

A CRITIQUE OF THE OFFICE OF THE SPECIAL PROSECUTOR BILL 2017: BY MARTIN A. B. K. AMIDU

INTRODUCTION

When on Tuesday, 18th July 2017 the internet carried the news that the Office of the Special Prosecutor Bill, 2017 and the Zongo Development Fund Bill, 2017 had been laid before Parliament and referred to the appropriate committees of Parliament to be dealt with under a certificate of urgency, I raised issues of the public's democratic right to participate in and make input into the enactment of the Bill. I had been hoping that the public will be given ample opportunity to make their input into the Special Prosecutor Bill whatever the form and shape it will eventually take. The Bill was subsequently formally withdrawn from Parliament. By then, I had hurriedly researched and written a lengthy constitutional and legal critique of the Bill which I promised will be aired and published at the appropriate time when the Parliamentary time table for public input is known. Nonetheless, I chose to highlight one fundamental problem with the efficacy of the whole Bill by publishing a critique of the functions of the Special Public Prosecutor and thereby pique the public interest in being watch dogs and guardians of the enacting process of the Bill.

I received notice while abroad on 18th August 2017 that the Constitutional, Legal and Parliamentary Affairs Committee of Parliament had scheduled meetings to discuss the Special Prosecutor Bill in circumstances which I narrate hereunder. I have therefore decided to keep my promise of finalizing and publishing my critique of the Office of the Special Prosecutor Bill for public consumption and for possible use by anybody who wants to do so.

I have read, examined, and analyzed the entire Office of the Special Prosecutor Bill, 2017 which was published a second time on the last day of the Parliamentary session on 2nd August 2017 together with all its antecedent Bills, including the one currently published on the Parliamentary website as having been laid on 17th August 2017 during the vacation. I have, however, decided to limit my critique of the Bill to the parts of the Bill dealing with the provision establishing the Office of the Special Prosecutor itself and the Administrative provisions which in my view constitute the jugular vein to the Constitutionality of the Office of the Special Prosecutor Bill, 2017.

This paper accordingly starts with an attempt to give a historical context to the examination, analysis and critique of the provisions of the Office of the Special Prosecutor Bill, 2017 by discussing in this introduction, the 2016 Presidential Elections and proposals by some of the candidates for the establishment of an independent prosecutorial agency; the gestation, laying, withdrawal and re-laying of the Bill before Parliament; the deliberations on the Bill during the Parliamentary vacation; and the duty of patriots for a bi-partisan actualization of the Bill into law

including the moral compass and integrity of Presidents, and the binding electoral promise of the President and its feasibility.

The examination, analysis and critique of the Bill then follow. Under this heading I discuss the memorandum of the Bill and its Long Title which includes the inadequacy of the policy and principles etc. grounding the Bill and the suggested credible and cogent policy and principles to ground the accompanying Bill. The individual clauses of the Bill dealing with the establishment of the Office of the Special Prosecutor; the objects of the Office; functions of the Office; independence of the Office; the governing body of the Office and related matters; nomination and appointment of the Special Prosecutor; the functions of the Special Prosecutor; the removal of the Special Prosecutor; the nomination and appointment of the Deputy Special Prosecutor; the removal of the Deputy Special Prosecutor; the appointment of staff; and the interpretation clauses of the Bill are then examined, analyzed and discussed. A discussion on general observations dealing with and including useful provisions in the Economic and Organised Crime Office Act, 2010 (Act 804) that may be included in the Bill as part of the examination and critique of the Bill is also made to complete the main examination and analysis of the Office of the Special Prosecutor Bill, 2017.

But in order to give a broader context to the Bill, the paper goes on to make a brief examination and analysis of the existing law on the appointment of Special Prosecutors under the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) and the Law Officers Act 1974 (NRCD 279) enabling the Attorney General to appoint Special Prosecutors under the existing laws and the authority of the Attorney General and the Executive Authority to appoint Special Prosecutors under Article 88 of the Constitution on a need-to basis by means of regulations which have the force of law. The argument will be made that while an appointment of a Special Prosecutor under the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) and Law Officers Act 1974 (NRCD 279) limits the independence of the appointed Special Prosecutor to the directions of the Attorney General, the Attorney General and the Executive Authority may under Article 88 of the 1992 Constitution appoint ad hoc Special Prosecutors under Regulations or pursuant to an Executive Instrument where such Special Prosecutors are subject to the authority of the Attorney General but do not act on or upon his directions.

The paper concludes by asserting that in spite of my preference for the strengthening of the traditional, common law and conventional independence of the Attorney General under our Anglo-American-Ghanaian system of jurisprudence, I think as a patriot that the establishment of a permanent Office of the Special Prosecutor is legal under Article 88 of the 1992 Constitution so long as it is done under the authority of the Attorney General. It has been argued, drawing from the American experience that a Special Prosecutor can be independent and still work under the authority of the Attorney General. It is also argued that the Attorney General and the Executive Authority have power under Article 88 of the Constitution to similarly appoint independent ad hoc Special Prosecutors to investigate and possibly prosecute the commission of other serious

offences instead of the President appointing Commissions of Enquiry into the commission of criminal offences which end up not being prosecutable because of the absence of procedures for the prosecution of findings of the commission of crimes by a Commission of Enquiry.

The Presidential Elections and establishment of an Independent Prosecutorial Agency

The President, Nana Addo Dankwa Akufo-Addo, came to power on the message and promise of fighting corruption which had become endemic during his predecessor's Government. He was one of the Presidential candidates who promised to set up an independent and separate office from the Attorney General as the vehicle to investigate and prosecute crimes of corruption when elected into office. His preferred vehicle and conduit was to set up an office of an independent Special Public Prosecutor for the purpose. Dr. Paa Kwasi Nduom preferred the separation of the office the Minister of Justice from the office of the Attorney General and making the latter independent of executive interference in the exercise of his or her functions.

Since assuming office as President of the Republic, Nana Akufo-Addo has increased his rhetoric on fighting corruption and related offences and insisted on ensuring the enactment of legislation to institutionalize the office of an Independent Special Prosecutor. This is in spite of the fact that a second school of thought did not share the view that one could establish the office of an independent Special Prosecutor without amending the entrenched Article 88 of the 1992 Constitution which vested the Attorney-General with the responsibility "for the initiation and conduct of all prosecutions of criminal offences" and enjoined further that: "All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney General or any other person authorized by him in accordance with any law."

Gestation, laying, withdrawal and re-laying of the Bill before Parliament

On 27th June 2017, the internet carried news that the Attorney General's office was holding a two-day Stakeholders' Meeting on the draft of the Office of the Special Prosecutor Bill, 2017 at the Movenpick Hotel, Accra from 27-28 June 2017 to enable it to submit a Bill to the Cabinet for approval for submission to Parliament for consideration for enactment into law. The Attorney General is reported to have told participants of the Stakeholders' Meeting that the Government wanted their honest and sincere views on the draft Bill before it was laid before Parliament.

I took the Attorney General's words to be an invitation to the public as well for their input and I looked for a copy of the Bill for my perusal to enable me to consider whether to submit any unsolicited comments to the Attorney General before the Bill got to the Cabinet. But alas, on 12th July 2017 the Daily Guide carried the news that the Office of the Special Prosecutor Bill, 2017 was already to be laid in Parliament. On Tuesday, 18th July 2017 the internet carried the news that the Office of the Special Prosecutor Bill, 2017 and the Zongo Development Fund Bill, 2017 had been laid before Parliament and referred to the appropriate committees of Parliament.

