

***STRENGTHENING COMMUNICATION AND COLLABORATION TO ENHANCE RESPONSIVENESS TO AUDIT***

**ROLE OF SPECIAL PROSECUTOR IN STRENGTHENING ACCOUNTABILITY FOR PUBLIC FUNDS**

On the 3<sup>rd</sup> of January 2018, the Office of the Special Prosecutor came into existence with notification in the Gazette of the enactment of Act 959. It is this act, the Office of the Special Prosecutor Act, 2017, (Act 959), which sets out the work of the Special Prosecutor. When we therefore ask the question, what role may the Special Prosecutor play in strengthening accountability for the public purse, then Act 959 should be at the heart of our conversation. *However, it would be foolhardy for us to try to answer the question without seeking to understand similar experiences within Ghana in the matter of fighting corruption.*

The call to root out corruption in Ghana has prevailed since independence on 6<sup>th</sup> March 1957, and the people of Ghana have witnessed the birth and rebirth of various state anti-corruption institutions and mechanisms for combating corruption, established under various enactments.

The 1992 Constitution has itself provided for three accountability watchdogs. These are the Ghana Police Service, a Commission for Human Rights and Administrative Justice, and an Auditor-General with an Audit Service. All three serve as constitutional instruments to fight corruption and the abuse of office.

Under this same Constitution, Parliament has enacted pursuant legislation to facilitate these constitutional bodies so that they can actualize their work. By legislation, Parliament provided for a Serious Fraud Office which was succeeded by the existing Economic and Organised Crime Office, a Bureau of National Intelligence, a Financial Intelligence Centre, a Ghana Revenue Authority, new Banking and Bank of Ghana Acts, and a new Ghana Immigration Service Act amongst numerous other enactments. The legislative framework was intended to assist law enforcement to stop the rapid spread of the canker of corruption which the framers of the Constitution had recognized in the Directive Principles of State Policy.

Twenty-five years down the line, since the promulgation of the 1992 Constitution, the majority of the people of Ghana have again confirmed in the last election that corruption has been on the ascendancy over the years, and not in decline. *If our nation's experience has been that, despite all the institutions and enactments, we continue to see corruption surge, then perhaps we should question our expectations and examine the limitations.*

The nation's latest experiment in fighting corruption is captured in the establishment of the Office of the Special Prosecutor. This new anti-corruption agency with its prosecutorial powers is being seen by many as an expected solution to the problem of corruption in Ghana. *From everything we have learned since gaining independence in 1957, one must question how the*

mere enactment of the Office of the Special Prosecutor Act is being touted by the Ministry of Justice at the least opportunity as an achievement against corruption.

I sincerely beg to differ. Neither the number of laws in the Constitution nor legislation enacted by Parliament has never successfully actualized in the fight against corruption. There are two reasons for this failure. The first is the nation's incapacity to ensure that law enforcement agencies and commissions are properly established with adequate resources. The second reason is Ghana's inability to allow these agencies and commissions to execute their mandates without politicization.

Apart from the institutional bane of law enforcement of internal corruption and corrupt practices that is traceable to lack of resources, the nation's inability to adequately resource and guarantee the independence of law enforcement from politics has affected the fight against corruption over the years.

The Office of the Special Prosecutor has naturally been born into this culture of inadequate resourcing and lack of political and economic independence. Unless there is a change of attitude in practice, *I can state categorically that* the Office of the Special Prosecutor Act would soon be seen by the public to be, like its predecessors, a delusion and not an achievement.

*It is not a matter of the will of the President of the Republic of Ghana.* That the President sincerely intends the Office of the Special Prosecutor to be a real signature achievement during his tenure in office is beyond doubt to me. The reality, however, appears to be that his intentions are not congruent with those of his subordinates who *must of necessity* help him achieve those objectives.

It is important that we locate whatever I am saying to this conference within the context of this preamble so that it is not said that when the Office had an opportunity to speak to such an august international forum, it was less than candid.

