A Introduction
The fundamental pillar of any democratic society is the independence and impartiality of the judiciary and prosecutors, wherein the respect for the rule of law and the effective protection of human rights are enshrined. The judiciary, prosecutors and lawyers have to exercise their professional responsibilities in an independent and impartial manner without fear, prejudice or victimisation.

The principle of an independent judiciary has its origin in the theory of the separation of powers, wherein the Executive, Legislature and Judiciary form three separate branches of government. A system of checks and balances is operational to prevent the abuse of power by one of the organs to the detriment of the other branches of government and also a free democratic society.1

From the above it is clear that unless the judiciary, prosecutors and lawyers are able to exercise their professional duties free from undue influence, impartially and independently, the rule of law will eventually cease to exist.

The appointment of Adv Mokotedi Mpshe SC to the Bench of the North West High Court sparked an outcry from various quarters of society. It was stated that he demonstrated ‘his political pliability – and hence unsuitability for judicial office.’2

Paul Hoffman SC was quoted as saying the following: ‘Radebe has, in effect, declared ‘open season’ for the “appointment of employees in public administration … to the High Court Bench.”’3

B Independence versus impartiality
The concept of independence was defined by the Canadian Supreme Court as ‘not only a state of mind but also a status or relationship to others – particularly to the executive branch of government – that rests on objective conditions or guarantees’.4

Judicial impartiality, according to the Supreme Court of Canada, is ‘a state of mind or attitude of the tribunal in relation to the issues and the parties of the case.’ This view has been accepted internationally. The European Court of Human Rights states that ‘impartiality’ contains both subjective and objective elements. It states that the tribunal should be impartial in that ‘no member of the tribunal should hold any personal prejudice or bias, and be impartial from an objective view point.’5

C Legal systems
In countries with common law roots it is practice that judges are usually appointed from the ranks of practising senior lawyers. Usually a distinction is made in the appointment procedures of lower and superior courts. As the appointments are usually made by the executive, it has led to political interference in a number of common law countries. In some cases judges run for office or must stand for election.

In systems with a civil law heritage the approach is based on qualifications where the candidates sit for examinations before being considered for the judiciary. Recently graduated candidates may apply for positions, although they will be appointed at a lower court level and work their way up and be promoted through their career path as is the case with any other civil servant.

It has long been advocated that the ideal appears to be a system where there is a balance between the organs of government that includes judges, so as to allow a role for civil society, the involvement of the legal profession and law teachers. The key seems to be the avoidance of domination by any grouping of people, be it the political elite, government or the private sector.6

D Criteria for the appointment of judges
Section 174 (1) of the Constitution, 1996, states the following: ‘Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.’

Principle 10 of the United Nations Basic Principles on the Independence of the Judiciary is in line with the Constitution, 1996, that requires the following: ‘Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.’

It is clear from the above that the method of selection is important. The Basic Principles prohibit discrimination, but does not give further guidelines to be used during the process of selection.

The Judicial Services Commission supplemented the existing constitutional criteria for the appointment of judges.8 From
those criteria it is clear that judicial appointment should be merit rather than alliance based.

Section 22 of the Constitution, 1996, states the following:
’Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.’9

Section 9(1) of the Constitution, 1996, states as follows:
’Everyone is equal before the law and has the right to equal protection and benefit of the law.’

E The view of the law societies
The Law Society of South Africa, in a letter dated 30 March 2012 and addressed to the Judicial Services Commission, objected to the appointment of judges from the ranks of senior prosecutors. It was submitted that the training received by prosecutors is ‘insufficient to render them fit and proper persons to be appointed judges, dealing with civil and criminal matters’. It was further alluded that the ‘lack of practical experience in civil matters would be of concern.’ The fear was also raised that ‘prosecutors are in gainful employment of the State and the perception could be created that they might conduct themselves in such a way that could compromise their independence … A prosecutor wishing to be appointed to the bench should therefore first have to resign his position as public prosecutor.’

In contrast to the above, a resolution10 was taken by the Black Lawyers Association wherein it was decided that in order to obtain and achieve demographic representation of the judiciary, members of the judiciary may be drawn from the ranks of legal academics, legal practitioners, lawyers in the private sector, advocates in the National Prosecuting Authority and government officials.

F Duties of judges and prosecutors
The duty of judges is and remains the application of the law and therefore, when deciding cases, they may not act arbitrarily in any way and must distance themselves from their own personal preferences.

Likewise, a legal system that upholds the rule of law needs strong, independent and impartial prosecutors willing to prosecute suspected crimes committed by members of society regardless of their official capacity.11

According to the Guidelines on the Role of Prosecutors, it is stated that prosecutors fulfil an essential function in the administration of justice and must be strictly separated from the other branches of government. In particular prosecutors must act objectively and impartially, respect the principle of equality before the law and adhere to the presumption of innocence. They must also give attention to human rights abuses, especially those committed by law enforcement officials.