On the same day, the Rt. Hon. Speaker of Parliament, prior to the laying of the Bill, was reported on the internet to have quoted Article 88 of the 1992 Constitution on the powers and functions of the Attorney General and “cautioned that the President must tread cautiously in the creation of the office” when he was speaking to an entourage of the British Minister of State for the Commonwealth and the UN. “Nevertheless, when you establish a law which clearly provides for another person to prosecute, a circumstance where the Constitution says it is only the Attorney General who can prosecute then we must treat a bit carefully,” he was reported by Citi FM to have said. So, like Pontius Pilate, the Speaker had washed his hands of any consequences a rush in enacting the Bill brings in the future.

I had to look for the Office of Special Prosecutor Bill, 2017 that had been laid before Parliament to compare it to the Stakeholders’ Meeting one to find out what changes had been made to the Bill discussed at the 27th-28th meeting to enable the submission of comments. But the Bill appears to have been laid in Parliament without sufficient copies having been made available for distribution to the Members of Parliament themselves as required by their own rules. To make matters worse it was also to be passed under a certificate of urgency – meaning that both the Members of Parliament and the interested public will not be given sufficient time to digest such an important anti-corruption Bill and make inputs for its success.

As expected the Minority in Parliament raised several objections to the constitutionality of the Bill, including the purported laying of the Bill in Parliament without the mandatory 14 days gazette period. The riposte was that the Bill was laid under a certificate of urgency and did not need to comply with the general gazette notification period for ordinary Bills. The debate raged within and outside Parliament on the utility and urgency of enacting the anti-corruption Bill into law before the close of the Parliamentary session for the long vacation on 2nd August 2017. It was to demonstrate by clear and cogent submissions that the Government, Parliament and the public needed to make haste slowly in enacting such a well-intentioned and important piece of legislation that I published my critique of Clause 3 (4) of the Office of the Special Prosecutor Bill, 2017, on 24th July 2017. Then on 26th July 2017 the Office of the Special Prosecutor Bill, 2017 and the Zongo Development Fund Bill, 2017 were formally withdrawn from Parliament without any assignation of reasons.

Deliberations on the Bill during the Parliamentary vacation

On 18th August 2017, I received a call from a lady who described herself as the Clerk to the Constitutional, Legal, and Parliamentary Affairs Committee of Parliament inviting me to assist the Committee in its deliberations of the Office of the Special Prosecutor Bill the next week. I was taken aback because I had no notice through the media or any other source that the Office of the Special Prosecutor Bill, 2017 had been laid a second time in Parliament. I was told by the Clerk that it had been laid before Parliament rose for the vacation. I told the alleged Clerk to the Committee that I was away in the United Kingdom. She wanted to know whether I would be

available to meet the Committee on the 6th and 7th September 2017. I was not prepared to commit myself without satisfying myself as to the antecedent facts that the Bill had indeed been laid a second time before Parliament rose on 2nd August 2017.

After the conversation with the Clerk, I immediately called a Deputy Clerk to Parliament to confirm whether the Bill had indeed been laid a second time before Parliament rose for vacation but could not get a ready answer. With the help of a friend back in Ghana, I went to the website of Parliament only to realize that the Special Prosecutor Bill was amongst 12 other Bills that had purportedly been laid the previous day, 17th August, 2017; in the vacation. The Zongo Development Fund Bill, 2017 which had been laid along-side the earlier Office of the Special Prosecutor Bill, 2017, was the only Bill listed as still standing as having been laid on 10th July 2017 even though it was also formally withdrawn from Parliament on 26th July 2017.

But finally, on 31st August 2017, when I had returned home, a Parliamentary reporter confirmed to me that the Special Prosecutor Bill was indeed laid a second time on 2nd August 2017 even though this was not reported to the public by the media due perhaps to the pressure of work on the last day of that Parliamentary session. The next evening, I received further confirmation from a Member of Parliament that the Bill was indeed laid a second time and evidenced by the distribution of printed copies from the Assembly Press to the Members of Parliament and not photocopies as members were supplied with after the first laying of the Bill which was later withdrawn. The Member of Parliament informed me that the Committee was using the recess to make contacts and review the Bill pending the opening of the next Parliamentary session in October 2017.

Having satisfied myself that the Bill had indeed been laid a second time on 2nd August 2017 without adequate publicity to the public and that the Parliamentary website contained a misrepresentation of the true state of affairs to the public, I looked for and eventually secured in the evening of 3rd September 2017 a true copy of the Office of the Special Prosecutor Bill, 2017 that had been laid a second time on 2nd August 2017. After labouriously and painstakingly reading each clause of the Bill I have concluded that the second Bill contains the same clauses and materials as the earlier first Bill that was laid and later withdrawn, therefore enabling me to submit a critique which is consistent with the current Office of Special Prosecutor Bill, 2017 laid in Parliament on 2nd August 2017 and referred to the Constitutional, Legal and Parliamentary Affairs Committee for consideration. So much for transparency and public participation in the legislation making process of Parliament demanded of democracies!

The duty of patriots for a possible bi-partisan actualization of the Bill into law

My original position before, during and after the 2016 General and Presidential Elections on the issue of whether to amend the Constitution to set up an independent Attorney General's office or to create by law any independent office to prosecute the narrow offence of corruption alone had

been that the inability of previous Governments to fight corruption and related offences cannot be attributed to a lacuna in the Constitution or the laws of Ghana. The problem is a failure of good governance, the rule of law, and civil society, combined with a weak democracy, and generally a docile citizenry. A considered law review article written by me and published in the (1989-90) 17 RGL at page 95 (Review of Ghana Law) on “The Qualification and the Constitutional Position of the Attorney General” shows my consistent position on this subject.

The institution of the office of the Attorney General, in my view, has always been capable of facilitating the investigation and prosecution of the crime of corruption and related offences if only the Executive Authority personified by the President himself fairly and impartially empowers the law enforcement agencies to independently and impartially treat the crime of corruption as crime and not politics. Secondly, Parliament in plenary generally, and in particularly the Security and Defence, and Constitutional, Legal and Parliamentary Affairs committees as committees of the plenary should act consistently with the mandates of the letter and spirit of the Constitution as a fair and impartial oversight body holding the executive to account in its duty to execute the law fairly and without fear or favour. Thirdly, the enlightened civil society including the media enjoined by the Constitution to defend it, have to play their roles as watchdogs against executive interference in investigations and prosecutions of crime. Enlightened Parliaments and Civil Society Organizations and citizens elsewhere have ensured the attainment of good governance, the rule of law and participatory democracy through their activism and we in Ghana can do it too without the creation of another permanent agency to investigate and prosecute corruption.

Historically and experientially, attempts to create independent prosecution offices because of perceptions that Attorneys General can be manipulated by the President or the Executive Authority have not achieved the desired results because the problem of fighting corruption is both human and institutional. Has the world not worried about Judges and other appointees of independent constitutional commissions or bodies which have independent and secure tenure being unable to resist corruption, let alone to fight it?

