

FROM APARTHEID ADMINISTRATORS TO  
LAWYERS OF THE PEOPLE: A HISTORY OF  
ACCOUNTABILITY INSIDE THE SOUTH  
AFRICAN PROSECUTION AUTHORITY  
(1948–2018)

INTRODUCTION

Prosecutors are powerful actors in the South African criminal justice system as in many other jurisdictions worldwide (UN 1990; Schönteich 2001; 2002; Jehle, Wade and Elsner 2008; Luna and Wade 2012; Tonry 2012a, 2012b). In South Africa the National Prosecuting Authority Act 32 of 1998 and Section 179 of the Constitution of the Republic of South Africa 1996 equip them with extensive powers of discretion to initiate or discontinue criminal proceedings on behalf of the state, backed by the power of the state.

They decide who to charge with a criminal offence, what charges to file and when to dismiss or withdraw a case. The type of criminal charge a prosecutor chooses to bring against the accused can, in some cases, make a difference between life imprisonment and a much lower prison sentence for the offender, once he or she is found guilty of a crime (e.g. murder versus attempted murder; indecent versus sexual versus common assault). Whether a case involves plea bargaining or an alternative form of dispute resolution, and which type of criminal cases should be prioritised (e.g. organised crime, domestic violence or cases of racial discrimination) and consequently, how the state's scarce prosecutorial resources are allocated, lies predominantly within the prosecutorial sphere of discretion.

Bail applications are another part of the criminal court process in which prosecutors make far-reaching decisions affecting the wider workings of the criminal justice system in South Africa (Ehlers 2008). Lapses or negligence in the bail application process can lead to the injury or death of a complainant or state witness. But if release and bail conditions are applied too strictly, this may result in awaiting trial

## MEASURING JUSTICE

prisoners experiencing overcrowding and other objectionable and potentially life-threatening prison conditions (Fagan 2005). Lastly, prosecutors in South Africa, and many other countries, also guide police investigators on legal issues in criminal cases. They, for example, decide on search and arrest warrants and have the power to safeguard the legality of the police's arrest, interrogation and custody practices.

Looking at the power and wide discretions prosecutors enjoy, it is not surprising that the accountability of prosecutors, and closely related to this, their independence, is a topic of much debate in many countries worldwide (Gordon and Huber 2009). However, how prosecutors' accountability is envisioned, demanded or practised in different countries, what forms of account giving are perceived as desirable, seminal or insufficient, depends to a large extent on the respective political and juridical systems of these countries (Tonry 2012b: 2). While in many jurisdictions they are expected, across different societal spheres, to act independently, impartially and non-politically (and do this more or less also in practice) (Fionda 1995; Johnson 2012). In countries where the top-prosecutors are elected, it is more common that prosecutors make decisions about cases not only 'on the merits of the case' but also by taking into account public attitudes and political considerations (Huber and Gordon 2004; Davis 2007; Gordon and Huber 2007; 2009). Similarly, in countries where there is an institutional dependence of the prosecution's authority on the executive, for example when high-ranked prosecutors are presidential appointments, accountability relationships can again look different. Here it is more common that politicians expect that they can use the power of prosecutors to pursue their own political interests and might call prosecutors to account if they refuse to do so by removing them from office (Tonry 2012b: 2–3; Krajewski 2012).

What prosecutorial accountability and independence means or should mean, to whom it is owed, to what end, according to which standards and mechanisms and with what consequences are questions which were time and again central in the history of the prosecution services in South Africa (Schönteich 2001: 15–22). These questions are indeed as old as the office itself. The history of South African prosecution services goes back to 1652, when shortly after Batavian laws were implemented by the Dutch East India Company in the Cape the first prosecutor-like office or 'fiskaal' was imported from the Netherlands to the Cape (Ross and Schrikker 2012: 29; see also: Schönteich 2002: 82). The first 250 years are permeated with battles

over how many formal liberties the position should be granted, with concerns over lack of accountability and attempts to silence the *fiskaal* and later, the attorney general. Salary disputes and fraud, since the *fiskaal* was entitled to a fee from the disputing parties, were also frequent reasons for friction. There were periods of great formal independence and in the administration of the Cape the position of the *fiskaal* was almost as powerful as that of the governor and the *secunde* (deputy governor). The position was well remunerated and *fiskaals* were highly respected amongst the colonists (Ross and Schrikker 2012: 32). But there were phases, particularly between 1926 until the early 1990s, during which literally no formal or substantive separation of powers between the attorney general(s) and the executive existed; and where the office was perceived as weak and unattractive because staff were badly paid and received little respect from the public (Schönteich 2002: 87–88).