*As I speak with you today, my goal is to empower you to understand both the potential and the limitations of the role that can be played by the Office of the Special Prosecutor in strengthening accountability for public funds.*

### **Let me start with a brief overview of the mandate of the Office of the Special Prosecutor**

As I have stated already, the Office of the Special Prosecutor Act, 2017 (Act 959) is the latest attempt within Ghana's political and Constitutional history to establish a more efficient and effective mechanism to fight corruption which is perceived to be pervasive within the body politic. The Act contains the standard anti-corruption provisions, enhanced protections and indemnity for the Office of the Special Prosecutor. Moreover, for the first time, the Act contains the ceding of those portions of the Attorney General's prosecutorial powers affecting corruption and corruption-related offences to the Special Prosecutor.

## THREE OBJECTIVES

The Office of the Special Prosecutor has been given **three objectives under the act**:

1. First, to **investigate and prosecute** alleged corruption or suspected corruption and corruption-related offences,
2. Second, to **recover the proceeds** of corruption and corruption-related offences, and
3. And the third objective is to **take steps to prevent corruption**.

## FUNCTIONS

To achieve its three objectives, Act 959 provides the Office with several stated functions.

The functions entrusted to the Office are also functions which participants in this conference may all be familiar with. These include the investigation and prosecution of cases of alleged or suspected corruption and corruption-related offences under various existing acts, in instances where those involved are public officers, politically exposed persons and persons in the private sector.

The Office is further charged with recovering and managing the proceeds of corruption. Its coordination functions are moreover twofold:

- To disseminate relevant information to competent authorities and other persons the Office considers appropriate in connection with the offences.
- And to cooperate and coordinate with competent authorities and other relevant local and international agencies.

Now in the matter of receiving and investigating complaints, let me clarify what the Act states. The functions of the Office are to:

- Receive and investigate complaints from a person on a matter that involves or may involve corruption and corruption-related offences;
- Receive and act on referrals of investigations of alleged corruption and corruption-related offences by Parliament, the Auditor-General's Office, the Commission on Human Rights and Administrative Justice, the Economic and Organized Crime Office and any other public body

The final function in the Act instructs the Office of the Special Prosecutor to perform any other functions connected with its objectives which in summary again pertain to investigating and prosecuting acts of corruption, recovering proceeds from corruption, and preventing corruption.

## **MANDATE**

The objectives and functions of the Office of the Prosecutor must be further examined in terms of the Mandate of the Office.

Under the Act, the Office of the Special Prosecutor is not subject to the direction or control of a person or an authority in the performance of its functions. The Act also makes it abundantly clear that subject to clause 4 of article 88 of the Constitution, the Office shall for the purpose of the Act be authorized by the Attorney General to initiate and conduct prosecution of corruption and corruption-related offences.

This is the provision which arguably cedes the prosecutorial authority of the Attorney General for corruption and corruption-related matters to the Special Prosecutor.

## **POWERS**

Now that we have addressed the objectives, the functions, and the mandate, let us explore the powers of the Office as contained in the Act.

The Special Prosecutor and authorized officers shall exercise the powers of a police officer specified in the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) or any other enactment.

This means that the Office has powers to request for information, make production orders or apply for such orders, powers of search and seizure of documents, search and seizure of tainted or suspected tainted property, making freezing orders and applying for freezing orders, realization of property, mutual legal assistance and many other powers to enable the Office to efficiently and effectively discharge its functions under the Act.

## **DIVISIONS**

In order to perform its objectives within its mandate and powers, the Act establishes four main divisions for the Office, namely – administration, investigations, prosecutions, and assets recovery and management.

Let me note here that the preventive object mentioned in Section 2 of Act 959 is not expressly provided for under Section 3 of the Act dealing with its functions. However, it is captured by the omnibus provision mandating the Office to “perform any functions connected with the objects of the Office”. The absence of an express provision on the preventive functions may also be because the investigative, prosecutorial and assets recovery and management functions are by implication directed towards the prevention of corruption generally.

