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NPA Accountability, trust and public interest

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Introduction

This discussion document deals with three key concepts associated with the National Prosecuting Authority (NPA) and its relation to the public, namely **accountability, public interest and trust**. It is presented that for the NPA to be regarded as a legitimate institution it needs to enjoy trust and in order to enjoy such trust, it needs to be seen and perceived to act in the public interest in an accountable manner.

Accountability

The Constitution requires, amongst others, that the public administration must be accountable [1] and this is further reflected in the Public Service Charter as a 'commitment by public servants'. [2] Corder, Jagwanth and Soltau describe accountability in the general sense as follows:

> Accountability can be said to require a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.[3]

In relation to prosecutors, independence without accountability 'poses an obvious **danger to the public interest**, which requires the fair and just administration of the criminal justice system'. [4] While prosecutorial independence is an essential element in the proper administration of justice, it must be recognised that inherent in independence without accountability is the potential for making 'arbitrary, capricious, and unjust decisions'.[5] It also creates a real risk of corruption at the highest level.[6] Events surrounding the NPA over the past ten years has increasingly shown an institution loathe to any form of accountability and clearly having been manipulated by powers from within to cut down its ability to fulfil its constitutional mandate.[7]

Given the tension between constitutional imperatives and the NPA's considerable discretion, the accountability of the NPA needs to be enhanced, while at the same time maintaining its necessary independence of office. The central issue is thus the question of balancing independence with oversight and accountability; imbalances in this regard have led to the various problems afflicting the NPA. These were concisely identified in research done already in 2007:

> [S]everal serious challenges still remain, including: poor court performance, a growing backlog of cases, low prosecution rates, growing numbers of sentenced prisoners and prisoners awaiting trial, the need to maintain positive public perceptions, clarifying the role and positioning of its elite crime fighting unit, the Directorate of Special Operations, allegations of criminality among its own members, high staff turnover, and the need to deal with the consequences of complex and politically sensitive investigations into high-profile political figures.[8]

Effective accountability relies on three principles, namely transparency, answerability, and controllability. In a constitutional democracy the public service must function in a transparent manner. It means that officials have a duty to act **visibly**, **predictably** and **understandably**.[9] Nothing must be hidden from public scrutiny, especially when human rights and

governance concerns are at stake. The actions of officials must be predictable as guided by policy, legislation, regulations, standing orders and good practice. The actions and decisions of officials must be motivated, rational and justifiable. It needs to be known what officials are doing, and when asked, they must be able to provide an understandable and predictable answer. However, without knowing what officials are doing and how decisions are made, accountability is impossible: there can be no accountability without information.[10]

Decision-makers must also be able to justify their decisions and actions publicly in order to substantiate that they are reasonable, rational and within their mandate – they must therefore be answerable. Transparency and answerability will have little meaning if there are not mechanisms in place to sanction actions and decisions in contravention of the given mandate; accountability institutions (e.g. Parliament) must therefore be able to exercise control over the institutions that they are overseeing. Failure to hold government and individuals accountable create the conditions for impunity to exist.

Public interest

As noted in the above, independence without accountability 'poses an obvious danger to the public interest'. The notion of public interest requires further exploration since the NPA is central to the rule of law[11] and holds the monopoly on the power to institute criminal proceedings,[12] save for when private prosecutions are undertaken[13] There is an expectation that the NPA will act in the public interest (i.e. for the greater good) by fulfilling its mandate. Even when difficult to define, 'public interest serves as the fundamental criterion for establishing the legitimation of power. Political power, then, is legitimate and necessary, and even acceptable, only inasmuch as it can be established that it serves public interest.'[14] This legitimising function is dependent on trust, namely the trust that the public has that political power (i.e. in the form of the NPA) will be used in the public interest; conversely if the NPA is not trusted by the public to act in its interest, it delegitimises the NPA.

The NPA is not only given extraordinary powers to prosecute but is furthermore protected by the Constitution that it must exercise these powers without fear, favour or prejudice.[15] The NPA will only be, in broad terms, regarded as legitimate if it is seen, perceived and trusted to exercise its vast powers in a manner that is in the public interest and indeed without fear, favour or prejudice. Its powers are indeed vast if it is kept in mind that the NPA can institute proceedings against individuals as well as corporations and members of associations,[16] and that assets can be frozen and forfeited on a balance of probabilities.[17] The NPA is also, in respect of certain serious offences, not restricted by time either as these offences do not prescribe after 20 years.[18] Not even a sitting president is immune from prosecution, should the NPA decide to institute such a prosecution.[19] The 'public' in 'public interest' therefore includes, but is not limited to, individual victims of property and violent crime we see in our courts every day, but also victims of criminal corporations, the tax payer who suffers losses due to state corruption, the victims of apartheid, and the electorate whose chosen leaders engage in corrupt activities. In short, on the one hand, every citizen has in one way or the other a stake in how the NPA makes decisions and the results of those decisions, and on the other hand, there is little, if anything, hindering the NPA in prosecuting *prima facie* cases and investigating allegations to determine their substance. The extent to which the NPA can establish overlap between public interest and successful and meaningful prosecutions will determine its legitimacy and the level of trust it enjoys.

