40). According to Heywood (2017, p.40), there are three key features of a liberal democracy, the right to rule through regular and competitive elections where every adult has the right to vote; the constraint of government power enforced by a Constitution to ensure institutional checks and balances for the protection of individual rights; and an active civil society which embraces a private enterprise economy, independent trade unions, and free press. Other features include individualism, freedom, reason, equality, tolerance, consent, and constitutionalism (Heywood, 2013, p.32).

Democracy, according to Heywood (2017, p.36), refers to the ‘rule by the people’ and is defined as “common values shared by peoples throughout the world community irrespective of cultural, political, social and economic differences. It is thus a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility, with due respect for the plurality of views, and in the interest of the polity.” (Bassiouni et al, 1998, p.VI). To establish a democracy, Dahl (2000, p.3), states that people should form an association in order to attain a certain common end. This Rousseau (1923, p.14), refers to as the social contract. There are different ways of understanding how a democracy can flourish; one way is Morlino's view of a good democracy, and an alternative view is Dahl's ideal democracy.

In Morlino's view (2007, p.15), in a good democracy, the rule of law is preserved and respected. Democracies have various forms and degrees and can be identified through a number of critical features. These critical features include the application of the legal system which enables people to be prosecuted for criminal behaviour, together with the sub-national level

which will guarantee the rights and equality of citizens. Following from that, an equal, unhindered, access to the legal system between private citizens or between private citizens and public institutions. The absence of areas dominated by organized crime for a safer living and working environment. The absence of corruption in the political, administrative, and judicial branches. The presence of local and centralized civil bureaucracy that is competent, effective and universally applies the law and assumes responsibility for their actions and lack thereof. The assurance of an efficient police force that respects the rights and freedoms guaranteed by law for both themselves and citizens overall. A reasonable, swift resolution of criminal inquiries, and civil and administrative lawsuits. And finally, the complete independence of the judiciary, and I will include independent institutions, from any political influence. While the above-mentioned refers to Morlino's idea of a good democracy, alternatively according to Dahl (2005, p.188-9) in an ideal democracy it is important to establish certain norms for a democratic process to occur. In South Africa, these critical features are inherent in our Constitution as set out in 1996, however, it is not always practised.

In Dahl's view (2005, p.188-9), there are several norms for an ideal democracy. The first norm for an ideal democracy is effective participation, this allows citizens the opportunity to partake in free and fair elections and efficient participation in all spheres of government. The second norm is voting equality, which grants everyone the chance to be equal under the law and to have an equal and effective opportunity to vote. Thirdly, meaningful and extensive competition should occur whereby political parties and their leaders are able to freely contest for support, without the fear of persecution from competing parties. Fourthly, citizens should be able to enjoy the civil and political freedom of a democracy and be able to form and join independent associations, express interests, as well as freedom of belief, opinion, speech, assembly, demonstration, and petition. Fifth, accountability is necessary in order for an accountable and responsive state and government. Sixth, the ability of the government to exercise a constraint of executive power through a separation of powers i.e. the executive, legislation, and judiciary. Lastly, citizens should be able to access alternative sources of information such as the media and civil society, to name a few, which is a crucial aspect of both vertical and horizontal accountability, and the survival of a democracy (Dahl, 2000, p. 3-4). Like Morlino's critical features, Dahl's norms are ingrained in South Africa's democracy, on the contrary, a few of the norms, more specifically, accountability, the constraint of executive power, the separation of power, and the rule of law are not always practised.

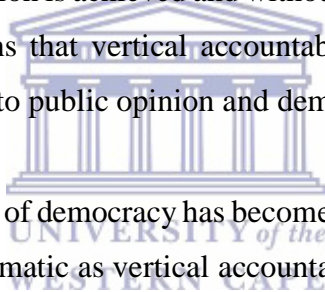
While all these democratic norms are important in post-apartheid South Africa and visible in most aspects. The key ones relevant to this thesis are accountability, the constraint of executive power, the separation of powers, and rule of law.

### **2.1.2 Accountability**

Accountability is defined as “the obligation of elected political leaders to answer for their political decisions when asked by citizen-electors or other constitutional bodies”, (Morlino, 2004, p.17). For freedom and equality to be present, accountability and responsiveness should be upheld as accountability and responsiveness are fundamental for a good democracy in order for it to prosper. According to Schedler (1999, p.14), accountability is a two-dimensional concept that answers and enforces. Answerability, on the one hand, ensures that officials in government are answerable for their actions or inactions. This is done by either informing society about their decisions or explaining their decisions. Subsequently, this part of accountability involves elements of monitoring and oversight, as well as to subject power to the rule of law and the rule of reason, which results in a dialogical relationship between the accountable and the accounting actor. Enforcement, on the hand, is the idea of rewarding good behaviour and punishing bad behaviour. In so doing, who is accountable for what and to whom? In democratic states, government officials are usually rewarded or punished for their actions or inactions through citizens either voting for or against them in elections.

Moreover, as Schedler (1999, p. 22) explains that the diverse standards of accountability, in its broader sense, suggests that we differentiate between a variety of types of political accountability. On the other hand, political accountability, in its narrower sense, assesses the suitability of policies that are necessary and policymaking processes. Accordingly, it also brings judgement on the personal qualities of political actors. Thus, administrative accountability reviews the expediency and procedural correctness of bureaucratic acts. Professional accountability fulfills the roles of ethical standards of professionalism which can include medical, academic, and judicial professionalism. Financial accountability is the subjective use of public money by government officials for typical patterns like refraining from non-indulgence, efficiency, and propriety. While moral accountability is the evaluation of political acts on the basis of prevailing normative standards which are independent of formal rules and regulations. Legal accountability is deemed as monitors that observe legal rules. And finally, constitutional accountability is the evaluation of legislative acts that are in accordance with constitutional rules.

According to Schedler, et al (1999, p.2), the problems in new democracies often point to weaknesses in the rule of law and weaknesses in public accountability, where there are no institutionalized checks and balances. Therefore, watchdogs are an essential part of democracy. Watchdogs or agents of accountability extend into two sub-categories, vertical and horizontal accountability. Vertical accountability, in Schedler's (1999, p. 23), view describes the relationship between unequal's- the uneven balance of power between government and the people, and in contrast, horizontal accountability describes the relationship between equals. While vertical accountability in Morlino's (2004, p. 17), view involves actors who govern – the accountable, and those who are governed – the accounting. These sets of actors, as a result, are not politically equal. The process occurs when the governed elects a governor, be it a representative or political party, to represent them in favour of their needs (or often what was promised by the governor during an election campaign). Vertical accountability is only legitimate when political competition is achieved and without it vertical accountability is weak. O'Donnell (1999, p. 30), explains that vertical accountability presupposes that citizens do exercise their participatory rights to public opinion and democratic demands.



In most democratic states, the idea of democracy has become closely identified with the process of elections. This becomes problematic as vertical accountability cannot just be limited to the process of elections every few years. Vertical accountability has to be open to other forms of public participation too. Smulovits and Peruzzotti cited this in O'Donnell (2003, p.47), referring to it as (vertical) societal accountability. Thus Smulovits and Peruzzotti (2003, p.47), states that it is a non-electoral mechanism of control of political authorities that rests on the actions of civil society, social movements, and the media. These actions aim at exposing government's transgressions, by bringing these issues to the public agenda or triggering the agents of horizontal accountability. It employs both institutional and non-institutional tools. The former triggers legal actions or claims before oversight agencies; while the latter refers to social mobilizations.

On the other hand, horizontal accountability as explained by Morlino (2004, p. 18), is the responsibility of governors to answer to other institutions or collective actors of equal power or position, such as regulatory bodies or independent institutions, that have the expertise and power to control the behaviour of those in power. Schillemans (2008, p. 179), agrees but further suggest that there are four main elements of horizontal accountability. First, there is an



acknowledged formal relationship between the ‘accountor’ and ‘accountee’ and the ‘accountee’ is independent of the hierarchical relationship between the two. Following this is the process of accountability which starts with the information stage, whereby the ‘accountor’ is obliged to explain their actions or inactions. A debate then follows between the ‘accountor’ and ‘accountee’, in which the ‘accountee’ passes judgement on the ‘accountor’. Lastly and consequently the ‘accountor’ is punished either by formal or informal sanctions. In O’Donnell’s (2003, p. 34), opinion horizontal accountability is the existence of independent democratic state institutions that are legally able, empowered, and willing to take action. These institutions span from routine oversight, criminal sanctions, or impeachment in relation to actions or omissions by other institutions of the state that may be qualified as unlawful. In other words, these institutions are known as ‘watchdogs’ of horizontal accountability.

O’Donnell (1999, p. 41), explains that institutions of horizontal accountability can qualify as unlawful as a result of two occurrences. One way independent institutions of horizontal accountability can qualify as unlawful is when an encroachment by one state institution upon the proper authority of another occur. Another way these institutions can be deemed unlawful is the irregular advantages that public officials obtain for themselves. “The effectiveness of horizontal accountability depends not just on single agencies [institutions] dealing with specific issues but on a network of such agencies [institutions] that includes courts committed to supporting this kind of accountability.” (O’Donnell, 1999, p. 41). Thereby Morlino (2004, p.17), suggest that horizontal accountability centres on a legal system that provides for the exercise of checks and balances by other public entities independent of the government, not competing as an alternative to it. Depending on the type of accountability, watchdogs can come in the form of vigilant political opposition, independent mass media, well developed civil society organisations, or independent institutions.

O’Donnell (1999, p. 43), states that there are a number of ways in which horizontal accountability can be enhanced. Firstly, opposition parties should have an important role in directing institutions in investigating alleged cases of corruption. Secondly, institutions that perform preventative roles should be highly professional, endowed with resources that are both sufficient and independent of the executive, and separate as much as possible from the executive. Thirdly, horizontal accountability requires a judiciary that is professional, a capable budget, independent from the executive and independent in decision-making. Fourthly, develop devisable reforms in institutions that have been rendered ineffective by delegating



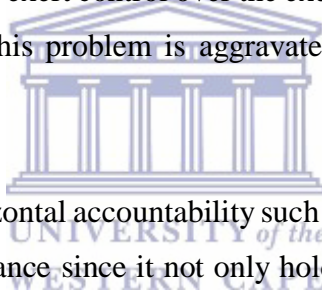
presidents and willing legislatures. Fifth, ensure that weak, poor, and unequal societies are supported by independent institutions. Sixth, have reliable, timely, and independent media. Seventh, to have lively and persistent participation from domestic actors. And lastly, the need for individual opinion and support because even though political and institutional leaders matter, despite instances of corruption and encroachment, horizontal accountability still values the input of the public.

Although there are ways in which horizontal accountability can be enhanced, there are also several limitations to horizontal accountability. According to O'Donnell (2003, p. 45), these limitations take account of the fact that the balance of institutions – executive, legislature, and judiciary – tend to be sensitive and erratic when confronted by alleged transgressions by other independent institutions. The actions toward institutions of horizontal accountability that are of equal power, may be prone to conflict. This kind of action between top independent institutions, such as the Chapter 9 institutions, the HAWKS (Directorate for Priority Crime Investigation), Independent Police Investigation Directorate (IPID), or the NPA in South Africa, may become visible and costly to the public. Conflicts, however, worsen when parliamentary regimes involve powers (the executive and legislative) that share electoral legitimacy. This is evident in South Africa with the conflict of authority between the executive, legislature, judiciary and sometimes the National Prosecuting Authority. The actors involved in these types of conflicts are often observed to be encouraged by prejudiced reasons, therefore adding to the difficulties of solving a given conflict. As a final point, due to their own main functions and the focus of attention on their leaders and not their values, the balance of institutions as a measure of control is too direct for the growing complication of institutions and their policies. Therefore, we cannot merely rely on a separation of powers as a tool of preventative measures but need to put in the proper oversight measures.

While institutions of horizontal accountability are important, it is of equal importance to question who holds these institutions accountable for their actions or lack thereof. There are various forms of institutions of horizontal accountability. The next section will look at accountability in South Africa, second-order accountability, political opposition, and independent institutions – which I will discuss in the latter part of this section.

### **i) Accountability in South Africa**

According to Murray (2006, p. 129), the idea that government should be checked is familiar. In liberal democratic constitutions like ours, checks and balances on the government take many forms. The requirement that the executive account to Parliament and its power to dissolve the executive are ways in which Parliament can check the executive and curb abuses of its power. However, this process then becomes complicated in one-party dominant states like South Africa. In South Africa, the percentage of votes you get in a national election is equivalent to the number of seats you get in Parliament as a party. As a result, the party that has the majority of the seats in Parliament is the same party liable to check and curb the abuses of power of the executive that belongs to that same party. The traditional "checks and balances", as Murray (2006, p. 130) explains, intended to control government and the use of power which has developed over centuries. However, they have not always been effective. In particular, in parliamentary systems, the relationship between the executive and legislature often leaves the majority in Parliament reluctant to exert control over the executive. Instead, it interprets its role as supporting the government. This problem is aggravated in systems like in South Africa whereby one party dominates.



Moreover, the other forms of horizontal accountability such as second-order accountability and political opposition are of importance since it not only holds the government constitutionally accountable for their actions or lack thereof, on behalf of the country's citizens, but it is also a measure of holding each other to account.

### **ii) Second-order accountability**

Second-order accountability, according to Schedler (1999, p. 25), holds institutions of accountability to account when they abuse their power in office. As a result, two things are established, reciprocal accountability and recursive accountability. Reciprocal accountability is the checks and balances placed on each other by two institutions, whereas recursive accountability, is much like the former, however, unlike reciprocal accountability, multiple institutions hold each other to account. "Achieving a significant degree of... accountability requires the coordination of several agencies, each of them subject to *divide et impera* strategies." (O'Donnell cited in Schedler, 1999, p. 25). Additionally, the contradiction of horizontal accountability, according to Schedler (1999, p. 24), is that specialised institutions hold actors accountable who are immensely more powerful on all accounts except in the agency's specific spheres of competence. Moreover, accountability of answerability does not

include the power to punish those accountable for bad behaviour, as it only allows the right to get an answer. An example of this is the Chapter 9 institutions i.e. the Public Protector. Another form of horizontal accountability, other than independent institutions, is political opposition.

### **iii) Political opposition**

The political opposition is usually the official opposition party in Parliament and it is regarded as a necessary precondition for a good democracy to flourish. According to Habib and Schulz-Herzenberg (2011, p.192), a viable parliamentary opposition reinforces the accountability dynamic within a democracy between the leaders and their citizens. When an incumbent party ceases to fear the ballot box they are less likely to be responsive towards the citizen. However, electoral uncertainty can provide a necessary system for checks and balances. Further, it helps to ensure that the ruling party remains responsive to the interests of poorer citizens by keeping incumbents committed to a social democratic development path. This is important because when independent institutions, like the NPA, fail to hold the executive to account, opposition parties are able to step in and not only hold the government to account but independent institutions as well. For example, the DA's court battle with the former National Director of Public Prosecutions (NDPP) on the President's 'spy tapes' and the reinstatement of corruption charges. Another victory is the DA's significant four Metropolitan win, leaning towards consolidating South Africa's democracy and weakening the stronghold of the dominant party. Another form of horizontal accountability is independent state institutions like the Chapter 9 institutions and the NPA which will be discussed in Part II.

For democracies to be upheld it is important for governments to be accountable both vertically and horizontally, in view of that, it ensures that "if the horizontal accountability is lacking or extremely weak, vertical accountability remains the only instrument for guaranteeing this dimension of quality democracy" (Morlino, 2004, p.14). This thesis will focus on the idea of horizontal accountability by looking at the relationship between democratic independent institutions such as the NPA and the political executive. However, where relevant it will refer to vertical accountability. Due to this, the relationship between the executive and the NPA, the constraint of executive power, impartiality along with accountability is integral to the development of a democracy. As a result, it is important to examine the constraint of executive power.

### 2.1.3 Constraint of executive power

“The political executive is the core of government, consisting of political leaders who form the top slice of the administration: presidents and ministers, prime ministers and cabinet.” (Hague, 2004, p.268). The constraint of executive power is integral to the survival of democracy. Therefore, according to Starr (2007, p. 15), the core principles of liberalism provide not only a theory of freedom, equality, and the public good but also a discipline of power. This is the means of creating power as well as being capable of controlling it. The discipline of power has been a singular achievement of constitutional liberalism. Liberal constitutions also impose constraints on the power of public officials, branches of government, and the state as a whole. These constraints protect citizens from autocracy, however, they also serve to protect the state from unpredictable, impulsive, or overreaching decisions.

The fundamental insight of liberalism, Starr (2007, p.15-6) states, is when power is subjectively exercised it is destructive not only of individual freedom but of the rule of law as well. On the one hand, the constraint of power limits haphazard influence and encourages confidence in the society that the law will be fair. In so doing, it increases the state’s capability to secure cooperation without the implication of inflicting force. On the other hand, it limits the scope of state power by increasing the likelihood of its effective use and the ability of society to generate wealth, knowledge, as well as other resources that a state may draw upon. The theory of power, including the freedoms of power, is implicit in constitutional liberalism. Another aspect in the constraint of power is the discipline thereof.

Starr suggests that there should be discipline in power, especially where executives are concerned. According to Starr (2007, p. 17), power in discipline formed is not necessarily power reduced, but discipline may impart greater legitimacy, a sharpened focus, and a sharper direction to power – to a kind of power that supports freedom instead of destroying it. In addition, liberal principles for the discipline of power have a threefold purpose: firstly, to constrain “power over” that is arbitrary, tyrannical, and presumptuously arrogant; secondly, to establish rules for the legitimate exercise of power; and lastly, to enlarge the overall capacities of both individuals and societies. Thus limited power can be “more powerful than unlimited power.” (Holmes in Starr, 2007, p. 18).

Liberal constitutions, for example, call for checks and balances, public participation, periodic elections, and other institutional mechanisms to prevent state power from becoming

dictatorships. But, according to Starr (2007, p.18), constitutions are not purely negative in purpose or effect. They also provide a plan for the exercise of legitimate powers and a conceptual framework for politics. Constitutions may often become the very basis on which national identity and patriotism are built and used as an instrument for nation and government building, in other words, some constitutions are constitutive of both a nation and its state. Thereby, Starr (2007, p. 18), adds that a state with checks and balances, and public accountability for governmental performance is more likely to correct its mistakes.

Furthermore, democratic liberalism, as explained by Starr (2007, p. 16), has not only called for broader social protections but also for stronger guarantees of civil liberties. With that said, according to Posner and Young (2007, p. 126), although every African country has a constitution as well as a body of laws and administrative procedures that place formal limits on executive power, the long-held consensus among observers has been that these rules play little role in actually constraining leaders' behaviour. This behaviour can be placed into the "personal rule" or "Big Man" paradigm. This paradigm is based on the idea that personal relationships are more important than formal rules and that a leader's decisions will always take precedence over the laws that those decisions might contradict. This is seemingly the case in South Africa, particularly during the Zuma administration. As a result, Posner and Young (2007, p. 127) state that, formal institutional rules do not matter as much as they used to, and have displaced violence as the primary source of constraints on executive behaviour.

Political executives can either take the form of a presidential government or a parliamentary government, which I will discuss in the following paragraph. Political executives are essential to the direction and development of democracies, but can also be found in other non-democratic systems such as authoritarian and totalitarian states. Unlike authoritarian and totalitarian states, the political executive has the responsibility to be accountable to its citizens since elections are an integral part of democracies. However, according to O'Donnell (2003, p. 50), every so often rulers find constraints in their power relations with other sectors of their regimes and powerful social actors. However, in contrast to horizontal accountability, the aforementioned constraints do not result from the effectiveness of legislated rules. Executive constraints are thus the result of naked power relationships which may lead to severe impasses. Political executives sit in a separate channel of authority to that of the judiciary and legislature. This is known as the separation of powers.

#### 2.1.4 The separation of powers

The separation of powers is often defined as “a means to avoid the concentration of power and to ensure accountability, responsiveness, and openness in the practice of governance” (Klug, 2015, p.2). According to Persson et al (2016, p.1163), the separation of powers is one of the most basic constitutional principles of a liberal democracy. The separation of powers is the parting of the three branches of government – executive, legislative, and judiciary. The separation of powers is vital to democracy as it circumvents encroachment and tyranny by those in power. Fombad (2005, p.301), concurs by stating that one important fundamental concern of constitutionalism is the avoidance of governmental tyranny through the abuse of power by rulers pursuing their own interests at the expense of the ‘life, liberty, and property of the governed’.

Fombad (2005, p.305), while John Locke advocates for a neutral/independent judicial branch of government, it was Baron de Montesquieu that categorised governmental functions as the legislative, the executive, and the judiciary. As a result, this categorisation analyses the relationship between the separation of powers and the balance of powers in terms of checks and balances. The separation of powers along with the appropriate checks and balances between the executive and legislative bodies helps to prevent the abuse of power. According to Persson et al (2016, p.1164), these checks and balances create a conflict of interest between the executive and legislature, but in so doing, it requires both bodies to agree on public policy. Montesquieu cited in Fombad (2005, p.305), however, further states that the practise of separation of powers and checks and balances constraints those processing power from grasping more powers, unless checked by other power holders.

Fombad (2005, p.307), suggests other than the prevention of tyranny through the diffusion of power, there are five main reasons why the legislative, executive, and judiciary should not be held by the same person. The first reason is the rule of law, which requires limits on the executive discretion, but it does not necessarily distinguish it or prevent law-making by the executive. The second is accountability, which is closely linked to the rule of law, as it ensures that non-law-abiding government officials to account for their actions or inactions. The third reason is the idea of common interest. Common interest prevents factions or groups within the branches of government from pursuing their own interest instead of the common interest of the people. The fourth is governmental efficiency, this reasoning is based on the assumption that the different functions of government requires different skill sets, and should, therefore, be



executed by different organs. And the fifth is the balancing of interest, this is influenced by the idea of mixed Constitutions whereby in parliamentary systems, in particular, the executive, the legislative – lower and upper level are all exposed to the appropriate checks and balances.

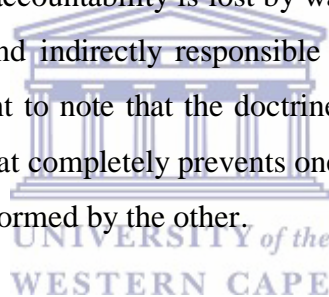
Additionally, Persson (2016, p.1166), states that a separation of powers improves the accountability of the elected officials and thereby reassures the voters, however only with the appropriate accountability measures. It allows the system of checks and balances to fulfill two conditions; a conflict of interest between the executive and the legislature; and legislative decision-making requires joint agreement by both branches of government (Persson, 2016, p.1166). Consequently, a simple conflict of interest between the executive and the legislature is not enough to improve accountability. Therefore, according to Persson (2016, p.1166), the key to making the separation of powers work in favour of the voters, is to ensure that no policy can be enforced unilaterally.

Fombad (2005, p.306), explains that the classic design of the doctrine of the separation of powers in its 'pure' form is based on the fundamental idea that there are three separate distinct and independent functions of government – the legislative, the executive (the government), and the judiciary (the courts). This doctrine can be formulated into three different aspects, firstly, the same person should not belong to more than one of the three branches of government, however, this differs in present-day parliamentary systems; secondly, one organ of government should not appropriate or encroach upon the powers or work of another; and lastly, one organ of government should not exercise the functions of another. It is important to note that while all democracies have a separation of powers, the balance of powers between the three branches of government and citizens differs in parliamentary systems and presidential systems and different constitutions can make these branches more or less powerful.

In democratic regimes, there are generally two types of systems, presidential and parliamentary. According to Persson (2016, p.1167), in presidential and parliamentary democracies, the process for appointing the Executive is direct in a presidential system, but indirect, through the legislature in parliamentary systems. Persson (2016, p.1167), further states that in presidential systems, there is a clear separation of power between the president, their government, and the legislator. In parliamentary systems, although it is a three-branch system of government and a clear distinction between the roles of the executive and legislature often overlap. For example, Hague and Harrop (2004, p.274) explain in presidential systems, like in

the United States, the President is separate from the assembly and independently elected as the political executive. Whereas, in parliamentary systems, like in South Africa, there is no separation between the two, so the President or Prime Minister is both the head of state and Parliament.

“Direct control by the voters keeps the executive more accountable for the actions, by minimising the danger of collusion between the executive and the legislature over the reappointment of the latter.” (Persson, 2016, p.1166). In contrast, according to Persson (2016, p. 1167), in parliamentary systems when the executive appointment is decided by the legislature, it becomes harder for the voters to exercise direct control. And in order for accountability to work well, responsibilities must be clearly defined so that it is clear whom to blame if a transgression were to occur. Persson (1997, p. 1192), explains that while direct accountability is maintained in the presidential system, the same cannot be said about parliamentary systems, as direct accountability is lost by way of the executive who is directly accountable to the legislature, and indirectly responsible to the voter. For Fombad (2005, p.309), to be clear, it is important to note that the doctrine of the separation of powers was never conceived as a rigid rule that completely prevents one organ of power from performing any of its functions normally performed by the other.



This thesis will look at the extent to which the executive is independent of the NPA and how the separation of powers works in practice in contemporary South Africa. In dominant party regimes – which I will discuss in the latter part of this chapter, the separation of powers is often obscured as political executive sometimes extends itself across all three branches of power. Therefore in parliamentary systems, it is difficult for the president or prime minister to separate themselves from their overlapping roles as the leader of a country and the leader of their respective political party. In order to ensure the separation of powers is carried out successfully, it is integral to any democracy to have a rule of law to support it.