This chapter will give a historical overview of the accountability set up of the South African prosecution authority. A focus will be on the historical developments between 1948 and 2018. The first part of this chapter describes prosecutors' accountability relationships during Apartheid – that means between 1948 and 1994. During that time, the prosecuting authority became increasingly dependent on, and accounted to, the White minority government that progressively controlled all spheres of state and society. Courts and prosecutors functioned as an integral part of the country's oppressive, exploitative and racist social order because they obsessively enforced it and thereby legitimised it. As a result, courts and prosecutors were deeply distrusted by most South Africans. I will provide specific examples of ways in which lower and High Court prosecutors failed to fulfil their prosecutorial duties and violated the country's criminal procedure act on a constant basis, with little consequence or sanction.

In the second part of this chapter, I describe how the predominance of the executive-orientated accountability of prosecutors came to an end around the time of the transition to democracy in 1994, and how the country's new national prosecuting authority was established in 1998. I explain that attempts to turn prosecutors into 'lawyers of the people' in the new democratic South Africa, in other words into an organisation people can trust and predict, relied on various forms of accountability. I will discuss the most prominent concepts of this change, namely accountability as *separation of powers*, as *representation* and as *professionalism*. *Quantitative* accountability in the form of a

## MEASURING JUSTICE

performance measurement system was an additional form of accountability introduced only at the turn of the new millennium, as I will show in the third and last part of this chapter.

The exploration of the history of South African prosecutors' accountability during the twentieth and twenty-first century provides important background information for the discussion of the central question of this book. Namely, how recently introduced performance measurement systems shape South African prosecutors' accountability understanding and prosecutorial practices. I show in this chapter that the accountability relationships of the prosecuting authority changed radically and became more diverse and complex since the transition to democracy and that these relationships rely on a wider spectrum of accountability definitions, techniques and instruments. Historicising account-giving practices of the prosecutorial workplace assists me to situate the effects and consequences that these new forms of quantitative forms of accountability have on this organisational setting more adequately.

LACK OF INDEPENDENCE AND ACCOUNTABILITY,  
ABUSE OF POWER AND INDIFFERENCE: THE  
PROSECUTION SERVICES DURING APARTHEID

Prosecutors occupy an important function in the court process where the accountability of people who are accused of having committed a crime is discussed, interpreted and established. They can be pivotal in assisting victims of crime to seek 'protection' from further harm and to obtain 'justice'. It is up to them to ensure that 'everyone is equal before the law' by holding also the 'rich, powerful and well-connected' to account for wrongdoings. And it is amongst their responsibilities that every accused receives a fair trial.

During the most part of the twentieth century, many South African prosecutors had a different function, far away from the above-mentioned ideals. The right and duty of prosecution until 1926 was vested in the office of the Attorney General.<sup>1</sup> This independence and freedom from political control and interference was removed in 1926 when, after legislative amendments initiated by the then government, the highest

<sup>1</sup> The office of the 'attorney general' can have different functions and responsibilities in different jurisdictions worldwide (Tonry 2012b). In South Africa, the highest prosecutor of the country was called 'Attorney General' until 1998 and then renamed in 1998, once the first national prosecuting authority was established, the 'National Director of Public Prosecution' (NDPP).

prosecutor of the country was placed under the control of the Minister of Justice, who was from then on authorised by law to reverse prosecutorial decisions and from 1935 onwards, after further legislative amendments, to act even as a prosecutor himself (Redpath 2012: 3; 1–10).

During the heyday of Apartheid in the 1970s, when strident protests took place against the country's racist and oppressive social order and the Apartheid government countered the resistance movement with escalated repression, including added pieces of repressive legislation, the 1935 position was reiterated in the then new Criminal Procedure Act of 1977. Formal separation of powers between the Attorney General and the executive were reconstituted only in 1992 via legislative amendment (Redpath 2012: 10). That means that the power and independence of prosecutors were severely curtailed between 1926 and 1992.

The courts and the prosecuting authority functioned, especially after 1948 when the Nationalist Party took power, as an integral part of the racist, exploitative and segregationist apartheid system. They obsessively applied, enforced and reinforced Apartheid's laws, which basically criminalised the everyday life of the majority of the South African population. As a result, prosecutors and courts were deeply distrusted by the majority of South Africans (West 1982; Klug 1988; Maylam 1990; Tshehla 2001).

