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The Constitution Eighteenth Amendment Bill 2013: An Unnecessary Constitutional Amendment to the NPA Provisions?

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Background

On 6 June 2013, Dene Smuts MP gave notice in accordance with Rule 241(1)(b) of the Rules of the National Assembly (NA), of her intention to introduce a private member's bill called the Constitution Eighteenth Amendment Bill (the Bill) to make provision for a variety of matters pertaining to the National Prosecuting Authority (NPA). [1]

The NPA is established in terms of section 179(1) of the Constitution of the Republic of South Africa, 1996, which provides as follows:

> "179 Prosecuting authority
> 1 There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of
> a. a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
> b. Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

According to the preamble, the Bill seeks to do the following:

1. to amend the Constitution of the Republic of South Africa, 1996;

2. to provide that the President appoints the National Director of Public Prosecutions (NDPP) on the recommendation and approval of the NA;

[1] See, Government Gazette No 36566 (14 June 2013).

3. to provide for the involvement of civil society in the nomination of persons for the position of NDPP;

4. to provide that the NDPP may only be removed from office following a finding of misconduct, incapacity or incompetence and the adoption of a resolution by the NA;

5. to delete the final responsibility of the Cabinet member responsible for the administration of justice over the prosecuting authority;

6. to provide that the NPA is accountable to the NA;

7. to provide for matters connected therewith.

Commentary on the Specific Provisions of the Bill

The Bill seeks to amend section 179 of the Constitution and matters related to it in at least four ways.

1. Comments on the Proposed Reforms on the Appointment of the NDPP

1.1. The Bill seeks to amend the manner in which the NDPP is appointed. It proposes that the NDPP be appointed by the President as head of national executive on recommendation of a committee of the NA and for the appointment to be approved by the NA through a supporting vote of at least 60% of the members of the NA.

1.2. I have two problems with the proposed reforms. Firstly, there is no clear articulation of the problem that this proposed amendment seeks to address. Without a clear problem statement of the current appointment processes, it is difficult to be persuaded of the need to reform or whether these reforms will cure existing failures. A Constitution is different from ordinary legislation because it is a supreme law and it must not be changed unnecessarily. Rather, proponents of a Bill to amend the Constitution bear a heavy burden of persuasion and must be able to justify a proposed amendment on substantive grounds.

1.3. In my view, the Bill is counter-productive as it creates an unnecessary and complicated process in an already complicated area of law. My conclusion is

that this proposed reform of the appointment of the NDPP is unnecessary because a case has simply not been made.

1.4. Secondly, the proposed appointment processes of the NDPP are too cumbersome and politicised. In terms of section 12(1) of the National Prosecuting Authority Act 32 of 1998, the NDPP is expected to hold office for a non-renewable term of 10 years. Yet the proposed reforms create a complicated and politicised appointment process as if the NDPP is a life time appointment. Judicial appointments are not this stringent or require such heightened procedures. Yet those judicial appointments are for longer terms and require a heightened level of independence from the executive branch in terms of separation of powers unlike the NDPP. It is my submission that the proposed reforms will likely discourage potential good candidates from putting themselves up for the position of NDPP.

1.5. Assuming arguendo that, the purpose of these reforms is to ensure that the President appoints a person who is fit and proper and appropriately qualified. The law already provides for this and the Constitutional Court in *Democratic Alliance v President of South Africa and Others*[2] has provided clarity on the legal requirements and the obligations by President in the appointment of the person of the NDPP.

1.6. Having said the above, I believe that the appointment of the NDPP must remain a political appointment by the President as head of national executive. The President must not become a rubber stamper of the NA decision as it is effectively being proposed in the Bill. However, I see no reason not to require the President (in the spirit of promoting checks and balances) to consult with the legislature just like the President is required to do in terms of the appointment of judicial officers such as the Chief Justice in terms of section 174(3) of the Constitution, Inspector appointed in terms of section 210(b) of the Constitution and other pubic officers.