### **2.1.5 The rule of law**

According to O'Donnell (2004, p.33), the rule of law is defined as whatever law exists, is written down, and publically spread by an appropriate authority prior to the events meant to be regulated by it, and is fairly applied by the relevant state institutions including the judiciary. To be clear, the rule of law implies formal qualities by establishing rules that are valid and ultimately regulated by the Constitution. In addition, the rights and obligations specified are



universal, applies to each individual, irrespective of their social position, more notably known as ‘equality before the law’ (O’Donnell, 2004, p.33). Furthermore, O’Donnell (2004, p.33), the rights and obligations attached to political citizenship by a democratic regime are a subsection of the general civil rights attached to a legal person as a member of their given society, in addition, to their rights to vote, free and fair elections, to run for office, along with other freedoms. The rule of law is often described, at its core, to be a hierarchical legal system. However, no one, including the most highly placed state officials is above the law. As a result; the government, government officials, and the executive are intended to be ruled by law and subject to it.

According to O’Donnell (2004, p.35), the conception of the law itself is legally regulated, this implies that the legal system is a feature of social order that in principle brings to definition specificity, clarity, as well as predictability. One of the most important conditions of the law is that it is constituted by a certain set of universal characteristics. These characteristics make it known that all laws should be approachable, open, clear, and relatively stable. Similarly, certain laws must be guided by open, stable, clear, and general rules. The independence of the judiciary must be guaranteed. The principles of ordinary justice must be observed. Courts must have the ability and powers to review or appeal, in order to show conformity to the rule of law, and courts must be easily accessible. And lastly, the freedom of choice of crime-preventing agencies should not be allowed to distort or corrupt the law. O’Donnell (2004, p.36), states that while the rule of law does not refer to any state agencies other than the judiciary. However, the entire state, as well as its agents, are obliged to submit to the rule of law. On the other hand, when state agents or private actors violate the law with immunity from punishment or loss, the rule of law has been ignored.

Instead, Reynolds (2015, p. 9), states that the rule of law should be seen as a solution to a problem. The problem with tyranny is that it often instructs the lives and property of others at will, in pursuit of discretionary ends. Therefore, according to Reynolds (2015, p.9), the rule of law is integral to the prosperity of societies. This is mainly due to men being radical individuals defined by the boundaries of their bodies, minds, pains, and pleasures. Additionally, men are also radical socially, by which the well-being of their bodies is dependent on other men. The man’s ability to reason and discourse is based on their social experiences and their control of their language and ideas. Most importantly, men as individuals and collectives, act in a variety of both selfless and selfish ways.

Licht, Goldschmidt, and Schwartz (2003, p.1), adding to the aforementioned, explains that the rule of law together with accountability and curtailing corruption are considered to be primary intermediaries for democratic development. These principles are central to international institutions on policies of good governance and empowerment. According to Licht, Goldschmidt, and Schwartz (2003, p.1), the rule of law, accountability, and curtailing corruption is viewed as part of a general category of social norms or ‘norms of governance’. These social norms prescribe to desirable modes of exercising political, economic, and other forms of power. Societies characterised by such culture, provide for a more transparent normative society. Thus, Licht, Goldschmidt, and Schwartz (2003, p.2), states that the rule of law or ‘law and order’, deals with the degree to which individuals and government authorities behaviour complies with both formal and legal rules.

The duty to obey the law is a universal rule. It ensures that power should only be used in ways allowed by the law. This includes the power inherent in holding executive office. According to Licht, Goldschmidt, and Swartz (2003, p.2), the rule of law limits the powers of state officials’ use of public office for private advances. A blatant disrespect for the rule of law renders law enforcement agencies and the judiciary as dysfunctional organisations. In conjunction with the rule of law and a zero-tolerance for corruption, is accountability. Accountability implies that the party holding power owes certain duties to the party subject to this power. As a consequence, those holders of power are accountable to give a reason for their decisions or actions as a measure of transparency. As a result, accountability is supposed to form ‘channels of feedback’ between the relevant parties involved. Without a zero-tolerance to corruption and accountability, the rule of law will not prosper accordingly. The rule of law is integral to this research study as it outlines the mandate of the NPA by the Constitution and the NPA Act and assists the democratic process.

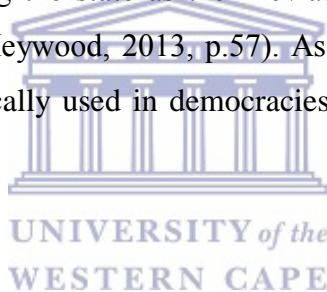
## **2.2 Part II**

### **2.2.1 Independence**

According to the Oxford Dictionary (2018, n.p.), the word independent is derived “partly on the pattern of French *indépendant*”, and is defined as “free from outside control; not subject to another’s authority” or “self-governing”. The term independent or sovereignty stems from the idea of a modern nation-state. Hislop and Mughan (2012, p.6), explains that the state stands as

the central political institution of the modern world, whereby the desire of politically organised groups and activist is to run the state or influence its policy.

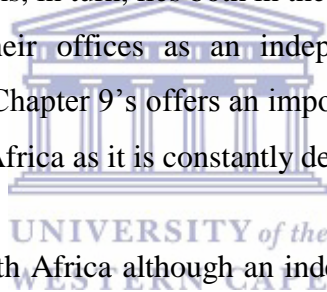
The modern state was first established during the Peace of Westphalia in 1648, and later during the French Revolution from 1789-1815. The Peace of Westphalia underpins two important principles, firstly each state has total authority within its territorial borders; and secondly, all states have legal equality, whereby no other state can interfere in their domestic affairs (Hislop and Mughan, 2012, p.11). Hislop and Mughan (2012, p.10), further defines sovereignty as the “possession of supreme authority over a given territory such that no other entities – whether domestic or international”, this they explain imparts the view that states reign supreme within their own borders and thereby enjoy legal equality on an international scale. Moreover, Heywood (2013, p.57), suggests the state is sovereign, it exercises total and unlimited power as it is superior to all other associations and societal groups. “Thomas Hobbes conveyed the idea of sovereignty by portraying the state as the ‘Leviathan’, a gigantic monster, usually represented as a sea creature” (Heywood, 2013, p.57). As a result of states superior nature, independent institutions are typically used in democracies as a measure to counter or limit states unrestricted power.



### **2.2.1.1 Independent Institutions**

Independent institutions are a form of horizontal accountability. Independent institutions are agencies that help support and uphold democracies. Independent institutions are intended to be sovereign and impartial from the government and act as an intermediary between government and the people. The role of independent institutions is to act as the watchdogs of government to ensure their accountability to the people that elected them. According to Murray (2006, p.127-8), independent institutions provide an opportunity for public participation in public life different to that that is provided in political processes. Independent institutions provide a way in which the needs of citizens can be articulated outside the weighed down environment of party politics. And if independent institutions are truly independent they can provide a reliable voice for the people, unburdened by political demands or vested interests. However, when independent institutions are not truly independent it can lead to a weakening of these institutions and democracy overall. In South Africa, independent institutions are specified in Chapter 9 of the Constitution and thus frequently called ‘Chapter 9’s’, (Murray, 2006, 124).

In South Africa, accountability to citizens is easily perceived as less important than accountability to party structures, particularly within the ANC. One example of independent institutions in South Africa, other than the NPA, is the Chapter 9 institutions. The ‘check’ that the Chapter 9’s provide on the government’s power is not through the exercise of power. Alternatively, according to Murray (2006, p. 131), they check the government’s power by providing a legitimate and authoritative account of the government’s record, which can be used by citizens and Parliament to scrutinise the government’s performance. On the contrary, Murray (2006, p. 131), suggest that Chapter 9 institutions do not have the power to enforce accountability, but they can demand an account of what the state and other actors have done. Another shortcoming, Murray (2006, p. 133) explains, is the effectiveness of these independent institutions, as their accountability mechanisms are not guaranteed by constitutional declarations of their independence and impartiality, special appointment processes or the security of their term. Lastly, he suggests that (2006, p. 132), the credibility of the reports conducted by Chapter 9 institutions, in turn, lies both in the quality and professionalism of the work and the legitimacy of their offices as an independent constitutional institution. Independent institutions like the Chapter 9’s offers an important role in providing checks and balances in a country like South Africa as it is constantly developing the rule of law.



On the contrary, the NPA in South Africa although an independent institution, it is uniquely apart of the executive branch of government, as it prosecutes criminal activity on behalf of the state. However, it has to prosecute all criminal activity without fear, favour, and prejudice, this includes government officials. Another difference is the Chapter 9’s hold government and Parliament to account, whereas Parliament holds the NPA to account through their submission of annual reports or questioning. The NPA also has the power to enforce accountability by prosecuting government officials that commit criminal offenses. The NPA, on the other hand, while an independent institution it falls under the Criminal Justice System and is located closer to the executive branch of government and will be the case study of this thesis. Another integral conceptual part of this research study is the idea of state capture.

### **2.2.2 State capture**

“Corruption is, by definition, an act of a person who has either the economic power to bribe another or the power to provide a favour for a bribe” (Zimring and Johnson, 2005, p.796).

Additionally, corruption or administrative corruption refers to “the intentional imposition of distortions in the prescribed implementation of existing laws, rules, and regulations to provide

advantages to either state or non-state actors as a result of the illicit and non-transparent provision of private gains to public officials” (Matei, n.d., p.6). Corruption can take the form of bribe payments to an ostensibly unending number of officials to overlook minor or major infringements of current regulations. These bribe payments can be to win licenses, customs procedures, gain tenders, or to be given precedence in the delivery of a variety of other governmental services. State officials then misuse the public resources, in their control, for their personal financial benefit (Matei, n.d., p.6). State capture can also be understood as an extreme form of corruption.

For Chipkin (2016, p.4), there are two spectrums of corruption, ordinary and extreme. ‘Ordinary corruption’ is understood as an act of private abuse, private misuse, or private appropriation at the heart of the phenomenon of corruption (Chipkin, 2016, p.1). Ordinary corruption is the abuse of public office for private gain where the public office deviates from its formal duties of a public role in order to line its own pockets. In addition, it focuses on acts of illegality, or the rule-breaking of politicians or officials to counteract the public good in favour of private interests (Chipkin, 2016, p.1). ‘Extreme corruption’ or state capture, on the other hand, is a severe form of corruption where the rule-making process itself is captured by government officials who regulate their business to favour private interests (Chipkin, 2016, p.1).

In contrast, state capture is traditionally defined as “the process through which firms make private payments to public officials to influence the choice and design of laws, rules, and regulations” (Matei, n.d. p.2). Open Society Foundation (2012, p.1), believes state capture is more damaging than ‘ordinary corruption’. State capture, like corruption, is based on compensatory power. Compensatory power uses money as a bribe to influence the outcome of laws, rules, and regulations to favour the captor, often at the expense of the public (Galbraith, 1983, p.5). Another form of state capture is party state capture. According to Innes (2013, p.1), party state capture occurs when parties re-politicise the state in pursuit of political monopoly. The World Bank describes this type of state capture as ‘government effectiveness which measures perceptions of the quality of public services and policy formulation and the degree of administrative independence from political pressures’ (Innes, 2013, p.3). The third form of state capture is corporate state capture, this occurs when “private interest pay to subvert legitimate channels of political influence” (Innes, 2013, p.1). Chipkin (2016, p.2), states that corruption on these terms – corporate or party state capture, occurs when politicians and

government officials lose sight of the public interest or public good to serve their own narrow interest. This section will examine who is involved in state capture, who they are captured by, what effect state capture has on democracies and the challenges of state capture.

According to Matei (n.d p.2), public officials like the executive branch ministries, the legislative branch, the judicial branch, and subnational governing institutions can corrupt the state if they abuse their authority in order to buckle the institutions and laws, mainly to follow their own financial interest, despite knowingly disadvantaging the public's interest. Public officials, Matei (n.d. p.2), explains are usually captured by persons, groups or private sector companies that seek tax exemptions or other advantages from the state. State capture has the potential to be harmful, it compromises the design of laws, rules, and decrees by a large number of state institutions, including the executive, the ministers, the legislative, and the judiciary (Matei, n.d. p.2). Open Society Foundation (2012, p.3), believes in some cases state capture occurs in institutions of force like the police and prosecutors. This potentially limits security or anti-corruption institutions as they are hollowed out, thus reducing their potential threat to the network of state captors, as with the NPA.

The concept of state capture is not new, however, in South Africa, it has become ubiquitous in the political and social commentary (Chipkin, 2016, p.1). State capture has become increasingly synonymous with President Zuma's administration and their suspiciously close relationship with the Gupta family. In the 'State of Capture Report' by former Public Protector, Thuli Madonsela, she states they influenced the appointments of cabinet ministers and senior officials, in order to benefit from huge state tenders. The findings in the 'State of Capture Report' clearly illustrates how state institutions can become politicised. As a result, Open Society Foundation (2012, p.2), believes to avert state capture, it is crucial to have formalised anti-corruption agencies to perform checks and balances to ensure effective transparency and monitoring of horizontal power holders. However, if these agencies are captured, to stall reforms, it poses an extra challenge to civil society when trying to expose captors. The other challenges of state capture include gaining detailed documented information about the actual structures and processes of state capture; being able to sustain public pressure; and keeping reformed institutions out of the reach of state capture.

According to Chipkin (2016, p.2), corruption such as this, is not simply the absence of ethics in the conduct of government affairs or of good governance, but also of a presence of different



ideologies of the state. Open Society Foundation (2012, p.2), explains that a captured state directly contradicts the idea of an open society, as it negatively impacts on the fundamentals of a democratic system, as well as the logic of governance, social norms, and the public's trust. Chipkin (2016, p.2), elaborates that the struggle around corruption, in South Africa, is really a struggle about the form of the state. On the one hand, are advocates of a liberal idea of the state, and, on the other hand, are those who defend patronage in the name of 'state transformation' or 'national democratic revolution'. For this research study, the theory of state capture will be used to evaluate whether the fundamentals of the NPA has been compromised by the politicisation of the executive. A possible reason for the rise of state capture is the dominant party system.

### **2.2.3 Dominant-party system**

Dominant party systems “occur within a democratic setting and thus enjoys the support of the majority, but this support continues despite non-delivery, mismanagement, corruption and other factors which would normally cost the political party its ruling seat” (2013, p.9). According to Doorenspleet and Nijzink (2013, p.4), dominant party systems do not follow the “normal” or “expected” pattern of party competition in a democracy. In dominant party systems, the phenomenon is basically regarded as abnormal in democratic systems. Therefore, Doorenspleet and Nijzink (2013, p.4), states that despite free electoral competition, open information systems, and respect for civil and political liberties a single party has managed to govern alone or as the primary and on-going partner in a coalition(s), without intermission from another party for an extensive period of time. To be clear, it is important to make the distinctions between dominant party systems on the one hand and one party systems on the other. A dominant party system usually occurs in a multi-party democratic regime whereby one party dominates electorally. In dominant party system, “despite the multi-party situation, only one party is so dominant that it directs the political system and is firmly in control of state power over a fairly long duration of time that even opposition parties make little if any dent on the political hegemony of a dominant ruling party” (Brooks, 2004, p.2). In contrast, a one-party system usually occurs in totalitarian regimes where there is only one electoral party, with no opposition. “One-party rule is a regime in which a single party monopolizes politics, with other parties banned or excluded from power” (O’Neil, 2010, p.160).

The conceptualisation of one-party dominance is not static. As a result, Doorenspleet and Nijzink (2013, p.3), explains dominant party systems are systems in which the same party wins an absolute majority in at least three consecutive elections. According to Southall (1998, p.444), the main challenge posed by dominant party systems is that it concurrently offends the idea that democracy is about the alternation of leaders, however, it often provides the opportunity for leaders to entrench themselves in power. “The issue then becomes not just the degree to which domination of a particular political system genuinely reflects popular opinion whilst permitting the articulation and representation of minority interests, but also the extent to which it provides for, or facilitates, the wider societal conditions that reproduce that party's hegemony over the long term” (Southall, 1998, p.444).

Brooks (2004, p.1), explains that in a context in which one party dominates the political environment and faces little to no expectation of electoral loss, is troublesome. As a result, Brooks (2004, p.1), states concerns start to grow around the possibility of a diminishing government response to public opinion; lack of accountability; and an overall degradation of democratic ideologies and the development of an authoritarian method of rule. Brooks (2004, p.2), further states that the presence of political opposition within a competitive party system offers alternatives to the governing party and allows debate within society over ideas and policies; and permits society to question the actions and choices of government. In addition, in order to check and prevent transgression towards authoritarian methods of rule and the abuse of power by the party in tenure, it is important to have a strong political opposition. However, typically in a dominant party system “the vital elements of democracy, namely genuine competition and uncertainty in electoral outcomes, are removed in a process that is self-sustaining” (Brooks, 2004, p.2). A lack of strong opposition competition, according to Brooks (2004, p.2), blurs the lines between party and state, which can likely reduce the number of independent civil society groups; and a growing superiority of political power, leading to abuse of office and haphazard decision-making that undermines the integrity of democratic institutions and its ability to check the executive. There is usually a symbolic bond which maintains a party's dominance. This bond can often be due to a particular historical event. A prominent characteristic of most dominant party systems is a highly symbolic history and the ushering in of a new political order usually from an authoritarian state to a democratic state, like in the case of the ANC (De Jager and du Toit, 2013, p.9). South Africa is a dominant party system whereby the ANC has governed since the dawn of its democracy in 1994. According to Southall (1998, p.443), in 1994 the ANC was democratically elected to replace apartheid's



former ruling National Party (NP). The dominance of the ANC was initially established by their majority position within the post-election coalition's Government of National Unity (GNU). Since the election, however, the ANC's dominance has begun to be extended as it won the 1999, 2004, 2009, and 2014 national general elections. For this thesis, the theory of dominant party systems in South Africa will be used to analyse the link between party dominance and state capture.

### **2.3 How the concepts relate to my research**

As a democracy, South Africa is founded on core democratic norms such as accountability, the constraint of executive power, separation of power, and the rule of law. These democratic principles are key to sustaining the country's democracy and the rule of law. And as a result, democratic independent institutions, like the NPA, were established as an integral part of the Criminal Justice System for justice to prevail and as a means of upholding South Africa's Constitution, and democracy. Based on the concepts used, there are several key themes that come to the fore.

Based on the concepts, in a democracy, transparency, and responsibility is a basic right and should be exercised in a manner that preserves and respects the rule of law. A critical feature of a democracy is the application of a legal system that prosecutes criminal behaviour and guarantees the rights and equality of all citizens. A democracy can only prosper efficiently when there is a civil bureaucracy that is competent, effective, applies the law, and assumes responsibility for their actions. For a democracy to prosper it needs accountable leaders. Accountability warrants elected officials and leaders to answer for their political decisions out of obligation to those who voted them into power. For a democracy to grow, accountability and responsiveness are fundamental. In so doing, political officials should answer and be responsible for their actions, and enforce accountability by rewarding good behaviour and punishing bad behaviour. As a result, it is important for any democracy to have checks and balances. These checks and balances are often reinforced by agents of accountability more commonly known as watchdogs. This thesis will investigate whether the NPA operates without fear, favour, or prejudice when prosecuting or convicting government officials when they commit criminal offenses.

Accountability can take shape in either vertically through electoral (voters) and non-electoral mechanisms (public participation – civil society, social movements, and the media); or horizontally, often triggered by vertical accountability, through government, watchdogs, political opposition, judiciary, and legislature. Watchdogs or more specifically independent institutions should act as an intermediary between the government and the people, outside of politics. They should be legally able, empowered, and willing to take action. However, it is unlawful for the encroachment of one state institution upon another and irregular advantages to be obtained by public officials for private use. Independent institutions should perform preventative roles, be highly professional, endowed with resources, sovereign, and separate as much as possible from the executive. This thesis will look at whether the NPA is independent in performing their intended role. Like accountability, the constraint of executive power is essential to the survival of democracy as it requires a discipline of power.

A constraint of power, protects citizens from autocracy, preventing unpredictability, impulsiveness, or overreaching decision-making. When power is subjectively exercised, it is destructive to individual freedom and the rule of law. Power without discipline can result in a leader's behaviour being labelled as 'personal rule' or 'big man' paradigm, which predisposes that personal relationships are more important than formal rules and a leader's decision will always take precedence over the rule of law. Therefore, for the constraint of power to be effective, there should be a clear separation of power. The separation of power decentralises power the use of power by one person. For separation to be obtained, the three branches of government, more particularly the executive, should avoid a concentration of power by ensuring accountability, responsiveness, and openness. Impartiality is even more vital in parliamentary systems like South Africa's where there is an overlap between the legislature and the executive.

As established in the concepts, the rule of law is regulated laws that are valid by a Constitution. The rule of law does not discriminate, as it calls for 'equality before the law'. As a result, we are all ruled and subjected to the law, including the executive. The rule of law should be viewed as a solution to a problem as it provides clarity and predictability. Disrespecting the rule of law by ignoring it, renouncing punishment, and allowing corruption and state capture to render law enforcement agencies and the judiciary as dysfunctional organisations curtail democratic development as it hinders independent institutions like the NPA to do their jobs effectively. And lastly, the relationship between state capture and the ANC as a dominant party in South

Africa. As a result of my theory on state capture and dominant party systems, there is a possible linkage between the growing dominance of the ANC as a hegemonic power and the unfavourable state capture.

### **Conclusion**

The chapter has set out the principal concepts that will be used to establish whether the NPA act as an independent state institution. I have used democracy as the main concept as a tool to measure how independent the NPA is by using the key democratic norms such as accountability, the constraint of executive power, the separation of powers, and the rule of law against the principles of state capture and dominant party systems. While part II, elaborates on the concepts of independence, state capture, and dominant party systems. Chapter Three, research methodology, will look at the research methodology used to successfully carry out this study as well as a step-by-step methods plan.



# Chapter Three: Research Methodology

## Introduction

According to Leedy (2010, p. 8), underlying and unifying any research is its methodology. The research methodology directs the research by controlling the study, dictating how data is acquired, arranging the data into logical relationships, setting up an approach to refine and synthesize data, allowing the meanings that lie below the surface of the data to manifest, and lastly, to produce one or more conclusions. As a result, research methodology has two primary functions, firstly, research methodology dictates and controls the acquisition of data, and secondly, it collects the data after its acquisition and extracts meaning from them. The aim of this section was to set out the methodology that was used for this research study, as well as the methods used for the collection of data for this thesis.

## 3.1 Methodology

Dawson (2007, p.15), states that research methodology is the philosophy or general principle which guides the research. Moreover, it asks ‘how you are going to do your research’. And while research methodology guides the research, it is ultimately the research methods that enable you to gather data, whether it is questionnaires or interviews. This study has made use of triangulation and focused on qualitative research study and case study.

### 3.1.1 Qualitative study

According to Dawson (2007, p.16), quantitative research generates statistics through the use of large-scale survey research, by usually using methods such as questionnaires or structured interviews. This type of research reaches more people and is a faster means of collecting data than qualitative research. Dawson (2007, p.21), states that if you have written certain words it helps to suggest if you are leaning towards quantitative research. For example, if you have written ‘how many’, ‘test’, ‘verify’, ‘how often’ or ‘how satisfied’, this puts forward that more inclined on doing quantitative research, instead of qualitative.

Qualitative research, on the other hand, “explores attitudes, behaviour, and experiences through such methods as interviews or focus groups” (Dawson, 2007, p. 16). Dawson further states that the abovementioned characteristics are important, as fewer people take part in the research, but the contact with these people last longer and often solicits more in-depth opinion from participants. Qualitative research can also be defined as the examination of words. “Qualitative

researchers collect data in the form of written or spoken language, or in the form of observations that are recorded in language, and analyse the data by identifying and categorising themes” (Terre Blanche and Durrheim, 2006, p. 47). As a result, it is ultimately the language that you use in writing your thesis, which determines whether you will make use of quantitative or qualitative research. Moreover, Dawson (2007, p.21), explains that if you have written words such as ‘discover’, ‘motivation’, ‘experiences’, ‘think or thoughts’, ‘problems’, or ‘behave or behaviour’, this suggests your study leaning towards qualitative research approach.

Other authors like Tracy (2013, p.3), state that qualitative research is about the researcher immersing themselves in a scene and trying to make sense of it. Moreover, in qualitative research studies, the researcher purposefully examines and takes notes of small cues in order to decide how to behave and make sense of the greater context and building knowledge on culture. Therefore, according to Tracy (2013, p.4), qualitative data can be systematically gathered, organised, interpreted, analysed and communicated to address real-world concerns. Terre Blanche and Durrheim (2006, p.47), conversely, states that qualitative methods allow the researcher to study selected issues in in-depth, openness, and detail in an effort to identify and understand the given information. In addition, qualitative research is described as naturalistic, holistic, and inductive. This means that the researcher can study a phenomenon as is without interruption, manipulation, and as an interrelated whole instead of a set or sets of predetermined variables.

According to Tracey (2013, p.5), a qualitative research study has a variety of different strengths. Firstly, it is excellent for when the researcher wants to study context. It can provide the researcher insight into cultural activities that otherwise could have been missed in structured surveys or experiments. Qualitative research studies can uncover prominent worldly issues. Qualitative research studies are well suited for accessing implicit, often taken-for-granted, intuitive understandings of a culture. It helps others to understand the world, their society, as well as institutions. And finally, it interprets the participants’ viewpoints and stories. I have used qualitative research as one of my method of methodology for my research study. A qualitative research study has allowed me to interview participants relevant to my research; systematically allowed me to gather, organise, interpret, analyse and communicate to address real-world concerns; while it allowed me as the researcher to study selected issues in-depth, with openness, and detail.