Moral compass and integrity of Presidents

Apart from the former Chairman of the PNDC, and later President Rawlings, President Akufo-Addo’s speeches have so far demonstrated a sincere commitment to fight the scourge of corruption. President Nana Akufo-Addo appears to have a handle of the personal and structural violence which corruption causes to millions of our fellow citizens and our nation. I would have wished that he empowered the Attorney General to comply with the ethics of the profession of the law and dealt with every allegation of corruption as crime in the true tradition of the law and not politics. We appear as a country to be contending that another Ghanaian can investigate and prosecute corruption simply because of being accorded independence and security of tenure. In that case, why can the President not ensure that as long as the Attorney General acts fairly and

impartially in the investigation and prosecution of all crime he will not change him or her during his four-year tenure? The circumstances leading to the United States Congress enacting the Ethics in Government Act of 1978 and which was allowed to lapse in 1999 demonstrates the challenges of hoping that by multiplying independent bureaucratic institutions on law enforcement and order we will have the ideal persons to fight corruption.

The binding electoral promise of the President and its feasibility

Be that as it may, it appears that the President has made an irrevocable commitment to use the medium of an independent prosecution office to launch an outright and total war against corruption in order to fulfill his electoral promise to the people of Ghana. The promise was fundamental to his victory at the elections and he is ethically enjoined to fulfill it to the people. I have no doubt that, President Akufo-Addo is sincere in his rhetoric to fight corruption. The fight against corruption has suffered for far too long under the 4th Republic. I am not sure what the future holds for the fight against corruption in Ghana but my view this year coincides with a view expressed by Linda Ofori-Kwafo, the Executive Director of the Ghana Integrity Initiative (GII) which is reported on the internet of 18th July 2017: “We are looking forward to a president that can deal with this canker. Some have said if Nana Akufo-Addo fails us in dealing with corruption then Ghana we are dead.” I do not think Ghana will die as such but that the resolution of the fight against corruption may have to await another revolution.

My detailed study of the subject has led me to the conclusion that it is feasible to enact a law establishing the Office of the Special Prosecutor that will not be inconsistent with the 1992 Constitution, particularly Article 88 thereof. The powers of the Attorney General under the 1992 Constitution are the same as the powers of the Attorney General of the United States of America. The United States Attorney General appoints Special Prosecutors with independence of tenure under Regulations which have been held to be consistent with the United States Constitution. The Office of Independent Counsel established under the Ethics in Government Act of 1978 was also held in Morrison v Olson 487 U. S. 654 to be constitutional even though as I pointed out already, Congress did not renew it when it expired in 1999.

The question with the Office of the Special Prosecutor Bill, 2017 should not, therefore, be whether it is constitutional but whether it has been drafted in such a way as to bring it within the Constitution and to achieve the independence from executive interference which is the President’s prime objective firstly for making the promise to the electorate and secondly for proposing the Bill. The letter, structure, scheme and design of the 1992 Constitution makes the establishment of a permanent Office of the Special Prosecutor feasible and doable. This is the only way any patriot may help the President to bring to fruition his promise to enact such a law and to leave it to posterity to judge its efficacy in the war against corruption. It is in this spirit that I examined, analyzed, and critiqued the Office of the Special Prosecutor Bill, 2017 that was

used at the Stakeholders' Meeting of 27-28 July 2017 and withdrawn, and the current Office of the Special Prosecutor Bill, 2017 that was laid before Parliament on 2nd August 2017.

THE EXAMINATION, ANALYSIS, AND CRITIQUE OF THE BILL

The Memorandum of the Bill

Article 106 (2) of the 1992 Constitution stipulates that no bill, other than one referred to in paragraph (a) of article 108 of the Constitution shall be introduced in Parliament unless “it is accompanied by an explanatory memorandum setting out in detail the policy and principles of the bill, the defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction.” The explanatory memorandum accompanying the Office of Special Prosecutor Bill, 2017 is in my respectful view seriously defective. I therefore, suggest credible and cogent reasons of policy and principles grounding the Bill and probable defects in the existing law and the remedies for curing those defects.

The inadequacy of policy and principles etc grounding the Bill

The first policy and principle grounding the establishment of the Office of the Special Prosecutor is the inability of the Attorney General to act independently because of being a member of the Executive. The argument that governance experts have singled out the alleged monopoly of the prosecutorial authority by an Attorney General hired and fired by the President as one of the key factors standing in the way of using law enforcement and prosecution as a credible tool in fighting corruption is not sustainable by logic or any credible evidence. Any institutional weakness cannot be attributable to the constitutional design and structure in allocating the executive power to the President with an Attorney General as his principal legal adviser to help in the execution of his investigatory and prosecutorial authority. Instead, it is attributable to weakness in the representative and legislative institutions of governance to hold the executive accountable for the exercise of the executive authority. The solution is for Parliament and the electorate to ensure that when the executive abuses the executive authority in failing or refusing to impartially investigate and prosecute breaches of the law, that it is held to account in accordance with the Constitution and pays for it at the elections.

The electorate executed its constitutional mandate in the 2000, 2008, and 2016 General and Presidential Elections by changing Governments perceived to be corrupt. The Executive and Parliament have consistently failed the constitutional scheme, structure and design by failing to honour the several promises by previous Presidents and Members of Parliament made to the electorate to fight the canker of corruption when elected into office. How does the Special Prosecutor proposed in the Memorandum to the Bill achieve investigative and prosecutorial independence simply because he is to exercise the same powers on the authority of the Attorney General?

There is no escaping the fact that the Special Prosecutor under the proposed Bill will remain an appointee of the Executive Authority (the President) pursuant to Article 58 of the 1992 Constitution in accordance with its separation of powers design, scheme and structure. The persons who have perpetually been responsible for the inability of Attorneys General and the Office of the Attorney General to execute their constitutional mandate of prosecuting corruption and related offences have been the Presidents as the Executive Authority in fully complying with the letter and spirit of Article 58 to execute the Constitution and laws, and to do so in accordance with their Constitutional Oaths – to all persons, without fear or favour, affection or ill will. It cannot be a defect attributed to the 1992 Constitution to justify the Office of Special Prosecutor Bill.

The second policy and principles grounding the Bill is to fight corruption and corruption related offences more effectively. It tries to justify the establishment of the Office of the Special Prosecutor by conjecturing that specializing in investigation and prosecution of corruption cases involving public officers and politically exposed persons in the performance of their functions will yield more positive results in the number of corruption cases prosecuted than a multipurpose or mixed mandate agency such as the Economic and Organized Crime Office (EOCO). It cannot seriously be contended that the institutional weakness of an agency of government to execute its independent mandate as the EOCO is a defect in the existing law inconsistent with the policy and principles for the establishment of such an existing agency. The argument also overlooks the fact that the Attorney General also has responsibility for EOCO and must have a similar responsibility for the proposed Office of the Special Prosecutor as part of the Executive Authority as well for the endeavours contained in the Bill to render it constitutional. The practice in most countries is for divisions to be created in the investigative agencies of Government with each division specializing in different subject matters of crime under divisional heads or directors and not to balkanize the investigation and prosecution of crime into specialized bureaucratic agencies.