While racial segregation and influx control had a long history of existence in South Africa and racially discriminatory laws and regulations existed from the end of the eighteenth century and increased and became more overtly racial during the turn of the nineteenth century, they were only systematically and more ruthlessly enforced after the Nationalist Party came into government (Ross 1999: 122ff.; Worden 2012: 75). Furthermore, the Population Registration Act of 1950, which enforced the classification of people into four racial categories,<sup>2</sup> together with the Group Areas Act of the same year, legislating and legalising separate racial residential urban areas, made the existing enforced separation of Whites and others in the spheres of work, residence and government more comprehensive, uncompromising and therefore compulsive (Maylam 1990: 58; 67).

<sup>2</sup> There were four racial classifications under the Population Registration Act of 1950, namely 'Natives or Bantu/African/Black', 'European/White' and 'Coloured/Mixed' and 'Indian'. The 'Office of Race Classification' was managing the classification and reclassification process. Decisions were made based on appearance, but also social standing. See also Bowker and Star 1999: Chapter 6.

## MEASURING JUSTICE

This bundle of old and new racially discriminatory pieces of legislation regulated almost every aspect of indigenous Africans' lives. They were indeed the scaffolding for the oppressive Apartheid system. People who were classified Black were restricted economically on a massive scale because the laws determined where Africans were allowed to own, rent and use land; where they could attend school and university; in which professions and economic sectors they might find a career; which public amenities and facilities they were allowed to use; with whom they could have sexual intercourse and marry; and where they could build a home. Access to the most basic forms and rights of political organisations and representations was also denied to Non-whites (Worden 2012: 73–103; see also: Wolpe 1972; Posel 1997).

These racially discriminatory laws created an illegal population, as the mere presence in a White-designated area of a person classified as Non-white who was not in possession of a valid permit was deemed to be a criminal offence which could be prosecuted. None of these laws applied to Whites or, as Klug (1988: 184) puts it, the 'condition for criminality' was being 'Black' because 'a person cannot be accused of certain crimes, such as residing outside of a Bantustan without permission, unless he or she falls into a particular racial category, in this case, unless he or she is Black'.<sup>34</sup> Maylam (1990: 78) states that between 1916 and 1984 almost eighteen million Africans were arrested and prosecuted for pass laws and other influx control offences. Nearly thirteen million of these prosecutions were conducted between 1948 and 1981 (Klug 1988: 201). And nearly six million pass law offences were prosecuted during the height of Apartheid during 1965 and 1975 (West 1982; Savage 1986). The available statistics have to be viewed with some caution as Michael Savage (1986) suggests, because the state artificially lowered the statistics because the number of pass law offenses was already so high.

<sup>3</sup> Except the Immorality Act of 1950 which prohibited mixed marriages and any sexual contact between Whites and other South Africans. However, Whites usually received less heavy penalties (Bowker and Star 1999: 198–199).

<sup>4</sup> A Bantustan, also later referred to as Homeland and finally even National States, refers to the land the Apartheid planners set aside for Black South Africans. Every Black South African was supposed to be assigned to a Bantustan according to her or his 'ethnicity'. During Apartheid, millions of people were forcibly removed to these mostly impoverished and not very fertile rural areas. The Nationalist Party used the Euphemism 'separate development' to justify these forced removals. Each race can develop at its best in a location where it can develop separately according to its own natural pace, needs and skills (Abel 1995: 385–434; Worden 2012: 48–50; 120–122).

These prosecution figures give an indication of the scale of involvement of prosecutors in the daily administering of Apartheid. Klug states that South African courts were 'engaged in the process of legitimising South Africa's social order, applying and giving legalistic credibility to the enforcement of apartheid laws' (Klug 1988: 177–180). And with regards to the Commissioners' Courts, also referred to as 'special courts' or 'pass courts' where most pass law and influx control offenders appeared, he states that they merely had a legal 'vener' (Klug 1988: 177–180; see also West 1982: 474).<sup>5</sup> West (1982: 472), who observed court proceedings in the late 1970s and early 1980s, states for example that the speed of the process was more important than ensuring a fair hearing and that the Commissioners' Courts 'appear to operate on the premise that cases will be undefended, and the prosecutor is usually unprepared or unable to continue a case where a plea of not guilty has been entered and a basis of defence disclosed'. Free legal representation for the accused offender was in theory available, but neither the police nor the prosecutors and magistrates gave the accused the opportunity to appoint an attorney (West 1982: 469–70). The relatives of those arrested were often not able to arrange a defence since the whereabouts of the detained person was frequently unknown to them or they were themselves illegally in an urban area which restricted them in their ability to act. The speediness of the whole procedure was a further limiting factor to arranging legal representation in time as the accused would be held in police custody overnight and usually appeared in front of the court the next day. The case was heard and sentenced on the same day (West 1982: 469).