### 3.1.2 Case study

For this research study, the NPA has been used as the case study. According to Yin (1994, p. 12), the central tendency among all types of case studies is that it tries to bring light to a decision or set of decisions i.e. why were they taken? How were they implemented? And with what result? Yin (1994, p.13), further states that a case study is an empirical inquiry that one, investigates a present-day phenomenon within a real-life context; and two, the boundaries between phenomenon and context are not clear or evident. A case study method is therefore used when the contextual condition is highly relevant to the researcher's phenomenon of study. Put simply, a case study is "a systematic and in-depth investigation of a particular intake in its context in order to generate knowledge." (Rule et al, 2011, p.1). For example, this research study aimed to bring light to the decision or set of decisions that lead to the alleged state capture of the NPA, by investigating beyond what the media has reported and brings clarity to the study where unclear or not immediately apparent.

Additionally, Yin (1994, p.13), mentions that the case study inquiry tries to cope with technically identifiable situations whereby there are much more variables of interests than data points with one result. Case study inquiries, furthermore, relies on multiple sources of evidence with data converged via triangulation, like this research study has, as another result. Case study inquiries benefit from the earlier development of theoretical propositions to guide data collection, as well as analysis. There are five commonly used types of case studies; namely explanatory case studies, exploratory case studies, descriptive case studies, illustrative case studies, and meta-evaluative case studies. This research study has made use of explanatory, exploratory and descriptive case studies. An explanatory case study, explained the causal links between real-life phenomenon that is too complex for survey or experimental strategies; an exploratory case study, has explored the situations of the phenomenon that has no clear or single set of outcomes; and a descriptive case study, has described the phenomenon in which it occurred, therefore providing a rich understanding of the overall phenomenon (Yin, 1994, p.15). How this relates to my research, the researcher has used journal articles, books, newspaper articles, interviews for the case study to highlight whether the NPA act as an independent institution and strengthens the quality of democracy, to establish if it has been captured by the state. The aforementioned has served as a vital means for data collection and the final findings and analysis chapters.



### 3.2 Methods of data collection

According to Dawson (2007, p.28), research methods are the tools that the researcher uses to collect their data. These methods include interviews, focus groups, questionnaires, and participant observation. Based on the methodology I have used, namely qualitative research study and case study, I have chosen to use interviews as my research method. This is mainly based on the type of people I have interviewed, the busyness of their schedules, and the in-depth opinions they offered. The interviews were chosen based on the information needed, convenience, and the availability of the interviewees. This, however, does introduce some bias due to the experiences these. The most common type of interviews are unstructured, semi-structured, and structured interviews:

Dawson (2007, p.28-9), states that unstructured or in-depth interviews from time to time are called life history interviews. In this style of interview, the researcher attempts to achieve an all-inclusive understanding of the interviewees' point of view or situation. When conducting unstructured interviews, the researcher needs to remain alert, recognise important information and search for more detail. The researcher will need to have the ability to delicately steer the participant back from non-subject matters. Additionally, it is essential to realise that unstructured interviewing can produce a great deal of data, however, it can be difficult to transcribe and analyse.

According to Dawson (2007, p.29-30), semi-structured interviews, on the other hand, is perhaps the most shared type of interview used in qualitative research. In this style of interview, the researcher wants to know specific information that can be compared and contrasted with information already gathered in other interviews or from other sources of information. In semi-structured interviews, the researcher needs to ask the same questions in each interview. Nevertheless, the researcher still wants the interview to remain flexible to give other important information the chance to arise. For this type of interview, the researcher will need to provide an interview schedule. The schedules may be a list of particular questions or a list of themes to be discussed. In research, the schedule is updated and revised after every interview, the researcher conducts, and this allows more themes to arise as a result of previous interviews.

While, structured interviews, Dawson (2007, p.30), explains are used frequently in market-related research. This style of interview is usually used in quantitative research and can be conducted either by means of face-to-face or over the telephone, at times with the aid of laptops



or computers. With that said, the method of data collection that was used was semi-structured interviews, this has given the interviewees some free reign when answering the questions. More specifically, I have conducted one-on-one interviews. Semi-structured, one-on-one interviews, allows the researchers the chance to ask more open-ended questions, according to Terre Blanche and Durrheim (2012, p.486), it allows the participants to freely communicate their experiences or opinions on the given topic without any restrictions.

### **3.2.1 Sampling**

According to Brink (2002, p.133), sampling refers to the process of selecting a small part of a population in order to obtain information that relates to your interest in the study. More specifically, “for many qualitative researchers, however, the ability to generalise their work to the whole research population is not the goal. Instead, they might seek to describe or explain what is happening within a smaller group of people. This, they believe, might provide insights into the behaviour of the wider research population.” (Dawson, 2007, p.49).

While there are various types of sampling methods, purposive sampling in qualitative research is best suited for that type of study. As a result, participants were selected based on the likeliness to generate useful data for the research study. According to Dawson (2007, p.54), purposive samples are used if description rather than generalisation is the goal. In this type of sample, it is not possible to specify the possibility of one person being included in the sample. The type of purposive sampling used for this research study was convenience sampling. I chose convenience sampling due to the limited time, resources available, and the type of research information that was needed. In addition, convenience sampling has allowed me to choose participants that were knowledgeable on the subject matter at hand. Therefore for this research, I have interviewed three groups of participants; group one, the Portfolio Committee on Justice and Correctional Service members; group two, senior NPA officials; and group three, subject experts. Each interview was approximately 30 to 60 minutes per participant. I have interviewed a total of 12 participants for this research study. Please note, all the interviewees expressed that they did not mind disclosing their identity.

#### **i. Portfolio Committee on Justice and Correctional Servicemembers**

For the first group of respondents, the researcher wanted to interview one representative of each political party. The researcher contacted the secretary of the Portfolio Committee of Justice to schedule interviews with the respective respondents, however, this did not materialise

so the researcher opted to contact the members personally. The researcher acknowledged that committee members have commanding schedules, and unlike bigger parties, smaller parties are spread thinly across various portfolio committees. However, interviewing members of the Portfolio Committee on Justice did provide on the ground insight into the constraints faced by the NPA. While five members of the portfolio committee have been contacted for the interviews, three have responded and two agreed to the interview, Advocate Glynnis Breytenbach – Former NPA prosecutor and Shadow Minister of Justice and Correctional Services for the DA and Mr Steven Swart – Member of Parliament for ACDP. The third person, the chairperson of the Portfolio Committee, declined due to a possible conflict of interest.

## **ii. National Prosecuting Authority officials**

For the second group of respondents, the researcher interviewed current and former senior NPA officials. The researcher contacted the NPA to find out their willingness to participate in the research study. The researcher was able to secure two interviews with current senior NPA officials, Advocate Shaun Abrahams – NDPP of the NPA and Dr Silas Ramaite DNDPP of the NPA, as well as an interview with former NDPP Advocate Vusi Pikoli – Former NDPP at the NPA and Police Ombudsman for the City of Cape Town. Since the NPA's VGM building is located in Pretoria, the researcher has conducted telephone interviews with Advocate Abrahams and Dr Ramaite, while the interview with Advocate Pikoli was face-to-face at his office in the Cape Town central business district. In interviewing these current and former senior NPA officials, the researcher was able to offer a well-rounded final outcome to the research study.

## **iii. Subject experts**

For the third group of respondents, the researcher interviewed various subject experts, namely academics and researchers from civil society who are well versed on the topic of the NPA, namely Mr Lawson Naidoo – Executive Secretary at the Council for the Advancement of the South African Constitution (CASAC), Mr Paul Hoffman – SC Director and Head of Projects at Accountability Now, Dr Jeff Rudin – Researcher at the Alternative Information and Development Centre (AIDC), Mr Gareth Newham – Senior Researcher at the Institute for Security Studies (ISS), Advocate Mike Pothier – Research Coordinator at the Catholic Parliamentary Liaison Office (CPLO), Professor Lukas Muntingh – Associate Professor at the Dullah Omar Institute, and Professor Lovell Fernandez – Law Lecturer at the University of the Western Cape. The researcher contacted the administrators of the various interviewees and in

some cases the interviewees themselves to schedule the interviews. The researcher acknowledged the demanding schedules of the interviewees, therefore some interviews were face-to-face while others were via Skype.

The interview questions for respondents were as follows:

1. In your opinion, what is the role of the NPA?
2. How successfully does the NPA perform its duties as an independent institution?
3. In your opinion, do you think the NPA succeeds in its mission to prosecute without fear, favour, and prejudice?
4. Has the NPA succeeded in its vision for justice to prevail in our society so that people can live in freedom and security?
5. In accordance with the NPA's values, has it fostered integrity through ethical conduct, high moral standards, honesty, moral principles and values, a zero tolerance to corruption or fraud, keeping promises, truthfulness and being beyond reproach?
6. Is the NPA impartial as an independent institution?
7. Is it beneficial for the political executive to have a role in the NPA?
8. Does the political executive's (Constitutional) role in the NPA blur the lines of power (or the separation of power) between the executive and independent institutions?
9. What are the challenges facing the NPA in carrying out its duties?
  - a. Do you think the constant change in the NDPP's effects the NPA?
  - b. Do you think the NPA is affected by infighting?
  - c. Do you think the change in Presidents Nelson Mandela, Thabo Mbeki, and Jacob Zuma affects the NPA?
10. Do you think South African's believe in the NPA as a credible institution?
11. Do you think media reports are an accurate reflection of the NPA?
12. What do you think is the future of the NPA in South Africa?
13. How do you think the NPA measures up to other independent institutions like the Chapter 9's?

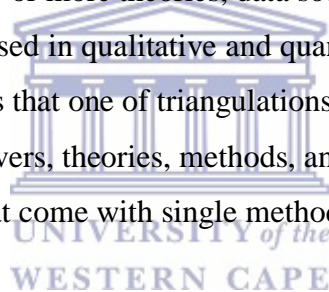
### **3.3 Limitations of study**

When conducting research, there are various limitations that prevent the researcher from fully conducting a good dissertation. On reflection, the limitations of my study are that I only interviewed a few NPA senior officials. The limited participation from the NPA could lead to a biased narrative of the research study. Additional biases include the balancing of

interviewees' prejudices of the NPA, the Zuma administration, and the Gupta family. Another limitation was the unresponsiveness from ANC members in the Portfolio Committee of Justice, despite having contacted all ANC portfolio committee members from the Justice and Correctional Services multiple times. The only member to respond was the chairperson of the portfolio committee – a member of the ANC, Dr MS Motshekga. Dr Motshekga 'requested for the interview to be placed on hold not to prejudge issues'. Other challenges included the long time period to complete all 12 interviews, the delay in waiting for ethical clearance in order to interview Advocate Shaun Abrahams and Dr Silas Ramaite, and the limited academic resources available on the NPA.

### **3.4 Triangulation**

Triangulation is described as “the process of verification that increases validity by incorporating several viewpoints and methods.” (Rahman and Yeasmin, 2012, p.156). It is also defined as the combination of two or more theories, data sources, methods or the investigation of a single study, and is usually used in qualitative and quantitative studies. Notably, Rahman and Yeasmin (2012, p.157), states that one of triangulations greatest strengths is that it has the ability to combine multiple observers, theories, methods, and empirical materials to overcome weakness, biases, or problems that come with single methods.



According to Rahman and Yeasmin (2012, p.156), triangulation is important because it provides the researcher with the opportunity to use various techniques for cross-checking, confirmation, and completeness of their research. Cross-checking for confirmation is applied in order to confirm if the instrument is appropriate for measuring a concept. While completeness is cross-checking to increase the in-depth understanding of the phenomenon at hand. Thus allowing the researcher to increase both the credibility of their research, as well as the validity of the end result. Furthermore, triangulation as mixed method research, blended research, interrogative research, and ethnographic residual analysis. How this related to my research, the two methods that I triangulated were the qualitative research study and the case study. Another form of triangulation was my interview groups. In order to balance bias views, I interviewed various groupings – subject experts, Portfolio of Justice Committee Members, and senior NPA officials.

### 3.5 Research ethics

Research ethics has increasingly become synonymous with the field of social sciences and was, therefore, an integral part of my research. According to Terre Blanche and Durrheim (2012, p.61), ethical consideration is essential to the purpose of research ethics as it aims to protect the welfare of research participants. However, research ethics further ensure that misconduct and plagiarism do not occur from the researcher. Terre Blanche and Durrheim (2006, p.69-73) states that there are eight essential elements of research ethics, collaborative partnership, social value, scientific validity, fair selection of participants, favourable risk/benefits ratio, independent ethical review, informed consent, ongoing respect for participants and study communities.

First, collaborative partnership, requires researchers to ensure that the research conducted is developed in association with the targeted community or population; second, social value of the research conducted should address questions of value to society or particular communities in society; third, scientific validity of the design, methodology, as well as, the data analysis applied in the study should be rigorous, justifiable, and feasible and lead valid answers to the research question; fourth, fair selection of participants should ensure that the population selected for the study are representative of the research question; fifth, favourable risk or benefit ratio intends to ensure the researcher should evaluate and identify all possible risks, harms, and costs of the research to the participants and specify the means to minimise those risks and cost in order for the risk or benefit ratio to be favourable; sixth, independent ethical review ensures that the maximum protection of participants is established, as well as, enhances the quality of research; seven, informed consent, ensures the standard components of consent provisionally entail the appropriate information, participants' competence and understanding, voluntariness in participating and freedom of to decline or withdraw after the study has started and the formalising of consent- often in writing; and eight, ongoing respect for participants and study communities, this requires that participants' be treated with respect throughout the study and that their individual information remains confidential (Terre Blanche and Durrheim, 2006, p. 73).

Additionally, there are two other important aspects that the researcher also needs to take into consideration when conducting research, plagiarism, and consent. The researcher signed a plagiarism declaration to ensure that firstly, the researcher acknowledged and respected the work of the authors used and referenced in the research study; and secondly, the researcher

acknowledged and respected the plagiarism policies of the University of the Western Cape and the Political Studies Department.

Furthermore, consent was an integral part of this research since the researcher conducted interviews. As a result, the research ensured the standard components of consent were followed by firstly, keeping the identity of the respondent confidential at all times unless otherwise specified by the participant. The researcher ensured that the participation of the participant during the interview process of the research was voluntary. The researcher ensured that there was no deception, discomfort or harm involved to the interviewees, or that there was any wrongdoing to the interviewees in any way possible. However, when at any time an interviewee felt that their consent had been violated during the interview process the interviewee had the right of way to withdraw. The researcher ensured that each respondent signed a consent form and provided each of the respondents with a copy of the information sheet of the research study for their personal possession. The researcher ensured that the interviewees that participated in the research study were not only a means to an end, after the researcher completed their field research and their findings and analysis sections, but if the interviewees so wishes – which they all did, the researcher informed each interviewee on the end results of the research study. And lastly, the researcher assured the interviewees of their importance in this research study, as their knowledge and opinions helped the researcher attain a better understanding of the research subject in question.

Confidentiality, like consent, was another integral component of the research ethics of this thesis. Confidentiality was of utmost importance as this research study aimed to interview high profiled individuals' i.e. high-ranking senior NPA officials and portfolio committee members. As a result, measures were set in place to protect the participants from harm, privacy, and accuracy or integrity of the research during the research process. This was done by providing all the participants with an information sheet which explained the purpose of the research study, and the importance of their consent and confidentiality as interviewees. Moreover, consent forms were signed by the interviewees. Similar to the information sheet, the consent form further clarified that their information would be kept confidential by stating the purpose of the research study, whether or not they wanted to disclose of their identity, the interviewee's right to withdraw at any time during the interview process, and the interviewee's right to refrain from answering questions that caused them discomfort.

## **Conclusion**

This chapter has set out the methodology and methods that were used in this research study. This research study was conducted by using a qualitative research study and a case study as its methodology. The methods used to conduct the research was convenience sampling. Convenience sampling allowed the researcher to conduct 12 semi-structured interviews. The interviews were grouped into three categories; senior NPA officials, Justice and Correctional Service Portfolio Committee Members, and subject experts. The interviewees were Advocate Shaun Abrahams, Dr Silas Ramaite, Advocate Vusi Pikoli, Advocate Glynnis Breytenbach, Mr Steven Swart, Mr Lawson Naidoo, Mr Paul Hoffman, Mr Gareth Newham, Dr Jeff Rudin, Professor Lukas Muntingh, Professor Lovell Fernandez, and Advocate Mike Pothier. Chapter Four will discuss the finding based on the research that was conducted in Chapter Three.





# Chapter Four: Framing the National Prosecuting Authority – Historical Overview and Contextualisation

## 4.1 Part A: historical overview

### Introduction

Pre-1994, South Africa has experienced more than three centuries of colonialism at the hands of Dutch and British colonialist and a further 46 years of apartheid under the National Party (NP). During this time South Africa was a violent, racist and unequal society. In 1994, following decades of violence and finally the negotiated settlement from 1990-1994, South Africa peacefully declared itself a democracy, with the African National Congress (ANC) at the helm as the country's 'liberation party' (Butler, 2009, p.1).

Post-apartheid South Africa saw unity and reconciliation take centre stage, bringing a sense of hope and new beginnings. South Africa was applauded for its exceptional Constitution, rectifying its unjust past with a new and transformed Executive, Legislature and Judiciary. In addition, the new South Africa emphasised the importance of the rule of law, democratic institutions, transparency, and accountability. This was short-lived, more than two decades into the country's democracy it has been marred by the dominance of the ANC. The failure to consolidate South Africa's democracy has slowly seen an unravelling of the country's democratic institutions, more particularly the NPA (Suttner cited in Brooks, 2004, p. 6-7). To establish my findings, this section will be divided into two parts, Part A – the historical overview of the NPA; and Part B – contextualising the NPA.

#### 4.1.1 Historical overview: pre-1994

Before the NPA was formed in 1998, Legislative History shows that the Attorneys-General had vested prosecution authority. Schönreich (2014, p.5), states that South Africa's prosecutors were, to varying degrees, subjected to executive interference, since its union in 1910. Prior to the 1998 NPA Act, in 1917, the Criminal Procedure and Evidence Act constituted that "this right and duty of prosecution vested in and entrusted to such Attorneys-General or Solicitor-General (as the case may be) is absolutely under his management and control" (Redpath, 2012, p.9). However, according to Schönreich (2014, p.6), between 1926 and 1992, successive Ministers of Justice effectively controlled the Attorneys-General. This extended across the

country's senior and most powerful prosecutors whose powers spread along provincial lines. Du Plessis et al (2008, p.345), explains in 1926 legislative amendments were made by then Prime Minister JBM Hertzog. The amendments placed the attorneys-general under the control and direction of the Minister of Justice allowing for direct and indirect political influence on the prosecution process. In 1935, another amendment was added which provided that "every Attorney-General and Solicitor-General shall exercise their authority and perform their functions under this Act and under any other Act subject to the control and direction of the minister who may, if he thinks fit, reverse any decision arrived at by an Attorney-General or a Solicitor-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function" (General Law Amendment Act 46, 1935, n.p.). This created a blurring of lines in the separation of powers between the Attorneys-General and the Executive for that period of time.

According to Redpath (2012, p.10), tight controls like this have always been related to political contestation in South Africa. In 1992, during the Convention for a Democratic South Africa (CODESA), former President FW de Klerk amended the 1926 Act by giving back autonomy to the Attorneys-General, with the function of the Minister of Justice being reduced to that of a coordinator. According to Schönteich (2014, p.6), in terms of the new Act, the authority to institute prosecutions became the sole responsibility of the Attorneys-General and their delegates, ultimately rendering them free from ministerial interference.

In 1992, during CODESA, another legislative amendment was presented by FW de Klerk's government. The new amendment entailed for the attorneys-general to be independent by doing away with the minister's power to impede with an attorney-general's decisions. The authority to institute prosecutions once again became the only responsibility of the attorneys-general and their deputies. The new amendment minimised the role of the minister to that of a co-coordinator – ensuring reports were submitted to Parliament, provide them with reports and offer explanations to the handling of particular cases (Redpath, 2012, p.10). According to Van Zyl et al (1999, p.5), the ANC, on the contrary, considered the legislation as an attempt by the apartheid prosecutors to protect their firmly rooted positions. The introduction of the NPA by the constitutional assembly in the final Constitution was to an extent a reaction to the 1992 amendments providing that an NDPP is appointed by the executive. Schönteich (2014, p.3), states the NPA arose out of South Africa's transition to democracy. The constitutional position of the NPA in relation to the executive branch of the government, presented by the presidency

and cabinet has its origins in the transitional negotiations and the 1993 interim Constitution. As a result, pre-1994 set the precedent for the NPA post-1994.

#### **4.1.2 Historical Overview: Post-1994**

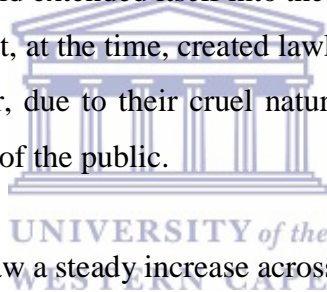
During South Africa's transition from an autocratic state to a democratic state, the 1992 Attorneys-General Act called for the newly found NPA to be independent of the state hindering it from political influence by the executive. The NPA was established in 1998, in accordance with the Constitution and the NPA Act of 1998. Section 179 of the Constitution and the NPA Act calls for the prosecuting body to prosecute without fear, favour, or prejudice to prevail so that people can live in freedom and security.

The NPA forms part of the Criminal Justice System as it prosecutes criminal offenses. The NPA is a large institution with various senior NPA officials, for example, the head of the NPA – the NDPP; four DNDPP's; various business units – Asset Forfeiture Unit (AFU), National Prosecuting Service (NPS), Sexual Offenses and Community Affairs (SOCA), Priority Crimes and Litigation Unit (PCLU), Office of Witness Protection (OW), Specialised Commercial Crimes Unit (SCCU), and Legal Affairs Division (LAD); administrations; nine provincial DPP's; and court prosecutors. According to Redpath (2012, p.9), the motivation of the Constitutional Assembly in introducing the provisions establishing a centralised NPA must be understood in terms of the legislative history of the Attorneys-General pre-1994. Post-1994, the newly elected ANC, viewed the 1992 Act by the Apartheid Government as a political ploy to entrench the position of the 'old order' Attorneys-General. Schönteich (2014, p.6), states that the ANC successfully pushed for a constitutional provision to establish a 'National Prosecuting Authority', whose head is appointed by the President. The constitutionality of the new NPA was challenged by a number of provincial attorneys, stating that it encroached on the separation of powers. However, according to Schönteich (2014, p.6), the Constitutional Court disagreed with their argument asserting that the NPA is not part of the Judiciary, and thereby the President does not contravene the doctrine of the separation of powers for his role in appointing the NPA head.

With reference to Schönteich (2014, p.6), the NPA was a contentious issue post-1994, prior to its establishment in 1998, as it inherited a fragmented and provincially-based institution, with poorly remunerated prosecutors, and some offices on the verge of a collapse. The newly formed NPA saw approximately 630 experienced prosecutors resign countrywide, nearly a third of the

prosecutors' at the time, lowering the average experience level of prosecutors at the time. The reason for the mass resignation of prosecutors, according to Schönreich (2014, p.8), ranged from inter alia, poor pay, working conditions, many senior white prosecutors uncertainty about their future and the rapidly increasing level of crime.

In 1998, when the NPA was established, it coincided with a shift in priorities for the Criminal Justice System. Since 1994. Government leaders in the justice sector, for three years, had focused on the transformation of the police and the criminal justice system. In so doing, their goal was to make the criminal justice system more responsive to community concerns, more accountable and democratic, as well as more focused on some of the underlying drivers of crime, such as socioeconomic deprivation. According to former NDPP Advocate Mxolisi Nxasana (2013/14, p.9), centuries of colonial rule and apartheid caused untold distress, hardship, and humiliation for the majority of the people in South Africa. These devastating effects of colonialism and apartheid extended itself into the Criminal Justice System, whereby the illegitimacy of the government, at the time, created lawlessness and disrespect for the rule of law among citizens. Moreover, due to their cruel nature, police officers and prosecutors lacked any legitimacy in the eyes of the public.



From 1992-1998, violent crime saw a steady increase across the country. In 1998, the creation of the NPA Act enabled the legislation to provide a new prosecuting authority, the investigating directorates, with the capacity to fight crime. Accordingly, the NPA formed three high-profile national investigating directorates to combat organised crime, serious economic offences, and corruption. According to Advocate Pikoli and Weiner (2013, p.139), one of the three investigating directorates that emerged was the Directorate for Special Operations (DSO), which was also known as the Scorpions that later dissolved and which was replaced by the HAWKS. According to Schönreich (2014, p. 9), investigating directorates, like the Scorpions, were meant to enable prosecution driven investigations, where investigations are conducted under the close guidance and assistance of a senior prosecutor to ensure that evidence collected can be used effectively in a court of law.

