National or Super Attorney-General:
Political Subjectivity or Juridical Objectivity?

Peet M Bekker
Professor of Law, Department of Criminal and Procedural Law,
University of South Africa

Brief historical remarks about the office of Attorney-General

The name attorney-general is in actual fact a misnomer as the incumbent of such an office does not do any work pertaining to an attorney. A former Attorney-General supposed that the name had its origin in the good old days when in the reign of Edward III he employed what he termed a "general attorney", to distinguish the position of the particular occupant of that post from an attorney he appointed for specific occasions and specific cases. The first King's Attorney-General is generally accepted as having been one Lawrence del Brok, who held office from 1247 to 1267. It is interesting that Shakespeare mentions the office of attorney-general in two of his plays - King Richard II and King Henry VIII. By a coincidence the reference is to be found in Act II, Scene I, of each play.

Position of the attorney-general in South Africa prior to the Attorney-General Act of 1992

At Union, section 139 of the South Africa Act gave the provincial attorneys-general exclusive control over the institution and conduct of public prosecutions. Unlike their pre-Union counterparts, South African attorneys-general were civil servants and exercised no political functions. No provision for ministerial control existed.

In 1926 the position was altered by section 1 of the Criminal and Magistrate's Courts Procedure (Amendment) Act, when the final control over prosecutions was removed from the attorneys-general (or the Solicitor-General in the then Eastern Districts) and vested in the Minister of Justice. This was done because public servants were not responsible to Parliament and, on high grounds of policy, the Government should have control over prosecutions. As will be seen later, this argument is once again dusted and used in 1995. This was found, however, to impose an intolerable burden of accountability on the Minister, and in 1935 a via media was settled on, leaving decisions with the attorneys-general, subject to the direction of the Minister. The ultimate control of prosecutions vested in the Minister of Justice, who was a member of the Cabinet. Section 3(5) of the Criminal Procedure Act 51 of 1977 stated that an attorney-general exercises his authority subject to the control and direction of the Minister of Justice "who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions."

In ordinary circumstances there would be no ministerial interference. In practice the Minister seldom interfered with the decision of an attorney-general and this provision was designed simply to ensure that the Minister has ultimate control over prosecutions. This statement is reassuring but the "seldom" is worrying and is not elaborated on. The attorney-general needed only to give reasons for his decisions if asked by the Minister of Justice. In law, the Minister of Justice had the final say, but, according to a former Attorney-General of that era, in practice the Minister did not interfere with his attorneys-general. Very significantly, however, he added that the Minister accepted, as a rule, the decisions they took.

He did not, however, elaborate on the "as a rule". The back-door for ministerial interference in the exercise of the functions of the attorney-general was, it seems, always left open.
The attorneys-general and their staff had entrench the non-interference of the always been civil servants and for many authority in 1992, except that the state initiatives by the Society of State Advocates of South Africa which started years attempts were made to remove Attorney-General holds a position of such case is, however, on record in Even the courts showed a marked disinclination to control, or even to comment on, the exercise of this discretion. In one instance the court refused to issue a mandamus to compel the respondent to prosecute, while in another case the court indicated that it would not interdict the attorney-general from prosecuting where he had decided to do so. In a third case the court refused to direct the attorney-general to decide within a specified period whether or not he intended indicting certain accused.

So far as the attorney-general remains within the legal limits of his powers, a court will not interfere in the manner he exercises his discretion. When, however, there is mala fides on the part of the attorney-general a court will probably interfere to stop a prosecution. No such case is, however, on record in South Africa.

There has always been high praise from the Bench towards the position of attorney-general. A former Judge-President of the Natal Provincial Division, Mr Justice James, once stated that “...the Attorney-General holds a position of great responsibility which requires the highest degree of integrity. He is entirely independent of the police... I have known many Attorneys-General in my time, both as an advocate and as a Judge, and the suggestion that any of them might fail to do all in his power to see that justice is done ... is unthinkable.”