International best practice shows that almost every efficient and effective anti-corruption agency has a well-established prevention of corruption division. The Office of the Special Prosecutor therefore proposes to establish a prevention of corruption division of the Office whose

responsibilities will include among others analyzing the risk of corruption, educating the public, assessing legislation, as well as publicizing detected acts of corruption.

The prevention of corruption division will stand alongside the other divisions created by the act.

## GOVERNANCE

Act 959 has established the goals and functions, mandate and powers, and structure of the Office of the Prosecutor within a strict governance framework.

As you well know, the Special Prosecutor and the Deputy Special Prosecutor are subject to a strict nomination and approval process by Parliament before they may be appointed by the President. Their positions and status are notionally equated to those of a Justice of the Court of Appeal and a Justice of the High Court respectively, and they enjoy the security of tenure and independence equal to those of superior court justices.

By the operation of the Constitution, the Office of the Special Prosecutor furthermore has a governing Board which consists of the Special Prosecutor, the Deputy Special Prosecutor, and six institutional representatives from the six anti-corruption, security and intelligence agencies. These representatives may not be below the rank of Director, and have to be nominated by the Head of the respective agency. There is a further board position for one other person, who is female, to represent the Anti-corruption Civil Society Organizations.

The Board elects its own chairperson from amongst its members other than the Special Prosecutor and the Deputy Special Prosecutor. It advises, oversees and monitors various aspects of the functioning of the Office. However, the provision of the Act spelling out the Board's functions was at pains to under-score the fact that "the Board shall not interfere in the day to day functions of the Office." Members of the Board are put under very strict and stringent fiduciary duties and responsibilities in the discharge of their duties.

## JURISDICTION

I have stated the goals and functions, I have explored the mandate and powers, and I have shared the structure and governance of the Office with you. Let me now discuss one area which seems to lack clarity, namely the jurisdiction of the Office.

There is the perception out there amongst the populace that the Office of the Special Prosecutor can investigate and prosecute any criminal offence under the laws of Ghana. *It is to be expected that the majority of the population* may not be able to read the legalese and properly understand the Office of the Special Prosecutor Act. However, the problem is compounded when persons, civil society and political organizations which ought to know better, choose to petition or complain to the Office on matters which have nothing to do with corruption and corruption-related offences.

Worst of all, these enlightened persons and organizations appear to be petitioning the Office more for media publicity and political point-scoring than pursuing genuine complaints against corrupt adversaries. Their modus operandi is to write a letter, petition or complaint, have it published in the media long before submitting or posting the complaint to the Office. The object of such persons and organizations is not to seek a fair and impartial investigation and prosecution. Instead they want to do maximum damage to perceived political opponents even before they can be investigated. It is a type of mob lynching for which no reasonable and impartial law enforcement agency should be used. Every citizen is entitled to the constitutional right to be presumed innocent and not to be presumed guilty and tried by public opinion before a determination even to begin investigations commences.

Unfortunately, the media aids in such cheap publicity seeking by just publishing the complaint without satisfying itself whether the petition really concerns a corruption and corruption-related offence.

Let me therefore list the TEN corruption and corruption-related offences as felonies or misdemeanors created under Act 959:

- (a) Dishonestly receiving property that a person knows to have been obtained or appropriated by a punishable criminal offence
- (b) Extorting property from any other person by means of threat
- (c) Using public office for private gain
- (d) Corruption of and by public officers
- (e) Accepting or giving bribe to influence a public officer or juror
- (f) A corrupt promise by a judicial officer or juror
- (g) The corrupt selection of a juror
- (h) Corruption, intimidation, and impersonation in respect of election
- (i) The falsification of returns at election, and
- (j) Withholding public money by a public officer.