Prior to the Scorpions disbandment, it implicated multiple high profiled politicians in corrupt dealings. “All that changed when the NPA, specifically the Scorpions, started targeting senior ANC politicians, most notably Mac Maharaj, Tony Yengeni, Ngoako Ramatlhodi and then Deputy President Jacob Zuma” (News24, 2012, n.p.), ultimately leading to the disbandment of

the Scorpions. The Scorpions were then replaced by the HAWKS which moved from being a unit within the NPA to being positioned in the South African Police Service (SAPS). “Just 13 days after I took office as NDPP, President Thabo Mbeki announced a commission to investigate the possibility of incorporating the Scorpions into the South African Police Service... [In 2007] The Directorate for Priority Crimes, also known as the HAWKS, has been established and is positioned within the SAPS” (Advocate Pikoli and Weiner, 2013, p. 129 and 139).

## **4.2 Part B: contextualising the NPA**

### **Introduction**

The NPA has had its many scandals play out in the media over the years, often tainting the image of the organisation overall and its senior leadership in particular. The scandals have not only highlighted the plight within the organisation but also the greater struggle independent institutions, in general, have dealt with in recent times regarding the alleged politicisation. Ultimately damaging the agents of accountability that are supposed to uphold and strengthen our democracy. This section will look at the NPA in a descriptive viewpoint with a particular emphasis on their role as set out in Section 179 of the Constitution and the NPA Act. This is done by examining the lines of accountability of the NPA, the relationship between the executive and the NPA, blurring the lines of powers, defining the role of the NPA within the rule of law, international guidelines for prosecuting services and judiciaries, and comparing international prosecuting services.

#### **4.2.1 Lines of accountability**

As a democratic independent institution, the NPA establishes itself on the foundation of democracy, the rule of law as put forth by the Constitution, and the NPA Act. As a result, the NPA is accountable to not only the people of South Africa – as the prosecuting body of the country – but to the executive, the legislative, and the judiciary. According to Muntingh et al (2017, p.21), accountability occurs when a person is responsible to explain or justify their decisions or actions, against a set of criteria such as a constitutional act, mandate, vision, mission, or values. The NPA emphasises this clearly in their strategic overview when stating that accountability “is depicted by being responsible and answerable for our actions” (National Prosecuting Authority of South Africa Annual Report, 2013/14, p.21).

It is important for accountability to take precedent in institutions like the NPA, since “independence without accountability poses an obvious danger to the public interest, which requires a fair and just administration of the Criminal Justice System.” (Flatman, 1996, p. 4). Flatman (1996, p.5), further explains how independence without accountability has the potential for making haphazard, impulsive, and unjust decisions. The NPA is subjected to a threefold system of accountability, the Minister of Justice as the executive, Parliament, and to an extent the Judiciary – as “the NDPP is explicitly accountable to the Minister of Justice and ultimately Parliament, while the reviewability in the courts of its decisions to prosecute or not” (Muntingh et al, 2017, p.22). Naidoo (interview, CASAC, 2017), further backs up this sentiment by stating that there has to be accountability in the NPA. So while the NPA is independent it cannot automatically translate into not being accountable. Constitutionally speaking, the only way it can be accountable is via the Minister of Justice to Parliament or directly to Parliament, but it is important that there is an accountability mechanism in the NPA.

#### **4.2.1.1 Accountability to the Minister of Justice**

The NPA is accountable to the Minister of Justice as the Minister has final responsibility of the NPA, “the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting body” (The Constitution section 179(6), 1996, p.102). In accordance with Section 179(6) of the Constitution (National Prosecuting Authority Annual Report, 2014/15, p.20), the Minister’s Constitutional mandate to exercise final responsibility over the NPA is only in as far as requesting reports from the NDPP regarding the functioning of the prosecuting body, these include the formulation of policy, reporting to Parliament, and financial integrity. Additionally, according to Muntingh et al (2017, p.26), the Minister is entitled to be informed of the NPA’s decision to prosecute or not to prosecute, particularly with regard to high-profile cases.

#### **4.2.1.2 Accountability to Parliament**

The NPA Act 32 section 35, provides that the NPA is accountable to Parliament “in respect of its powers, functions, and duties under this Act, including decisions regarding the institution of prosecutions” (NPA Act 32, 1996, n.p.). Based on its mandate to prosecute on behalf of the state, the NPA forms part of neither the judiciary nor the legislative but does as a result form part of the executive tier of government. “Although the NPA executes its constitutional mandate independently, legislative prescripts position it within the Department of Justice and Constitutional Development” (NPA Annual Report, 2015/16, p. 9). Despite its placement, the



NPA is still constitutionally mandated to be an independent institution and free from political influence. According to Muntingh et al (2017, p.24), since the Constitution requires the executive, in this case, the Minister of Justice and Correctional Services, to account to Parliament for its actions, policies, expenditure, and budget, so too does it apply to the NPA.

#### **4.2.1.3 Accountability to the Judiciary**

The NPA is accountable to the judiciary – the Judicial Council, the courts, and judges for a myriad of reasons, some of which includes the accountability for the general conduct of proceedings, the accountability for the decision to prosecute, accountability for the decision not to prosecute, and the accountability for prosecution policy and directives. According to Muntingh et al (2017, p.22), this is due to the fact that the duty of the prosecutor is not solely to secure a conviction, however, to assist the courts in arriving at a just verdict. The court also has the right to subject judicial review on the NPA’s prosecution policy and directives.

#### **4.2.1.4 Accountability to the People: NPA’s Strategic Overview**

The NPA’s strategic overview as set out in their annual NPA report stipulates the institution's vision, mission, values, and constitutional mandate – thereby creating a measure of accountability to the people it serves. According to the NPA’s annual report (2015/16, p.14), the vision of the NPA is for justice to prevail in South Africa’s society, in order for its people to live a prosperous life in freedom and security. Along with it is the mission of the NPA, which instructs that, the NPA is guided by the Constitution and is here to “ensure justice to victims of crime by prosecuting without fear, favour or prejudice” and by working with their partners as well as the public to solve and to prevent crime (NPA Annual Report, 2015/16, p.14).

In order for the NPA to achieve its vision and mission, the institution imparted a set of values. The values of the NPA aims for the institution to be integral through ethical conduct, high moral standards and principles, honesty, and values with a zero-tolerance for corruption or fraud, keeping promises, being truthful, and being beyond reproach. Secondly, for the NPA to be accountable for being responsible and answerable for their actions or inactions; provide excellent services that is in line with the Batho Pele principles; by being professional both in and out of court; and demonstrate credibility through providing consistency and the ability to inspire belief or trust in the people (NPA Annual Report, 2015/16, p.14). Furthermore, the NPA is legislatively mandated, in terms of Section (1) of the NPA Act to, “(a) institute and conduct criminal proceedings on behalf of the state; (b) carry out any necessary functions incidental to



instituting and conducting such criminal proceedings; and (c) discontinue criminal proceedings” that is within their constitutional mandate (NPA Annual Report, 2015/16, p.15).

#### **4.2.2 The relationship between the executive and the NPA**

In 1996, South Africa officially adopted the Constitution of the Republic of South Africa. “The Constitution provides for a constitutional democracy and lists the rights to which the people of this country are entitled. To give substance to these Constitutional rights, independent institutions have been established to promote rights and to strengthen constitutional democracy.” (PMG, n.d. para.1). Chapter Nine of the Constitution outlines the independent institutions that support its democracy. However, Chapter Nine institutions are not the only independent institutions supporting democracy. There are other independent institutions, like temporary commissions that support the constitutional democratic rights of people i.e. the Truth and Reconciliation Commission (TRC). “In addition to the commissions described in Chapter Nine, the Constitution sets up other structures in South Africa to make sure that human rights are protected and a constitutional democracy is guaranteed.” (PMG, n.d. para. 21). The NPA forms part of the Criminal Justice System, however, it is uniquely situated in the executive branch of government as it prosecutes crimes on behalf of the state. However, although situated in the Executive, it is constitutionally mandated to be independent, so that it is free from political influence. Put simply, the NPA is an independent institution set up in Chapter Eight of the Constitution to ensure that justice prevails in our society so that people can live in freedom and security, by prosecuting without fear, favour, or prejudice (NPA, 2014, n.p.).

According to Muntingh, et al (2017,p.9), in South Africa independence is usually assumed to only relate to independence from the executive, however this is not the international norm, as independence refers to both internal and external independence and relates to inappropriate influence of any kind, including that by government, a political party, the media or public opinion. The Constitution along with the NPA Act legally ensures the NPA to exercise its function without fear, favour, or prejudice, constitutionally guarantees its independence, and in the NPA Act (1998, n.p) Section 32(1)(b) formerly prohibits any functionary in government from interfering in the NPA. In South Africa, the focus of independence from the executive and factions within the ruling party is largely the result of the unusual matter whereby the current president face potential prosecution for corruption, fraud, racketeering, and money laundering.

The constitutional guarantee of the independence of the NPA is complex, as 14 of the top tier senior NPA officials are appointed by the President, while the Minister of Justice serves as a consultant. NPA Act (1998, n.p.), Section 10 states that the NDPP is appointed solely by the President, without the consultation of the Minister of Justice. The President further appoints up to four Deputy NDPPs, nine Provincial Directors of Public Prosecutions (DPP) in consultation with the Minister of Justice. Whereas the Minister of Justice in consultation with the NDPP appoints the Deputy Provincial Directors of Public Prosecutions (DDPP), and the Minister of Justice, may in respect with the NDPP appoint one or more Deputy Directors of Public Prosecutions. In addition, although the President has the constitutional right to appoint NPA officials, he also has the right to fire them. However, the hiring and firing of NPA officials come with constitutional guidelines. The Constitution along with the NPA Act, Section 6(a) provides that:

“The President can provisionally suspend the NDPP or a Deputy Director of Public Prosecutions (DDPP) pending an enquiry into his or her fitness to hold office. The President may remove him or her from office for (1) misconduct, (2) on account of ill health, (3) on account of incapacity to carry out his or her duties, and (4) on account that he or she is no longer a fit and proper person. The reason for the suspension, as well as the representations thereto, must be communicated to Parliament within 14 days of the suspension. Within 30 days (or as soon as possible after the communique), Parliament must pass a resolution to endorse or dismiss the decision of the President.” (Muntingh et al, 2017, p.15).

According to the Constitution of the Republic of South Africa (1996, p.102), Section 179(6) provides that the Minister of Justice exercise final responsibility for the NPA in accordance with the NPA Act. This action only allows the Minister of Justice with the right to be informed of open prosecutions or prosecutions to be opened that may provoke public interest. It does not, however, provide the Minister of Justice with the right to instruct the NPA to prosecute, decline to prosecute or dismiss pending prosecutions. The appointment process of the NDPP and other top NPA officials and the responsibility exercised over the NPA by the Minister of Justice causes a blurring of lines of separation of powers between the executive and the NPA. As we do not know the intent with which the President appoints the top tier of NPA officials nor is the requirement for the NDPP and DNDPPs fitness to hold office not adequately described by the Constitution or the NPA Act. As a result, these actions can easily flout the

NPA's right to constitutional independence by leaving them exposed and vulnerable to political interference causing factions and infighting. For example, in a recent court ruling, According to Mitchley (2017, n.p.), the Pretoria High Court declared that the former NDPP Advocate Nxasana's termination was unconstitutional and as a result, current NDPP Shaun Abrahams must vacate his post as his appointment was unconstitutional. Furthermore, due to President Zuma's corruption charges, the High Court found that there is a conflict of interest, therefore instated Deputy President Cyril Ramaphosa to appoint a new NDPP. Not long thereafter the NPA filed an appeal.

### **4.2.3 Blurring the lines of power: the succession of NDPP's**

The relationship between the Presidents and the NDPP is crucial to the stability of the NPA. Stability from the top fosters trust and credibility for both prosecutors of the NPA and everyday people that look to the NPA for justice.

#### **4.2.3.1 NDPP Bulelani Ngcuka 1998 – 2004**

The NPA's first NDPP, Advocate Bulelani Ngcuka, was NDPP from 1998 to 2004. He was appointed by President Nelson Mandela. According to Schönteich (2014, p.6), prior to Advocate Ngcuka's appointment as NDPP, he was relatively unknown. He had served as an ANC Chief Whip in the National Council Provinces, worked on the ANC's Constitutional Committee, and he worked with the United Democratic Front. Schönteich (2014, p.6), further states that, at the time of his appointment, Advocate Ngcuka was well perceived across the political spectrum, considered a hard worker, and a consensus builder.

In 1999, when Thabo Mbeki became President Advocate Ngcuka was labelled an ANC/Mbeki affiliate. According to Schönteich (2014, p.6), as the NPA's first head, the appointment of Advocate Bulelani Ngcuka raised concerns among the General Council of the Bar and opposition parties as they feared the new NDPP would be a partisan political appointee. The concern comes as a result, "of his [Advocate Ngcuka's] close history with the ANC, opposition parties at the time of his appointment questioned the extent to which the NPA under him [Advocate Ngcuka] would operate independently and particularly whether the NPA would act in relation to crimes linked to high-profile ANC-members" (Redpath, 2012, p.12).

In 2003, halfway through his tenure as NDPP, Advocate Ngcuka announced he had a *prima facie* case against both Schabir Shaik – financial advisor to then Deputy President Zuma and

then Deputy President Jacob Zuma. Despite both Shaik and then Deputy President Zuma both facing similar charges, only Shaik was successfully prosecuted while the charges against the Deputy President Zuma were dropped by Advocate Ngcuka. Nearly a year later, in 2004 Advocate Ngcuka stepped down as NDPP after then Public Protector Lawrence Mushwana found Advocate Ngcuka had “infringed Zuma’s right to human dignity and improper prejudice” by his public announcement (Redpath, 2012, p.11). The parliamentary committee, predominantly ANC-members and selected by a meeting chaired by Zuma, adopted Mushwana’s report. In 2005, Deputy President Zuma was relieved of his duties as Deputy President by then President Mbeki after Shaik was found guilty of corruption. Despite Advocate Ngcuka’s failure to prosecute then Deputy President Zuma, according to Muntingh et al (2017, p.12), during his tenure, Advocate Ngcuka prosecuted the struggle icon Alan Boesak and two senior ANC politicians – Winnie Madikizela-Mandela and party chief whip Tony Yengeni. However, Muntingh et al (2017, p.120) state that some argue that the aforementioned cases were not reflective of Ngcuka’s independence, but rather a function of his close association with the Mbeki-oriented (anti-Zuma) faction of the ANC.

#### **4.2.3.2 Acting NDPP Silas Ramaite 2004 – 2005**

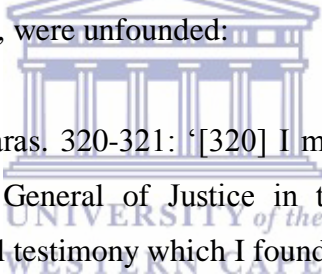
In 2004, after Advocate Ngcuka’s resignation, Advocate Silas Ramaite was appointed as Acting NDPP by then President Mbeki. According to Redpath (2012, p.13), Advocate Ramaite held his position as Acting NDPP from 2004 to 2005, seemingly without any controversy. “During a time when morale was particularly low in the NPA after Ngcuka’s exit. Ramaite adopted a comparatively low profile, in line with his academic and more conservative legal background and his position as acting NDPP. He has, however, been a key member of NPA leadership throughout its turbulent history” (Redpath, 2012, p.13), especially as one of the Deputy Director of Public Prosecution (DDPP), a position he holds until he retires. Advocate Ramaite held the position of Acting NDPP for less than a year when Vusi Pikoli replaced him as NDPP in 2005.

#### **4.2.3.3 NDPP Vusi Pikoli 2005 – 2007**

In 2005, Advocate Vusi Pikoli, previously Director General (DG) of Justice, was appointed by then-President Mbeki as NDPP. Advocate Vusi Pikoli served two out of his ten-year tenure as NDPP. In 2007, Advocate Pikoli’s departure as NDPP came under questionable circumstance. This brought to light the extent to which an NDPP’s tenure provides sufficient protection when undertaking politically difficult prosecutions says Redpath (2012, p.13). Advocate Pikoli and

Weiner (2013, p.164), states in November 2005 during Advocate Pikoli's tenure as NDPP, former Deputy President Zuma was charged with rape. Around the same time, Advocate Pikoli reinstated Zuma's corruption charges. However, according to Advocate Pikoli and Weiner (2013, p.165), in May 2006 Zuma was acquitted of rape. In 2007, Advocate Pikoli presented a warrant of arrest to another high-profile ANC affiliate and late former Police Commissioner, Jackie Selebi. Selebi was a known ally of the then President Mbeki. In 2007, Advocate Pikoli was suspended by President Mbeki for the alleged 'irretrievable breakdown' of relationship with the then Minister of Justice Bridget Mabandla. Advocate Pikoli's suspension by former President Mbeki was looked upon with suspicion by opposition parties.

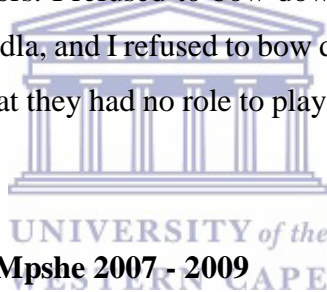
In 2007, former House Speaker of the National Assembly, Frene Ginwala, headed a commission of inquiry to probe Advocate Pikoli's fitness to hold office and the alleged breakdown in the relationship between Advocate Pikoli and then Minister of Justice Mabandla. According to Redpath (2012, p.14), the Ginwala Inquiry found that the allegations against Advocate Pikoli, for the most part, were unfounded:



“Ginwala Commission, paras. 320-321: ‘[320] I must express my displeasure at the conduct of the Director General of Justice in the preparation of Government’s submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Advocate Pikoli were without foundation. These complaints related to matters such as the performance agreement between the Director-General of Justice and the Chief Executive Officer (CEO) of the NPA; the NPA’s plans to expand its corporate services division; the DSO dealing with its own labour relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA. [321] All these complaints against Advocate Pikoli were spurious, and are rejected without substance, and may have been motivated by personal issues.’” (Redpath et al, 2017, p.13).

However, Ginwala further states that she had found that Advocate Pikoli should have “agreed to Mbeki’s request that he be given two weeks before proceeding against Selebi, on the basis of national security” (Redpath, 2012, p.14). At the end of 2007, at the ANC’s party conference in Polokwane, shortly after Zuma’s indictment charges, he was elected as President of the

ANC, defeating Mbeki for the leadership position of the ANC. Consequently, in September 2008, then President Mbeki was forced to step down as President of South Africa. In 2008, Kgalema Motlanthe was voted interim President by Parliament's National Assembly, until the 2009 national elections. During his presidency, the President Motlanthe refused to reinstate Advocate Pikoli as NDPP, despite being vindicated for his decision to prosecute Selebi as he was successfully convicted and sentenced for corruption. At first hand, Advocate Pikoli challenged his dismissal in court but later accepted a settlement payout of R7.5 million before the case was tried in court. According to Hoffman (2015, p.2), the refusal of Advocate Pikoli to bow down before political interference in his work as NDPP certainly contributed to his suspension and ultimately his dismissal, despite the Ginwala Commission into his conduct making the recommendation that he is a fit and proper person to hold the office of the NDPP. Likewise, Advocate Pikoli (interview, CoCT, Police Ombudsman), explains "one can even say in my own case when I was suspended, I was suspended because I believed that I was protecting the independence of the prosecutors. I refused to bow down to the wishes of the Minister of Justice at the time, Bridget Mabandla, and I refused to bow down to the wishes of the President at the time, Thabo Mbeki. I felt that they had no role to play in our decisions [as the NPA], and what happened, I got suspended".



#### **4.2.3.4 Acting NDPP Mokotedi Mpshe 2007 - 2009**

In 2007, Advocate Mokotedi Mpshe became the new Acting NDPP. Prior to his appointment as Acting NDPP, Advocate Mpshe was the head of the National Prosecuting Services (NPS), which is responsible for public prosecutions. According to Redpath (2012, p.15), during his time as Acting NDPP, Advocate Mpshe announced the withdrawal of Zuma's prosecution:

"Acting NDPP Mpshe announced on 6 April 2009 that he had decided not to prosecute Jacob Zuma. This was in light of the allegations of abuse of process in the Zuma case, allegations arising out of leaked intelligence recordings of telephone conversations between former NPA head [Advocate] Bulelani Ngcuka and Leonard McCarthy, then head of the Scorpions and then person responsible for the proceedings against Zuma" (Muntingh et al, 2017, p.13).

Advocate Mpshe claimed that "an unfettered discretion for NDPP's in deciding not to prosecute and further claiming that such decisions are not in the ordinary course susceptible to judicial review" (in Redpath, 2012,p.15). According To Redpath (2012, p. 15), this demonstrates the



fine line between independence, impartiality, and the duty to prosecute. Redpath (2012, p.15), further states that former President Mbeki's recall by the ANC and then President Motlanthe's election as President by the National Assembly, ultimately formed the backdrop of Advocate Mpshe's decision not to prosecute Zuma. The timing of Advocate Mpshe's announcement not to prosecute Zuma was skeptical, as it cleared the path for Zuma to become President of South Africa after the ANC won the majority in the 2009 National Elections.

#### **4.2.3.5 NDPP Menzi Simelane 2009 – 2011**

In 2009, Advocate Menzi Simelane was appointed as NDPP. In 2008, Redpath (2012,p.17), explains during Advocate Simelane's tenure as DG OF Justice, it emerged in the Ginwala Commission of Inquiry that Advocate Simelane drafted an instruction to Advocate Pikoli to halt the prosecution of the late former Police Commissioner Jackie Selebi. According to Advocate Pikoli and Weiner (2013, p.296/7), Ginwala described Advocate Simelane's behaviour as highly irregular as he did not have the right to interfere with the work of the office of the NPA. Despite Advocate Simelane's irregular conduct, he was still appointed NDPP by President Zuma. During Simelane's tenure as NDPP, a few controversies occurred. First, he attempted to demote a number of the senior prosecutors, restructure internal reporting lines, as well as alter the manner in which the asset forfeiture section of the NPA would be engaged by the state. Secondly, he intervened in a high profiled case that was handled by the Asset Forfeiture Unit as part of the arms deal. And lastly, he was at the helm when the DSO's Scorpions were dissolved and absorbed into SAPS as the HAWKS (Redpath, 2012, p.18). Not long after these controversies, Advocate Simelane was forced to vacate his post as NDPP. The Supreme Court of Appeal found Advocate Simelane to be not a fit and proper person for the position of NDPP, as a result of his lack of integrity before the Ginwala enquiry dated back to 2007.

#### **4.2.3.6 Acting NDPP Nomqoba Jiba 2011 - 2013**

In 2011, Advocate Nomqoba Jiba was appointed as Acting NDPP. Advocate Jiba did not go without controversy herself. Throughout her time as NDPP, Redpath (2012, p.18) states that Advocate Jiba was perceived in quite a negative manner. Prior to her position as Acting NDPP, Advocate Jiba was suspended for her role in the illegal arrest of Prosecutor Gerrie Nel, who at the time was prosecuting Selebi. Advocate Jiba has been accused of unlawfully abusing her prosecutorial powers. As a result, according to Muntingh et al (2017, p.14), she is facing criminal charges and removal from the roll of advocates, after repeated court judgements



reprimanding her for irrational and illegal withdrawal of murder and corruption against former Crime Intelligent Boss, Richard Mdluli, and for prosecuting anti-corruption investigator, Major-General Johan Booysen without any evidence. According to Naidoo (2013, p.2), Judge John Murphy was critical in his remarks to the way in which Advocate Jiba as Acting NDPP handled the case on Mdluli. Furthermore, Judge Murphy stated that “the attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the office they hold” (Naidoo, 2013, p.2). After assuming the position of leadership for 18 months, Tamukamoyo and John (2014, p.1), states that Lawson Naidoo from the Council for the Advancement of the South African Constitution (CASAC) took legal action against President Zuma, forcing his hand into permanently appointing a new NDPP.

#### **4.2.3.7 NDPP Mxolisi Nxasana 2013 - 2015**

In 2013, Mxolisi Nxasana was appointed as the new NDPP, finally replacing Acting NDPP Advocate Jiba. One year after his appointment, the Presidency announced an inquiry into Advocate Nxasana’s fitness to hold office. According to Newham and Maunganidze (2015, p.2), this comes after Advocate Nxasana’s checkered past was brought to light by then Minister of Justice Jeff Radebe. Newham and Maunganidze further state that at the time Advocate Nxasana had a number of criminal investigations and charges that were not fully disclosed during his security clearance process. These charges range from nepotism, two criminal convictions for assault, and resisting arrest for serious traffic offences.

Prior to Advocate Nxasana’s fitness to hold office, the National Prosecuting Authority’s Annual Report (2014/15, p.31-33), states that Advocate Nxasana addressed a memorandum to the Minister of Justice for him to request the President provisionally suspend Advocate Jiba, as well as two other senior NPA staff members on their fitness to hold office. Advocate Nxasana’s request was based on Judge John Murphy’s findings. **See Appendix 1.** According to Naidoo (Interview, Executive Secretary, CASAC, 2017), when Advocate Nxasana was still NDPP and just after he has been threatened with suspension himself, he appointed Justice Yacoob to conduct an investigation into what was going on in the NPA. Naidoo (interview, Executive Secretary, CASAC, 2017), states one of the key recommendations by Justice Yacoob was a full Judicial Commission of Enquiry with full judicial powers because the rot in the NPA is so widespread and deep, moreover, because ‘people like Advocate Jiba’ and others refused to testify or provide any information. Shortly before the enquiry, Advocate Nxasana’s was given the golden handshake with an R17.3 million payout for the remainder of his tenure.