According to the said guidelines, ‘persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.’12

The following standards of professional responsibility and essential duties of prosecutors were agreed upon by the United Nations Commission on Crime Prevention and Criminal Justice wherein it is stated that prosecutors shall:13

- At all times maintain the honour and dignity of their profession;
- Always conduct themselves professionally in accordance with the law and the rules and ethics of their profession;
- At all times exercise the highest standards of integrity and care;
- Keep themselves well-informed and abreast of relevant legal developments;
- Strive to be consistent, independent and impartial;
- Always protect an accused person’s right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law;
- Always serve and protect the public interest;
- Respect, protect and uphold the universal concept of human dignity and human rights.

G The matter of Mark Walters14
The sixth respondent in this matter was the Director of Public Prosecutions, South Gauteng. As such a senior state advocate, attached to that office, appeared representing the Director of Public Prosecutions. It was vigorously argued on behalf of the applicant that an admitted advocate cannot, by virtue of employment, represent the National Prosecuting Authority in civil proceedings without being briefed by an attorney. Monama J found that, although he was satisfied that the State Advocate did not act mala fide, her appearance was irregular as she appeared without a brief. This finding was made as the constituents bars of the General Bar Council of South Africa prohibit its members to appear in any proceedings except on brief. The court found that a State Advocate is...
bound by these rules and that the rules of ethics of the profession of advocates are very clear in this regard.

From the above it is clear that there is no distinction between advocates in private practice and State Advocates—all are bound by the same rules of ethics.

What is also noteworthy is that the Bar Council may by way of application approach the High Court to expel any advocate who transgresses the law or code of conduct.

**H Conclusion**

It is an undisputed fact that the Constitution, 1996, is the supreme authority in South Africa. It is also clear from the above that the only requirement to be appointed as a judge is to be appropriately qualified and to be a fit and proper person. Other criteria set by the United Nations are merely there to supplement the Constitution, 1996. The writer could not find any law or regulation that bars prosecutors or advocates that are employed by the National Prosecuting Authority from being appointed as judges.

The website (www.sabar.co.za/legal-career.co.za) of the General council of the Bar states the following: ‘Advocates adhere to a “cab rank” rule which means that any person no matter how grievous a crime they are accused of, how poor or rich they may be or however unpopular they may be politically, is entitled to the services of an advocate, and it is unethical for an advocate who is available to take a case to refuse to do so because the advocate disapproves of the person’s acts or behavior.’

The Law Society of South Africa is of the opinion that ‘judicial Independence’ would be compromised if judges are appointed from the ranks of State Advocates. This argument flies in the face of the current practice whereby acting judges are appointed from the ranks of members from the Bar and other legal organizations. The question that immediately arises is why is ‘judicial independence’ not compromised by the fact that defense counsel are regularly appointed as acting judges when they do not give up their practices? They are at liberty to keep a profitable practice running whilst on the bench and in most instances they return to those practices when their term as acting judges ends. What guarantee has there been in the past that they would not be biased towards the prosecution when sitting on the Bench as acting judges? It is a glaring fact that they did not appear as prosecutors whilst in practice, but as defense counsel appearing for hardened criminals and other accused. Is it the Law Society of South Africa’s contention that a person from private practice is automatically ‘unbiased’ and prosecutors are automatically biased? This distinction is clearly artificial and forced. Why is the integrity of private practitioners above board but not that of members of the National Prosecuting Authority or any other government department? State Advocates also take the oath as an advocate to uphold the law and also operate under the same rules as members in private practice.

This is clear from the judgment of Monama J.

What guarantee is there that advocates in private practice that adhere to the ‘cab rank’ rule will be able to ‘distance’ themselves from their practice and not be biased towards the prosecution when they are on the Bench?

Of particular concern is the misconception that is created by the proposal of the Law Society of South Africa that prosecutors have less knowledge, expertise and are in fact inferior to others in the legal field. Such a misconception would have far-reaching implications and would in fact further detract from and undermine the very vital role of the prosecutor in the administration of justice as eluded to earlier. One should also keep in mind that prosecutors represent the community and are regularly seen as the complainant or society’s lawyer representing them and stating their case.

All persons in the legal profession study the same law, obtain the same degrees and use the same text books. The same authorities are quoted. Broadly speaking, what has been learned is applied differently depending on whether the purpose is to prosecute, defend or adjudicate. What is it really that disqualifies a prosecutor for a position as judge? If anything, the level of integrity, transparency and competence expected of a prosecutor alone, if not already, makes the prosecutor a fit and proper person for the judicial bench.

