

STAAC

Strengthening Action Against Corruption

Comparative Review of Prosecutorial Systems in Selected Jurisdictions

Drawing lessons for Ghana's Proposed
Office of the Special Prosecutor

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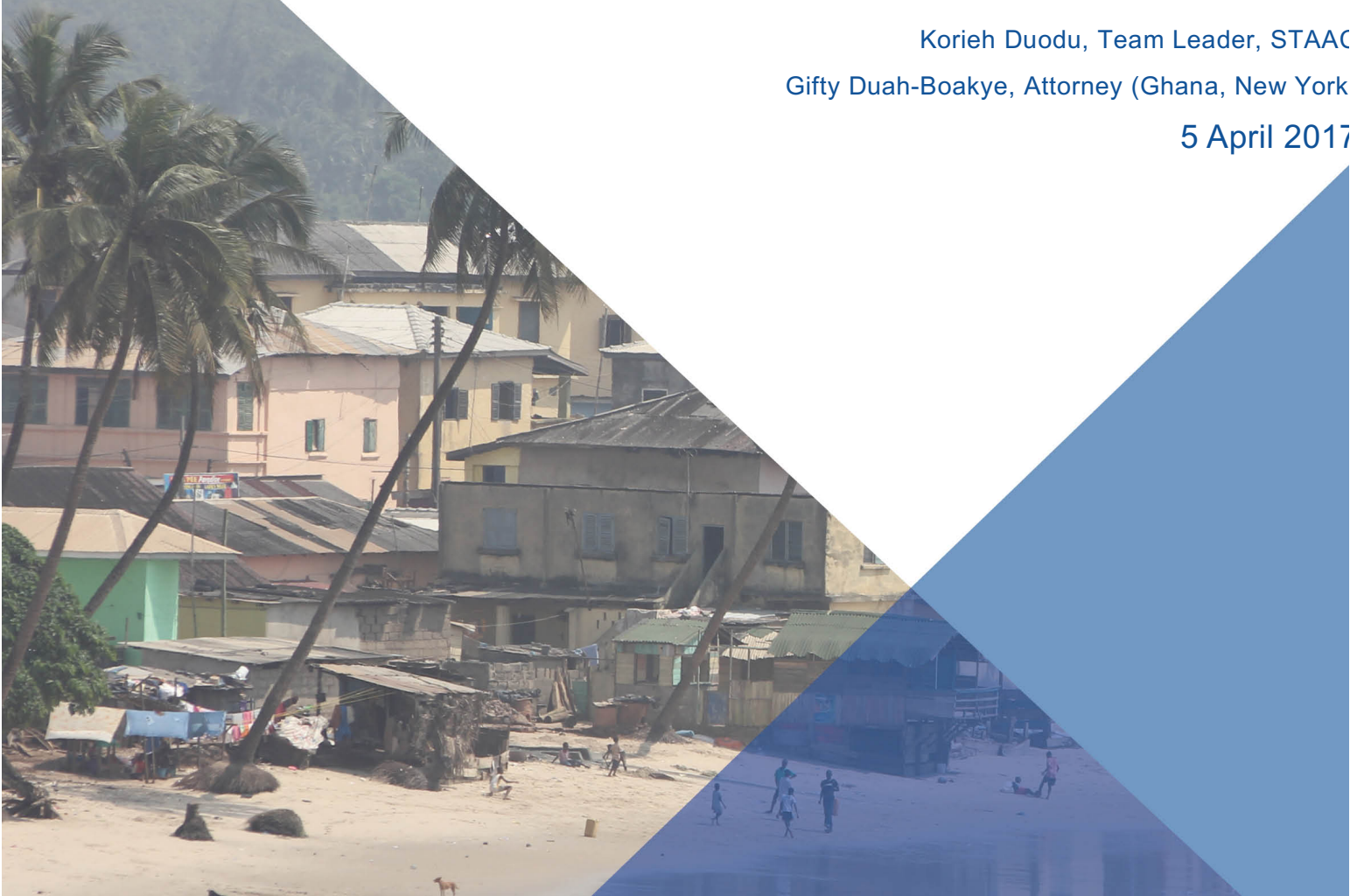


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A. Executive Summary

1. Background

The New Patriotic Party which won the recently held presidential elections in Ghana included in its manifesto a commitment to create an Office of the Special Prosecutor (the “OSP”) for the prosecution of crimes against the state by government officials and political appointees. Since entering into government in January 2017, the Government of Ghana (“GoG”) has continued to look into the various options for setting up the OSP.