[2] *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

1.7. However, I caution that we must not equate the appointment of the NDPP with judicial appointments because the two are distinct (in terms of the level of independence that is required) and must remain so. [3]

1.8. It is important to be reminded what the Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of the National Director of Public Prosecutions (Ginwala Commission) said about the independence of the NPA. It said that the NPA

> "does not have the distinct status accorded to the judiciary or that provided to the Chapter 9 State Institutions Supporting Constitutional Democracy. One cannot be "independent" of an arm of government of which one is a part and under whose political authority one falls. The independence of the prosecuting authority is limited to the execution of its functions, importantly, of deciding whether to prosecute or not to prosecute a particular offender."[4]

1.9. Therefore, I support the NA's involvement in the appointment process subject to my comments below.

1.10. The proposed involvement by the NA in the appointment of the NDPP will make the process too political and cumbersome. However, as the Justice Ngcobo said in *Glenister v President of the Republic of South Africa and Others* that the Constitution 'presupposes that the legislature, the executive and the judiciary have a role to play in the exercise by [the NPA] of their powers, consistently with the country's Constitution.'[5] Therefore, my sense is that the NA has a role to play in the appointment of the NDPP, but we need to ensure that this role must not hinder the exercise of executive authority, in relation to the NPA.

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[3] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) at para 124. (stating that "the independence of an anti-corruption unit in the context of international agreements must not be confused with the independence of the judiciary, for example. Nor does independence in the context of anti-corruption international agreements require that the executive should play no part in the functioning of anti-corruption agencies. Were this to be the case, this would run afoul of the fundamental principles of our legal system as contained in our Constitution, in particular, sections 206(1) and 179(6)").

[4] Ginwala Commission Report at para 52.

[5] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) at para 123.

1.11. My recommendation is that the NA should either be involved in recommending or approving a candidate to the position of NDPP but not both. My recommendation is that the NA should be involved by confirming or approving the President's appointment, but the President must be free to put up a name that he/she wishes to appoint as the NDPP. My recommendation would ensure that the President is able to appoint a candidate of his choice with the necessary check and balances from the NA to prevent presidential appointment of unfit characters.

1.12. The above recommendation is in line with the appointment practices for similar office bearers in other democratic countries such as the United States, Australia and others. For example, title 28 of the United States Code provides that "the President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."[6]The United States Attorney is the equivalent office to the NDPP in South Africa. In Australia, the Director of Public Prosecutions Act 1983 empowers the Governor-General to appoint the Director of Public Prosecution.[7]

2. Civil Society Involvement in the Appointment of the NDPP

2.1.The Bill also seeks to amend section 179 of the Constitution to ensure that civil society organizations are involved in the appointment of the NDPP. Given what I have said above concerning the NA's involvement, it goes without say that if the NA were to be involved in the appointment of the NDPP either in the way that it is currently being proposed in the Bill or in some modified way as I have recommended, section 59(1)(a) of the Constitution requires that civil society and the public at large be involved. The Constitutional Court in a number of cases including *Doctors for Life International v Speaker of the National Assembly,*[8] *Matatiele Municipality v President of the RSA and Others;*[9] *Matatiele Municipality v*

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[6] See, Title 28 United States Code 541 "(a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."
[7] See, section 18 of the Director of Public Prosecutions Act 1983.
[8] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399, 1427 (CC)
[9] *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) BCLR 622 (CC).

President of the RSA[10]; and *Merafong Demarcation Forum v President of the Republic of South Africa*[11] has emphasized the need for the legislature to facilitate public involvement in the legislative and other processes of the legislature.

2.2. Section 59(1)(a) of the Constitution is very clear that the legislature has a constitutional obligation to facilitate public involvement in the legislative processes and other processes of the NA and its committee.[12] It is important to mention that while the Constitution imposes an obligation on the legislature to facilitate public involvement, the Constitutional Court has made it clear that the legislature has the discretion to determine how to fulfill that obligation.[13] Furthermore, the Constitutional Court has made clear that the purpose of involving the public in the legislative processes is not to substitute the wisdom of the legislature. Instead, as Justice Ngcobo eloquently put it in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*:

> "the purpose of facilitating public involvement under ...the Constitution is not to have the views of the public dictate to the elected representatives what position they should take on a bill. The purpose of facilitating public involvement is to enable the legislature to inform itself of the fears and the concerns of the people affected. The decision as to how to address those concerns and fears is, by our Constitution, that of the elected representatives."[14]

2.3. While the appointment of the NDPP may not qualify as legislative process or act, it may qualify as the "other process of the Assembly and its committee" contemplated in section 59(1)(a). Hence, my submission is that civil society's involvement will constitutionally follow if the proposed reforms to involve the NA and its committees in the appointment of the NDPP are adopted.

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[10] *Matatiele Municipality and Others v President of the RSA and Others* 2007 (1) BCLR 47

[11] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (10) BCLR 968 (CC).