If one looks at the oath that prosecutors are bound to take in terms of section 32 of the National Prosecuting Authority Act and compare it to the oath taken by a judge, one will see that it is almost identical. The duty of a prosecutor is also much closer aligned to that of a judge (and stands in direct contradiction to the duty of a defence counsel). From a proper reading of matters such as the Bonagli-matter and other similar matters, one can see how much is expected of a prosecutor in terms of being a minister of truth who is not winning or losing cases, but assisting the court to come to a proper and correct judgment and ensuring that justice prevails. By definition prosecutors are more than suitable to be deployed on the bench.

Seeing all the arguments raised against private counsel from the Bar acting as prosecutors in terms of section 38 of the NPA Act, it leaves one with a feeling that the objectivity and neutrality expected from a prosecutor makes them ideally suited for deployment to the Bench.

Furthermore it has always been the duty of a prosecutor to present the facts at his/her disposal to court – even facts that may be detrimental to his/her case – so that the court can make the necessary findings. Prosecutors are not persecutors who wish to win at all cost. They are ethically bound to help the court come to a just conclusion on the available evidence before the court.

The issue regarding so-called lack of civil experience is also unconvincing as many State Advocates appear in the civil courts on a regular basis, inter alia, in motion proceedings, as the law reports will attest to. Furthermore, one needs to keep in mind that the practice has always been that Acting Judges are appointed from senior counsel – many who ceased to practice criminal law ages ago as there is more money to be made with a civil practice. Again the question comes to mind why the lack of experience in criminal matters is a non-issue if it is a member from the Bar that is an acting judge.

Most advocates appointed to the Bench in last 20 years specialised to some extent in their practice. Why would it be acceptable to appoint an attorney specialising in third party claims as judge/acting judge, or appointing an advocate who specialises in medical negligence, but be so wrong to appoint a prosecutor who specialises in the field of criminal law? There can be no objection if the prosecutor is in all other
respects a suitable person.

Of note is also the fact that the State President has conferred the status of Senior Counsel on various members of the National Prosecuting Authority. Again State Advocates are treated as equals to their colleagues in private practice and the same rule of ethics and law applies. To take the matter further, advocates from the Prosecuting Authority and advocates in private practice receive the same letters patent. The following is the wording of the letters patent that all advocates receive from the State President:

**TAKE NOTE** that as a special token of my trust and confidence in your fidelity, integrity and ability, I have thought fit to constitute and appoint you one of the SENIOR COUNSEL for the REPUBLIC OF SOUTH AFRICA, to hold and enjoy within the Republic, all and singular, the rights, privileges and pre-eminences belonging or appertaining to the said appointment, in as full and ample a manner as any other Senior Counsel learned in the Law does hold or enjoy, or of right ought to hold or enjoy, together with the liberty of practising as a member of the Legal profession in the Republic of South Africa as any Senior Counsel learned in the Law does, ought to, or may, and also to hold and enjoy place and precedence in the Courts of South Africa ...

FORMER members of the prosecution, such as Klaus Von Lieres SC (who was the Attorney-General of the erstwhile Witwatersrand Local Division), Etienne Du Toit SC (of the well-known text book *Commentary on the Criminal Procedure Act*) and Chris Human SC (the latter both being Deputy Attorney-Generals in the erstwhile Witwatersrand Local Division) went to the Bar and practised without doing any pupillage as this was apparently acceptable. Interestingly enough both Du Toit and Von Lieres acted as judges of the High Court.

A further question that needs to be addressed is why it is acceptable that prosecutors may be appointed as magistrates without it being seen as compromising their independence and impartiality. Most criminal matters being heard presently in South Africa are being heard in the lower courts, presided over by magistrates (and as such erstwhile prosecutors). We have also seen in the last year that regional court magistrates learned in the arts of court craft.

When appointed to the lower court Bench, be it district or regional, they are required to adjudicate in civil matters, despite their careers only having concentrated on criminal law. Many of these ex-prosecutors have excelled at the adjudication of civil matters- despite their perceived lack of prior experience in civil law. Their legal qualification and them being fit and proper persons is what governed their appointment to that public post. I draw this analogy to point out the farcical nature of the Law Society of South Africa’s submissions that a prosecutor per se should not be a good choice for the Bench.

It is a slap in the face of advocates employed by the National Prosecuting Authority to be told by the Law Society of South Africa that the training received by advocates to deal with criminal and civil matters should be seen as a ‘fundamental flaw’ when they are to be considered for a position as a Judge. I submit that the legal qualifications and experience of advocates employed by the National Prosecuting Authority, whether only in civil or criminal law, is exactly the same that was received by their colleagues in private practice, and cannot be used as a bar to their appointment as judges of the High Court. In the same vein, what about the many academics who have been appointed to the Bench who have never set foot in a court before to either prosecute or defend matters, with no practical experience in civil and criminal law?