The Attorney-General Act 92 of 1992

The attorneys-general and their staff had always been civil servants and for many years attempts were made to remove them from that position. The Attorney-General Act came into operation on 31 December 1992 as a result, inter alia, of the initiatives by the Society of State Advocates of South Africa which started as far back as 1984. The purpose thereof was to take the attorney-general and state advocates out of the control of the Public Service Commission and to entrench the non-interference of the Minister of Justice. The final draft legislation was accepted by the executive authority in 1992, except that the state advocates and deputy attorneys-general were left under the control of the Public Service Commission.

In the memorandum on the Bill which preceded the Attorney-General Act it was stated that the community demands that each attorney-general should function independently of any possible interference from the executive and that the purpose of the proposed Act would be “to meet the need to place the independence of an Attorney-General beyond any doubt.” These aims were largely met by the provisions of sections 3, 4, 5(5) and 5(6) of the Act, in terms of which the salary payable to a particular Attorney-General shall not be reduced except by Act of Parliament; he shall be removed from office by the President only if an address from each of the respective Houses of Parliament in the same session praying for such removal on the ground of misconduct of the Attorney-General or on account of continued ill-health or his incapacity to carry out his duties of office efficiently, is presented to the President.

An attorney-general is no longer subject to the control and directions of the Minister of Justice (as was theoretically the case in terms of the repealed section 3(5) of the Criminal Procedure Act). The Minister of Justice can now at most request an attorney-general to furnish information or a report as described in section 5(5)(a) and to provide reasons as described in section 5(5)(b). An attorney-general must annually not later than the first day of March submit to the Minister a report on all his activities during the previous year. Such report must be tabled in Parliament within 14 days after it was submitted to the Minister.

Thus the complete independence of the office of attorney-general was assured. But only slightly more than a year later a new government came into power and one of the institutions which came under attack was that of the attorney-general.

Criticism of the position of attorney-general

It was admitted that the authority of an attorney-general was far-reaching, indeed more extensive than that of the courts in that the exercise of the powers of an attorney-general is not delimited by laws and that everything is in fact left to his unfettered discretion. In addition, in contrast to the courts, an attorney-general need not supply reasons for his decisions, and in consequence such reasons cannot normally, as in the case of the courts, be subjected to public scrutiny and debate. Furthermore, the decisions of an attorney-general are usually not subjected to review by a court of law. It was submitted that a position of chief attorney-general, with attorneys-general under his control, be created to submit a report annually to Parliament on his activities of his division (comprising all the attorneys-general) and he could be obliged to appear before a Parliamentary committee to answer questions on the way in which he or attorneys-general had exercised their powers or performed their functions. In this way effective Parliamentary supervision could be exercised. The apparent intention was that such a chief attorney-general would not be a cabinet minister or other politician but would be an independent official, such as perhaps the most senior attorney-general.

A then Attorney-General immediately criticized the above suggestion in that such an official would just replace the Minister in exercising control over attorneys-general.

In his budget vote speech to the National Assembly and the Senate in 1994 the new Minister of Justice stated that the justice system in South Africa had to be transformed but that it should take place not by the Department of Justice alone but in consultation with relevant organisations with a view to calling a broad consultative legal forum.

Proposed National Attorney-General

(a) National Association of Democratic Lawyers (Nadel)

At the conclusion of Nadel’s conference Reshaping the Structures of Justice for a Democratic South Africa held in October 1993, a proposal was adopted calling for the establishment of the office of National Attorney-General. He would be appointed by the President, be a member of the Cabinet and oversee the Prosecution Service of all the regions.

It was stated that “despite some reservations having been expressed about a political appointment and consequent governmental interference with the prosecutorial discretion of the Regional Attorneys-General, the proposal for (a) political appointment was adopted for the following reasons:

(1) while appointment by an independent body might be ideal, this is for practical purposes unrealistic since the Government ultimately controls the running of the country and must therefore have the power to lay down the rules governing the administration of justice;
(2) the Cabinet must have the power to determine which offences are to be prosecuted. Leaving this power to the Attorney-General would undermine the authority of the Government. It has to be noted that this proposal goes much further than what the position was between 1935 and 1992.