Under the heading "Prosecution in the public interest" the NPA Prosecution Policy sets out three broad considerations with regard to the issue prefaced by "a prosecution should normally follow, unless public interest demands otherwise" and it is necessary to cite it here in full:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused person and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome, in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care must be taken when considering this factor, since public interest may demand that certain crimes should be

prosecuted - regardless of whether or not a complainant wishes to proceed.

- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused person, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether or not the accused person has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (In this regard the degree of culpability of the accused person and the extent to which reliable evidence from the said accused person is considered necessary to secure a conviction against others will be crucial).
- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution.
- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in the delay.[20]

The Prosecution Policy seems to pin public interest down to a finite list and this seems to be at odds with thinking from elsewhere. The first issue is that the guidelines in the Prosecution Policy do not seem to be alive to the broader substantive issues, such as South Africans' experience of crime, but rather individualises decisions to prosecute or not with reference to the offence, the offender and the victim. There then seems to be a disjuncture between how the Prosecution Policy interprets public interest compared to, for example, the Constitutional Court. The Constitutional Court have dealt with a range of issues brought by public interest litigants, such as the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt, the landless, gender equality, the rights of the child, the constitutional rights of gay men and lesbian women, and in relation to freedom of expression.[21] The jurisprudence from the Constitutional Court shows the open-ended nature of the notion of public interest and its link to constitutional rights, especially where it concerns vulnerable groups. This understanding of public interest does not seem to surface in the Prosecution Policy. One may indeed argue that if the Prosecution Policy should contain guidelines on prosecutions in the public interest, then priorities should be the prosecution of corrupt politicians and government officials, prosecutors who cause harm to victims through negligence,[22] and law enforcement officials implicated in human rights violations, to name a few. Based on crime trends and those crimes instilling the most public fear one may similarly add other priority areas. In short, what one would consider to be in the public interest is not reflected in the Prosecution Policy and what is reflected provide little substantive guidance.

Secondly, the question arises whether public interest can be defined, and is it even desirable to attempt to define it? The Australian Law Reform Commission advises against it: "'Public interest' should not be defined, but a list of public interest matters could be set out in the new Act. The list would not be exhaustive, but may provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope. This may in turn reduce litigation."[23]

The Australian Federal Court gave further insight into the complexities and that an open mind must be maintained:

> The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that "the public interest" can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. [24]

Whilst it seems that public interest should not be a closed list, there are certain requirements that those claiming to act in the public interests must comply with, or of whom it is expected to act in the public interest. Acting in the public interest has two separate components. Firstly, objectives and outcomes - the

objectives and outcomes of the decision-making process are in the public interest. Secondly, the process and procedure, noting that the process adopted and procedures followed by decision-makers in exercising their discretionary powers are in the public interest, which would include:

- Complying with applicable law (both its letter and spirit)
- Carrying out functions fairly and impartially, with integrity and professionalism
- Complying with the principles of procedural fairness/natural justice
- Acting reasonably
- Ensuring proper accountability and transparency
- Exposing corrupt conduct or serious maladministration
- Avoiding or properly managing situations where their private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties, and
- Acting apolitically in the performance of their official functions (not applicable to elected public officials).[25]

Succinctly put, "'The public interest' is best seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term, or the approach indicated by the use of the term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (i.e. more 'public') concern."[26]

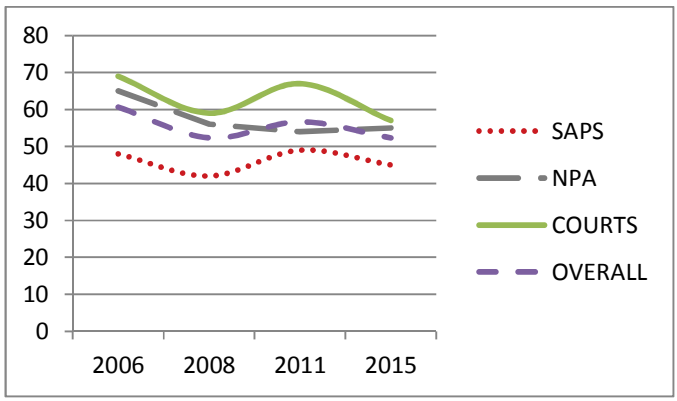
Working in the public interest then seems to be as much about procedure as it is about outcome. South African courts have recognised that procedure is important and that it is in the public interest to decide on specific issues.[27] Without predetermining the outcome, the courts recognise that dealing with an issue is or itself in the public interest. Not making decisions when one is mandated to make decisions works against public interest and there are few better examples than the NPA not making decisions on 686 cases referred to it since 2013 by the Special Investigating Unit (SIU).[28] Similarly in 2016/17 Independent Police Investigative Directorate (IPID) referred 1140 cases to the NPA and was awaiting feed-back on 97% of them.[29] It is in the broader public interest that serious criminal cases are prosecuted and that police officials who are implicated in criminal activities, especially human rights violations, are prosecuted. Criminal cases are also diverted on a significant scale by the NPA through mediation and given the scale on which this happens, serious questions must be posed about the 'public interest' of this practice. In 2016/17 there were some 340 000 verdict cases and 164 000 cases handled through mediation and thus no prosecution, representing 32% of total cases finalised.[30] More detailed information on the profile of these cases are not available. While the NPA's conviction rate has been on a steady increase (latest is 96%), the number of prosecutions has declined and the available data indicates that it is unlikely that serious, dangerous and prolific offenders are prosecuted.[31] Given current crime trends, it seems at least suspicious that nearly a third of criminal cases are dealt with through mediation and this undermines public expectations regarding the prosecution of criminal suspects. It is thus required to look more closely at how the NPA defines public interest and if current policy and practice is indeed serving the public interest.