To take this issue further, why is it acceptable for a prosecutor to resign his position at the National Prosecuting Authority, become an academic and then be eligible to be appointed to the Bench? Are we saying that the mere fact that a person is no longer employed by the National Prosecuting Authority all of a sudden makes that person acceptable and unbiased? Did the mere fact that these people resigned from prosecution give him or her such a drastic change in status that they suddenly become acceptable? Is the Law Society of South Africa saying that this is what happened to judges who are currently on the bench that were prosecutors in a previous life?

Furthermore the following is stated on the website of the General Council of the Bar:

‘Although all practicing and academic lawyers are eligible to be appointed as Judges, most Judges appointed by the Judicial Services Commission are advocates because of their experience in the arts of court craft.’

A QUICK glance at the website of the Pretoria Bar (www.pretoriabar.co.za/advocacy-as-a-career.co.za) also suggests that judges of the High Court are often appointed from members of the Bar. It states further that the Bar serves as ‘training ground for a career on the High Court Bench.’

It seems that the General Council of the Bar is in agreement that all practising lawyers with experience in the arts of court craft are eligible to be appointed to the Bench, although they prefer it to be members of their association, as is openly ponted on their website.

It is a common misconstrued fact that prosecutors are in the gainful employment of the State. Prosecutors are employed and receive their delegations to prosecute in terms of the NPA Act. Prosecutors are paid from public funds (the taxpayer’s money even though prosecutors also pay taxes). The ‘government’ is the entity responsible for the administration of public funds. Prosecutors are in fact representing the Republic of South Africa and not the government of South Africa. This distinction needs to be emphasised in view of the averment that ‘prosecutors are in the gainful employment of the state and the perception it creates.’
Another example of the double standards being preached by the Law Society of South Africa is that prosecutors should resign before they can be considered for an acting position on the Bench. If a private lawyer is called for an acting period, he can suspend his practice for three months or more, and once the acting period is over, he may return and carry on where he left off. However, it is expected of a prosecutor to resign, give up his income and pension benefits, and once his acting period is over, he is stranded with no practice or any form of income.

Currently, practitioners of the Legal Aid Board may act as judges, and once the acting period is over, they are free to return to their offices to continue working as legal practitioners. The writer submits that this arrangement smacks of discrimination and will not survive constitutional scrutiny.

In a previous article it was stated by a fellow colleague that ‘the quest to perfect the independence of the judiciary should not yield to a call for the privatisation thereof…”20 The writer submits that it is clear that the Law Society of South Africa is under the impression that positions on the bench should be reserved for its members and makes the bold submission that the arguments raised on behalf of its members will not stand once it is measured against the Constitution which is the supreme law of this country.

From the above it is clear that prosecutors and State Advocates are being discriminated against when it comes to the present system of appointment of judges as the current system is clearly biased.

This smacks of exclusivity and one may ask what right the Law Society has to claim that right. The time has come to cast out derogatory and scathing criticism that generalises and serves no purpose but to cling to misconceptions that prosecutors and other civil servants are unqualified, not open-minded and therefore biased.

Adv Mareume21 stated that it is time to ‘[] let us allow South African men and women to prove themselves and then judge them on their conduct and not on fears of the unknown’. To that the writer can only say Amen! A

Endnotes
3 As quoted by Anthea Jeffery in ‘Chasing the Rainbow.’
8 This was done at a special sitting held on 10 September 2010.
9 This is also in line with the preamble of the African Charter, where States affirm adherence to the principles of human and peoples’ rights contained in declarations such as the United Nations Principles on the Independence of the Judiciary. Article 10 of the African Charter also guarantees the right to freedom and association.
10 Black Lawyers Association General Meeting held in Mpumalanga on 30 June 2010
11 During his keynote address on ‘The Rule of Law’ at the 18th Annual Conference of the International Association of Prosecutors held in Moscow on 9 September 2013, it was said by Yuri Fedotov, Executive Director of UNODC, that prosecutors play a critical role in the strengthening of the rule of law in combatting crime. It is a prerequisite for sustainable development that the rule of law be strengthened and this is achieved by effective prosecution services that act with integrity and impartiality in the administration of justice.
13 Guidelines 5 and 6.
15 Judgment by Monama J in the South Gauteng High Court as yet unreported. [Case Number 2012/38742.]
16 Bonugli & another v Deputy Director of Public Prosecutions & others 2010 (2) SACR 134 (T)
17 In contrast with a defense lawyer who’s duty it is to present his client’s version to court. See also the cab rank rule referred to earlier.
18 See Bonugli supra.
19 The same information is contained in a brochure called A career as an Advocate published by the General Council of the Bar
20 Adv RT Mareume ‘The appointment of Public Servants as Judges is neither Unconstitutional nor does it undermine the Independence of the Judiciary,’ 23 September 2010.
21 Adv Mareume supra.

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