It is not a theoretical ministerial supervision of the attorney-general that is proposed but an active involvement by the Minister of Justice and the Cabinet in the traditional role of the attorney-general. Politicians could, therefore, have the final say in matters whether to prosecute, of what offence and whom.

A further proposal was that this political National Attorney-General would “by virtue of confidence placed in him or her” (ie political confidence) appoint the Regional Attorneys-General and Deputy Attorneys-General who should be accountable to the National Attorney-General. The whole structure of the traditional independent role of the Attorney-General would, therefore, be politicised.

(b) Consultative Legal Forum

The Minister of Justice proposed in 1994 during his budget speech to Parliament that a National Consultative Legal Forum on the Administration of Justice be set up to give effect to the Government’s commitment to the transformation of the Republic’s legal administration.

The first meeting of the forum was held from 11 to 13 November 1994 in Cape Town. The delegates of certain interest groups attending the workshop on administrative structures urged the Minister to appoint an independent politician as a “super attorney-general”.

On the last day of the forum Minister Omar in his closing address mentioned the position of the attorney-general as being one of the most contentious ones for him and one of the more sensitive ones. Replying to a remark by the Attorney-General of the Cape about the need for sensitivity to the community, he stressed that no mention had been made about the accountability of the attorney-general. He asked the question to whom was the attorney-general accountable and said that its office had been an instrument of the apartheid state and had applied repressive legislation with vigour and enthusiasm. In this respect he mentioned that the attorney-general may prevent the granting of bail in certain circumstances and alleged that attorneys-general applied this provision with vigour and great enthusiasm. Minister Omar said that many people saw the attorney-general as an instrument of the apartheid state. He mentioned, however, that in “the dying days of apartheid” the independence of the office of the attorney-general was introduced. This, he concluded, was not done so much to guarantee independence but to entrench the status quo.

At this stage already the question can be posed whether a political National Attorney-General would not have the same inherent dangers of political manipulation of the office of the attorney-general that the Minister so vehemently criticized in respect of the apartheid state. Whatever the reasons behind the introduction of the independence of the office of the attorney-general, this was at least a step in the right direction.

In regard to accountability the Minister posed the question: “How is the attorney-general accountable to Parliament and who represents the views of the community?” An “unelected official, emanating from the apartheid regime or a democratically elected Parliament?” And further: “Does the attorney-general have the right to decide policy?” He referred to the question of the death sentence and raised the question whether “we (are) going to find a situation where the attorney-general argues for constitutionality and the government of the day argues that it is unconstitutional?”

This (healthy) state of affairs is in fact going to be the position when the Constitutional Court has to decide the constitutionality of the death sentence. From reports it appears as if an attorney-general is going to argue the case for the constitutionality of the death sentence while the Government instructed eminent senior counsel to argue the contrary.

This is the position because of the independence of the attorney-general and since he is not a lackey of the Government.

Reaction to the speech of the Minister of Justice

The Executive of the General Council of the Bar of South Africa (GCB) has taken note of the statement of the Minister, who had indicated that he was in favour of the appointment of an Attorney-General who would be a member of the Cabinet and the GCB will, at an appropriate time, engage in discussions with the Minister on this important aspect of the administration of justice.

In response to the delegates at the Legal Forum who urged the Minister to appoint an independent politician as a “super attorney-general”, then President of the Association of Law Societies, Mr Willem Venter, strongly opposed this in a subsequent press statement, saying that it was of the utmost importance that the office of the attorney-general be independent of any political party and that the appointment should in no way be politically motivated.

The Attorney-General of the Witwatersrand Local Division, Klaus van Lieres und Wilkau SC, according to press reports, also criticized the possible introduction of a National Attorney-General because of the political nature of the position. He reportedly indicated that he would not be willing to serve under such a person.