Various government spokespersons have indicated that the OSP will be established by Act of Parliament. The main issue which has captured the public’s attention so far has been how the OSP can be truly independent of the executive arm of government, considering that prosecutorial powers are vested by the Constitution of Ghana, 1992, in the Attorney-General.

This review, commissioned by Ghana Integrity Initiative, Ghana Anti-Corruption Coalition, the Centre for Democratic Development and STAAC Ghana, aims to conduct a comparative analysis of jurisdictions with OSPs and also review the current prosecutorial structures in Ghana to see if they can support an effective and independent OSP.

2. Comparative Review of OSP Jurisdictions

The OSPs or their equivalents in Kenya, South Africa, Tanzania, Uganda and Jamaica¹ are studied in this report.

The OSPs in all the jurisdictions in this study are established by the constitutions of their respective states. This is a fundamental difference from the proposed approach in Ghana, where such an office would be set up by legislation alone. The lack of constitutional underpinning to the OSP in Ghana could provide a fundamental challenge to its effectiveness.

The effectiveness of an OSP is likely to be fundamentally impacted by the independence the OSP enjoys from the government. The OSP’s level of freedom from government’s interference ordinarily hinges on whether the government or the Attorney-General exercises some form of control over the OSP, whether directly or indirectly. In Tanzania, for example, the Attorney-General exercises direct control over the workings and operations of the OSP, although the Constitution of Tanzania provides that the OSP should not be interfered with in its work. The exercise of control by the executive through the Attorney-General is made possible by a provision in the Constitution which allows laws to be made to regulate the powers and functions of the OSP. The government may also indirectly control the OSP through its budgetary allocations and staffing of the office. Complaints to this effect have been made with regard to the government’s financing of the OSP in Kenya.

Naturally, the processes for the appointment and removal of OSPs also affect the OSPs’ independence. It has been observed that elaborate and participatory processes for the appointment and removal of OSPs as well as security of tenure impacts positively on the independence and ultimately the effectiveness of the OSP. In South Africa, the OSP under Thabo Mbeki was suspended by the President because of an alleged “irretrievable breakdown” in his relationship with a member of the Executive. Such interference utterly undermines the effectiveness of the office.

Another factor contributing to the effectiveness of the OSP is the power to conduct investigations, as well as to direct and control investigations by other authorities. In Kenya, where the OSP has to rely on the police or other investigative agencies to gather evidence for prosecution, the OSP can be rendered ineffectual, particularly in the case of prosecutions against political appointees. Naturally this is because in many jurisdictions (including those we have considered), the investigative organs are most often controlled by the very government the OSP is established to police.

It is also critical that there is a clear demarcation of offences for which the OSP can prosecute. Any enabling legislation should carve out the offences which come under the Office’s mandate, to avoid turf wars and competition with other prosecuting authorities. At the same time, the Attorney-General and other delegated prosecuting authorities should make a commitment not to prosecute such offences, or interfere with the work of

¹ There are indications from GoG that the Jamaican system has influenced the choice of OSP model proposed for Ghana.

the OSP. This, as we discuss below, will require a significant amount of political will, prior to any amendments to the Constitution of Ghana.

3. Challenges to Setting up the OSP in Ghana

Ghana's current system presents some important issues which need to be considered in setting up the OSP. The power to initiate and conduct prosecution is vested in the Attorney-General by Art. 88(3) the Constitution, 1992. The Attorney-General may delegate this power to other agencies or persons but exercises the ultimate control over the initiation and conduct of criminal proceedings. The Attorney-General may even discontinue a case at any time before judgment on his/her sole discretion (under the power known as *nolle prosequi*). Unless a constitutional amendment is made, it is impossible for the Attorney-General's power of prosecution to be transferred wholesale or irrevocably to the OSP, or for the Attorney-General to do so without exercising a degree of control.

The laws on corruption, bribery, causing financial loss, etc. are scattered in a myriad of diverse pieces of legislation. There have also been debates among the general public on whether offences like bribery and corruption have been properly and clearly defined. In our view, there is the need to consolidate the laws and specifically provide for the offences over which the OSP may be given the mandate. This is an opportunity to enact a Bribery and Corruption Act (2017?) for Ghana.