[12] *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006 (4) BCLR 462 (2006 (1) SA 474) (SCA) at para 19; and *Doctors for Life International v Speaker of the National Assembly and Others at para 124.*

[13] *Doctors for Life International v Speaker of the National Assembly and Others* at para 122 and 139.

[14] *Merafong Demarcation Forum and Others,* at par 282.

2.4. However, it must always be kept in mind that the appointing authority is the President, and the wisdom of *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* teaches us that civil society organizations may not dictate to the president on what appointment should be made in the same way as the public may not dictate to parliament on what laws it may pass.

3. **Proposed Deletion of Section 179(6) of the Constitution**

3.1. Thirdly, the Bill seeks to delete section 179(6) of the Constitution, which provides that the "Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority." In the alternative, the Bill proposes that the NPA should be accountable to the NA and must report to the NA at least once a year.

3.2. From a separation of powers point of view, the proposed deletion of section 179(6) of the Constitution is very problematic. Section 85(1) of the Constitution provides that "the executive authority of the Republic is vested in the President". What this means is that under the text of our Constitution, a single President possesses the entirety of the executive authority. Furthermore, in terms of section 85(2)(a), the president has authority to implement national legislation. It is a well-established principle of constitutional law that criminal investigations and prosecution of crimes thereof are characteristically executive functions.[15]

3.3. If the Bill were to deprive the Minister of Justice (who serves at the pleasure of the President) of the final responsibility over the prosecuting authority and allocate those purely executive responsibility to the NA, it would breach section 85(1) of the Constitution because that section vests all (not some)

[15] See, *Olson v Morrison*, 487 US 654, 706-705 (1988)(stating that governmental investigation and prosecution of crimes is a quintessentially executive function)(Justice Scalia dissenting)); *Heckler v Chaney*, 470 US 821 (1985)(stating that refusal to institute criminal proceedings has long been regarded as the special province of the executive branch in as much as it is the executive which is charged by the Constitution to implement the law); *Buckley v Valeo*, 424 US 1 (1976)(declaring 'that a lawsuit is the ultimate remedy for a breach of law, and it is to the president, and not the legislature that the Constitution entrusts the responsibility to implement the law').

executive authority (which include prosecuting authority) in the President as head of national executive.

3.4. Moreover, it is important to point out that the current constitutional scheme assigns and fosters executive responsibility and accountability for a number of functions such as defense, police, prosecution, intelligence and others.

3.5. In relation to the prosecuting authority, the following provisions in the Constitution and National Prosecuting Act delineate the areas of responsibility and oversight that the executive branch enjoys over the NPA, which are material to analyzing the Bill. Section 179(5)(a) of the Constitution provides that:

> "the National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process".

3.6. Another relevant provisions is section 33 of the National Prosecuting Act, which provides as follows:

> "33. Minister's final responsibility over prosecuting authority.—(1) The *Minister* shall, for purposes of section 179 of the *Constitution, this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*.
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> (2) To enable the *Minister* to exercise his or her final responsibility over the *prosecuting authority*, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*—
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> (*a*) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
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> (*b*) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
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> (*c*) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21 (1) (*a*);

(*d*) furnish the *Minister* with information with regard to the policy directives referred to in section 21 (1) (*b*);

(*e*) submit the reports contemplated in section 34 to the *Minister*; and

(*f*) arrange meetings between the *Minister* and members of the *prosecuting authority*."

3.7. The Ginwala Commission cited with approval the submission by the former Deputy Minister of Justice De Lange, who chaired the portfolio committee of the NA that processed the NPA Bill before it was passed. De Lange said:

> "Whilst recognising that the NPA constituted part of the Executive, the model adopted guaranteed a measure of autonomy for the NPA. However, this model does not accord the NPA the independence the Constitution guarantees the judiciary and other Chapter 9 institutions. Hence section 179 of the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions 'without fear, favour or prejudice. This distinction is of paramount importance and must not be overlooked. It is on this basis that the relationship between the Minister and the NDPP must be understood. The same applies to the context, the nature and the extent of the concept of prosecutorial independence within the South African constitutional framework. The Minster is given overall constitutional and political responsibilities to account to the executive, legislature and public on the activities of the prosecuting authority. This constitutional scheme envisages that the NPA and Executive will work hand in hand."[16]

3.8. I agree with the Ginwala Commission and De Lange that the above view captures the spirit of our constitutional design. Therefore, it would violate this constitutional scheme if the Bill were to deprive the executive branch (by proposing to establish the NPA as a chapter nine institution) the responsibility that it enjoys over the prosecuting authority as a consequence of section 85(1) and the principle of separation of powers in our constitution.