The Society of State Advocates of South Africa termed the possible creation a National Attorney-General who would also be a member of the Cabinet and to whom the so-called Regional Attorneys-General would be accountable “extremely disturbing. The inescapable conclusion is that such a post of a political Attorney-General would leave the door wide open for political interference in the functioning of the prosecution.”

Short comparative study of chief public prosecutors’ constitutional powers in Commonwealth jurisdictions

Introduction

As the South African legal tradition is mainly based on English law, it might be of interest to compare the relevant situation in certain Commonwealth countries.

In the Commonwealth, the general power to initiate, take over or withdraw criminal proceedings usually vests in the Attorney-General or a specially appointed public officer, often, following the English model, called the Director of Public Prosecutions (DPP). The duties of the holders of these offices tend to be similar to those exercised in England and Wales, though there may be significant variations. The office of the Attorney-General for England and Wales evolved out of the medieval King’s Attorney and King’s Serjeant, whose role it was to represent the monarch in the Royal Courts. The function of the modern Attorney-General is that of chief legal adviser to the government and
It is an established principle that general power to initiate, take over or terminate cases without political or other pressure. The Office of Director of Public Prosecutions (DPP), on the other hand, has independently on a day to day basis it remains subject to the directions of the attorney-general.

Attorneys-General exercise enormous quasi-judicial power through their discretion to initiate, take over or terminate prosecutions. In England and Wales it is an important constitutional principle that this discretion is exercised independently and impartially. In 1959 the then British Prime Minister, Harold MacMillan, stated: "It is an established principle of government in this country, and a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter, where a public as opposed to a private prosecution is concerned, for the prosecuting authorities to decide on the merits of the case without political or other pressure. It would be a most dangerous deviation from this sound principle if a prosecution were to be instituted or abandoned as a result of political pressure or popular clamour."45

Despite this statement, it may still in practice prove to be difficult for an Attorney-General to be immune to political forces. The multiplicity of his roles raises questions about the effective separation of powers. How can an Attorney-General who is a member of the legislature and the executive ensure that any decision to prosecute or not to prosecute is based on impartial considerations and not on political ones? Issues around the separation of powers arise.46

Other Commonwealth Countries

It will serve no useful purpose to discuss the legal systems of all Commonwealth countries. Suffice it to say that the following possibilities are to be found in different countries:47

1. A political attorney-general with general power to prosecute offences.48

2. Civil service attorneys-general with general powers to prosecute offences.49

3. Specially appointed public prosecutors with general powers to prosecute but subject to at least some specific directions of a supervisor.50

4. Specially appointed public prosecutors with general powers to prosecute and not subject to the directions of a supervisor.51

Summary in respect of the Commonwealth

The general power to prosecute may vest either in the Attorney-General or the DPP. The Attorney-General may be either a member of government or a civil servant. In the case of the former, issues around the separation of powers arise. If the Attorney-General is a member of the executive and/or legislature, how is that office to arrive at an independent, non-partisan decision? The creation of the office of DPP could be a partial solution to this dilemma of possible bias. If a DPP is completely independent, issues can arise as to how that officer is made accountable to Parliament and hence to the electorate. But a DPP who is subject to the control of a political Attorney-General is not able to make entirely independent decisions.52 The latter is the crux of the matter in South Africa.

Conclusion

It is my submission that to create a National Attorney-General who would also be a member of Cabinet and to whom the so-called Regional Attorneys-General would be accountable would be a giant step backwards from the position created by the Attorney-General Act of 1992. The remark by Minister Omar that the Office of Attorney-General had applied repressive legislation with vigour and enthusiasm53, can then equally be applicable to the new proposed National Attorney-General. It is submitted that if a politician has the final say in judicial matters there is always the danger that he or she would strive to influence the officials who occupy a non-political office.