#### 4.2.3.8 NDPP Shaun Abrahams 2015 – Current

In 2015, Advocate Shaun Abrahams was appointed NDPP. Despite the mixed reviews on Advocate Abrahams appointment, particularly his relatively junior position previously held within the NPA, he has quite the glowing review from those he has previously worked with. According to Newham and Maunganidze (2015, p.3), in his over 17 years of experience Advocate Abrahams has successfully prosecuted a former terrorist leader from Nigeria, as well as the ‘Mangaung Four’ – four Afrikaaner men were prosecuted for the alleged right-wing bomb plot set to take place at the ANC’s elective conference. In 2016, more than a year into his tenure Advocate Abrahams announced that he was charging former Minister of Finance Pravin Gordhan, and two former South African Revenue Services officials Oupa Magashula and Ivan Pillay with fraud. A short while thereafter, Advocate Abrahams withdrew the charges citing that “they did not have the requisite intention to act unlawfully.” (Pather, 2016, n.p.).

According to Pather (2016, n.p.), Advocate Abrahams has been heavily criticised by civil society organisation and senior ANC politicians for his decision to prosecute former Minister of Finance Gordhan on what they call bogus, trumped-up charges. Another cause for concern is Advocate Abrahams close relationship with former Acting NDPP Advocate Jiba. With that said, Advocate Abrahams faces an unnerving task heading the NPA with the bad reputation set by his predecessors and political interference at the highest level of the NPA. Since Advocate Abrahams appointment as NDPP, he has seemingly shied away from re-prosecuting President Zuma on his 783 corruption charges. The DA, however, had the 783 charges against President Zuma reinstated after taking the NPA to court on the spy tapes matter relating to the arms deal involving the President. Recently, President Zuma along with the NPA has appealed for the charges to be withdrawn, but the Supreme Court of Appeal ruled against them.

This section shows the instability of the NPA due to the constant change of leadership and selective prosecution. The instability within the NPA could be as a result of the relationship between Presidents and the NDPPs, and the level of political interference into the NPA over the years. It illustrates how the prosecuting body has been involved in numerous political events over the years, often putting forth the perception of a compromised independence. According to Redpath (2012,p.19), the degree to which the NDPP and NPA are independent and to whom and in what way they are accountable are questions of both legal and practical importance. Moreover, Advocate Pikoli (interview, CoCT, Police Ombudsman), states that we need to draw a line between those in leadership of the NPA and ordinary prosecutors doing an honest day’s

work – at the Magistrate Court, District Court, Regional Court, and the High Court – because in criticising the NPA, we do not want to be criticising hard-working prosecutors who are honest and fair in their jobs.

#### **4.2.4 Defining the role of NPA within the rule of law**

According to Redpath (2012, p.1-2), the pivotal role of the prosecution in the criminal justice system requires a prosecution service to provide neutral, non-political, nonbiased decisions about the application of criminal law and policy to everyday cases. Independence applies particularly in relation to the core functions of prosecutors, common to most legal systems, these include deciding on whether to initiate or continue a prosecution, conducting prosecutions before the courts, as well as appealing or conducting appeals concerning all or some court decisions. In South Africa in particular, the NPA derives its mandates from section 179 of the Constitution. The National Prosecuting Authority's Annual Report (2013/14, p.20), states that Section 179(2) empowers the NPA to institute criminal proceedings on behalf of the state. The NPA Act in terms of Section 20(1) "the power vests in the prosecuting authority to, (a) institute and conduct criminal proceedings on behalf of the state, (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings, and (c) discontinue criminal proceedings" (National Prosecuting Authority's Annual Report, 2013/14, p.21). In accordance with the aforementioned, Section 179(4) of the Constitution thereby requires that the NPA carries out its functions without fear, favour or prejudice.

##### **4.2.4.1 The role of the NDPP**

The National Prosecuting Authority's Annual Report (2013/14, p.20), provides that the NDPP as head of the NPA, and DPP's are responsible for ensuring compliance with its constitutional obligation. Moreover, Section 179(5)(a) and (b) of the Constitution stipulates that the NDPP must determine prosecution policy and issue policy directives. Prosecution policy and any amendments thereof must be determined in concurrence with the Minister of Justice and after consultation with DPP's. According to the NPA Act, the DNDPP is subjected to the control and direction of the NDPP.

##### **4.2.4.2 The role of the President**

The President is constitutionally mandated to appoint the NDPP. In terms of Section 11 of the NPA Act, the President also has the authority to appoint four DNDPPs, however, after consultation with the Minister of Justice and the NDPP. Furthermore, under Section 13(1) of

the NPA Act, the President may after consultation with the Minister of Justice and the NDPP appoint the nine provincial DPPs at the respective seats of the High Court. Moreover, according to Redpath et al (2017, p.15), the President, in accordance with Section 12(6)(a) of the NPA Act, may provincially suspend the NDPP or the DDPP pending an enquiry into his fitness to hold office. Additionally, Redpath et al (2017, p.15), states that the President may remove the NDPP or DDPP from office on account of misconduct, ill-health, incapacity to carry out their duties, and on account that they are no longer 'a fit or proper person'.

#### **4.2.4.3 The role of the Minister of Justice**

The National Prosecuting Authority's Annual Report (2013/14, p.20), states that in accordance with Section 179(6) of the Constitution, the Minister of Justice exercises final responsibility for the NPA, thereby in terms of legislation the Minister may request reports from the NDPP regarding the functioning of the institution. As a result, according to Redpath et al (2017, p.20), the Minister of Justice is entitled to be kept informed in respect of all prosecutions, including prosecutions that were initiated and those about to commence which might arouse public interest or involve important aspects of legal or prosecutorial authority, for example the case of Oscar Pistorius and the case of President Jacob Zuma. Additionally, the Minister of Justice appoints a DDPP, under Section 15(1)(b) of the NPA Act, to the Office of a DPP. Can an independent body operate impartially when the President has a direct influence in choosing who heads it? What is the international precedent? Why was it set up this way? There are various international guidelines that prosecuting services, like the NPA, and judiciaries follow and have to abide by.

#### **4.2.5 International guidelines for prosecuting services/judiciaries**

According to Redpath (2012, p.2), in most Western European countries, the institutional dependence of prosecutors on the executive branch is the existing state of affairs. The acknowledgement of the problems related to prosecutorial dependence upon the executive branch is growing as there is a trend towards increasing the independence of prosecution services from the Executive, this is especially apparent in transitional democracies.

Redpath (2012, p.2), states that the need for prosecutors in nation states to be both independent and accountable in carrying out their role is increasingly being acknowledged in international organisations such as the United Nations (UN) Guidelines. She further states that South Africa's Constitution directs courts to regard international law in their decision-making, despite

the fact that international law does not provide provisional guarantees for the institutional independence of prosecutors. “Nevertheless, the UN Guidelines recognise the crucial role played by prosecutors in ensuring the Universal Declaration of Human Rights principles of equality before the law, the presumption of innocence, and the right to a fair and public hearing by an independent and impartial court are upheld, and encourages states to ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability ” (Redpath, 2012, p.2). A dominant party system, like South Africa’s, has given rise to state capture. It is important to establish how the NPA compares to other prosecuting services around the world.

#### **4.2.6 Comparing international prosecuting services**

Newham and Rees (2014, p.1), states that unlike in the NPA, in England and Wales, the Crown Prosecution Services has an Inspectorate who seeks to improve the quality of justice through independent inspection and assessment of the Crown Prosecution Service. As a result, it examines the quality of prosecutorial decisions and duly indicates poor performance. In Northern Ireland, on the other hand, Newham and Rees (2014, p.2), explains how an independent assessor of complaints investigate and determine whether complaints have been adequately handled. While in Japan, according to Newham and Rees (2014, p.2), Prosecutorial Review Commissions may review prosecutorial decisions not to prosecute individual cases, thus serving as a watchdog for political interferences of high-ranked states officials.

However, in the United States, much like the NPA, the Attorney General is appointed by the President, but with the advice and consent of the Senate. The Attorney General serves a term of four years and is subjected to the removal and the discretion of the President. According to Redpath (2012, p.5), the Namibian Constitution provides for there to be an Attorney-General and a Prosecutor-General. As a result, the Attorney-General is a political appointment and holds office at the discretion of the President without the security of a tenure. While the Prosecutor-General, on the other hand, is appointed by the President upon the recommendation of the Judicial Service Commission and under the Constitution. Thus allowing the Prosecutor General with the vested power to prosecute on behalf of the Republic of Namibia. Another important aspect in framing the NPA is to look at how the ANC’s dominance effect the NPA.

#### 4.2.7 ANC party dominance and electoral statistics

The ANC was established in 1912, as a movement that represented the country's black middle-class, at the time. According to Marais (1998, p. 14), the ANC initially built itself around a relatively privileged layer of independent African blue-collar workers, following a liberal trajectory the movement petitioned for the extension of voting rights, non-racialism and other injustices that affected black South Africans at the time. The ANC negotiated South Africa into a peaceful democracy and has been the governing party of South since the inception of democracy in 1994.

In post-apartheid South Africa, after nearly 24 years at the helm, the ANC has been unrivalled by opposition political parties and continues to assert its power. According to Wieczorek (2012, p.29), in dominant party systems, like in South Africa, multiple parties compete for power, but only one party consecutively wins elections. This structure arguably may have played a role in establishing the foundations of democracy in South Africa because it is seemingly more stable than a system characterized by multiple fragmented parties. It, however, has the ability to be undemocratic, loot the economy, intimidate minorities, and participate only in elections they know they can win. "The ANC's liberation credentials, and its association with the struggle against apartheid results in an affinity to the party that goes beyond a mere instrumentalist relationship between it and its constituency. Some people who lived under apartheid associate the ANC party with a 'sense of freedom' and the notion of human dignity" (De Jager and du Toit, 2013, p.9). De Jager and du Toit (2013, p.9), further state that political parties such as the ANC, have a far larger share of widespread legitimacy at their disposal than any of their political competitors merely based on their historical representation.

There are two types of party dominance in dominant party systems, illiberal and liberal. Illiberal refers to 'hegemonic party systems', whereas liberal can be understood as dominant party systems. Although dominant party systems as a result of the ANC's supremacy in national elections, South Africa has a robust democracy. Unlike many other dominant party systems, South Africa has strong democratic qualities. These qualities include competitive opposition parties that hold government accountable through horizontal accountable when vertical accountable goes unaccounted for, vibrant and active participation through marches, protests and watchdogs, civil and political freedoms, an adherent rule of law, moderately equal society – in terms of wealth, and a responsive governing party when political pressures are applied. These qualities as a democracy limit the ANC from drifting towards authoritarian tendencies

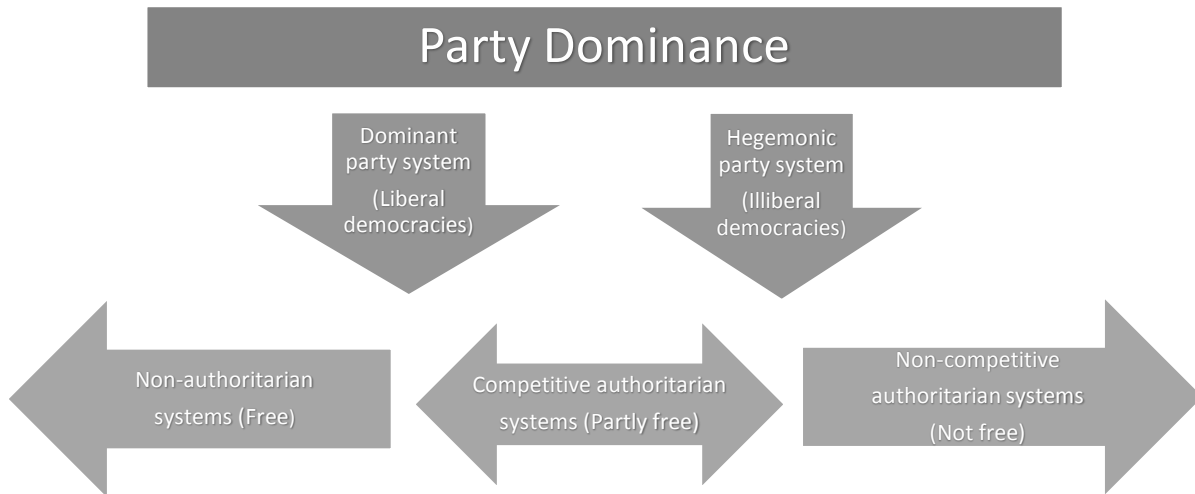


of domination (Butler, 2009, p.158). According to Jung and Shapiro cited in Habib and Schulz-Herzenberg (2011, p.193), in order to maintain oppositional institutions we need to ask awkward questions, shine the light in dark spaces, and expose abuses of power, which tend to serve as a check on governments who have an incentive to camouflage any mistakes or controversial decisions that might threaten their popularity as a government or party.

In 2014, there was a shifting pattern of dominance as the ANC saw a decline in votes. According to Schulz-Herzenberg (2014, p.3), in 2014, the ANC won a 62.2% majority in the national elections, a decrease of 213 827 votes since the 2009 national elections. This results in a 35% decrease in eligible voters for the ANC. However, Habib (2011, p.191), suggests that an increase in votes for the ANC in the 2009 elections differed from preceding elections because of three aspects, firstly the succession race for leadership of the governing party since 2005, between former President Mbeki and current President Zuma, caused middle-class voters of all races to go to the polls; secondly, the youth were prompted to vote as a result of the Obama factor – in the USA then Presidential hopeful, Barack Obama, gained a substantial amount of youth voters due to his ‘Yes We Can’ campaign; and lastly, the split in the ANC and the formation of the Congress of the People (COPE) stirred dissatisfied voters, giving them a substitute for a non-racial alternative to the ANC. Despite South Africa being a robust democracy, continued ANC party dominance can be detrimental to independent institutions and parastatals alike. The politicisation of these integral institutions, like the NPA, can essentially mean an erosion of democracy and the rule of law. See **Figure 4**.



**Figure 4: Typology of party dominance in political systems** (Source: adapted by the author, derived from: De Jager and du Toit, 2013, p.12).



In the 2016 South African local government elections, a further shift away from dominance occurred as the ANC lost all the major metropolitans, namely Johannesburg, Tshwane, and Nelson Mandela Bay. According to Schulz-Herzenberg in an online news article by the SABC (2016, n.p.), the ANC narrowly won the DA in Johannesburg by 44.55% to 38.37%. While the DA won the ANC in Tshwane by 43.15% to 41.25%, and the DA won the ANC in Nelson Mandela Bay by 46.71% to 40.92%. Even though the DA did not win the Johannesburg metro, since the ANC failed to win an outright 50% of the votes and failed to form a coalition, the DA won the metro by successfully forming a coalition with EFF. The DA also scored the remaining two major metros via a council vote backed by the EFF. Although the ANC lost three of its major metros in South Africa, it still won 54.49% of the country's overall vote, allowing them to dominate once again. In comparison, the DA only won 27.02% of the country's overall vote, with the EFF merely only securing an 8.27% of the country's vote. It is undoubtedly the poor economic and political performance of the ANC over the past few years, as well as the low favourability ratings of President Zuma that pushed many voters towards opposition parties like the DA and EFF in the 2016 local government elections (Schulz-Herzenberg, 2016, n.p.). The lack of effective competition from opposition parties during elections gives rise to the ANC's dominance. While this is true, Butler state that both prolonged dominance by the ANC and consolidation by an opposition have consequences:

“South Africa seemingly cannot afford robust opposition or a fragmentation of the liberation movement, neither can it afford the consequences of deepening ANC domination. South Africa’s democracy is not robust enough to cope with fluidity and party system reconstruction because of the need to build sound, legitimate and trusted institutions. Yet the longer the ANC remains dominant, both electorally and in the executive, the more harm may be caused by state-party integration, patronage politics, opposition de-legitimation, and the abuse of incumbency” (Butler, 2009, p.158).

#### 4.2.8 Politicisation

In 1998, Advocate Bulelani Ngcuka was appointed as NDPP by the late former President Nelson Mandela, and he was dubbed an ANC affiliate. Advocate Ngcuka’s appointment caused contestation within the institution, shortly after Ngcuka’s the infamous South African arms deal scandal followed, which implicated high profiled persons and politicians. The arms deal scandal mainly involved Tony Yengeni – former ANC MP and Chief Whip, and Schabir Shaik – a businessman and financial advisor to then Deputy President Jacob Zuma. It later became known that Schabir Shaik, was believed to have a corrupt relationship with Deputy President, Zuma, who too was a suspect in the arms deal investigation by the NPA. However, while Shaik was prosecuted for his corrupt implication in the Arms Deal scandal, the Deputy President Zuma was not. Despite Advocate Ngcuka’s findings of a *prima facie* case against the Deputy President (Schönteich, 2014, p.9). As a result, a power struggle emerged between two factions within the ANC, pro-Zuma allies, and pro-Mbeki allies.

In 2005, President Mbeki relieved Deputy President Zuma of his duty in government due to his alleged corrupt relationship with Shaik. President Mbeki appointed Vusi Pikoli, in 2005, as the new NDPP. Under Pikoli’s leadership, the NPA pressed charges against Zuma, based on Shaik’s successful conviction. Another high-profile prosecution under Pikoli’s leadership was that of National Police Commissioner, Jackie Selebi, an ally of President Mbeki was prosecuted by the NPA based on corruption charges. Shortly after Selebi’s arrest, President Mbeki suspended Pikoli as NDPP. According to Mbeki, this was as a result of an irretrievable breakdown in the working relationship between the Minister of Justice and Constitutional Development and Advocate Pikoli, making this the second incidence of political meddling in the NPA even though the Ginwala enquiry found Advocate Pikoli to be a ‘fit and proper person’. Advocate Pikoli was then replaced by Acting NDPP Advocate Mokotedi Mpshe, who withdrew the corruption charges against Mr Zuma, citing political influence as the reason. At

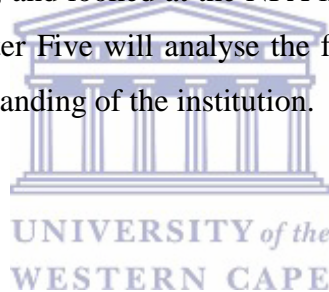
the 2007 ANC presidential elective conference in Polokwane, Zuma was elected as the President of the ANC. This set the tone for the series of events to follow in the NPA.

The trend in NDPP's unable to complete their full tenure continued during President Zuma's administration. Due to his Acting position Advocate Mpshe's was replaced by Advocate Menzi Simelane. Shortly after Advocate Simelane's appointment, he was dismissed as the Supreme Court of Appeal found him to not be 'fit and proper' for the position due to his lack of integrity before the Ginwala enquiry. Advocate Simelane was replaced by Advocate Mxolisi Nxasana who too after a short stint as NDPP was given a golden handshake allegedly as a result of his previous criminal charges. In 2015, President Zuma appointed Advocate Shaun Abrahams as NDPP. He too was not unscathed by controversy. In 2016, Advocate Abrahams charged then Finance Minister Pravin Gordhan with fraud, causing the economy to dip. Weeks later Advocate withdrew stating "he found Gordhan lacked the requisite intent to act unlawfully" (EWN, 2017, n.p.). More recently, Deputy NDPP Jiba and head of the Specialised Commercial Crimes Unit, Advocate Mrwebi were struck off the Bar after being accused by the Courts of abuse of power, misconduct, and perjury.

Muntingh (Interview, 2017), states what went wrong in the NPA is that nobody anticipated that it would come under political pressure. And as a result, Muntingh express the role of the NPA defined in the Constitution was drafted at a time when we all had 'democracy and Mandela fever' and all this 'kumbaya', and now nearly 20 years later we see that this guarantees of independence, and serving without fear, favour, or prejudice was to some extent naïve. Naidoo (interview, 2017), believes the lack of trust in the NPA is based on the fact that people view it as an entity that is riddled with factionalism, political interference and in some cases pursue a political agenda. While Advocate Pikoli (interview, 2017), similarly states that what tends to attract attention to the NPA is your high profiled cases, "I suppose that people tend to judge them or measure them based on their high profiled matters". More specifically high profiled cases which would involve politicians or high profile members of society who have tendered to see some kind of interference in the work of the NPA and where politicians tend to want to influence certain decisions. Another cause of concern within the NPA is the alleged factions and infighting.

## Conclusion

In this chapter, it was found that the performance outcomes of the NPA, according to the NPA Annual Report (2015/16, p.9), is indicative of the drive and commitment of the NPA officials in their rigid pursuit for justice within the limitations of the rule of law and immensely difficult environments. The NPA, as an independent institution, was set in place to uphold South Africa's democracy preventing it from possibly eroding and hindering its democratic progress. However, while the vision, mission, values, and legislated mandate of the NPA are firmly rooted in the Constitution and the NPA Act, the reality often differs. The NPA Annual Report (2015/16, p.30), states that political and or domestic instability is a serious challenge to the country, and if left unchecked it will undermine South Africa's democracy, rule of law and development trajectory. In order to determine the factors that aided in the NPA demise, this chapter has discussed the lines of accountability of the NPA, the relationship between the executive and the NPA, defined the role of the NPA based on the rule of law, the dominance of the ANC as a governing party, and looked at the NPA in comparison to other prosecuting services around the world. Chapter Five will analyse the findings of the NPA from Chapter Four for a comprehensive understanding of the institution.



## Chapter Five: Analysing the National Prosecuting Authority

### Introduction

During the 18 years that the NPA has been in operation as the country's prosecuting body, it has been marred by disorder and instability. The NPA has been embroiled in controversy since its inception in 1998 when Advocate Bulelani Ngcuka was appointed as NDPP, and in recent times continues to find itself in a position of controversy. The various incidences of alleged political influence, factions, and infighting in the NPA have seen a loss of public faith in the prosecuting body's ability to prosecute without fear, favour, and prejudice. According to Naidoo (interview, Executive Secretary, CASAC), the issue of independence of an institution, like the NPA, relies a lot on public perception, so whether those perceptions are true or not it still plays a huge role. Based on my research question(s) in Chapter One – does the NPA act as an independent state institution and does it strengthen the quality of democracy in South Africa?, the principal concepts in Chapter Two, and the findings in Chapter Four, this section will try to address those controversies that embroil the NPA, by analysing the causes for the NPA's dysfunction.

### 4.1 Democracy

There are two main viewpoints of democracy in this thesis. Morlino's (2007, p.15), prescribes that a good democracy is when the rule of law is preserved and respected, through the application of the legal system and the sub-national level's guarantee of citizen's rights and equality. Additionally, the absence of dominant organized crime; corruption; a competent local and centralized civil bureaucracy; an efficient police force; reasonable, swift criminal inquiries, and civil and administrative lawsuits; and an independent judiciary, and independent state institutions. In comparison, Dahl's (2005, p.188-9), explains that in an ideal democracy there should be effective participation, voting equality, meaningful and extensive competition, civil and political freedom, accountability and responsiveness, constraint of executive power through a separation of powers, and access to alternative information – media and civil society. Drawing on both points of view, this section will analyse how democratic the NPA is as an independent institution and whether it strengthens democracy. This will be done by using Dahl's viewpoint on an ideal democracy, I will also include some of Morlino's critical features of a good democracy, with the inclusion of state capture and dominant party systems.

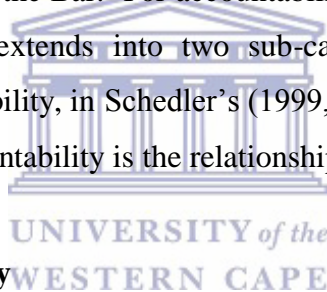
## 4.2 Accountability

As mentioned before, accountability is defined as “the obligation of elected political leaders to answer for their political decisions when asked by citizen-electors or other constitutional bodies”, (Morlino, 2004, p.17). Thereby for freedom and equality to be present, there should be accountability and responsiveness for a good democracy to prosper. Accountability is a two-dimensional concept that answers – monitors and oversight and enforces – rewarding good behaviour and punishing bad behaviour. In democratic states, government officials are accountable to citizens. As set out in my findings in Chapter Four, the NPA is accountable to not only the people of South Africa – as the national prosecuting body of the country – but to the executive, the legislative, and the judiciary. According to Muntingh et al (2017, p.21), accountability occurs when a person is responsible to explain or justify their decisions or actions, against a set of criteria such as a constitutional act, mandate, vision, mission, or values. The NPA emphasises this clearly in their strategic overview when stating that accountability “is depicted by being responsible and answerable for our actions” (National Prosecuting Authority of South Africa Annual Report, 2013/14, p.21). However, while accountability is one of the values of the NPA, the institution often lacks accountability.

In accordance with the values of the NPA, in an interview with Glynis Breytenbach (DA Shadow Minister of Justice and Correctional Services, 2017) she says that the NPA does not have any values as it has not succeeded as an organisation, the leadership of the organisation has failed miserably, and the reason for the lack of success and failure can be blamed on the poor leadership of the organisation. Gareth Newham (Interview, 2017, Institute for Security Studies – Senior Researcher), similarly states that while the NPA has really good values, there are too many instances of people in the NPA at a very senior level that are not adhering to those values and that has damaged the NPA quite considerably. For example “we have got at least two national/ deputy national directors of public prosecutions who have been found by various enquiries not to adhere to this values. However, they are not being held accountable for not adhering to this very laudable values and you have these powerful people in institutions, you get the biggest salaries, have the most authority”. Newham further explains that not adhering to the institutions own code of values and not being held accountable weakens the meaning of those values for the prosecutors and opens up opportunities and possibilities for more members of the prosecuting authority to act outside of those values.