Let me also note that Section 92(2) of the Public Procurement Act, 2003 (Act 663) deals with offences constituted under the Act for which jurisdiction is given to the Office. Surprisingly it fails to mention Section 93 dealing with corrupt practices.

The jurisdiction of the Office of the Special Prosecutor is therefore strictly provided for under the Act. It is more restrictive than any other anti-corruption agency I have come across.

Apart from the challenges which the Office has faced since the assumption of Office of the Special Prosecutor, the foregoing explains why the Office is not investigating the several alleged suspected offences perceived to have been committed by particular ministers of state and operatives under the present Government and previous Governments. The Office does not and cannot investigate financial and economic offences in which no evidence of corruption can be demonstrated from the beginning.

This further explains why the Office cannot investigate the alleged commission of offences contained in any draft or final 1999 Forensic Audits of SSNIT reports by an alleged minister in the Government, the recent bank scandals, and BOST allegations which do not point to the suspected commission of corruption and corruption-related offences.

Just give the Office personal knowledge of facts to support an abuse of public office for private gain and the Office will take up the investigations. But do not politicize the work of the Office by dragging it into media propaganda. What happened since 1999 that an alleged offence committed around that year has not been investigated by any previous Government? The remit of an independent anti-corruption agency is not to dabble in politics.

#### CHALLENGES OF RESOURCING THE OFFICE

One area where the media has been accurate in its reporting is the matter of the resource challenges that the Office of the Special Prosecutor faces. I saw recently in the media that the Auditor General called on people to visit my Office to make their own determination of the resourcing situation. May I politely denounce that invitation, because as it is we do not have enough space or parking for the handful of individuals currently occupying the premises.

On a more serious note, a key lesson from past anti-corruption endeavors has been that such institutions need to be properly and effectively resourced so that they may operate independently.

In this regard, a Special Prosecutor, a Deputy Special Prosecutor, a Chief Accountant, a Secretary to the Office, a Senior Private Secretary, a Special Assistant to the Special Prosecutor, a records officer, a driver each for the Special Prosecutor and his Deputy, one police orderly, soldiers on guard duty, a senior steward, and since 17<sup>th</sup> September 2018, three police personnel with the rank of detective – these are the staff that constitute the Office of the Special Prosecutor. Almost all the members of staff are on secondment from other public agencies.

But *I should add that* the Office of the Special Prosecutor Act, 2017 anticipated some of these problems and tried to make provision to prevent them. It mandated that a legislative instrument shall be made for the Office providing for certain matters, within 90 days after the assumption of Office of the Special Prosecutor. More than double the 90 days have long passed. No Legislative Instrument to govern the administrative and operational activities of the Office of the Special Prosecutor has been laid before Parliament let alone to mature into law. Consequently no

recruitment of staff or engagement on contract can be made by the Office to enable it to achieve its mandate.

In the *meantime, without knowledge of the absence of resources, the public* concluded that with my nomination, approval and assumption of Office, the one-man Office of the Special Prosecutor could receive their petitions and complaints and go out there arresting, prosecuting and jailing persons suspected of having committed corruption and corruption-related offences in the past and in the present. The public has thus been baying for the blood of corrupt officials with citizens inundating my Office with petitions even before I was given space for my Office.

The media has aggravated the situation by publishing any alleged petition to the Special Prosecutor immediately after my appointment and assumption of Office even when I had not had a Secretariat to receive those petitions or complaints. This media frenzy gradually developed into attempts to politicize the work of the Office with rival political parties, particularly the largest two of them, falling over each other to demonstrate whose supporters have lodged the most petitions or complaints with the Office. The attempted politicization of the Office moved from the mainstream media into the social media where unprintable insinuations can be read.

It was in the midst of the massive public support and reaction for immediate results even when the basic subsidiary legislative framework for the Office had not been established that I resorted to the idea of conducting joint investigations with the Economic and Organized Crime Office for corruption and corruption-related offence, for which the Office had sufficient preliminary evidence to warrant a full investigation. The most negative aspect of a joint investigation is that the Office ceases to have control over the investigation process, which is very important for its independence.