The Serious Fraud Office, the predecessor of the Economic and Organized Crime Office, was established with independent powers to fight corruption and fraud. The EOCO was reorganized to strengthen this capability. It could have had a specialized division dealing with corruption offences. The creation of an entirely new bureaucratic agency to deal with corruption offences is no guarantee of independence or political neutrality in the investigation and prosecution of such offences.

Suggested credible and cogent policy and principles etc to ground the accompanying Bill

The United States of America justified the establishment of the Ethics in Government Act, 1978 with the policy and principles of conflict of interest in the Executive Authority to impartially investigate and prosecute persons of a political class seen to be in the same Government as the Attorney General who has responsibility for the Department of Justice. The defect in the existing

law was to remove that conflict of interest on the part of the Attorney General as representing the Executive Authority and to allow an independent prosecutor to fairly and impartially investigate and possibly prosecute any infractions of the law to ensure equity in prosecutorial decision and prosecution process.

In Ghana, the ethical injunction of conflict of interest has been raised to the highest Constitutional requirement when Article 284 of the Constitution decreed that: “284. A public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office.” The Executive Authority is a public office and none of its officers must be put in a position in which the interest of the executive authority conflicts with the appointee’s performance of the functions of his office. The public confidence in the administration of the criminal justice system is maintainable only when there is no abuse of prosecutorial powers. It is, therefore, arguable that to allow a political appointee (the Attorney General) to decide which corruption offence might be initiated, terminated or how it should be conducted will not conduce to the fundamental human rights and freedoms of politically exposed persons and public office holders for equality before the law and non-discrimination. This is why the John Mahama Government violated Article 284 when its Attorney General supervised and compromised a fair and impartial prosecution of the Woyome criminal trial - thus rendering it null and void if properly challenged in the Supreme Court.

Be that as it may, my view is that the defect in the existing law that necessitates the Office of Special Prosecutor Bill, that meets the mandatory requirements of Article 106 of the 1992 Constitution on the accompanying Memorandum to the Bill, is not so much the failure of EOCO and other investigatory agencies to investigate and for the Attorney General to direct and prosecute corruption and corruption related offences, but the conflict of interest in the executive investigating and prosecuting its own or members of the political establishment. It may be argued that the Office of Special Prosecutor cannot escape being part of the executive branch and being an appendage of the Executive Authority’s chariot under Article 58 of the 1992 Constitution. The reasoning in the 7-1 United States Supreme Court decision of Morrison v Olson 487 U. S. 654 affirming the constitutionality of the Office of Independent Counsel justifies the special position of the Office of Special Prosecutor in the Constitutional scheme analogically even for the Ghanaian 1992 Constitution’s provisions in Article 88 thereof.

The Long Title to the Bill

The Long title to the Bill puts it within the constitutional structure when it states that it is to investigate and prosecute offences involving corruption of public office holders, political office holders and private individuals implicated in their commission and prosecute them on the authority of the Attorney General (Emphasis supplied).

Establishment of the Office of Special Prosecutor: Clause 1.

The establishment of the office as a body corporate only serves to add another bureaucratic layer to the prosecutorial authority of the Attorney General. The Director of Public Prosecutions' (DPP) office is a recognized division of the Attorney General's Department which prosecutes all crimes in Ghana on the authority of the Attorney General. Already the Attorney General's Office, and in particular the DPP's Office is seriously under-staffed and under-funded nationwide. The budget will be burdened further with the creation of this office to handle just a small portion of a specific crime which could be handled by the Attorney General's Department if the President as the personification of the executive authority supported and championed respect for the time hallowed common law mandates and conventions of that office. Ghana is part of the Anglo-Americo-Ghanaian system of jurisprudence and these conventions and the common law have been preserved as part of the existing laws of Ghana under Article 11 of the Constitution thereof.

It may be asked, between the DPP and the Special Prosecutor, who will be more senior and why is the DPP not having a similar independence in prosecuting the balance of the offences some of which may involve public officers and politically exposed persons? Does the Office of the Special Prosecutor not look like a mini Attorney General's office with better tenure than even the Attorney General? Barbados and Namibia solved similar problems by giving independence to the Office of the Director of Public Prosecutions albeit by means of the Constitution in the case of Namibia. See King v Director of Public Prosecutions and Others [1990] LRC (Const) 842; and Ex Parte Attorney General, Namibia: Re the Constitutional Relationship between the Attorney General and the Prosecutor-General [1995] 3LRC 507.

Be that as it may, Ghana is at liberty in fulfilling the President's electoral promise to set up by law the Office of Special Prosecutor with its eyes open to the alternatives. The Namibian situation of the Prosecutor-General was written into the Constitution but nothing prevents Ghana from using the instrumentality of legislation to achieve the same objective within Article 88 of the Constitution, which is doable on the authority of the Attorney General.

Objects of the Office: Clause 2.

Would it not be more effective if the Office were specifically empowered in addition to investigate and prosecute related offences of obstruction of justice, perversion of justice, perjury, etc arising in relation to the investigation of corruption and related offences? The American Special Prosecutor was specifically given such powers which served well to prevent suspects from lying or trying to tamper with the evidence during corruption and related investigations. The US regulation provides as follows: "The jurisdiction of the Special Counsel shall include the authority to investigate and prosecute crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice,

destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted.” I respectfully suggest the inclusion of a similar provision to make the Special Prosecutor’s power on investigating and prosecuting more efficacious in its execution.

Functions of the Office: Clause 3.

I have already made recommendations by way of the comments for addition of new clauses to the objects of the Bill. It is my opinion that should the above recommendations be accepted then they may also be reflected in the functions of the Office as well - to investigate and prosecute related offences of obstruction of justice, perversion of justice, perjury, etc, arising in relation to investigation of corruption. Consideration may be had to adding the US formulation in a modified form or version as quoted above to the functions of the Special Prosecutor.

The original draft submitted for discussions at the Stakeholders’ Meeting of 27-28th July 2017 did not include the new Clause 3 (3) and (4). Sub-clause (3) that has been added to the Bill before Parliament is with respect unnecessary and populist to be enshrined in the law.

Clause 3 (4) which was also not part of the original draft negates the whole promise of the President made during his campaign and after his assumption of office to fight corruption if, as it states, the Special Prosecutor is not to investigate and prosecute corruption offences relating to the Public Procurement Act, 2003 and the Criminal Offences Act, 1960 specified in sub-clauses (3) (1) (a), (b) and (c) unless the commission of the offence is in respect of a vast quantity of assets that (a) constitute a substantial proportion of the resources of the country; (b) threaten the political stability of the country; or (c) threaten the sustainable development of the country.”

First and foremost, sub-clause 4 of Clause 3 of the Bill before Parliament lays down vague and ambiguous exceptions for the purposes of determining which corruption offences will meet those standards for investigations to begin in the first place. Secondly the vagueness and ambiguity of the exceptions made provides an argument to be overcome by the Special Prosecutor when the objection is raised in Court that his decision to prosecute a corruption offence does not meet the threshold standard stipulated in the Bill. Thirdly, the attempt to distinguish types of corruption offences that may be investigated and prosecuted by the Special Prosecutor sends the clear message to Ghanaians that the President and his Government now accept that certain types of corruption offences are not serious for prosecution or at least to be prosecuted by the Special Prosecutor. Fourth, the question may be asked, who will be responsible for investigating and prosecuting categories of corruption offences by the same public officers and politically exposed persons not meeting the standards in Clause 3 (4), or are they then immune from prosecution for such corruption offences?