It is therefore important to start at the top with senior NPA officials, “there's an old Chinese proverb the fish rots from the head and that is why it is absolutely critical for the NPA to ensure that its senior members always held strictly to those laudable principles and values” (Interview with Newham, ISS, 2017). As soon as there is any indication that anybody at the top of the organisation is not being held accountable, “when they break those values then you start with the process of organisational decline and a process of public mistrust in that organisation”. The lack of principle and values was evident when the North Gauteng High Court made unfavourable findings against Advocate Nomgcoba Jiba, Advocate Lawrence Mrwebi, and Advocate Sibongile Mzinyathi. In the leaked Yacoob report the three senior NPA officials were found guilty of abuse of power, misconduct, and perjury (National Prosecuting Authority’s Annual Report, 2014/15, p31-33). “One of the other earlier things that Advocate Abrahams did when he took office was to drop the charges against Advocate Jiba” (Interview with Lawson Naidoo, CASAC, 2017). However, Advocate Jiba along with Mrwebi and Mzinathi still had to go before the General Council of the Bar. For accountability to occur we need watchdogs or agents of accountability. This extends into two sub-categories, vertical and horizontal accountability. Vertical accountability, in Schedler’s (1999, p. 23), is the relationship between unequal’s, while horizontal accountability is the relationship between equals.



### **5.2.1 Horizontal accountability**

Horizontal accountability is understood by Morlino (2004, p. 18), to be the responsibility of governors to answer to other institutions or collective actors of equal power or position, such as regulatory bodies or independent institutions, that have the expertise and power to control the behaviour of those in power. Schillemans (2008, p. 179), there are four main elements of horizontal accountability. First, there is an acknowledged formal relationship between the ‘accountor’ and ‘accountee’. The process of accountability then starts with the information stage, whereby the ‘accountor’ is obliged to explain their actions. A debate follows between the ‘accountor’ and ‘accountee’. Lastly, the ‘accountor’ is punished either by formal or informal sanctions. This section will analyse the relationship of the ‘accountor’ and ‘accountee’ of the NPA.

Accountability in South Africa, for the most part, has been a contentious issue. One of the major problems of accountability in South Africa is that it lends itself to a weakening of democratic institutions in South Africa, some of these may be established in the following



examples. According to Roelf (2008, n.p.), other examples of this trend is when the President signed the disbandment of the Scorpions into legislation after it emerged that the ANC was accused of abusing their power in political cases, and the Public Protector accused the government of interfering in the functioning of her work in office. Furthermore, part of this weakening of democratic institutions, like the NPA, is that Parliament is ineffective in its oversight role to hold the NPA to account through its Portfolio Committee on Justice and Correctional Services. In an interview with Professor Lovell Fernandez (Interview, 2017, P University of the Western Cape, Law Faculty – Criminal Justice and Procedure), he said that “they [the NPA] were not being held accountable by Parliament, the NDPP seems to be operating in a smoke room”. He continued by stating that the NPA needs an accountability body as it cannot solely rely on Parliament as watchdogs.

According to Muntingh et al (2017, p.24), the NPA Act provides that the NPA shall be accountable to Parliament ‘in respect of its powers, functions, and duties under this Act, including decisions regarding the institution of prosecutions’. However, Muntingh et al (2017, p.24), states that despite these provisions, the legislation is unclear on how Parliament should actually exercise its mandate. Moreover, Muntingh et al (2017, p.24), explains that the term oversight has a broader meaning than just accountability, and includes a mixture of activities and initiatives aimed at monitoring the executive. A crucial means of holding the NPA to account to Parliament is through the Portfolio Committee on Justice and Correctional Services.

According to Muntingh et al (2017, p.24), Parliamentary Monitor Group (PMG) states that the Portfolio Committee on Justice and Correctional Services has called on the NPA to report to it on nine occasions in the last four years between 2012 and 2016. See **Table 1**. Nine engagements over a five-year period are insufficient to deal with the in-depth matters pertaining to the NPA. With reference to the ‘decisions regarding the institution of prosecutions’, Muntingh et al (2017, p.25), states that in late 2016, the current NDPP, Advocate Shaun Abrahams, was summoned to appear before the Portfolio Committee on Justice and Correctional Services where he had to explain why he had charged the former Minister of Finance, Pravin Gordhan, along with two other South African Revenue Service (SARS) officials with fraud, only to withdraw the charges days thereafter and for meeting President Zuma at Luthuli House. The fraud charge controversy against Pravin Gordhan simply deepened suspicions about the motives and independence of the NPA, as tensions mounted between the former Minister and the President at the time, says Muntingh et al (2017, p.25). However, having Parliament call

for Advocate Abrahams to appear before it to explain his decision sets a dangerous precedent, as it was the first time Parliament summoned an NDPP to explain his actions for why he charged former Minister Gordhan and why he visited Luthuli House to meet with President Zuma. “When Advocate Abrahams was here at Parliament the other day with his wonderful speech telling us about it was a Monday afternoon what bullshit” (Interview with Breytenbach, 2017). Moreover, Breytenbach says that the effects of state capture, as a result of the changes in NDPP’s, has caused the NPA to become a rudderless organisation. Alternatively, Advocate Abrahams (interview, NDPP, 2017), states that the prosecution makes provision for the Minister of Justice to assign a responsibility over the NPA, but as you would recall from the Ginwala commission of inquiry it was extrapolated from that matter that the Minister's powers are not to interfere in prosecutorial decisions of the NPA. Additionally, Advocate Abrahams adds “the NPA Act also makes provision for the minister to have final responsibility over the NPA as it does in the Constitution. The Act also obligates the NPA to be accountable to Parliament, now does empower Parliament or the Minister of Justice to interfere in prosecutorial decisions or in prosecutorial powers? No, it does not. Therefore, when somebody says that a minister, the President, or a politician or anybody has ever asked me to make a certain decision I can categorically say never” (Interview with Advocate Abrahams, NDPP, 2017). As the NDPP Advocate Abrahams assures that the Constitution and NPA Act has not and cannot be violated, and clearly stipulates that there are no external influences on the NPA. While horizontal accountability allows equals to hold each other to account, vertical accountability gives voters the opportunity to hold elected official to account.

**Table 1: NPA reporting to Portfolio Committee on Justice and Correctional Services**

(Source: adapted by the author, derived from: Muntingh et al, 2017, p.24)

<b>Date</b>	<b>Topic</b>
16 April 2012	Strategic Plan
15 October 2012	Annual Performance Plan
22 April 2013	Strategic and Annual Performance Plan
7 October 2013	Annual Report
3 July 2014	Strategic Plan
24 April 2015	Strategic Plan
15 October 2015	Annual Report

12 October 2016	Annual Report
4 November 2016	Report on withdrawal of charges against former Minister Pravin Gordhan and meeting at Luthuli House
29 March 2017	Annual Performance Plan
6 September 2017	Performance
4 October 2017	Annual Report

### 5.2.2 Vertical accountability

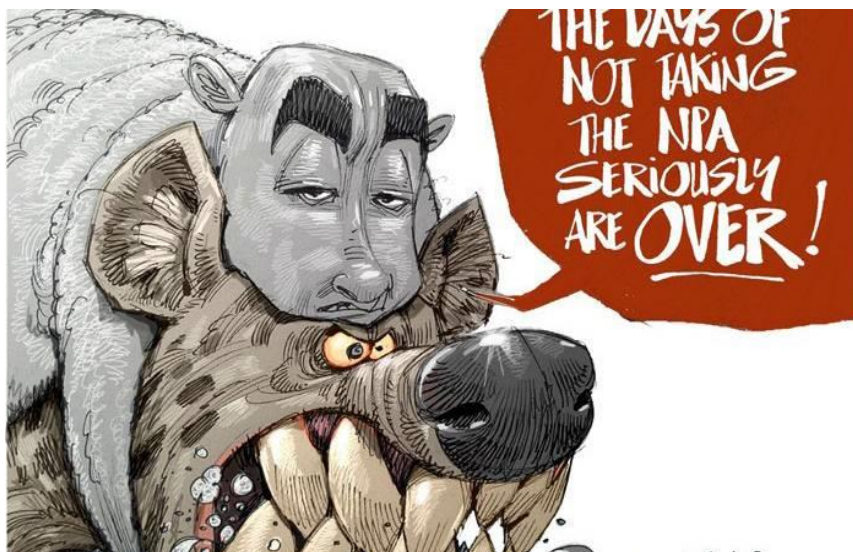
Vertical accountability, on the other hand, involves actors who govern (the accountable) and those who are governed (the accounting) (Morlino 2004, p. 17). The governed elects a governor, be it a representative or political party, to represent them in favour of their needs, or what was promised during an election campaign. Vertical accountability is only legitimate when political competition is achieved and without it vertical accountability is weak. In an interview with Newham (Interview, ISS, 2017), he stated that:

“I think most South Africans have [credibility in the NPA], but as I said before the victims of crimes survey suggests that their faith is declining because of all these high-profile scandals affecting the NPA. So it is going to take some work to ensure that the NPA can regain that lost ground. It could regain that lost ground if we only had people appointed to the top organisation who believe in the law and the constitution, are not open to political manipulation, or getting involved infighting, or becoming too involved with political decision-making. So for those reasons, we have seen a decline in trust and that is a very worrying issue. I believe most people would like to be able to trust the NPA, we would like to know that if we are innocent of a crime the NPA would not prosecute us, and if they are people out there who are guilty of crimes they will be prosecuted”.

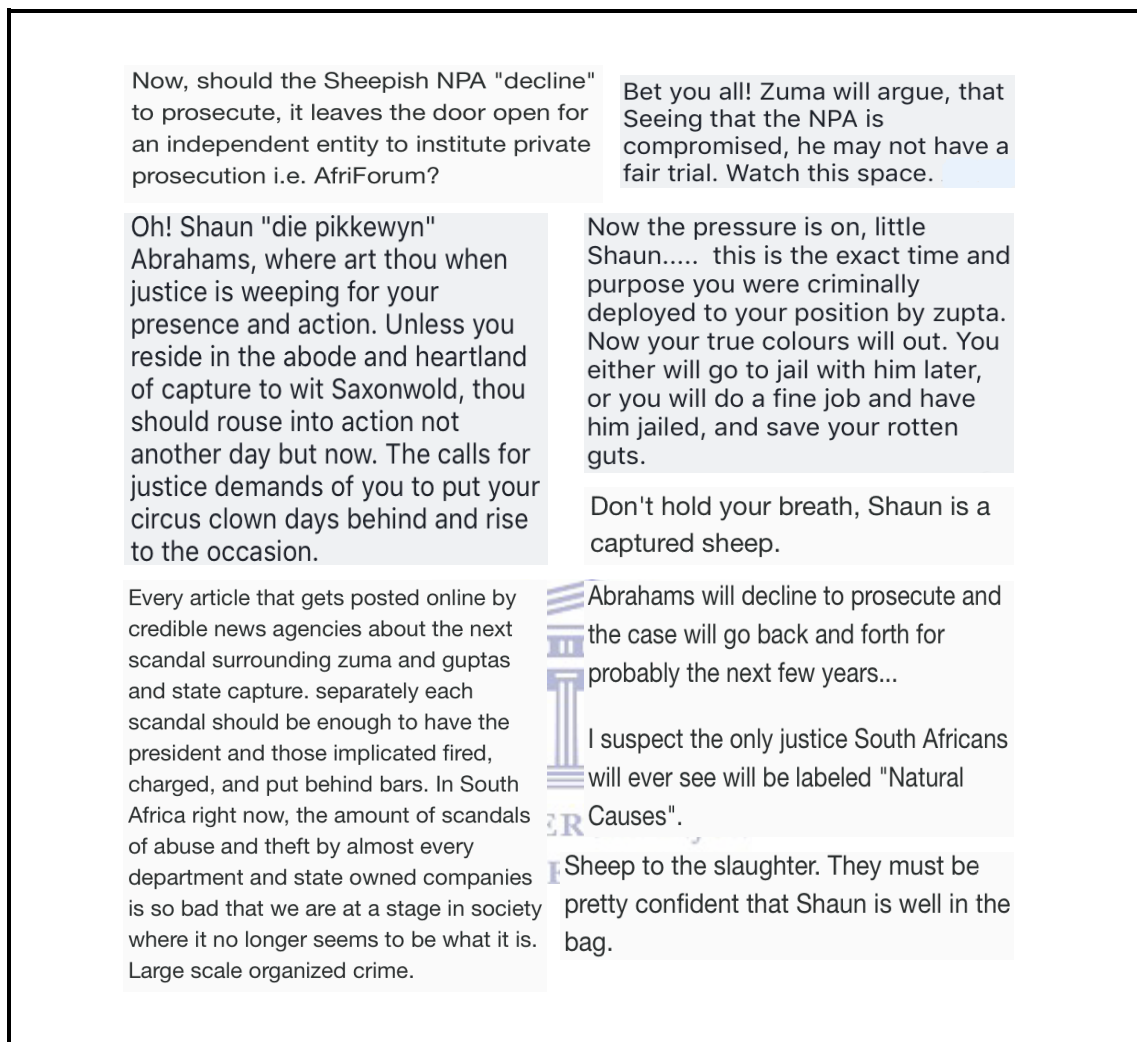
Newham (interview, ISS, 2017), further explains that there have been high profile cases of people with no evidence of crimes like Pravin Gordhan – former Finance Minister, Johan Booysen – the Hawks, and some others that they have gone ahead and prosecuted when they have not had the evidence to prosecute them. On the other hand, Newham

(interview, ISS, 2017), states there are other prosecutable cases like President Zuma's 783 counts of corruption and the Toshin Pandey – a benefactor of Zuma's family members in KwaZulu-Natal. These are cases with strong evidence of corruption, but the NPA has decided against prosecuting these cases. It is issues like the aforementioned that causes South Africans to lose credibility in the NPA as an independent institution, more particularly labelling the current NDPP Shaun Abrahams as 'Shaun the Sheep' for blindly following the 'flock'. See **Figure 5** and **Figure 6**.

**Figure 5: A hyena in sheep's clothing** (Source derived from: Dr Jack and Curtis cited in EWN, 2016, n.p.)



**Figure 6: Comments by citizens on President Zuma’s Supreme Court of Appeal loss**  
 (Source: adapted by the author, derived from: Bateman,2017, n.p, EWN, 2017, n.p, and Times Live, 2017, n.p.)



For Dr Mampole Rampele, “as a citizen, it [accountability] means for me the capacity of a system to hold those in public service responsible for discharging the mandates that they are given, to ensure that the democracy that we have, that so many people died for, has meaning in the day-to-day lives of ordinary citizens,” (Naicker, 2013, n.p.). However, Rampele further states that the nature of South Africa’s past is a cause for the lack of political accountability in the country today. Although accountability is vital, so too is the constraint of executive power.

### 5.3 The constraint of executive powers

The constraint of executive power is integral to the survival of democracy. Therefore, Starr (2007, p. 15), argues that the core principles of liberalism provide not only a theory of freedom,



equality, and the public good but also a discipline of power. This is the means of creating power as well as being capable of controlling it. It also imposes constraints on the powers of public officials, branches of government, and the state as a whole. These constraints protect citizens from autocracy, however, they also serve to protect the state from unpredictable, impulsive, or overreaching decisions.

Starr (2007, p.15-6), explains when power is subjectively exercised it is destructive not only of individual freedom but of the rule of law as well. The constraint of power limits haphazard influence and encourages confidence in the society that the law will be fair. It also limits the scope of state power by increasing the likelihood of its effective use. The discipline of power has three purposes: firstly, to constrain “power over” that is arbitrary, tyrannical, and presumptuously arrogant; secondly, to establish rules for the legitimate exercise of power; and lastly, to enlarge the overall capacities of both individuals and societies. Thus limited power can be “more powerful than unlimited power.” (Holmes in Starr, 2007, p. 18). Unlimited power leads to “personal rule” or “Big Man Paradigm” which is based on the idea that personal relationships are more important than formal rules and that a leader’s decisions will always take precedence over the laws that those decisions might contradict. This is seemingly the case in South Africa, particularly during the Mbeki and Zuma administration. It is clear that there is a lack of discipline of power in the relationship between the NDPP and the executive.

For example, then President Thabo Mbeki called Advocate Pikoli to the presidential residence to appoint him as NDPP in 2005, after already discussing the appointment with the then Secretary General of the ANC, Kgalema Motlanthe. According to Muntingh (interview, 2017), Advocate Vusi Pikoli, at a Dullah Omar armchair discussion, was telling the story of how he was then Director-General of Justice and he got invited to former President Mbeki’s residence in Pretoria and when he got there Mbeki said “Kgalema – who was ANC secretary general at the time, and I decided that [Advocate] Pikoli must go to the NPA”. Muntingh further explains that “here is a Luthuli House character essentially deciding with the President who is going to be the next NPA head”. Advocate Pikoli concurred with this statement in his book, *My Second Initiation*, where he explained that he saw a missed call on his phone from President Mbeki which he returned the phone call and the President mentioned that he wanted to see him, he was Director-General of Justice at the time, so they arranged to meet the following day. Advocate Pikoli met Mbeki at the official resident Mahlamba Ndlopfu “I knew I had not been called to enjoy a drink and that there must be a pressing matter... I was ushered into his office

where then Deputy Minister of Foreign Affairs Aziz Patel was waiting alongside Mbeki... Vusi, you know about this matter that we do not have an NDPP, he said... Kgalema and I have decided that you should go to the NPA and be the NDPP, he told me, adding that the Minister [of Justice] had agreed” (Pikoli and Weiner, 2017, p. 124). This highlights the informality of the appointment process.

In an interview with Advocate Pikoli (CoCT, Police Ombudsman, 2017), he expressed that there is no competition in the appointment process. “When I was appointed, I was just called by the President and he told me that well, I want to appoint you as the head of the NPA, there was no other person that I competed with, all I did do was to submit my curriculum vitae. So the manner of appointment of the head of the NPA needs to be examined or to be changed actually” (Advocate Pikoli, interview, 2017). Furthermore, given the current developments and role played by the President in the appointment of the NDPP:

“Of course he is exercising his functions in terms of Section 179 of our Constitution and that is his responsibility, but his appointments have been challenged. Starting from the appointment of Advocate Nomgcoba Jiba and what happened between President Zuma and Advocate Mxolisi Nxasana who had to leave having been in office for two years or just under two years” (Advocate Pikoli, interview, 2017).

While Breytenbach (interview, 2017), states that the way the NDPP is appointed should be challenged, since the “President has the sole mandate, it should instead be done a lot more like the Public Protector”. Muntingh (interview, 2017), on the other hand, suggest that the appointment of the National Director and the “14 disciples”, as he calls them, must either be done by Parliament or by the Judicial Services Commission. “Essential to a successful appointment process is the fact that you have different interest groups participating in the identification of a suitable candidate. If you have the ANC and EFF in one committee you can guarantee that they going to dig up the dirt on each other’s candidates, so it becomes a transparent process. If we do not fix the appointment process, the institution will not be fixed”. Dr Ramaite shares a different viewpoint, he believes that there is nothing wrong with the current process in which the NDPP is appointed. “Once an NDPP is appointed it is done in terms of the law and upon appointment, the NDPP is expected to be ‘a fit and proper person’” (Dr Ramaite, interview, 2017). The separation of powers warrants that authority is equally spread by limiting the concentration of the executive s powers.



#### 5.4 The separation of powers

The separation of powers is often defined as “a means to avoid the concentration of power and to ensure accountability, responsiveness, and openness in the practice of governance” (Klug, 2015, p.2). The separation of powers along with the appropriate checks and balances between the executive and legislative bodies helps to prevent the abuse of power. The separation of powers is vital to circumvent encroachment and tyranny by those in power. The role of the ANC is twofold, the ANC as a political party and the ANC as government. In South Africa, the executive wears the hat of both political executive (head of the ANC) and parliamentary executive (head of Parliament). Thus, somewhat blurring the lines of the separation of power. Despite the aforementioned, the executive is expected to act impartially in his roles as the President of the ANC and the President of the country. However, the ANC does not require its members to act impartially in their roles in Parliament or The President, and the Constitution fails to make provision for this. In the Westminster model of Parliament for example, which South Africa’s Parliament is loosely modelled on, it is a prerequisite for the Speaker of the House to be politically impartial. According to the United Kingdom Parliament (1989, n.p.), the Speaker of the House of Commons must resign from their political party and remain political separated during their tenure as speaker and even into retirement. However, South Africa’s parliamentary system is based on the system of proportional representation, whereas the United Kingdom is constituency based.

According to Butler (2009, p.139), in South Africa, the Constitution constitutes for two legislative bodies to be elected, the National Assembly and the National Council of Provinces (NCOP). The electoral system is established on the basis of a common voter’s role using proportional based representation. “The system chosen to fulfil this mandate for the national parliament was a highly proportional party-list system, in which each party draws up closed and rank-ordered national and provincial lists of candidates for parliament.” (Butler, 2009, p.139). The Constitution does not clearly stipulate through a separation of powers which branch the NPA is a part of, instead we can only assume the NPA as part of the executive. In an interview with Dr Ramaite (DNDPP, 2017), he explains that in any democratic system there are three arms of government, the legislature, the executive, and the judiciary. Interestingly the prosecution authority is not directly mentioned in any one of those, but it is generally accepted that the NPA is part of the executive. Although in terms of fulfilling its functions and mandate it must do so independently, in other words even independent of the executive

According to the NPA Act (Section 179, 2008, p.1, 8), the role of the political executive (the president) is to appoint the National Director of Public Prosecution (NDPP) as head of the NPA. However, the justice minister has the final responsibility for the NPA, not the president. The NPA Act also stipulates that the President has the authority to remove the head of the NPA from office, although only on account of misconduct, continued ill-health, incapacity to carry out the duties of office efficiently, or if they are no longer a fit and proper to hold office. But the president does not have the authority to appoint or remove the NDPP on account of personal affiliation, as that would violate the constitutional democracy and blur the lines of the separation of power. In an interview with Advocate Abrahams (NDPP, 2017), he states that the prosecution makes provision for the Minister of Justice to assign a responsibility over the NPA, but as you would recall from the Ginwala commission of inquiry it was ‘extrapolated’ from that matter that the Minister's powers are not to interfere in prosecutorial decisions of the NPA. Advocate Abrahams (interview, NDPP, NPA, 2017), further states that the NPA Act also makes provision for the minister to have final responsibility over the NPA as does the Constitution. As a result, the Minister of Justice maintains the separation of power through their constraint of power provided by the Constitution and NPA Act.

Even though the NPA is an independent institution, it falls under the executive branch of government and can blur the lines of power. For example, Advocate Pikoli (interview, Police Ombudsman, 2017), explains that “before 1998, prosecutors fell under the Department of Justice, they fell under the Minister of Justice and the Director General of the Department of Justice. With the 1998 NPA Act, it took them away from the helm or at the head of the institution of the National Director who had control and management of all prosecutors”. In addition, Advocate Pikoli (interview, Police Ombudsman, 2017), explains the Attorneys-General or NPA were taken away and out of the Department of Justice. Therefore, the NPA now occupies a position which is not necessarily part of the Judiciary, but also not really part of the executive, but a member of the executive who exercises final responsibility over the NPA – who is then the Minister of Justice. There is also the constitutional guarantee of the independence of the NPA, so even though the Minister of Justice exercises final responsibility over the NPA, the executive cannot tell the NPA which matters to prosecute or not to prosecute, so in that sense, the NPA do have independence.

The issue around the independence of an institution, like the NPA, Naidoo (Interview, CASAC, 2017), explains relies a lot on perceptions, and whether those perceptions are true or not, so

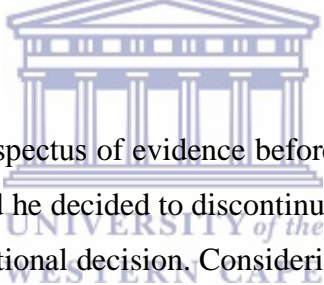
perceptions play a big role. In an interview with Lukas Muntingh (Associate Professor, Dullah Omar Institute, 2017), he stated that due to the ‘shenanigans’ that are happening at a national level of the NPA perceptions are formed about its leadership and based on those perceptions “I am very critical of the NPA as an institution because they have not lived up to expectations”. According to Naidoo (Interview, Executive Secretary, CASAC, 2017), the NPA is further constrained by the fact that it has to rely on the HAWKS and no longer have the investigative power it once had with the Scorpions. In the interview with Breytenbach (DA, 2017), she explained that in order to have true independence “you need to be able to prosecute people that need to be held accountable”, this she states includes people like President Jacob Zuma. In doing so, “it gives direction to all those poor prosecutors in these little courts... to do their job with integrity. At the moment those people [prosecutors] are trying to do their jobs with integrity and they are being led by a bunch of bananas”. Advocate Abrahams shares a different viewpoint on the NPA’s independence:

“Our independence, as the NPA, is entrenched, I really think our independence is entrenched. The minister has made it clear that it cannot interfere with our independence is entrenched. Contrary to what anybody else says and the mere fact that we are entrenched scare the living daylight out of them because they cannot get to us, they cannot interfere, there is not a single politician or single person that can come forward and say I had influence over Shaun Abrahams. There is no person that can come forward and say they have influence over me or influence over the institution” (Advocate Abrahams, interview, NDPP, NPA, 2017).