Trust

Trust can be described as 'the belief, despite uncertainty, that something you believe should be done will be done and the belief, despite uncertainty, that something you believe should not be done, will not be done, the outcome of which will be beneficial to you or another'.[32] Taking a broader perspective, trust in an institution is at least partly reliant on the behavioural conduct of that institution.[33] Trust in the police, for example, therefore, is to some degree a function of perceptions of police conduct[34] and the same would then apply to the NPA.

Trust is not simply a state of mind of an individual, but rather involves a consequence associated with some kind of risk to one's ultimate welfare. The Merriam-Webster Dictionary defines trust as "assured reliance on the character, ability, strength, or truth of someone or something" with synonyms being confidence, credence, faith, and stock. In addition, trust and confidence both imply a feeling of security. Trust also implies instinctive unquestioning belief in and reliance upon someone or something like a group to which one belongs or a public institution established to protect citizens.[35] Levi and Stoker define trust as relational in nature, and argue that 'it involves an individual making herself vulnerable to another individual, group, or institution that has the capacity to do her harm or to betray her.'[36]

Figure 1 How much do you trust each of the following, or haven't you heard enough about them to say? (% who say "somewhat" or "a lot")[37]



Importantly, trust can be measured, as shown in Figure 1, and the situation does not reflect well on the NPA, nor the courts or SAPS. Figure 1 presents the results in *Afrobarometer* surveys to the question 'How much do you trust each of the following, or haven't you heard enough about them to say?' giving the combined percentage of responses indicating "somewhat" or "a lot". From 2006 to 2015 this proportion of responses declined from 65% to 55%, but the most substantial decline was in respect of the courts – declining from 69% top 57%; a decrease of 12 percentage points. The NPA can hardly disassociate itself from the courts and public levels of trust will undoubtedly be informed by their experiences in and at the courts. Some 30% of respondents indicated that they don't trust at all or trust the NPA very little. In respect of the courts, this figure was 41%.

The overwhelming impression gained is then that fewer and fewer South Africans, from 2006 up to 2015, held the view that the NPA (and the police and courts) acted in the public interest and from this it then follows that the NPA enjoys declining legitimacy. While high profile cases may shape respondents' views (e.g. the Zuma prosecution or lack thereof), it cannot negate peoples' real lived experiences of the NPA and the criminal justice system.

Conclusion

Three concepts were discussed in the above, being accountability, public interest and trust. All three have bearing on the legitimacy of state institutions and how political power is used. The ultimate result being sought is a high appreciation of the legitimacy of the NPA, but that can only occur if there is trust in the NPA that it will act in the best possible public interest. Such trust will be shaped by the extent to which the NPA conducts itself as an accountable institution of state, i.e. the degree to which it is transparent, answerable and controllable.

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[2] Public Service Charter, Public Service Collective Bargaining Council, Resolution 1 of 2013, para 7.22.

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[15] S 179(4) Constitution

[16] S 332 Criminal Procedure Act. See also Farisani, D. M. (2017) Corporate criminal liability in South Africa: what does history tell us about the reverse onus provision? *Fundamina* (Pretoria) [online]. 2017, vol.23, n.1 [cited 2018-08-28], pp.1-19. Available from: <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2017000100001&lng=en&nrm=iso>. ISSN 2411-7870. http://dx.doi.org/10.17159/2411-7870/2017/v23n1a1.

[17] Basdeo, V. (2014) The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A constitutional Dilemma, *Potchefstroom Electronic Law Journal*, Vol 17 Nr. 3.

[18] S 18 Criminal Procedure Act. These offences are: Murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child-stealing; rape or compelled rape; genocide, crimes against humanity and war crimes, trafficking in persons for sexual purposes and torture. The latter two offences added by the Judicial Matters Amendment Act (8 of 2017).

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[21] Para 19 *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009).

[22] Para 62 *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001).

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