The President has been clear throughout his campaign and on assumption of office that the canker of corruption must be fought and uprooted through a Special Public Prosecutor. He has said several times that crime is crime and therefore corruption is corruption. So how come that the Bill that was submitted to the Stakeholders' Meeting on 27-28th July 2017 did not contain this exception but the exception found its way into the draft after it apparently returned from the Cabinet to Parliament? The Stakeholders' Meeting of anti-corruption organizations and civil society, I am reliably informed did not insert sub-clauses 3 and 4 now appearing in the Bill before Parliament.

The original draft Bill after taking into account the suggestions of the stakeholders was approved by the Cabinet, so was it the Cabinet which sought to nullify the fight against corruption by inserting this negation of the purpose of the Bill? Whosoever inserted sub-clause 4 of Clause 3 thought they were being ingenious as we the foolish people of Ghana will not notice that the definition of "corruption and corruption related offence" ceded to the Special Prosecutor in the interpretation at Clause 77 includes all corruption offences without exception or degree of seriousness. Therefore to exclude a species of corruption offences as they sought to do simply means that there would be no institution responsible for the prosecution of the so-called corruption that does not fall under the sub-clause 4 exception.

It follows from the foregoing that the Cabinet or whosoever inserted the sub-clause is legalizing an undefined species of corruption perceived as not being serious corruption constituting a substantial portion of national resources; threatening the political stability of the country; or threatening sustainable development of the country. The serious reader will notice from the Bill before Parliament that the consequential amendments in Clause 78 (1) removes the offence of corruption from the jurisdiction of the EOCO when it states that: "The Economic and Organised Crime Office Act, 2010 (Act 804) is amended in Section 74 by the deletion of the words "corruption and bribery" in paragraph (a) of the definition of serious offence." Who then will investigate the species of corruption the Government has removed from the Special Prosecutor by the insertion in Clause 3 (4) of the Bill before Parliament?

This whole exception is a negation of the President's fight against all forms of corruption in the body politic by using public office holders and politically exposed persons as an example. Will somebody call the President's attention to read Clause 3 of the Bill before Parliament and confirm whether or not he endorsed the exception in sub-clause 4 for submission to Parliament? The retention of sub-clause 4 of Clause 3 of the Bill will make it unnecessary to enact any Office of the Special Prosecutor Bill into law.

I have no doubt that the insertion of Clause 3 (4) that negates the whole Bill before Parliament was done by a strong and powerful cabal which wishes to harvest its share of the proceeds of corruption that comes with public officers who find their way into public office through the

deception of the appointing authority of rendering service with integrity to the Republic. The insertion of Clause 3 (4) in the Bill is therefore a wake-up call for the President to watch his so-called incorruptible appointees because as the saying goes, it is not all that glitters which is gold.

I am fortified in the belief that the attempt to pull a fast one on Ghanaians by the insertion of Clause 3 (4) of the Bill to negate the fight against corruption is the work of a strong and powerful cabal within the government because they succeeded in ensuring that the Memorandum to the Bill was silent on this important matter so that it will not catch the eye of the casual Ghanaian reading public.

Independence of the Office: Clause 4.

The Economic and Organized Crime Office has a similar provision of the independence of the Office but that provision has not made it independent from the direction and control of the Executive in the performance of its functions. Prosecutions are an executive function under the Constitution. Consequently, the Office is subject to the Executive authority of Ghana under Articles 58 and 88 in the performance of its functions. This is why the President's strong moral character and integrity to empower the anti-corruption institutions of the Republic to fearlessly execute the law against every citizen without fear or favour is more important than a thousand laws on paper to fight against corruption without that support.

The modest successes achieved by former President Rawlings were due to that strong moral character and integrity which instilled in each appointee the clear understanding that he or she shall not be spared when caught in acts of corruption and related offences. I see the same mantle from the rhetoric of President Akufo-Addo and urge him to inspire not only the Office of Special Prosecutor but also the EOCO, the CID, and above all the Attorney General as the moral compass of justice enshrined under Article 88 of the Constitution. Above all, the abysmal failure or refusal of the Commission for Human Rights and Administrative Justice, the only independent Constitutional body purposefully established under Chapter 18 of the 1992 Constitution, to investigate and facilitate the prosecution of corruption and related offences stands as a perpetual warning to the fact that independence and security of tenure is not a guaranteed solution to the fight against corruption. Here again a President's strong moral character and integrity of executing the law without fear or favour, affection or ill will may be the moral compass that can assure that the fight against corruption succeeds.

Governing body of the Office: Clause 5 and related Board matters.

The setting up of a governing body for the Office clearly means added financial and budgetary encumbrance on the public purse in an already depleted resource state. The added bureaucracy of creating a body corporate means that unlike the present situation of the Office of the Attorney

General where no Board interposes between the Attorney General and the prosecution of corruption or any other offences, now there will be a Board between the Special Prosecutor and the Attorney General under whose authority he prosecutes.

It is absurd that the Special Prosecutor should answer or account to a Board for the decision to prosecute and for the prosecution of corruption offences when the Attorney General did not have to. Professional Attorneys in the Attorney General's Office make independent decisions whether or not the facts arising from investigations warrant a prosecution. The DPP or the Attorney General may persuade an Attorney to change his mind but does not substitute his or her judgment for that of the prosecuting Attorney. To do so would be unethical under the disciplinary code of lawyers. How then can the decision to prosecute for corruption, as distinct from the investigations be shared with a Board?

We may find some Board Chairman who may want to instruct the Special Prosecutor not only on how to investigate but also on the prosecution. The solution may be to make it clear in the law that the Board shall not interfere in the investigation and prosecution functions of the Office. The Police Council for instance assists in the general administration of the service but does not deliberate on policing functions and duties of the IGP and his office, particularly involving the investigation of crime. The CID which is responsible for the investigation of crime submits dockets to the Attorney General's office and not even to or through the IGP or the Police Council.

Section 6 of the defunct Serious Fraud Office Act, 1993 (Act 466) is a good example of limiting the functions of the Board: It states that: "Section 6. The Board has general control of the office on matters of policy." It also defines the powers of the Executive Director in Section 9 (3) as follows: "(3) The director is the head of the Office and is responsible, subject to the general directions of the Board on matters of policy, for the overall operation and administration of the affairs of the Office." Under Section 5, the governing Board includes "the Attorney General or ... as his representative." The Economic and Organized Crime Office Act, 2010 (Act 804) states the functions of the Board on policy formulation in Section 5 as follows: "Section 5. The Board shall formulate policies necessary for the achievement of the objects of the Office." The functions of Executive Director are stated in Section 12 thus: "Section 12. (1) The Executive Director is responsible for the day to day administration and operations of the Office and is answerable to the Board in the performance of the functions under this Act."

The problem which the draft person faces in the creation of a governing body for the Office of the Special Prosecutor is silently exposed by the fact that Clauses 5 to 11 inclusive of the Bill unusually do not specify the functions of the Board as most other corporate bodies set up under an Act of Parliament do. There has rather been a lame attempt to smuggle one omnibus function for the Board under the functions of the Special Prosecutor under Clause 13 (1) upon which

further comments will be made below. What is the justification to further burden the national purse with a Board with only one omnibus and ineffective function?