Advocate Abrahams suggests that the NPA’s independence is ingrained because it is a constitutional guarantee and refrains the executive from interfering. Steven Swart (Member of Parliament for the ACDP, interview, 2017), agrees with Advocate Abrahams by stating that the NPA to a large degree is independent, particularly in terms of the Constitution and the NPA Act. However, Mr Swart state “the concern that one does have is to what degree there is political influence or political interference in the decision-making on high-profile cases, mainly on their decision to prosecute the Finance Minister, which seems to have played towards a certain faction within the ANC”. Swart (interview, ACDP, 2017), further explains that “there is an accountability to the Minister as set out in terms of the Constitution and the NPA Act, but it can never be that the Minister can interfere with the decisions to prosecute”. In Section 179 of the Constitution, it is set out that the cabinet member responsible for the administration of

Justice must exercise final responsibility over the prosecuting authority. In Canada, the Public Prosecution Service safeguards the Director's (the head of the institution) independence by requiring all instructions from the Attorney General (Minister of Justice) to be in writing and published in the Canada Gazette (Public Prosecution Service Canada, 2016, n.p.).

The Constitution and the NPA Act provides a limitation for one's power; be it the executive, senior officials or ordinary prosecutors; "it is undeniable that state organs are being used regrettably to pursue certain political agendas. I have seen it over many years and it increases or decreases depending on who is in power and I think under President Zuma there has been a lot of manipulation of state organs including the NPA to pursue certain political agendas" (Swart, interview, 2017). In addition, Swart (interview, ACDP, 2017), states that it has resulted in the High Court and the Constitutional Court in intervening in matters which has validated the perception that there has been political interference. The North Gauteng High Court found that former NDPP Mokotedi Mpshe was irrational in his decision to withdraw the prima facie case against now President Zuma:

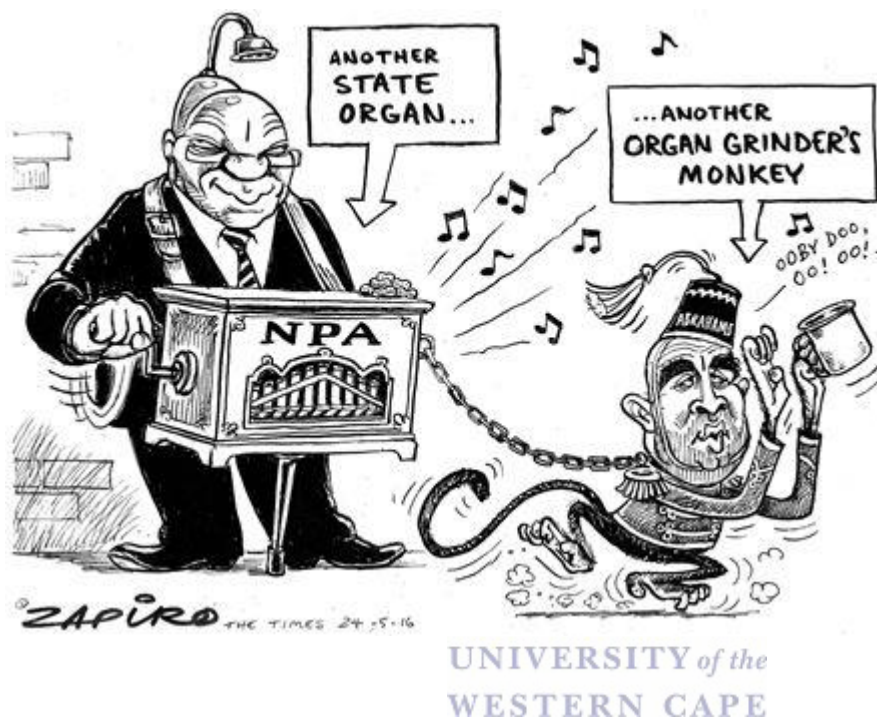


"Having regard to the conspectus of evidence before us we find that Mr Mpshe found himself under pressure and he decided to discontinue the prosecution of Mr Zuma and consequently made an irrational decision. Considering the situation in which he found himself, Mr Mpshe ignored the importance of the oath of office which demanded him to act independently and without fear or favour. It is thus our view that the envisaged prosecution against Mr Zuma was not tainted by the allegations against Mr McCarthy. Mr Zuma should face the charges as outlined in the indictment" (Nicholson 2016, n.p.).

Even though the separation of powers prevents the concentration of power in one person, the rule of law is sometimes misused or bent for the provision of state capture. However, factions and infighting due to politics in the NPA are a clear indication that the institution lacks separation of power. A lack of separation of power strengthens the executive's hold on power. According to Advocate Abrahams (interview, 2017), it is of grave importance for the office of the NPA to be free from any political influence. Therefore, "a National Director should be mindful of the political climate he or she should be able to meet with anyone and everyone on issues, however, that should never affect their objectivity, it should never matter how you feel about anybody you should always treat people fairly" (Advocate Abrahams, interview, 2017).

Objectivity, as mentioned by Advocate Abrahams, along with the constraint of power is integral to maintain the separation of power. See **Figure 7**.

**Figure 7: State organs misused for political agendas** (Source derived from: Zapiro cited in Politicsweb, 2016, n.p.)



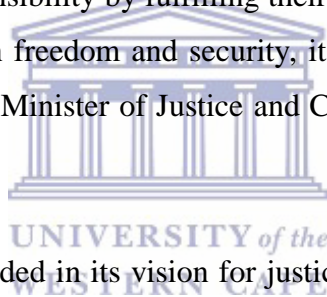
### 5.5 The rule of law

O'Donnell (2004, p.33), explains that the rule of law is defined as whatever law exists, is written down, and publically spread by an appropriate authority prior to the events meant to be regulated by it, and is fairly applied by the relevant state institutions including the judiciary. The rule of law implies formal qualities by establishing rules that are valid and ultimately regulated by the Constitution. In addition, the rights and obligations specified are universal, applies to each individual, irrespective of their social position or status, to ensure 'equality before the law' (O'Donnell, 2004, p.33). O'Donnell (2004, p.35), the independence of the judiciary must be guaranteed and courts must have the ability and powers to review or appeal, and courts must be easily accessible, crime-preventing agencies should not be allowed to distort or corrupt the law. Naidoo (Interview, CASAC, 2017), states the NPA is probably as important as the judiciary itself, in some cases maybe more so. As the NPA are vested with huge powers to prosecute or not to prosecute a particular case, to develop prosecutor policy, and guidelines in consultation with the Minister of Justice. He explains that the role of the NPA is to prosecute crimes in the name of the people of South Africa in terms of a set of guidelines and principles,



and that should be clearly articulated in a manner that represents the interest of the people. However, the NPA has not executed its mandate to prosecute without fear, favour, or prejudice, it has not upheld the highest standard of integrity and it has not prosecuted the number of corruption cases that we would have expected. In South Africa the rule of law is arguably often manipulated for the benefit of state capture, this is especially worrying since the President can appoint up to 14 senior NPA officials including the NDPP.

In an interview with Lawson Naidoo (Executive Secretary, CASAC, 2017), he sees the NPA as one of the most critical institutions of government. “The reason why I say it is one of the most important institutions is that the constitutional democracy is founded on the principle of the rule of law, and in many respects, the NPA and how it behaves and acts have a huge impact on the strength of the rule of law”. When a democratic constituted institution, like the NPA, does not protect people’s basic right of citizenship to be exercised under conditions of freedom, equality, transparency, and responsibility by fulfilling their vision for justice to prevail in our society so that people can live in freedom and security, it has failed. For example, Glynnis Breytenbach (interview, Shadow Minister of Justice and Correctional Services, 2011), states that:



“The NPA has not succeeded in its vision for justice to prevail in our society so that people can live in freedom and security. If you look at the number of people that leave our country on a daily basis, they leave because they are afraid. You go and ask people that live in squatter camps, you go and ask people that live in lower class suburbs, everywhere else in South Africa you go and ask women and children who cannot afford electric fences and security guards and bulletproof cars, ask them if they feel safe you can even go ask the men in those areas if they feel safe they will tell you no and you can ask them if they will receive justice if they were attacked, they will also say no”.

She further explains that as long as one person feels that way we have not succeeded. According to Statistics South Africa’s Victims of Crime Survey (2017, n.p.), housebreaking incidents decreased by 8%, home robbery decreased by 25% and theft of personal property decreased by 12%. The hijacking of motor vehicles and sexual offences increased, however, it increased sharply by 93% and 110% respectively. See **Appendix 2**. The NPA is responsible for the prosecution of criminals and, as a secondary function, envisions for justice to prevail so that people can live in freedom and security. However, the increase in crime hinders our access to



freedom and security and therefore the quality of our democracy in how we live our day-to-day lives. While the NPA is not directly responsible for the increase of crime in South Africa, it does form part of their role within the Criminal Justice System as the NPA is constituted to prosecute criminals for their crimes. The primary function of the NPA is to prosecute crimes without fear, favour, and prejudice, however, its secondary function is to ensure that justice prevails in society so that people can live in freedom and security.

According to Muntingh et al (2017, p.27), effective prosecution occurs when offenders are held accountable for their crimes; crime is reduced through the conviction of serious, serial and prolific offenders who are responsible for a disproportionate number of crimes; cases are disposed of appropriately; and cases are disposed of in a timely, efficient and cost-effective way. So when criminals are not held accountable in court, they become a liability to society by continuing to commit criminal offenses thereby infringing upon our right to safety and freedom. However, Advocate Abrahams state that the NPA is fulfilling its vision and mandate, “I think we are doing extremely well under the financial climate the country finds itself in – there is budget cuts, resource constraints, prosecutors working under difficult conditions. I really think that the criticism of the NPA in the media is misplaced or unfounded, disingenuous, completely mischievous to say the least” (Interview with Advocate Shaun Abrahams, NPA, NDPP, 2017). Advocate Abrahams continued by stating:

“Many people say, the NPA does selective prosecution, however, we cannot do selective prosecution. When a matter is received, you have to assess whether there are reasonable prospects for prosecution or not. When we make decisions to take matters to court you cannot take a case to court that you are going to lose because it is not in the interest of justice to do so. Now, why would you waste taxpayers' money? Why do you waste the courts time to take a matter to court when you know the person will be acquitted? For anybody to say there is selective prosecution either does not understand the process, does not understand the criminal justice system, or does not understand criminal law, procedure and evidence does not understand the basic principles. You cannot take all matters to court because you cannot prove the guilt beyond reasonable doubt of all those matters. So, to say that it is selective prosecution is wrong” (Interview with Advocate Abrahams, NDPP, 2017).

Advocate Abrahams strongly disputes against the accusation that the NPA practises selective prosecution. However, he does acknowledge that political and/or domestic instability is a serious challenge and if left to persistent it will undermine our democracy, rule of law and development trajectory (NPA Annual Report, 2015-16, p.30).

## 5.6 State capture

According to Chipkin (2016, p.1), state capture is a severe form of corruption, when the ruling-making process itself is captured as government officials regulate their business to favour private interests. Party state capture, is “government effectiveness which measures perceptions of the quality of public services and policy formulation and the degree of administrative independence from political pressures” (Innes, 2013, p.3). It occurs when parties re-politicise the state in pursuit of political monopoly. State capture, according to Matei (n.d., p.2), is “the process through which firms make private payments to public officials to influence the choice and design of laws, rules, and regulations”. This is what has seemingly occurred between the NPA and the executive, and the undue political influence it causes can be damaging to the NPA, the rule of law, and democracy overall.

Muntingh (interview, 2017), believes that the problems with Advocate Bulelani Ngcuka and his decline to prosecute then Deputy President Zuma. “If one looks at the NPA, I think the real problems there started with Advocate Ngcuka with his decision not to prosecute Zuma, and then people started asking questions, what is this prima facie case that they not going to prosecute?” (Muntingh, interview, 2017). Then Advocate Vusi Pikoli was appointed, which “I think was an independently minded person, but I think was already under pressure by former Minister of Justice Bapanda and Menzi Simelane who was Director General of Justice at the time, and they tried to manipulate him” (Muntingh, interview, 2017). Eventually, Advocate Pikoli was forced out of his position, ultimately revealing the pressure from the executive and a few other things. There were a string of other prosecutors, including Advocate Jiba, who along with Advocate Mrwebi and Advocate Mzinyathi have been struck off the roll of prosecutors, which they are in the process of appealing. Despite this, Muntingh (interview, 2017) states that Zuma still does not want to suspend them. Muntingh (interview, 2017) further expresses “when one looks at the court decisions you get this picture of people who appear to be of a poor moral character and are not independent, that are trying to manipulate situations. So I do not think it is unfair to say that sorry they do not leave me with the impression that this

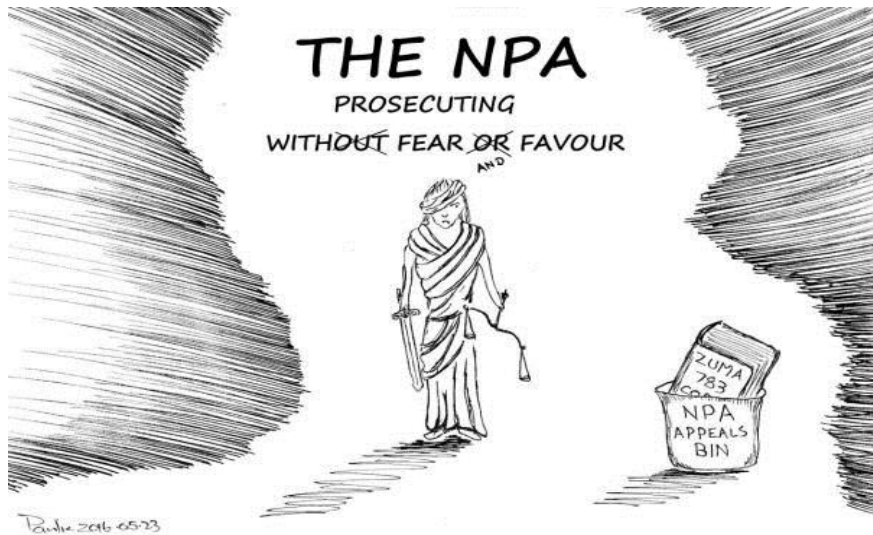
is an institution that functions with integrity and is impartial that holds the safety of the public close to their heart”. The negative perceptions of the NPA are self-inflicted due to the leadership of the institution over the years.

The NPA as an institution is large in size and employs thousands of state prosecutors. Therefore, to be clear, we need to distinguish between the everyday prosecutors that we see in District, Magistrate and High Courts, and senior prosecutors and senior NPA officials in leadership positions. Advocate Pikoli (interview, 2017), states that what tends to attract attention to the NPA is high-profile cases. “I suppose people tend to judge them or measure them based on their high-profile matters. On general prosecutions, I think the NPA has done well and is performing well insofar as the general run of the mill cases, however, in high-profile cases which would involve politicians or high-profile members of society who have tended to see some kind of interference in the work of the NPA where politicians want to influence certain decisions” (Pikoli, interview, 2017). One of the first examples of the NPA taking a political approach to prosecutorial authority, according to Naidoo (interview, 2017), is in 2004 when Advocate Ngcuka decided against prosecuting then Deputy President Zuma, despite having a prima facie case against both him and Schabir Shaik – who was his financial advisor at the time, for similar charges. Shaik was later trialled and prosecuted, while President Zuma still awaits trial for the charges brought against him for the 1999 Arms Deal.

Another example of party state capture, in an interview with Advocate Mike Pothier (Catholic Parliamentary Liaison Office, Research Co-ordinator, 2017), there are people in the NPA who see their job as to protect certain people, to favour certain people and conversely to undertake some prosecutions. “So it is not just keeping Zuma out of court, but also what we saw last year with the pursuit of charges against the then Minister of Finance Pravin Gordhan” (Advocate Pothier, interview, 2017). Advocate Pothier further states, those were prosecutors who actually followed through on trumped-up nonsense and they must have known it was nonsense. They, therefore, allowed themselves to be used in a pro-active way to wrongly prosecute someone and it is not just turning a blind eye. Advocate Pikoli (interview, 2017), concurs by stating that any experienced prosecutor would have declined to prosecute then Minister Gordhan on the basis of whatever was presented to them by the HAWKS. However, here you had high-profile and senior prosecutors involved in the form of Advocate Sibongile Mzinyatha and Advocate Torie Pretorius. Furthermore, Advocate Pikoli continued to say that “those are senior prosecutors who on the evidence presented to them could have never have decided to prosecute

the Minister of Finance of fraud, so you begin to think that some kind of outside influence was brought to bear the prosecutors”. See **Figure 8**.

**Figure 8: The Non-Prosecuting Authority** (Source derived from: Paulie, 2016, n.p.)

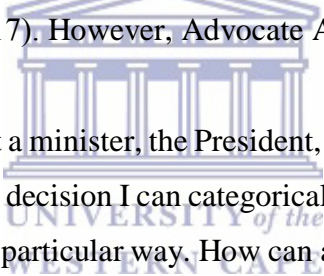


Professor Lovell (interview, 2017), believes that since former President Mbeki’s administration the executive looked to appoint someone who is pliant. “For example, Shaun Abrahams deliberately “dilly-dallying” to delay prosecuting Zuma is a sign that he has been captured politically”. See **Figure 9**.

**Figure 9: Advocate Shaun Abrahams and President Jacob Zuma** (Source derived from: Siwela Cartoons, 2016, n.p.)



Mr Swart (interview, 2017), shares Professor Lovell's sentiment by stating an important point is the private member's bill brought by Dene Smuts on the appointment process of the NDPP, which recommends that it should follow a process similar to the Chapter 9 institutions or judges. "How you protect the NPA from State Capture is you make sure the appointment and firing are done through a parliamentary process and not just at the behest of the Executive because one of your safeguards for independence is the security of tenure" Mr Swart explained. He continued to state if your NDPP is beholden to the executive who appoints the person and can just fire them you need a process that preferably includes Parliament to ensure due process is followed when the NDPP is fired. A good example thereof is Advocate Mxolisi Nxasana. "Advocate Nxasana was a clear guy that was not playing ball and the next thing he gets a fat golden handshake to leave and then they appoint another more pliable person" Mr Swart states. He goes on to say that "I am not saying they are corrupt, I am just saying they would appear to be more pliable because you are sitting with the decision to prosecute or not and who is going to benefit?" (Swart, interview, 2017). However, Advocate Abrahams believe otherwise:



"When somebody says that a minister, the President, or a politician or anybody has ever asked me to make a certain decision I can categorically say never! Nobody can ever ask me to make a decision in a particular way. How can a career prosecutor, somebody that has excelled in every sphere, somebody that has been respected by his peers, get appointed to a position - he has been lauded and applauded his entire career, he gets appointed by a president to this position and all of a sudden because he is appointed by a particular president he has become rogue. That cannot be, under any circumstances. It is all part of politics and the political hype." (Advocate Abrahams, NDPP, NPA, 2017).

Advocate Abrahams disagrees with the notion that he is beholden and pliable to the executive as the NDPP as he has always acted impartially as a career prosecutor. In contrast to popular belief, in an interview with Dr Jeff Rudin, he states in his opinion all states are captured, and this idea and critique is not a new one:

"I have a difficulty with that understanding of state capture because in my understanding all states are captured and they are captured by the ruling interests. Which in my understanding are a combination of the people who own the main



economic wealth and then depending on the division of labour, in terms of time, if there is a distinct political class, then it is a unity and alliance between the economic and the political and the state always meets their needs. The only time the state is not captured by the ruling class, is in my understanding, during periods of revolution and it becomes a defining characteristic for me of revolution. So the very notion of these independent or autonomous bodies that just very kindly acts in the public interests, I think is a myth and I think it is a convenient myth for those who actually exercise state capture. It is not a new idea, it is a long-standing critique” (Dr Jeff Rudin, Researcher, Alternative Information and Development Centre, 2017).

Unlike most state capture theorists in South Africa, Dr Rudin alternatively takes a Marxist perspective by viewing the state as a hegemonic structure. He believes that all states are captured and that state capture is a normal part of the functioning of the state. It is, therefore, the norm for the ruling elite to practise state capture in order to gain certain state favours like policy reforms or tenders. He further suggests that there is no such thing as independent or autonomous bodies which, for example, is why you will find that there is such an imbalance in prosecution cases between individuals with wealth and those individuals that are poor. Dr Rudin (interview, 2017), suggests that this does not necessarily mean that all state institutions are captured, for example, when Thuli Madonsela was Public Protector, her office was run with integrity because she did not allow to be captured by the state or ruling elite. There are other underlying reasons that contribute to the state capture of the NPA, for example, the continued dominance of the ANC as South Africa’s governing party.

### **5.7 Dominant party systems**

The dominance of the ANC in South Africa is due to the lack of effective competition from the opposition. As a result, the ANC’s dominance has led to the failure to consolidate South Africa’s democracy as there has not been two peaceful electoral turnovers or transition of power by two separate political parties post-1994 (Huntington, 1991, p.267). This, however, does not mean that South Africa is not a robust democracy. While South Africa may not be a consolidated democracy in terms of a peaceful electoral turnover by two separate parties, it does have a vibrant and active civil society and democratic institutions to hold government accountable. Therefore, despite meaningful and extensive competition, most South African’s are still symbolically resonate with the ANC as the liberation movement that gave them freedom through democracy. In 2014, the Democratic Alliance (DA), South Africa’s official



opposition party, attained a 22.2% of the vote in the national elections, ensuring an increase of 5.57% since the 2009 national elections. Since 1994, the DA has steadily increased their support-base (Schulz-Herzenberg, 2014, p.3). According to Schulz-Herzenberg (2014, p.3), the DA roughly secured a 20% increase among black constituencies in South Africa in 2014. While newcomers, the Economic Freedom Fighters safeguarded a 6.4% of the votes in the 2014 national elections becoming South Africa's third largest political party. Thus placing the Inkatha Freedom Party (IFP), in the fourth position, with COPE coming in eighth securing a mere 0.67% in 2014, compared to 7.4% in the 2009 national election.

According to Habib (2004, p.96), at the core of democracy is political uncertainty, and it takes the shape of two distinct forms; institutional uncertainty, and substantive uncertainty. "Institutional uncertainty – the uncertainty about the rules of the game – implies the vulnerability of the democratic system to anti-democratic forces. Substantive uncertainty – the uncertainty of the outcomes of the game – is about the perceptions of ruling political elites in a democratic system on whether they will be returned to office" (Schedler cited in Habib, 2004, p.96/7). Institutional uncertainty, Habib (2004, p.97), state is bad for democracy as it promotes the view for a regression to authoritarianism in the Third Wave of democracies. Substantive uncertainty, on the other hand, Habib (2004, p.97), explains is good for democracy as it keeps politicians on their toes, and ensure they are responsive to their citizens. Habib (2004, p.97), expresses that despite the presence of institutional mechanisms; such as elections, opposition parties, civil liberties, autonomous media, and the separation of powers, that are intended to promote substantive uncertainty, the objective still evades much of the Third Wave of democracies.

Habib (2004, p.97), suggests that the fear of a relapse to authoritarianism has officials fixated on the bureaucratic features of democratisation and made substantial political and institutional concessions to the state and economic elites of the authoritarian order. According to Habib (2004, p.97), a huge part of the ANC's dominance is due to the 'honeymoon phase' whereby citizens are reluctant to vote against liberation parties, like the ANC, responsible for organising the revolution(s) that brought down authoritarianism, like South Africa for example. The outcome of this is as a result of the lack of substantive uncertainty in the political system in South Africa at the time. Therefore, due to the institutional uncertainty of South Africa's political past, South Africans continue to vote along racial and/or ethnic lines leaving opposition parties "to continue to fish in the shallow electoral pool of the minority

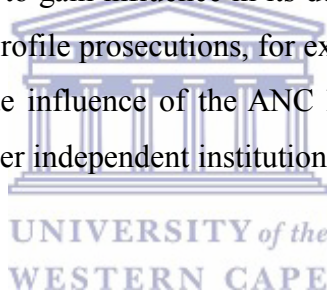
communities” (Habib, 2004, p.98). Habib (2004, p.98), believes that these factors ensure that the ANC is not threatened at the polls, wearing away the inexplicit accountability relationship between the state and their citizens. The fear of institutional uncertainty is the cause of South Africa’s failure to consolidate its democracy. In 2004, however, it seemed unusual for the Western Cape, which is made up of a large constituency of coloured voters, to vote for the DA that is labelled a ‘white’ party by the ANC. At their 2011 election manifesto launch, the DA stated, “the emphasis on the election being about a national race between two parties, and one framed in terms of competence rather than race was repeated consistently by the DA” (Piper, 2012,p.37).

In addition, even though the ANC is responsive, they are not necessarily always accountable nor do they always take direct responsibility unless forced upon them by the media, opposition parties, and/or civil society. For example, the ‘Guptagate’ scandal, where family members and among other guest landed at the Waterkloof military airbase, a national key point (News24, 2015, n.p.). Other examples include the electricity crisis, the ANC denied that South Africa was in crisis, despite the dip in the economy, the loss of jobs and the string of issues that followed (Nicholson, 2014, n.p.). And now the water crisis which the ANC denies is a crisis even though parts of South Africa are experiencing a drought (Thelwell, 2014, n.p.). On the other hand, for Mampole Rampele, “as a citizen, it [accountability] means for me the capacity of a system to hold those in public service responsible for discharging the mandates that they are given, to ensure that the democracy that we have, that so many people died for, has meaning in the day-to-day lives of ordinary citizens,” (Naicker, 2013, n.p.). However, Rampele further states that the nature of South Africa’s past is a cause for the lack of political accountability in the country today.