During the trial, the accused were often not informed about the charge(s) against them or did not understand them due to language barriers and lack of interpreters, but the onus was on them to convince the court of their innocence. Most pleaded guilty in order to get out of the court as soon as possible and to return to work to avoid further loss of income after they paid their fines or did their time in prison (West 1982: 470). Nearly half of those sentenced could not afford to pay their

<sup>5</sup> The Commissioners' Courts were set up by the Apartheid state in an elaborate manner and developed separately from the ordinary South African court system. The Department of Justice was in charge of the operation of the Commissioners' Courts, which were established on a district basis, and it also appointed the prosecutors. Commissioners and prosecutors in these courts were often less qualified and trained than their colleagues working at ordinary magistrates' courts, and in certain instances they were appointed without any legal qualifications. Despite this, the Commissioners' Courts had the same jurisdiction as magistrates' courts in criminal offences committed by Blacks (Lewin 1944; Klug 1988).

## MEASURING JUSTICE

fines.<sup>6</sup> People who appeared in the courts included people who were unlawfully arrested; however, they lacked the resources and the knowledge to sue the state for wrongful arrest. The prosecutors and magistrates who discharged them did not assist or inform them about such a possibility and right (West 1982: 472).

West states that the rapid and at times unlawful administrative processing of cases at three-minute intervals was severely interrupted when the accused were legally represented, which became more common in the 1980s when a growing number of 'human rights' or 'anti-Apartheid' lawyers offered their assistance to illegal township dwellers. It became then more difficult for prosecutors and magistrates working at the Commissioners' Courts to only pretend to follow due process of law and to give the accused a fair trial (West 1982: 470; see also Abel 1995: 23–66).

While the lower court or Commissioners' Courts upheld the unjust and repressive influx control laws, and were thereby involved in the criminalisation of Black everyday life, so the higher South African courts, like the country's High Courts and the Supreme Court of Appeal, were implicated in the criminalisation of the political life of Black South Africans (Abel 1995; Lobban 1996). The aim of these prosecutions and trials were to prevent the political activities of the ANC and other anti-Apartheid organisations and resistance movements from fighting for a non-racial democracy and to publicly demoralise their leaders as terrorists, as it was done at the famous Rivonia trials of 1963 and 1964, during which a large number of ANC leaders, including the late Nelson Mandela, were charged under the country's Sabotage Act and sentenced to life imprisonment. The details of these often highly publicised political trials have been analysed in depth (see e.g. Davis and le Roux 2009: 36ff.).

Cases in the Commissioners' Courts described above were speedily dealt with in an administrative way by prosecutors with little legal knowledge. The prosecution practices in political trials heard in the High Court were rather different. Here, there were cases where Black political leaders and resistance fighters refused to plead to the charges –

<sup>6</sup> It is important to notice that the painful and discriminatory consequences of influx control prosecutions did not stop people coming to the cities to look for work and to live together as families. West (1982: 472–473) argues that the level of impoverishment in the homelands was so high and the chances of finding employment in the rural areas so low that it was still economically more advantageous for people to work part-time 'illegally' in the city. He states that this was the case 'even if she or he [was] fined and imprisoned fairly regularly. (...) Arrest [was] therefore an occupational hazard' (see also Wolpe 1972).



often treason and sabotage – thereby rejecting the Apartheid state’s right to exercise jurisdiction over them, and protesting against the methods of the security police and security forces, which in the first place had brought them and their cases to court (Klug 1988: 175–176). When attempts were made to force the accused to plead guilty they would plead not guilty and then a lengthy trial would ensue, which could take months or years, even under the repressive Apartheid regime. As Davis and le Roux (2009: 40) note, ‘(...) even during this bleak legal period, the law of procedure guaranteed a measure of fairness for the accused’. For example

the State was obligated to let the accused know in clear terms what case they were required to meet in court. The accused were thus entitled to object to the charge sheet on the basis that the charges set out were vague in describing all of the necessary particulars or that it failed to specify elements of the crimes for which they stood charged. Where a court sustains such an attack, the State must be given a chance to remedy the charge sheet by amendment and failing which the charge will be quashed and the accused freed.