4. Recommendations

In light of the challenges to the setting up of the OSP, it is suggested that:

- (1) the OSP may be set up through an Act of Parliament or through a Constitutional Instrument immediately.
- (2) Notwithstanding the legislative framework for the office to be set up, the OSP will remain under the control of the Attorney-General, since the provisions of Art. 88 of the Constitution will take priority over any legislation in the event of any conflict.
- (3) There is a clear requirement for political will of the GoG and executive for the OSP to operate independently so as to achieve the intended purpose, prior to any amendment of the Constitution. A clear statement to this effect might be included by GoG in the proposed legislation.
- (4) The Constitution ought to be amended to ensure that the powers of the AG as per Art 88 are made to reflect the independence and autonomy of the OSP. This is in line with all the other OSPs we have considered, where the A-G plays no prosecutorial function but rather focuses on acting as the legal representative of the Government in civil cases.
- (5) The process towards constitutional amendment (including by referendum) could begin immediately.
- (6) A national referendum on the Constitution, with a central issue being the creation of an independent and autonomous body to combat corruption, might bring additional focus to the issue of corruption in public consciousness and discourse. This could aid critical work that the President and GoG have committed to, around not only developing a stronger regulatory framework for tackling corruption, but addressing the underlying cultural and attitudinal changes that are necessary, primarily through education.
- (7) We consider that there is strong merit in the proposition that the various laws on bribery, corruption and related crimes be consolidated for easy accessibility, understanding and reference. This will assist the OSP in understanding its remit and also assist the public in understanding the new approach and intolerance to corruption-related offences.
- (8) The OSP should be given power to control and direct not just prosecution but the investigation of offences over which it may prosecute. This will be a further measure preventing interference by government of cases the law enforcement agencies choose to investigate diligently and towards prosecution.
- (9) The OSP should be placed within a closely co-ordinated framework of other investigating and prosecuting agencies. It is essential that extensive consideration is given to how cases are allocated to the various agencies for investigation and/or prosecution. Overlaps between agencies should to a large extent be removed, as should discretion as to which agency does what. A central co-ordinating office should determine the allocation of cases. Ultimately, the OSP should have the power to take over any

prosecution which it considers to be within its remit. This would avoid some of the turf war problems Tanzania has experienced.

- (10) Security of budget, tenure and emoluments, as well as a lifecycle of the OSP that runs independently of the President, will assist significantly to ensure the office is capable of carrying out its mandate with the resources required, and without interference.

B. INTRODUCTION

The Government of Ghana has proposed setting up an Office of the Special Prosecutor (the “OSP”) with the aim of creating an independent prosecutorial office which will seek to prosecute mainly corruption cases involving public officers, government officials and political figures. The setting up of this office is seen as a reaction to successive governments’ inability and most of the time reluctance to prosecute cases of corruption involving persons who are in one way or the other affiliated with the ruling government of the day.

This research note, commissioned by Strengthening Action Against Corruption (STAAC), a UKAID Department for International Development programme based in Ghana, is intended to aid discussion of the various issues surrounding the setting up of the OSP, by considering OSP offices in other jurisdictions to see how effective they have been and the challenges they have faced.

For the review, the following questions were used as guiding posts to address fully the OSP institution in the selected jurisdictions of Kenya, South Africa, Tanzania, Uganda and Jamaica:

- (1) How do the jurisdictions seek to guarantee independence of the OSP?
- (2) What is the relationship between the OSP in such jurisdictions and the Attorney-General?
- (3) What constitutional protection is given to the OSP?
- (4) What commentary or criticism has been made of the OSP and how it functions, as well as its effectiveness?
- (5) Are there any pieces of academic research which have examined the efficacy of an OSP and considered challenges, successes and failures?

This review also conducts a general review of the proposed OSP to be set up Ghana and considers some of the challenges to its establishment and operations.

5. KENYA

5.1. Overview

Kenya’s equivalent to the OSP is the Office of the Director of Public Prosecutions. The office of Director of Public Prosecutions is a constitutional office created under the Constitution of Kenya, 2010 and operationalized by the Director of Public Prosecutions Act, 2013.² The Director of Public Prosecutions (the “DPP”) is nominated by the President and after approval by Kenya’s National Assembly is appointed by the President.³

5.2. Qualification for Appointment as DPP

To qualify for appointment as a DPP, one must have the same qualifications as a person to be appointed to the High Court in Kenya.⁴ The qualifications for appointment to a High Court in Kenya and by extension to the position of the DPP are:

- (a) *at least ten years’ experience as a superior court judge or professionally qualified magistrate; or*
- (b) *at least ten years’ experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or*

² Kenya Constitution, 2010, article 157(1).