It is further submitted that the important criticism by Minister Omar that with the present system a problem of accountability exists, can be overcome if a position of chief (national, super) attorney-general is created, who would be in charge of attorneys-general and who would have to submit an annual report to Parliament. He could be obliged to appear before a parliamentary committee to answer questions on the way in which he or she or attorneys-general had exercised their powers or performed their functions. In this way effective Parliamentary supervision could be exercised.54

Such a chief attorney-general should, of course, also be totally independent. In conclusion it is to be noted that the Constitution of the Republic is the supreme law of the Republic55 and not Parliament. The attorneys-general as lawyers are therefore bound to uphold the Constitution and not to be subject to the caprices of a politician, however duly elected he or she may be. Let us build a proud tradition of truly independent attorneys-general so that justice will not only be done but manifestly be seen to be done.

Note:

It is generally known that I served as Director-General of Justice for ten years until my retirement in 1984, and before that as a senior official in the legal section of the Department for many years. And on the basis of the experience so gained I can unhesitatingly say that a great disservice would be done to the country if politicians were again to be involved in the prosecution process. I respectfully endorse the following remarks made by Lord Peter Rawlinson, a former Attorney-General of England:

The case of Gouriet v HM Attorney General and others brought to the surface the doubts which lurk in some minds that no person can, or no person nowadays appears to, carry out the quasi-judicial duties of Law Officer [Attorney-General] while at the same time serving in a modern Ministry. The system, according to this view, which was acceptable in the 19th century, is no longer acceptable in the second half of the 20th [century].

(See John LIJ Edwards, The Attorney General, Politics and the Public Interest, p 63, (Sweet & Maxwell 1984)).

As indicated by Lord Rawlinson, the clock would be turned back at least 100 years if a politician were to be placed in charge of prosecutions in South Africa. Moreover, I have no doubt that if such a change is made the Government will soon regret it. The administration of justice (which, in the wide sense, includes the prosecution process) and politics should be kept entirely separate in present-day circumstances, otherwise serious problems will arise. The accountability problem can be overcome in the manner indicated supra. — Editor
Footnotes