The 2016 local government elections have surprisingly seen the ANC lose its major metros like Johannesburg, Tshwane, and Nelson Mandela Bay to the DA, suggesting South Africa may be moving closer to a consolidated democracy. However, trends suggest that we cannot necessarily assume that a decline in votes for the ANC, in the 2016 local election, was the cause of voters voting for opposition parties. But rather, that they have not voted in the elections at all. According to Schulz-Herzenberg in an online article by the SABC (2016, n.p.), even though voters do take government’s performance into account, research indicates that if an ANC voter became dissatisfied with the party, he or she is far more likely not to vote at all. While a lot has happened since the last national elections in 2014, which saw President Zuma retain his second

term in office, the straw that broke the camel's back may have to do with the state capture of independent institutions and parastatals, more particularly the country's resentment towards the Gupta family's alleged cosy relationship with the President and his cabinet.

The dominance of the ANC throughout South Africa's 24-year democracy has led to the party's superiority in political power, the abuse of office, and haphazard decision-making which undermines the integrity of our democratic institutions. If the dominance of the ANC is sustained, it can lead to a further concentration of power by the government where there is no or little constraint of power and a complete blurring of lines in the separation of power. This ultimately dismisses the democratic notion of 'rule by the people' and replaces it with 'personal rule'. Personal rule becomes obvious when personal relationships are more important than rules and when a leader's decisions take precedence over the law. This is seemingly the case in South Africa as the ANC's continued dominance has arguably seen it overstep its boundaries of power by allegedly politicising the NPA to gain influence in its decision-making process in order to manipulate the outcome of high-profile prosecutions, for example, President Zuma's on again off again 783 charges. The undue influence of the ANC has arguably led to factions and infighting within the NPA and other independent institutions alike, including state parastatals.



### **5.8 Factions and infighting**

Subsequently, after Ngcuka's resignation and Pikoli's suspension, the NPA's senior leadership was divided into political factions, Pro-Mbeki and Pro-Zuma, impacting the institution's day-to-day performance. According to Schönreich (2014, p.10), fighting in the NPA affected the Scorpions ability to successfully investigate, as they instead spied on politicians and members of Parliament, which ultimately led to the demise of the Scorpions. In 2009, President Zuma appointed Menzi Simelane as NDPP, however, the Constitutional Court found his appointment unconstitutional as he was not fit and proper for the position, due to his criminal record. The inability of the NPA to secure a fit and proper NDPP for its supposed ten-year term, as well as other contributing factors, has caused the public to lose faith in the NPA as the country's national prosecuting body. In the first half of 2015, it has emerged that the NPA has had a difficulty in maintaining an NPA head for longer than six months. Grootes (2014, n.p.)

Furthermore, the factions in the NPA have been labelled as one of the reasons for the institution's poor performance. It has been alleged that "years of meddling by politicians for party and factional gain have comprehensively weakened and corrupted South Africa's

prosecution service – a vital part of the fight against crime.” (Mail & Guardian, 2014, n.p.). Moreover, the Mail & Guardian states that this type of manipulation is twofold, firstly, the sabotage of senior officials by their factional adversaries; and secondly, attempts to have individuals prosecuted or shielded from prosecution, like in the case of Advocate Jiba. According to Naidoo (interview, 2017), the Yacoob Report<sup>2</sup> stated that “the rot in the NPA is so widespread and deep that in order to uncover it all you would need a full judicial commission of enquiry with full subpoena judicial powers, because people like Advocate Jiba and others refuse to testify or provide any information.

## **Conclusion**

Professor Lovell (interview, 2017), believes that the NPA is at the beck and call of political influence, instead of being the people’s lawyers and protectors. “In my personal experience of doing cases with a lot of local prosecutors in the High Court many of them are quite demoralised, they kind of feel who are we working for or we are working for a mickey mouse institution” (Pothier, interview, 2017). Furthermore, he states it is not good that people are coming to work unhappy, while most of them who come to work are very diligent and hardworking, there is still this palpable sense of frustration amongst many prosecutors. Professor Lovell (interview, 2017) expresses it is important for South Africa to have a justice system that is predictable. Unlike what we have now, especially where high-profile cases are concerned, as justice must not just be done it must be seen to be done. As a result, this chapter has analysed the NPA and its leadership in terms of democracy, accountability, the constraint of executive power, the separation of powers, the rule of law, state capture, and dominant party systems. Chapter Six will discuss the conclusion of this research study.

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<sup>2</sup> The Yacoob Report conducted by Justice Zak Yacoob was a commission of enquiry into the functioning of the NPA. The commission of enquiry was at the request of then NDPP Mxolisi Nxasana. The report was never made public, however, the report was leaked and reported on.

## **Chapter Six: Conclusion**

### **6.1 Challenges in the NPA's independence**

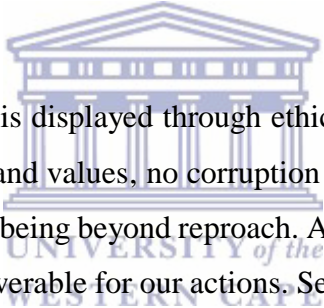
The NPA has been marred by public controversy since the shocking decision by Advocate Ngcuka's not to prosecute President Zuma's on his 783 charges for the 1999 Arms Deal saga. These controversies have caused a large portion of the South African public to lose confidence in the NPA, which is backed by media reports, social media news comment sections, and interviews. Based on the information and evidence presented in this research study, the NPA may arguably seem to be politically infiltrated. The research demonstrates that yes, according to law, the NPA is independent as its independence is legally mandated by the Constitution. However, in reality, the NPA leadership, in particular, does not act independent.

There are two levels to the NPA, the lower level – ordinary court prosecutors, the senior level – senior NPA prosecutors and officials. The NPA overall prosecutes crime on behalf of the state on a day-to-day basis. These crimes range from petty theft to high-profile cases. Based on the evidence of my research, on the lower level, the NPA functions with integrity and without fear, favour or prejudice; although because of its leadership instability staff morale from time to time may be low. However, it is at the more senior level that we find the NPA to seemingly be politically captured causing its independence to be tainted, resulting in the NPA leadership not acting impartially. “I think that there are people in the National Prosecuting Authority who do aspire to fulfil those values, but the top management is captured... Once you are captured you are running a different agenda to the constitutional agenda and that undermines constitutionalism and the rule of law” (Paul Hoffman, Accountability Now, interview, 2017). The NPA is not a redundant institution, but if the NPA is further compromised or captured, it may then find itself in the position of contravening the Constitution and the NPA Act due to the inability to function impartially. Advocate Ngcuka's decision not to prosecute Zuma opened the gate to politicisation into the NPA.

### **6.2 Undermining the rule of law and democracy**

Section 179 of the Constitution and the NPA Act clearly constitute the mandate of the NPA. This calls for the provision of a single national prosecuting authority, the appointment by the President of an NDPP as head of the NPA, the appointment of Directors of Public Prosecutions and prosecutors. The cabinet member responsible for the administration of justice to exercise

final responsibility over the NPA; ensure that the DPPs are appropriately qualified and are responsible for prosecutions in specific jurisdictions. In so doing, it safeguards the NPA to exercise its functions without fear, favour or prejudice. Moreover, it provides that the NDPP must decide, with the concurrence of the Minister of Justice and Correctional Services for the administration of justice, and after consulting the DPPs, prosecution policy which must be practical in the prosecution process. The Constitution and NPA further afford the NDPP the right to intervene in the prosecution process when policy directives are not abided by and may review a decision to prosecute or not to prosecute. It provides the NPA with the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions essential to instituting criminal proceedings. Lastly, it provides for all other matters relating to the NPA to be set by national legislation (NPA Act 32, 1998, p.1-2). The vision – for justice to prevail so that people can live in freedom and security, mission – to prosecute without fear, favour, or prejudice, and values of the NPA further make reference to the purpose of the institution:



Values – “integrity which is displayed through ethical conduct, high moral standards, honesty, moral principles and values, no corruption or fraud – zero tolerance, keeping promises, truthfulness and being beyond reproach. Accountability which is depicted by being responsible and answerable for our actions. Service excellence which is found in providing first class customer service and complying with the Batho Pele principle. Professionalism which can be seen through commitment/dedication, punctuality, competence, and professional conduct in and out of court. Credibility which is depicted in the following behaviour: consistency and the ability to inspire belief or trust” (NPA Annual Report, 2016/17, p.13).

The mandate of the NPA, however, to an extent, has been overstepped by the executive as the process of appointment have become casual with no real competition, and the instatement of new NDPP appointees pliable allowing political influence to infiltrate the institution.

There are two probable reasons for politics to undermine the rule of law in independent institutions, like the NPA. Firstly, the political dominance of the ANC. The ANC has been unrivalled by smaller opposition parties since its instatement in 1994. The political dominance of the party has witnessed an increase in corruption, as well as the ongoing blurring of lines between the executive, legislation, and judiciary. Secondly, the lack of separation of power. A



separation of power in government ensures that each sphere functions and operates within its mandate. However, with the political dominance of the ANC, when the abuse of power becomes more desirable, the blurring of lines is more noticeable (Premhid, 2015, n.p.). And according to Mail & Guardian (2014, n.p.), politics within independent institutions like the NPA poses a serious threat to our constitutional order.

In this research, democracy refers to ‘rule by the people’ (Heywood, 2017, p.36), where “common values [are] shared by peoples through the world community irrespective of culture, political, social, and economic differences. It is the basic right of citizenship to be exercised under conditions freedom, equality, transparency, and responsibility, with due respect for the plurality of views, and in the interest of the polity” (Bassiouni et al, 1998, p.VI). To establish a democracy there needs to be a social contract whereby citizens consent to electing a representative to represent them to make decisions on their behalf. According to the NPA Annual Report (2015/2016, p.30), In South Africa, political and or domestic instability is a serious challenge to the country, therefore if left unchecked it can determine the functionality of our democracy and rule of law, and development trajectory. To ensure our democracy and rule of law remains in-check and unscathed by instances of political and or domestic instability it is integral to uphold and strengthen our democracy through horizontal accountability by upholding our democratic independent institutions, like the NPA. By protecting our independent institutions we ultimately honour and safeguard our basic human rights to freedom, equality, transparency, and responsibility. There are a few suggestions that may assist in the improvement the NPA.

### **6.3 How to strengthen the independence of the NPA in relation to democratic norms**

In order to hold the NPA to account we need to enhance our horizontal accountability. According to O’Donnell (1999, p. 43), there are a few ways in which we can improve our horizontal accountability. Firstly, opposition parties should have an important role in directing institutions in investigating alleged cases of corruption, especially where high-profile cases pertain. Institutions, like the NPA and Chapter 9’s that perform preventative roles should be highly professional, endowed with resources that are both sufficient and independent of the executive. Secondly, the NPA needs to be separated as much as possible from the executive in order to be fully independent. Thirdly, it should have a judiciary that is professional, have a capable budget, and is independent of the executive and independent in their decision-making.

A plan should be developed to reform institutions that have been rendered ineffective by the executive and willing legislatures. The weak, poor, and unequal societies should be safeguarded and supported by independent institutions. For horizontal accountability to be improved, there should be reliable, timely, and independent media. And lastly, it is also important to have active and persistent participation from civil society, and input of public opinion and support.

Another recommendation is the reform in appointment processes of the 14 senior NPA officials, specifically the NDPP to make the processes more democratic. For example, the private member's bill by Dene Smuts which recommends that the NPA appointment process should follow a process similar to the Chapter 9 institutions or the judges. This will safeguard the independence in the security of tenure of the NDPP by ensuring that the NDPP is not beholden to the executive who constitutionally holds the right to appoint and fire the NDPP on the account of misconduct, ill-health, incapacity to carry out their duties, and if they are no longer a fit or proper person – a definition not defined in the Constitution or NPA Act. Hoffman (interview, 2017), expresses that a reform in the appointment process by replacing executive oversight by oversight from parliament would allow the NPA to cut loose from the executive. Others like Advocate Breytenbach and Advocate Pikoli argue, that there is no need for constitutional reform, instead what is needed is a president that does not abuse their constraint of power because of a conflict of interest.

The NPA could also benefit by having an accountability unit, much like the role of the Inspector General in the South African State Security (SSA). According to Advocate Silas Ramaite (DNDPP, NPA, interview, 2017), in terms of accountability there is a position within the National Prosecuting Authority Act for an accountability structure, unfortunately, over the years that structure has never been established, but it currently in the process of getting it off the ground. Advocate Ramaite (interview, 2017), further states there are differences of opinion on who should establish the accountability structure. There are some that feel that the structure should consist of members of the National Prosecuting Authority, while there are others who say it should consist of members of the judiciary or appointed or nominated by the minister. In the United Kingdom, for example, the accountability structure is headed by the Chief Justice. Now in our case, the accountability is only confined to the prosecution part of the criminal justice system and not the criminal justice system in its entirety. Advocate Ramaite (interview, 2017), continues to say there is currently a committee making proposals to the NDPP on this

matter. These enhancements could see the NPA maintain its independence without political influence and provide it to add to the quality of South Africa's democracy as intended when established.

This thesis assessed whether the NPA act as an independent institution by using the principal concepts of democracy as well as the concepts that aid in its erosion. The principal concepts used were democracy, accountability, the constraint of executive power, the separation of powers, the rule of law, state capture, and dominant party systems. These concepts helped assess instances of state capture of the NPA by the executive, nevertheless, the political interferences determined that the institution's leadership did not act independent. Despite the aforementioned, NPA by right (de jure) remains independent. Since it has been established that the NPA is an independent state institution according to law, the question now is to what extent is it able to exercise its independence? According to law, the NPA should exercise its independence by prosecuting without fear, favour, or prejudice. But the NPAs senior leadership has not always acted independently throughout its 18 years of prosecution, specifically where high-profile cases like President Zuma comes into question.

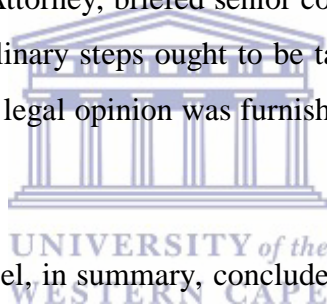
Political influence often caused by factions within party politics has played a significant role in the independent state institutions of South Africa, as we have seen with the NPA. However, the reach of power by the executives over the years has tainted the perception of the institution, causing it to lose its credibility by the public. To be clear, the state capture of the NPA should not by any means be normalised since it is still legally independent. For stability and credibility to be restored within the institution, the state capture of independent institutions – including that of the NPA, should be dealt with urgency and seriousness. An independent and accountable NPA is important, as it will allow the institution to prosecute without fear, favour, or prejudice, and ensure that justice will prevail so that people can live in freedom and security. It will further enforce equality by ensuring that no one is above the law. The independence of the NPA is integral to the safeguard of South Africa's Constitution and ultimately allows for a quality and robust democracy.

## Appendix 1

**High profile matters – NPA** (National Prosecuting Authority’s Annual Report, 2014/15, p31-33):

“In *Freedom Under Law versus National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP) April 2014), the North Gauteng High Court (per Murphy J) made certain unfavourable credibility findings against three senior members of the NPA, namely, Advocates Nomgcobo Jiba, Sthembiso Lawrence Mrwebi, and Sibongile Mzinyathi. The judgment of Murphy J was confirmed by the Supreme Court of Appeal (SCA) in *National Director of Public Prosecutions versus Freedom Under Law* 2014 (4) SA 298 (SCA).

Following the above-mentioned decisions of the High Court and Supreme Court of Appeal, the NPA, via the office of the State Attorney, briefed senior counsel to furnish a legal opinion as to whether, among others, disciplinary steps ought to be taken against the above-mentioned senior members of the NPA. The legal opinion was furnished to the State Attorney on 7 July 2014.



In his legal opinion, senior counsel, in summary, concludes that the findings of Murphy J in the High Court, as confirmed by Brand JA in the Supreme Court of Appeal, constitute compelling justification for disciplinary proceedings against Advocates Jiba, Mrwebi and Mzinyathi. The fact that they misled the Court and were prepared to lie under oath not only indicates a strong prima facie case of serious misconduct but also casts grave doubt on their fitness to hold office. He consequently recommends that the President should, in terms of section 12(6)(a) of the NPA Act, consider provisionally suspending the mentioned senior NPA managers pending an inquiry into their fitness to hold the office of Deputy National Director of Public Prosecutions and Directors of Prosecutions, respectively, to be presided over by a retired judge of the High Court. He further recommends that a criminal investigation for perjury be opened against all three members of the NPA and that the findings against the mentioned NPA members made in the judgments be submitted to the General Council of the Bar as a matter of urgency to consider whether an application should be brought against them in terms of section 7 of the Admission of Advocates Act.

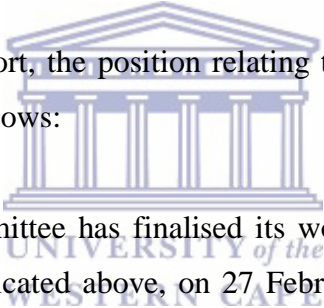
In a memorandum dated 18 July 2014 addressed to the Minister of Justice and Correctional Services, the NPA explained in detail to the Minister the NPA's motivation and arguments pertaining to a request that the President should provisionally suspend Advocates Jiba, Mrwebi and Mzinyathi from their respective offices. The Minister was requested to forward the contents of the memorandum to the President and request the President to provisionally suspend the three senior NPA members from their respective offices pending an enquiry into their fitness to hold such offices and the finalisation of the envisaged criminal investigations and outstanding inquiries and investigations and action of the General Council of the Bar.

In a memorandum dated 31 July 2014, the CEO of the NPA informed the Minister that the NPA had appointed a fact-finding committee to investigate allegations that certain employees of the NPA, including senior members, had committed unethical and unprofessional conduct and to advise on appropriate remedies if contraventions had occurred. The Minister was informed that the nature of the allegations and the seniority of the officials allegedly involved necessitated the involvement of an outside committee of suitable credibility. Therefore, the CEO appointed retired Judge Zak Yacoob as the chairperson of the committee. He was assisted by Advocate TK Manyage, a member of the Johannesburg Bar. The committee has finalised its report. The committee, among others, also made certain unfavourable credibility findings against Advocates Nomgcobo Jiba, Sthembiso Lawrence Mrwebi, and Sibongile Mzinyathi. On 27 February 2015 the CEO informed the Minister about the findings and recommendations of the committee.

During the beginning of September 2014, it came to the National Director's attention that the Minister had publicly indicated that he has not yet approached the President regarding the above-mentioned recommendations of the National Director. The opinion was held that failure to bring these serious matters to the attention of the President is causing a credibility crisis within the NPA as a whole and that it was appropriate to urgently bring stability within the NPA and it is of utmost importance that the matter should be communicated to the President as a matter of urgency. Therefore, a decision has been taken to approach the President directly so as to bring the matter officially to the President's attention. Accordingly, in a letter dated 12 September 2014, the National Director wrote directly to the President and brought the matter to his personal attention. The National Director personally handed this letter to the President.

Furthermore, in a letter dated 17 September 2014 the National Director responded to certain questions raised by the Minister; he informed the Minister about further instances of misconduct committed by and adverse findings made against Advocates Jiba and Mrwebi; informed the Minister about steps already taken by the NPA and steps to be taken against the three senior members of the NPA concerned; informed the Minister about the NPA's submission made directly to the President; and again requested the Minister to also engage with the President regarding the proposed suspension of the three senior members of the NPA as a matter of urgency. It was also pointed out to the Minister that after the High Court judgment in April 2014, the National Director requested reports from Advocate Jiba regarding the Mdluli corruption matter, which request was ignored. Further, the National Director has repeatedly requested an official handover report on matters being dealt with by Advocate Jiba, without any response. The National Director held the view that such insubordination is intolerable and makes it very difficult to perform his duties.

At the time of finalising this report, the position relating to the conduct of Advocates Jiba, Mrwebi and Mzinyathi was as follows:

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- (a) The fact-finding committee has finalised its work and submitted a report to the National Director. As indicated above, on 27 February 2015 the CEO informed the Minister about the findings and recommendations of the committee
  - (b) The General Council of the Bar has already brought an application in the High Court, Gauteng Division, for an order striking the names of each of the respondents (Advocates Jiba, Mrwebi and Mzinyathi), from the roll of advocates, alternatively, to suspend them from practising as advocates for such period as the court may deem appropriate. Advocates Mrwebi and Mzinyathi have already indicated that they will oppose the application.
  - (c) Criminal proceedings have been instituted against Advocate Jiba in the Regional Court, Pretoria. The charges are fraud and perjury and the case has been postponed to 10 June 2015
  - (d) Perjury charges have been laid against Advocates Jiba, Mrwebi and Mzinyathi. This case is still under investigation by the South African Police Service
  - (e) Criminal proceedings are also outstanding against Advocate Mrwebi for contravening section 32(1)(b), read with sections 1, 20, 24, 25, 32(1)(a) and 41(1) of the NPA Act.



In spite of the above-mentioned urgent requests directed to the Minister and the President, and the outstanding criminal proceedings against Advocates Jiba, Mrwebi and Mzinyathi, no feedback has been received from the Minister or the President. As emphasised by the High Court, “the respondents are unbecoming of persons of such high rank in the public service, and especially worrying in the case of the (acting) NDPP, a senior officer of this court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold.” Therefore, it is important for the Minister and the President to fulfill their constitutional mandate and to act as a matter of urgency.” (National Prosecuting Authority’s Annual Report, 2014/15, p31-33).



## Appendix 2

**Victims of Crime Survey 2016/17** (Statistics South Africa, 2017, n.p.):

MEDIA RELEASE

28 September 2017

“Statistics South Africa, released the 2016/17 Victims of Crime Survey results on Thursday September 28th. According to this survey, crime experienced by households and individuals aged 16 years and older, has been decreasing between 2013/14 and 2016/17. Approximately 7% households in South Africa were victims of crime in 2016/17, compared to about 9% households in 2015/16. The estimated number of incidents of crime also decreased for many types of crime. For example housebreaking incidents decreased by 8%; home robbery decreased by 25% and theft of personal property decreased by 12%. However, hijacking of motor vehicles increase and sexual offence increased sharply by 93% and 110% respectively. Estimates for hijacking and sexual offence, however, should be used cautiously as they fall under the second level of quality (acceptable statistics) due to the small number of respondents that experienced these types of crime.

An estimated total of 1,5 million crime incidents were experienced by approximately 1,2 million households in 2016/17. Male-headed households had a higher percentage (7,5%) of victimisation compared to female-headed households (6,6%). Whilst households headed by coloured (8,9%) household heads were the most likely to be victimised, households headed by black Africans (6,9%) were the least likely to be victimised by crime.

A comparison of crime types shows that housebreaking/burglary (53%) was the most common crime experienced by households in 2016/17, followed by theft of livestock (11%) and home robbery (10%). Theft of personal property tops the individual crime list at 42 percent, followed by assault (18 %) and robbery (16%).

Further analysis showed that household’s feelings of safety when it is dark continued to deteriorate over the years. It is not surprising that a large number of households have actively taken measures to make their homes (51%) and vehicles (41%) more secure. Although households took measures to protect their property, the fear of crime persists and prevent them from engaging in daily activities such as going to open spaces (32%), allowing children to play

outside (20%) and walking to town (15%). The study highlighted that households' confidence in police services and courts has been gradually eroding over the years. Households that held negative attitudes about the police felt that the police could not recover stolen goods (59%), whereas those that were disgruntled with court services said that courts were too lenient towards criminals" (Statistics South Africa, 2017, n.p.).





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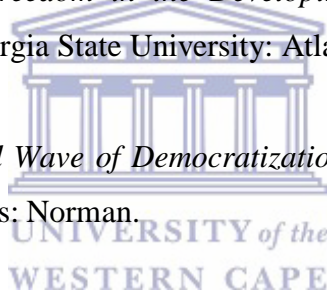
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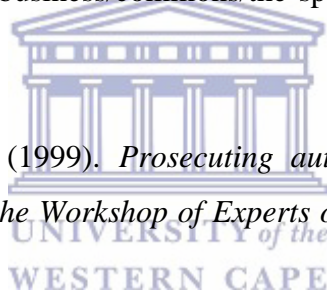
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## **Interviewees:**

Advocate Mike Pothier, 2017, Catholic Parliamentary Liaison Office (CPLO), Research Coordinator.

Advocate Shaun Abrahams, 2017, National Prosecuting Authority (NPA), National Director of Public Prosecutions (NDPP).

Advocate Silas Ramaite, 2017, National Prosecuting Authority (NPA), Deputy Director of Public Prosecutions (DNDPP).

Advocate Vusi Pikoli, 2017, City of Cape Town, Western Cape Police Ombudsman.

Dr Jeff Rudin, 2017, Alternative Information and Development Centre (AIDC), Researcher.

Dr Lukas Muntingh, 2017, Dullah Omar Institute, Associate Professor.

Mr Gareth Newham, 2017, Institute for Security Studies, Senior Researcher.

Mr Lawson Naidoo, 2017, Council for the Advancement of the South African Constitution (CASAC), Executive Secretary.

Mr Paul Hoffman, 2017, Accountability Now, SC Director and Head of Projects.

Mr Steven Swart, 2017, African Christian Democratic Party (ACDP), Member of Parliament.

Mrs Glynnis Breytenbach, 2017, Democratic Alliance (DA), Shadow Minister for Justice and Correctional Services.

Professor Fernandez Lovell, 2017, University of the Western Cape, Law Lecturer.

## Figures and Tables:

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