Nomination and Appointment of Special Prosecutor: Clause 12.

Clause 12: The original Bill did not include the nomination of the Special Prosecutor for approval by Parliament. As the original draft Bill showed, the appointment of public officers (of which the Special Prosecutor will be one) under Article 195 of the Constitution is an executive function and not a Parliamentary one. The whole of Chapter Fourteen particularly pursuant to Articles 190, 191, and 195 under which the Office of the Special Public Prosecutor is being enacted support and compliment the Executive Authority of Ghana in the performance of the executive functions of Government. The Constitution specifically requires under Article 195(1) that “the power to appoint or act in an office in the public service shall vest in the President, acting in accordance with the advice of the governing council of the service concerned given in consultation with the Public Services Commission.”

The Office of the Special Prosecutor Bill, 2017 laid in Parliament on 18th July 2017 which was later withdrawn and later laid a second time on 2nd August 2017 does not disclose the Article of the Constitution pursuant to which the Office of the Special Prosecutor is being established. Somehow, Clause 20 of the Office of the Special Prosecutor Bill, 2017 still recites Article 195 as the pursuant authority for the President to “appoint other staff of the Office that are necessary for the proper and effective performance of the functions of the Office.”

But the only other article of the Constitution that empowers the President to appoint public officers to assist him in the execution of his functions pursuant to Article 58 thereof is Article 70(1) (e) which allows the President acting in consultation with the Council of State to appoint: “(e) the holders of such other offices as any be prescribed by this Constitution or by any other law not inconsistent with this Constitution.”

The Office of the Special Prosecutor is, therefore, being created by statute as part of the public services under Articles 191 (d) and 195, or under Article 70(1) (e) of the 1992 Constitution. Parliament cannot consequently and in accordance with the separation of powers enshrined in the structure, design, scheme and letter of the Constitution by legislation purport to share in the unitary executive power of appointment committed to the President under the Constitution. The 1992 Constitution purposefully provided in Chapters 7, 18, and 19 for three independent Constitutional Commissions with security of tenure to be appointed by the President acting in consultation with or acting on the advice of the Council of State and not with the approval of Parliament. It is common knowledge that the Council of State is an integral part of the Executive Authority under the Constitution. Accordingly, the provision that the President should nominate

the Special Prosecutor for the approval of Parliament clearly violates the structural separation of powers enshrined in the letter and spirit of the Constitution and is accordingly void.

I believe that this explains why the legislative draft person did not violate the Constitution by making provision for the nomination of the Special Prosecutor for approval by Parliament for appointment by the President in the first draft Bill presented to the Stakeholders' Meeting supra. The Constitution has clearly delineated the type of public officers who shall be appointed by the President with the approval of Parliament. Public officers in the category of the Special Prosecutor do not fall under that category and it is unconstitutional for Parliament to partake in the unitary and exclusive appointment powers of the President. No lacuna has been demonstrated in the Constitution, the existing law or any defect shown why Parliament may arrogate to itself the right to partake in the unitary executive appointing powers of the President of the Special Prosecutor or any of his staff.

The pegging of the qualification of a person to be appointed Special Public Prosecutor to at least 15 years standing at the bar and equating that person's equivalent position to that of a Justice of the Court of Appeal is a disincentive to more qualified persons whom the President may wish to consider for appointment to that office. There will be many over qualified lawyers who would decline the President's offer simply because they are more senior in qualification to that of a Justice of the Court of Appeal. There may be persons, former Deputy Attorneys General and Attorneys General who may not accept this appointment because of pegging the qualification to that of a Justice of the Court of Appeal because under the Legal Service Act, 1993 (PNDCL 320) their equivalent position has been that of a Justice of the Supreme Court Judge. Furthermore, the Judiciary frowns upon this equalization of their offices with other public offices apart from those specified under the Constitution. Parliament, therefore, ought to avoid pegging public service positions at parity with the judiciary. There is no lacuna in Chapter Fourteen of the Constitution to warrant it.

If the Special Prosecutor will hold office on such terms and conditions specified in his letter of appointment then why limit his entitlement and privileges to a Justice of the Court of Appeal? Cannot the letter of appointment deal with the terms of appointment and thus give the President some flexibility? The unanswered question is whether the Special Prosecutor a principal officer or an inferior officer as under this scheme he will not be subjected to the day to day supervision of the Attorney General as a subordinate officer.

Under the American Ethics in Government Act of 1978 the Special Prosecutor is appointed by the Special Tribunal from outside serving executive branch officers to achieve independence and the staff of the Special Prosecutor or Independent Counsel are recruited by the Special Prosecutor: they are not appointed for him by the President who may undermine him with politically minded persons who would render his impartiality and independence questionable.

The whole concept of an independent Special Prosecutor will be rendered nugatory if he is saddled with staff whose integrity he cannot vouch for.

The current US Regulations for the appointment of Independent Counsel requires that: “An individual named as a Special Counsel shall be a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of criminal law and Department of Justice Policies. The Special Prosecutor shall be selected from outside the United States Government. Special Counsels shall agree that their responsibilities as Special Counsel shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending on their complexity and the stage of the investigation.”

The Government and Parliament may wish to draw upon the foregoing experience in arriving at a formulation for the Office of Special Prosecutor that will adequately serve our interest as Ghanaians. Parliament and the Attorney General may also wish to draw from the interesting and apparent neutral formulation in Article 183 (4) dealing with the Governor of the Bank of Ghana’s condition of service. Article 183 (4) (c) and (d) state: “(c) his emoluments shall not be reduced while he continues to hold office as Governor; (d) he shall not be removed from office except on the same grounds and in the same manner as a Justice of the Superior Court of Judicature, other than the Chief Justice, may be removed.” It may be note-worthy that the Governor of the Bank of Ghana who is part of the executive branch’s management of the economy, is appointed in consultation with the Council of State under Article 183(4)(a) of the Constitution for periods of four years each.

Functions of the Special Prosecutor: Clause 13

Clause 13 (1): In the original draft Bill presented to the Stakeholders’ Meeting: “The Special Prosecutor is responsible for the day to day administration and operations of the Office and is answerable to the Board in the performance of the functions under this Act.” In the Bill purportedly laid and withdrawn, and re-laid before Parliament it is stated as a function of the Office that: “Section 13 (1) The Special Prosecutor is accountable to the Board in the performance of the functions under this Act.” Whatever the two renditions were intended to achieve, one thing is clear: the Office of the Special Prosecutor cannot pass the constitutional mandate of being consistent with Article 88 of the 1992 Constitution without some form of accountability to the Attorney General who holds constitutional responsibility for the Special Prosecutor’s office. Consequently, is it fair for the Office to be accountable again to the Board for the performance of the same functions?