3 In Richard II reference is made to the Attorney-General of the Duke of Heretford (ie those persons holding this general power of attorney). In Henry VIII there is a reference to the attorney-general prosecuting at the trial of the Duke of Buckingham for treason. See Yutar op cit 135.
5 31 May 1910.
8 Section 1 of the General Law Amendment Act 46 of 1935.
9 Hahlo and Kahn, ibid. They quote a former Minister of Justice (and former State President Swart) who often stated that he would intervene only when national interests were involved: a rather vague and wide concept.
11 Yutar, op cit 136. Another former Attorney-General stated that ministerial control served virtually exclusively to report in Parliament on prosecutorial decisions: DJ Rosouw SC: Letter to the Editor 1990 Consultus 73. The Minister could, however, pull all the strings behind the scenes and thereafter take shelter behind the Attorney-General: "Position of Attorneys-General" 1991 Consultus 143.
12 Gillingham v Attorney-General 1909 TS 572.
13 Allen v Attorney-General 1935 CPD 302.
14 Wronsky v Prokaree-General 1971 (3) SA 292 (SWA). See, also, FG Richings "The Prosecutor's Discretion: A Plea for Circum­vention" 1977 SACC 143 at 144.
15 Staar v Nellmapias 1885-1888 SAR 121; R v Waldech and Thine 1913 TPD 568; Gilling­ham, supra.
17 S v Hassim 1972 (1) SA 200 (N) 203 B-D.
1990 Consultus 2-4 where it was stated (p4) that the only acceptable solution was to return to the situation as created by section 139 of the South Africa Act of 1909, where all powers and functions relating to the pros­ecution of crimes were vested in the attor­neys-general. No provision for ministerial control or intervention existed. This has been seen to be independent of the executive authority and bureaucratic control ...". See press statement of 25 November 1994.
20 B69-92 (GA).
21 The provisions of which are quoted supra.
22 Section 6(a) of the Attorney-General Act 92 of 1992.
23 Section 6(b) of the said Act. See in general, Du Toit and al Third Commentary on the Criminal Procedure Act 51 (soft cover 1993) 1-4 to 11.
24 See, also, Editorial in 1991 Consultus 73.
25 Editorial "Attorney-General in a new dispens­" 1990 Consultus 3. Some weak­nesses in the system, mentioned in the Edi­torial, have since been eliminated; viz the Attorney-General being a public servant and subject to the control and directions of the Minister of Justice.
27 DJ Rosouw SC in a letter to the Editor of Consultus (October 1990: 73).
29 Would the position, therefore, "be ideal" if Attorneys-General were to be appointed by the President on recommendation by the Judicial Service Commission?
30 See text against footnotes 10 and 18 supra.
31 Justice News (Newsletter of the Department of Justice) vol 1.3 November 1994.
32 1990 DR 8.
33 Section 61 of the Criminal Procedure Act 51 of 1977.
34 See the provisions of section 5(5)(a) and (b) of the Attorney-General Act 92 of 1992 and the text against footnote 21 supra.
35 According to reports the Government has a back-up in the form of draft legislation which would repeal the death sentence (should it be declared constitutional by the Constitutional Court).
36 General Council of the Bar of South Africa.
37 Is this not a rare event?
38 See 1995 DR 8.
40 The same was allegedly said by two senior state advocates of Cape Town: Beeld ibid. See also the criticism of a former dean of the Law Faculty of the Rand Afrikaans University and the then Principal-elect, Prof JC van der Walt – Beeld of 17 November 1994.
42 South Africa now also being a member of the Commonwealth. The following discus­sion is based exclusively on the following article by Roger Rose and Sandy Paul "Chief Public Prosecutors. A Short Compar­ative Study Of Their Constitutional Powers In Commonwealth Jurisdictions" May 1994 The Commonwealth Lawyer vol 6 no 1 49­58.
43 The proposed National Attorney-General would then be very similar to the English Attorney-General.
44 The DPP can thus be compared to our offices of Attorneys-General as they were between 1935 (see footnote 8 supra) and 31 December 1992 (see the discussion of the Attorney-General Act 92 of 1992 supra).
45 As quoted in the article of Rose and Paul, supra 50.
46 This question is raised by Rose and Paul, ibid.
47 See Rose and Paul, supra 52-57.
48 Bahamas, Brunet, Canada, Gambia, Ghana, Kenya, Kiribati, Lesotho, Malaysia, Mal­dives, Nigeria, Sierra Leone, Tonga, Uganda, Western Samoa, and Zimbabwe. Also Scotland and Northern Ireland – see Rose and Paul, supra 56.
49 Botswana, Cyprus, Malawi, Malta, Seychelles, Singapore, Tuvalu and also the UK dependencies, eg Falkland Islands, Gibraltar, Isle of Man, Jersey, etc.
50 This "supervisor" is usually the attorney-general. Countries falling in this category are Antigua, Bermuda, Australia, Barbados, Bangladesh, Dominica, Namibia (the constitu­tional relationships between the Attorney-General – a member of the Executive and the Cabinet – and the Prosecutor-General – the equivalent of the UK Director of Public Prosecutions – is presently pending before the Supreme Court of Namibia), New Zealand, Papua New Guinea, Solomon Islands, Tanzania, England and Wales (the Attorney-General being politically answer­able for the decision of the DPP), and Zamb­ia. This is the category in which Minister Omar would apparently like South Africa to be.
51 Belize, Grenada, Guyana, India, Jamaica, Mauritius, Swaziland, Trinidad and Tobago, and a few others. This is where the South African attorney-general fits in at present.
52 See Rose and Paul, supra 57-58.
53 See text between footnotes 32 and 33. supra.
54 See Editorial April 1990, Consultus 4.

"From a wise mind comes careful and persuasive speech."
PROVERBS 17:24

APRIL 1995

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