The Office has, therefore, resorted to referring complaints and petitions which fall within its mandate for consideration of the various divisions of the Office when they come upstream. Almost all complainants and petitioners who have submitted petitions and complaints have been given acknowledgments and informed of the status of their complaints. Anonymous complainants of course could not be acknowledged.

The delay in providing the legislative framework for the Office is what has led the Office into resorting to the concept of a limited secondment of other public officers to staff the Office. I have been under enormous pressure to second more staff to the Office instead of recruiting the quality of personnel base on the organization's statutory requirements to be provided for in its subsidiary legislation and approved scheme of service.

Should the Office accede to the request to second a substantial number of its staff, it is likely to join previous experiments in this area of law enforcement where the new establishment is swamped by the old such that the new becomes in practice the old establishment in new bottles. It is doubtful whether this is what Ghanaians wanted by asking for the creation of the Office.

The best course, in my independent judgment, is for the Office to recruit and train its own staff that may include persons who previously have worked within other public services.

## **COLLABORATION AND COOPERATION**

This brings me to my final point on the role of the Special Prosecutor in strengthening accountability for public funds. Such an effort is a collective obligation, and the Office is required by its functions to cooperate and coordinate with competent authorities and other relevant local and international agencies in furtherance of the Act.

The Audit Service is one of the competent authorities in Ghana and is required by the 1992 Constitution to audit and report on “all public accounts of Ghana and of all public office including the courts, the central and local government administrations, of the Universities and public institutions of the like nature, any public corporations or other body or organization established by an Act of Parliament.” By the nature of its work, the Audit Service provides an avenue for intelligence to the Office of the Special Prosecutor on the suspected commission of corruption and corruption-related offences for which the Office has the mandate to investigate, prosecute, and to prevent potential corruption activities.

The modus operandi in the past was for the Auditor-General to complete his annual or special audit and report on it to Parliament. Law enforcement and other investigatory agencies may then investigate suspicious criminal conduct disclosed in the audit reports when a complaint is made to them. The Public Accounts Committee of Parliament also holds hearings on the audit reports and recommends remedial action.

The Office of the Special Prosecutor has since the appointment of the Special Prosecutor reached an understanding that enables the Auditor-General to alert the Office of the Special Prosecutor of any suspicious criminal conduct of corruption while the audit is on-going to enable the preliminary investigation and full investigatory processes to be ticked into motion as appropriate before the conclusion and reporting on the audit. This will enable investigation to be commenced promptly and for prosecutions to be undertaken independently of the final audit report based solely on the evidence gathered by the investigators of this Office to constitute the prosecutions docket.

It is also part of the understanding that the Audit Service may assist the Office with the services of auditors in the investigations of corruption and corruption-related offences that may require audit expertise to unravel.

## **CONCLUSION**

The Office of the Special Prosecutor is the latest experiment in fighting corruption. The mere enactment of the Office of the Special Prosecutor Act is not a demonstration of the success of the President’s intention to fight corruption. It is just a beginning.

The success of the experiment will depend on the extent to which ministries, departments and agencies of government with responsibility to cooperate with the Office collaborate with it to achieve the vision of the President who championed the setting up of the Office.

The present situation where critical ministries and agencies have failed or refused to produce public records on demand to aid the Office in critical investigations of offences running into millions of cedis clearly demonstrates that there is a divergence between the President's vision and that of some of his appointees. The success of the fight against corruption will depend on the extent to which the President's vision is supported by his operatives. The personality and reputation of the Special Prosecutor cannot be the solution to a problem which has festered since independence.

The cries of the Office appear to be acted upon. Time will tell whether we succeed or we fail as a nation with this new Office of the Special Prosecutor Act, 2017.