Even the Ghana Police Service is not responsible to the Police Council which is chaired by the Vice President and of which the Minister of the Interior and the Attorney General are members, for the day to day investigations and the prosecution of crimes. Why is the Office being created if it is not going to be independent of a Board in the exercise of its core functions of investigations and prosecutions? The American Special Prosecutor is not answerable to the Department of Justice for its day to day investigations! There is, however, a degree of accountability to the Department of Justice. Clause 13(1) is immediately contradicted by Clause 13 (2) which gives the Special Prosecutor full authority and control over investigations, initiation and conduct of proceedings under Clause 3 (a), (b) and (c). How do we reconcile the provisions of Clause 13 (2) also with the provisions of Clause 4 which subjects him to Articles 58 and 88 of the Constitution? It appears to me that the President wants a situation where the Special Prosecutor “shall have full authority and control over the investigation, initiation and conduct” of corruption proceedings. If this is the case, then to make the Office “accountable to the Board in the performance of the functions under this Act” will defeat the intentions of the President.

I have made previous comments and suggestions on the objects and functions of the Office which may be relevant to the functions under Clause 13 now under examination and they should be read along-side the foregoing.

Removal of the Special Prosecutor: Clause 14.

Clause 14 (4): Why must the President set up the Committee and not the Chief Justice if the purpose of this Act is to protect the Special Prosecutor from Executive interference? Is this not an imposition or limitation of the unitary executive authority of the President to involve the Chief Justice in removing the Special Prosecutor from office? Is the involvement of the Chief Justice in the President’s removal powers of the Special Prosecutor not an infringement of the separation of powers enshrined in the Constitution? Or is this provision and the independence of the Special Prosecutor gambling on its supposed “too strong appeal to the public common sense,” and consequently to survive any challenge to the constitutionality of the provision? Be it as it may, the rendition in Article 183 (4) (d) of the Constitution appears to provide guidance to the draft person as to a more neutral formulation on the removal of the Special Prosecutor from office just as the Governor of the Bank of Ghana may be removed.

Nomination and appointment of Deputy Special Prosecutor: Clause 15.

The examination, analysis and comments on the appointment of the Special Prosecutor should be read mutatis mutandis with the provisions of this Clause.

Removal of the Deputy Special Prosecutor: Clause 17.

The examination, analysis, comments and recommendations on the removal of the Special Prosecutor should be read mutatis mutandis with the provisions of this Clause.

Appointment of other staff: Clause 20.

The Office cannot be independent unless the Special Prosecutor has some independence in determining who he has confidence to work with. In spite of the purported independence granted in the Bill, the appointment of a Deputy Special Prosecutor and other staff for the office by the President does not guarantee actual independence for the Special Public Prosecutor as he may not command the loyalty of his investigation and prosecution staff. The Economic and Organized Crime Office and its predecessor, the Serious Fraud Office, were designed to be independent offices but political appointments to those offices negated them. Indeed, the only constitutionally established independent anti-corruption Commission (the Commission for Human Rights and Administrative Justice) purposefully established under Chapter 18 of the Constitution is another demonstration of the effect of political motives on staff appointments of perceived independence and security of tenure entities. There will be no use setting up another bureaucracy with political appointees and a supposed independent Special Prosecutor who will be unable to execute his functions due to politicking by staff over which he has no control.

Interpretation: Clause 77.

This clause defines corruption and corruption related offences to mean offences under: Sections 146 (dishonestly receiving property); 151 (Extortion); 179 (c) (using public office for profit); 239 (corruption of and by public officer or juror); 252 (accepting or giving bribe to influence a public officer or juror); 253 (corrupt promise by judicial officer or juror); 254 (corrupt selection of juror); 256 (corruption, intimidation and personation in respect of election); 258 (falsification of returns at election); and 260 (withholding of public money by public officer). It is submitted that the Bill will be more effective to combat corruption should the offences include those of deceiving a public officer which should include deceiving a public officer with “intent to defeat, obstruct, or prevent the course of justice, or the execution of the law, or evade the requirements of the law, or to defraud or injure a person, or to obtain or assist in or facilitate the obtaining of any passport, instrument, concession, appointment, permission or any other privilege or advantage, endeavours to deceive or to overreach a public officer acting in the execution of a public office or duty,”

General observations and the useful provisions in the EOCO Act, 2010 (Act 804) that may be included in the Bill

I have indicated at the beginning of this paper that the foregoing examination, analysis and critique of the Office of the Special Prosecutor Bill, 2017 was limited to the Parts of the Bill dealing with establishment of the Office of the Special Prosecutor and Administrative Provisions which in my view constitute the jugular vein to the Constitutionality of the Office of the Special Prosecutor Bill, 2017. This is in spite of the fact that I had carefully examined, analyzed and critiqued the entire Bill. The other provisions of the Bill which I have not commented about in this paper are in my view just standard provisions found in Bills dealing with similar investigatory matters such as the EOCO.

In a comparative analysis of the Office of the Special Prosecutor Bill, 2017 I found that certain important provisions which will facilitate an effective investigation of corruption and related offences appear to have been excluded from the Bill. Government and Parliament may therefore wish to consider whether the following provisions in the Economic and Organised Crime Office Act, 2010 (Act 804) should not be adopted with necessary changes for inclusion into the Office of the Special Prosecutor Bill to make it more efficacious:

“Trial Court and proceedings:

Section 69. (1) The High Court and Circuit Court have jurisdiction to try an offence provided for under this Act.

(2) In a trial for an offence under this Act, the accused person may be presumed to have unlawfully obtained pecuniary resources or property in the absence of evidence to the contrary if the accused person

(a) is in possession of pecuniary resources or property for which the accused cannot satisfactorily account and which is disproportionate to the accused person’s known income,

(b) had at the time of the alleged offence obtained access to personal pecuniary resources or property for which the accused person cannot satisfactorily account, or in respect of which there is no evidence of taxes having been paid.”

“Compensation:

Section 72. The Court may order restitution to be made or compensation to be paid to a victim of a serious offence under this Act.”

I also take the view that the Court ought to be empowered to order compensation to be paid to a whistleblower under the Bill to enhance public spiritedness in reporting on corruption and related offences.

THE EXISTING LAW ON THE APPOINTMENT OF SPECIAL PROSECUTORS

Appointment of Special Prosecutors under the existing laws

Under Article 11 of the 1992 Constitution the existing laws are part of the Constitution except those that are found to be inconsistent with it and are to that extent void. By virtue of Article 11 of the Constitution, the Law Officers Act 1974 (NRCD 279) exists as the Act that provides for the functions of the Attorney-General and for related matters. The Attorney General is empowered under NRCD 279 to appoint prosecutors from without his office pursuant to Section (1) (b) and (c) of NRCD 279, which provides that subject to article 88 of the Constitution, (b) a person appointed under section 56 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30), or (c) any public officer so authorized by the Attorney-General, may perform any of the functions vested by an enactment in the Attorney-General subject to the directions of the Attorney-General. Section 2 thereof states that: “Section. (2) Evidence shall not be required to be produced that a direction has been given by the Attorney-General in regard to a matter.”

Section 56 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) also provides for the appointment of Public Prosecutors and Conduct of Prosecutions. It states that: “Section 56. The Attorney-General may, by executive instrument appoint generally, or for any specified class of criminal causes or matters, or for any specified area, one or more public officers to be public prosecutors, and may by writing under his hand appoint any legal practitioner or public officer to be a public prosecutor in any particular criminal cause or matter. Any public prosecutor so appointed may appear and plead before any District Court in which any criminal cause or matter of which he has charge or of which he has assumed the conduct under section 57 is under enquiry or trial, and shall be subject to the express directions of the Attorney-General. It is then stated in Section 58 that: “(58). Proceedings shall not be instituted for the trial of an accused upon indictment save by or on behalf of the Attorney-General.”