(Davis and le Roux 2009: 40)

Political accused were in many cases represented by well-known and experienced attorneys and advocates who argued every legal point they could find to free the political activists, or at least in unwinnable cases to prevent the worst: the death penalty (Abel 1995). The state was also represented by experienced prosecutors in these political trials. For example, in the Rivonia case, the second most senior prosecutor of the Transvaal province, Dr Percy Yutar, was in charge of the trial. For him it was, according to Davis and le Roux (2009: 24), of great importance for his career to win this trial and to ‘show his usefulness’ to the Apartheid executive in order to achieve his ambition to become the highest ranked prosecutor of the province, the Attorney General of the Transvaal.<sup>7</sup>

Indifference to the immorality of the Apartheid system was one area in which these High Court prosecutors failed to fulfil their prosecutorial duties. However, there were also other instances of more tangible legal negligence in the everyday actions of these prosecutors whose main aim was to obtain a conviction, and which had disastrous consequences for

<sup>7</sup> Transvaal used to be one of the provinces of the Union of South Africa (1910 until 1961) and then of the Republic of South Africa (1961 until 1994). After 1994 the province was dissolved and parts of it belong today to the following provinces: North West, Limpopo, Mpumalanga and Gauteng (Ross 1998).

## MEASURING JUSTICE

the accused in these political trials. Most importantly, prosecutors hardly questioned the fallibility of the police (Abel 1995; Davis and le Roux 2009). They used evidence which was often obtained illegally; they did not follow up potential cases of abuse of police power in which the accused complained that they had been assaulted or tortured by the police while under arrest or held in custody.<sup>8</sup> They used as witnesses other political accused who had been detained without a trial for lengthy periods of time, which was legal during Apartheid, but who often only agreed to testify against their former comrades after they had been coerced and tortured, even though this was illegal under Apartheid.<sup>9</sup>

Having said that political trials were often lengthy and involved with accused who pleaded not guilty, there were also many less publicised political court cases where activists confessed at their first court appearance. Again, these confessions were often coerced as a result of torture, but this was not taken into account and followed up by the prosecutors and the judiciary. In other words, prosecutors sanctioned, with their indifference and in their working practices, the use of violence as a legitimate investigative technique. Consequently, they severely violated the rights of the accused in terms of the Criminal Procedure Act (Truth and Reconciliation Commission 2003: 6/5/2).

<sup>8</sup> Detainees had been complaining for a long time that they were tortured while being held in police and/or prison cells. 'Mysterious' deaths in custody had occurred from the 1970s onwards and detainees' relatives protested against the police's suggestion that incarcerated political activists committed suicide or died while trying to escape. Academic research had confirmed the torture allegations against the police. However, denial from the government and the police was widespread, brushing these allegations off as 'unscientific' and '*ammunition for the communist enemies*' (Davis and le Roux 2009: 86–87).

<sup>9</sup> Davis and le Roux state that between 1960 and 1990 the police detained 80,000 South Africans without a trial, as they show 'a parallel system of incarceration existed' (2009: 81). The General Law Amendment Act of 1963 introduced detention without a trial for 90 days to the South African legal system, but the permission to detain people for 90 days was extended to an indefinite period of time when the Terrorism Act of 1967 was introduced. For example, in 1975, at the age of 28, the well-known founder and leader of the South African Students' Organisation (SASO) and of South Africa's Black Consciousness Movement, Steve Biko, was detained and held for 137 days without charge or trial. In 1976 after the Soweto uprising he was detained in solitary confinement for 101 days. In 1977 he was arrested, detained and released in March and rearrested in July, charged and acquitted, and again arrested in August. He died in custody in September of that year. The official state inquest into Biko's death was heard a few months later. Despite evidence that Biko had been tortured and murdered by members of the Security Branch, the magistrate ruled in favour of the policemen and acquitted them, available at: [http://www.sbf.org.za/Main\\_Site/steve\\_biko\\_timeline.php](http://www.sbf.org.za/Main_Site/steve_biko_timeline.php), [4 June 2018]; See also: <http://untreaty.un.org/cod/avl/ha/cspca/cspca.html>; <http://daccessddsny.un.org/doc/RESOLUTION/GEN/NR0297/01/IMG/NR029701.pdf?OpenElement>; <http://www.un.org/documents/scres.htm> [4 June 2018].