3.9. Section 179(6) is a necessary function of separation of powers.[17] Deleting it and allocating the responsibility therein to another branch of government breaches separation of powers. There are a number of foreign case authorities dating back to 1869, which support this proposition that prosecution of crimes is essentially an executive function, which section 85(1) of our Constitution

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[16] Ginwala Commission at para 54.

[17] See, Section 85(1) read together with sections 85(2)(a) of the Constitution.

vests in the President, and that its constitutionally void for any law to vest purely executive functions in a person who is not the president.[18]

3.10. It is important to point out that the above constitutional scheme is obtained in many other constitutional democracies such as Canada[19], Australia and others.[20] Clearly, the constitutional scheme which vests the final responsibility over the prosecuting authority on the minister of justice or Attorney General is obtained in other constitutional systems founded on the principle of separation of powers.

3.11. Based on this analysis, if the Bill were to be adopted in its current form it would do violence to the South African constitutional scheme that vests political accountability in the executive branch and the principle of separation of powers in our Constitution.[21]

3.12. According to Judge Mojapelo, the principle of separation of powers requires that every specific function, duty and responsibility of the State must be allocated to distinctive institutions with a defined means of competence and jurisdiction.[22] The South African State is divided into three branches, each with separate and independent powers and areas of responsibility so that no branch has more power than the other branches. Essentially, every function, duty of responsibility of the State must fall into one of these branches' domain.

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[18] *Olson v Morrison*, 487 US 654, 705-706 (1988); *Heckler v Chaney*, 470 US 821 (1985); *Buckley v Valeo*, 424 US 1 (1976); *United States v Nixon* 418 US 683 (1974); *United States v Nixon* 418 US 683 (1974); *Confiscation Cases*, 7 Wall. 454 (1869); *Cox v. Hauberg*, 381 US 935 (1965).

[19] See, sections 3(3), 13, 14 and 15 of the Director of Public Prosecutions Act 2006.

[20] See, sections 7(1) and 8 of the Director of Public Prosecutions Act 1983.

[21] See, *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77,86 (CC)(holding that there can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid); *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC); *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241,260 (CC); and *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449, 499 (CC).

[22] Judge Phineas Mojapelo, The doctrine of separation of powers (a South African perspective), the Advocate (April 2013) at page 37.

3.13. By deleting section 179(6) of the Constitution, the Bill would violate this cardinal principle of separation of powers because it will blur the line of responsibility, which the Constitution and the law require must fall into the executive branch of the State. If the Bill were to be passed in its current form, it would not be clear who is politically responsible or accountable for prosecutions as is the case with the police (in terms of sections 206, 207 and 208 of the Constitution) or the defense forces (in terms of section 201 of the Constitution) in the Republic.

3.14. Justice Ngcobo in *Glenister v President of the Republic of South Africa and Others* explains the special feature of our Constitution, which if this Bill is adopted in its current form would be compromised. He says:

> "The qualification that —full independence is not a mandatory feature of an anti-corruption agency is a significant one. It recognises that there are different fundamental principles within each legal system. There are those legal systems, like ours, where the executive is assigned final responsibility over the functioning of police or the prosecution, as the case may be. Even with the administration of justice, the Minister for Justice and Constitutional Development bears political responsibility for the administration of justice. This is a special feature of our constitutional democracy. The Cabinet Minister responsible for the police is required by our Constitution to take final responsibility for the functioning of the police, including all crime fighting units located within the police. The same is true of the Minister for Justice with regard to the NPA." [23]

3.15. Thus, the Constitution makes a single President (through the Minister of Justice and Police who all serve at the pleasure of the President) responsible and accountable for prosecutorial and policing matters. The framers of the Constitution decided to vest executive authority in one person in order to facilitate accountability. This is why the President, though able to delegate duties to others, cannot delegate ultimate executive responsibility.[24]

3.16. Based on the above observations by Justice Ngcobo, it is clear that the Bill proposes a constitutional scheme that is inconsistent with other provisions

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[23] *Glenister v President of the Republic of South Africa and Others* at para 122.