The combined effect of the foregoing enactment is that the Attorney General may appoint public officers or any legal practitioners in particular causes or matters as Special Prosecutors who must be subject to the Attorney General’s directions instead of merely operating under his authority as expansively provided for under Article 88 of the Constitution.

Appointment of other Special Prosecutors under Article 88 of the Constitution

Both the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) and the Law Officers Act 1974 (NRCD 279) were enacted during regimes whose practice of multiparty democracy and modern constitutionalism was in great deficit, as was the executive authority and powers of the Attorneys General under those regimes. This explains the limitation placed on legal practitioners appointed as Special Prosecutors under Act 30 and NRCD 279 to act in accordance with the directions of the Attorney General in those days. Article 88 of the 1992 Constitution is expressed in more expansive terms to give flexibility to the powers of the Attorney General to be restricted by the narrow provisions of Act 30 and NRCD 279. In this regard it is my view that Article 88 of the Constitution of the Constitution is expansive so as to enable the Attorney General and the Executive Authority to appoint Special Prosecutors in place of Commissions of Enquiry to deal with suspected serious crimes.

The 1992 Constitution by its structure, scheme and design empowers the executive authority under Chapter 23, particularly Article 278, to appoint Commissions of Enquiry to investigate stated matters including the commission of serious crime. The operation of Chapter 23 of the Constitution has demonstrated the ineffectiveness of using those provisions to aid the prosecution of criminals by virtue of the fact that findings of the Commission invariably become judgments of the High Court for which no procedure has been provided for the prosecution of persons found to have committed crimes by a Commissions of Enquiry. Article 88 on the powers of the Attorney General provides the executive with an alternative process of investigation and prosecution using Special Prosecutors instead of Commissions of Enquiry in appropriate cases.

I have made a close and detailed study of the powers of the Ghanaian Attorney General under Article 88 of the Constitution and those of his United States counterpart under the American Constitution. The powers and authority given under Article 88 of the Constitution to the Ghanaian Attorney General are the same as the powers and authority entrusted to the Attorney General of the United States of America. Under Article 88 of the 1992 Constitution and the American Constitution a person may be a Special Prosecutor under the authority of the Attorney General without being subjected to the prosecutorial directions of the Attorney General.

There is a world of a difference in the literature and the case law on a person prosecuting under the directions of the Attorney General and one prosecuting under his or her authority. Practice and common sense also vindicates this position. Professional lawyers employed by the office of the Attorney General ethically prosecute under the authority of the Attorney General and not on the directions of the Attorney General otherwise they cease to be professional lawyers individually responsible to the disciplinary body of lawyers for misconduct. On the other hand, lay public officers appointed as Special Prosecutors naturally prosecute on the directions of the Attorney General which includes the Attorney General's professional prosecutors.

I have stated already that the Attorney General of Ghana as part of the Executive Authority is entitled by regulations, particularly Executive Instrument, to set forth regulations for the appointment on a need-to basis of independent Special Counsel or Prosecutors to investigate and prosecute such criminal offences in which the Government or the Attorney General may be suspected of having a conflict of interest under Article 284 of the 1992 Constitution or which involves politically exposed persons generally. In addition to the foregoing authority for the appointment by the Attorney General as part of the executive authority of independent Special Prosecutors or Counsel, there is valid constitutional authority in the common law supporting an inherent power in both the Ghanaian Attorney General and the American Attorney General to do so from the separation of powers doctrine and the structure of both Constitutions. It was on this basis that in spite of the failure or refusal of the United States Government and Congress to renew the operations of the Ethics in Government Act of 1978 in 1999, the Attorney General made departmental regulations empowering the appointment of Special Counsel which have been upheld by the Courts as lawful in the 7-1 United States Supreme Court decision of Morrison v Olson 487 U. S. 654 which is persuasive authority in Ghana. The Ghanaian executive authority may wish to assert the same or similar powers when it deems fit.

The impression that the Executive Authority under Chapter Eight of the 1992 Constitution is limited in its ability under the Constitution to curb crime using the instrumentality of independent Special Prosecutors or Counsel is according to my examination, and analysis of the 1992 Constitution and a comparative analysis with the United States Constitution the result of the lack of a deep study of the 1992 Constitution and its reach.

CONCLUSIONS

As the introduction of this paper shows the exertions entailed in the examination, analysis and critique of the Office of the Special Prosecutor Bill, 2017 were undertaken impartially, voluntarily and gratis as part of my patriotic and constitutional duty under Articles 3, 35 and 41 to defend the 1992 Constitution and fight against corruption in the body politic. I have attempted to do my duty to my country under the Constitution without being oblivious of the fact that others may have been commissioned to contribute towards the drafting and participation in the enactment of the Bill into law.

In spite of my preference for the strengthening of the traditional, common law and conventional independence of the Attorney General or the Director of Public Prosecutions under our Anglo-Americo-Ghanaian system of jurisprudence, the paper asserts my conclusions as a patriot that the establishment of a permanent Office of the Special Prosecutor is legal and doable under Article 88 of the 1992 Constitution, so long as it is done under the authority of the Attorney General. Drawing from the American experience, it is argued that a Special Prosecutor can be independent and still work under the authority of the Attorney General.

It has also been argued that the Attorney General and the Executive Authority have power under Article 88 of the Constitution to similarly appoint legal practitioners as ad hoc Special Prosecutors to investigate and possibly prosecute the commission of other serious offences, instead of the President appointing Commissions of Enquiry under Chapter 23 of the Constitution to investigate the commission of serious criminal offences which end up not being prosecutable because of the absence of procedures for the prosecution of findings of the commission of crimes by a Commission of Enquiry. This lacuna in the scheme of Chapter 23 has encouraged previous Presidents to resort to the cover-up of the appointment of Commissions of Enquiry to temporarily appease the anger of the voting public when serious allegations of crime are made against government officials, politically exposed persons or the government's other political associates.

My personal belief in the feasibility of establishing a permanent Office of the Special Prosecutor to deal specifically with corruption and related offences by law is premised on the exemplary moral compass and integrity of the Executive Authority personified by the elected President and his determination to give law enforcement authorities, including the Attorney General, the expected constitutional support to operate strictly in accordance with their oaths of office to be fair, transparent and impartial in the execution of their duties without fear or favour, affection or ill will. Absent such a President and public officers, no number of enactments can achieve the objective of fighting systemic corruption in Ghana.

It is my hope that this paper will help civil society, the active public, the Government and Parliament to give due consideration to all the factors that need to be taken into account to make the Office of the Special Prosecutor Bill, 2017 now being discussed by the Committee of Parliament during the vacation, capable of being enacted in a bi-partisan manner when Parliament resumes in October 2017.

The chronicle of the events leading to the writing of this paper is also expected to provide a historical record on my website, martinamidu.com or Martin Amidu Speaks, of parts of the processes that led to the enactment of the Office of the Special Prosecutor Bill, 2017 for the future assessment of any law passed pursuant to this Bill.

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(Citizens Vigilance for Justice)
6th September 2017