[24] See, *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC).

of the Constitution such as those dealing with police, intelligence or defence and the exercise of executive authority in the republic. This view is in line with what the Constitutional Court said in *United Democratic Movement v President of the Republic of South Africa and Others* that the Constitution must be read as a whole and its provisions must be interpreted in harmony with one another.[25]

3.17. It is not possible to establish the NPA as a chapter nine institution, similar to the Public Protector, South African Human Rights Commission, Commission for Gender Equality, Electoral Commission or Auditor General, without violating the cardinal principle of separation of powers, because the functions performed by these institutions is distinct to that of the NPA. The NPA's functions are essentially executive in nature while as those performed by the nine institutions are not.

3.18. If passed into law in its current form, the Bill can easily be challenged on the grounds of inconsistency and disharmony with other provisions of the Constitution some of which I have mentioned above.[26] I do not believe there is any way to cure the defect in the Bill in relation to its proposed deletion of section 179(6).

4. Removal of the NDPP

4.1. Lastly, the Bill seeks to amend the manner in which the NDPP is removed from office. At the moment the removal of the NDPP is governed by section 12(6) through (8) of the National Prosecuting Act 1998, which provides in pertinent part as follows:

> 6) (*a*) The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—
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> (i) for misconduct;
> (ii) on account of continued ill-health;
> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

[25] *United Democratic Movement v President of the Republic of South Africa and Others* 2003 (1) SA 495; 2002 (11) BCLR 1179 at para 12.

[26] *United Democratic Movement v President of the Republic of South Africa and Others* at para 12.

(*b*) The removal of the *National Director* or a *Deputy National Director*, the reason therefor and the representations of the *National Director* or *Deputy National Director* (if any) shall be communicated by message to Parliament within 14.

(*c*) Parliament shall, within 30 days after the message referred to in paragraph (*b*) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.

(*d*) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.

(*e*) ...

(7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (*a*), is presented to the President.

4.2. It is clear from the above provisions that the NDPP cannot be removed from office without the concurrence of Parliament.

4.3. Contrary to the above provisions, the Bill proposes that the NDPP should only be removed on the following grounds:

(a) The National Director of Public Prosecutions may be removed from office only on–
- (i) The ground of misconduct, incapacity or incompetence;
- (ii) A finding to that effect by a committee of the National Assembly' and
- (iii) The adoption by the Assembly of a resolution calling for that person's removal from office.

(b) A resolution of the National Assembly concerning the removal from office of the National Director of Public Prosecutions must be adopted with a supporting vote of at least two thirds of the members of the Assembly.

(c) The President must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

(d) The National Prosecuting Authority is accountable to the National Assembly and must report to the Assembly at least once a year."

4.4. My reaction to the reforms concerning the removal of the NDPP is that no case has been made that the removal provisions in the National Prosecuting Act are defective or not sufficient. In my view, the removal provisions in the National Prosecuting Act are sufficient and provide adequate legislative oversight over the removal of the NDPP. As clearly mentioned, the removal of the NDPP requires approval of Parliament.

4.5. If the President were stripped of the removal powers over say, the NDPP, Military Command of the Defense Force, Financial and Fiscal Commission or Police Commissioner, then the President would no longer fully control, direct and be accountable for the exercise of executive authority as the Constitution demands should be had.[27] The president's power to remove a public official is critical to the president's power to control the executive branch and perform his executive functions effectively. [28]

4.6. Based on the above, my view is that the proposed reforms on the removal of the NDPP are counterproductive except to make the process of removing the NDPP more difficult, which is already the case under current law. I believe South Africa should not fix something that is not broken.

5. Conclusion

5.1. No problem has been articulated to justify the reforms in the Bill.

5.2. The proposed reforms have not properly considered separation of powers implications

5.3. I support the proposal for parliamentary and civil society's involvement in the appointment of the NDPP.

5.4. The deletion of section 179(6) of the Constitution would violate separation of powers and be inconsistent with other provisions of our constitution.

5.5. To deprive the President of the power to remove the NDPP would be contrary to the constitutional scheme of ensuring that the executive remains in control and politically responsible for prosecutorial and other related matters.

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[27] See, Sections 201, 204, 206, 207, 208, 209, 179 and 221(3) of the Constitution.

[28] See, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd*, 537 F.3d 667, 685-714 (2008)(Justice Kavanaugh, dissenting); *Edmond v. United States*, 520 U.S. 651, 664(1997)(recognizing that the power to remove officers is a powerful tool for control); *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Myers v. United States*, 272 U.S. 52,(1926).