³ *Ibid.*, article 157(2).

⁴ *Ibid.*, article 157(3).

- (c) [the person must have] held the qualifications specified in [(a) and (b) above] for a period amounting, in the aggregate, to ten years.

5.3. Powers of the DPP

The DPP has the power to direct the police service to investigate any information or alleged criminal conduct.⁵

The DPP exercises the state's power of prosecution and is responsible for all criminal prosecutions except in cases of offences for which the power to prosecute has been conferred on another authority by Kenya's Parliament.⁶

The DPP may also take over any criminal proceeding instituted or undertaken by another authority with the permission of that authority. The DPP, in a criminal proceeding may also discontinue a matter at any stage before judgment is given with the permission of the court.⁷ The DPP may delegate his/her powers, either generally or specifically.⁸ Regarding corruption and breach of ethics, the DPP may commence and undertake prosecution on the recommendation of the Ethics and Anti-Corruption Commission Act, 2011.⁹

It is noteworthy that Kenya has a distinct legislation on anti-corruption, bribery and breach of ethics— the Anti - Corruption and Economic Crimes Act, 2003.

5.4. How does Kenya seek to guarantee the independence of the DPP ('OSP')?

The DPP's independence from the arms of government, particularly, the executive is assured in that the DPP does not require the consent of any person or authority to commence criminal proceedings.¹⁰ The DPP shall also not be under the direction or control of any person or authority in the exercise of his or her powers or functions.¹¹

5.5. What constitutional protection is given to the DPP ('OSP')?

Upon appointment, the DPP shall hold office for a term of eight years after which he/she shall not be eligible for re-appointment.¹² This term allows for a separate cycle of appointment from that of the President, who runs for a maximum of two five year terms. In this way, the DPP's position is secured for a certain number of years unless he/she resigns or is removed from office in accordance with laid-down procedure under the Kenyan Constitution.

A DPP may be removed from office only on the following grounds:

- (a) inability to perform his/her function as a result of mental or physical incapacity;
- (b) non-compliance with leadership and integrity requirements under Chapter Six of the Constitution;
- (c) bankruptcy;
- (d) incompetence; or
- (e) gross misconduct or misbehavior.¹³

The Constitution sets out an elaborate procedure under which a DPP may be removed on any of the above listed grounds. The process involves the following:

- (a) a person sends a written petition to the Public Service Commission;
- (b) the Public Service Commission refers the petition to the President if it is satisfied that any of the grounds for removal exist;
- (c) the President within fourteen (14) days suspends the DPP and appoints a tribunal consisting of four (4) members who hold or held positions as judges of the superior court or who are qualified to be appointed judges of the superior court, one(1) advocate (lawyer) of at least fifteen (15) years' standing nominated

⁵ *Ibid.*, article 157(4).

⁶ *Ibid.*, articles 157 (6) &(12). The courts before which the DPP may prosecute does not include a court martial.

⁷ *Ibid.*, articles 157 (6) &(8).

⁸ *Ibid.*, article 157(9).

⁹ Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011), section 11(1)(1)(d).

¹⁰ *Ibid.*, article 157(10).

¹¹ *Ibid.*

¹² *Ibid.*, article 157(5).

¹³ *Ibid.*, articles 158 (1).

by the statutory body responsible for the professional regulation of advocates, and two (2) other persons with public affairs experience to inquire into the matter;¹⁴ and

(d) the President shall act on the recommendations of the tribunal.

5.6. What is the relationship between the OSP in such jurisdictions and the Attorney-General?

The office of the Attorney-General in Kenya is another constitutionally created office.¹⁵ It is a separate office from the office of the DPP. Similarly to the DPP, the Attorney-General (the “A-G”) is nominated by the President and appointed by the President after approval of the National Assembly.¹⁶ The A-G has no power to commence or undertake criminal proceedings but is responsible for representing the government in all civil proceedings where the national government is a party.¹⁷ The A-G also serves as the principal legal adviser to the Government and may delegate his or her powers to subordinate officers, either generally or specifically.¹⁸

5.7. What commentary or criticism has been made of the OSP and how it functions, as well as its effectiveness?

The office of the DPP has been criticized as understaffed therefore contributing to a large backlog of cases in the courts.¹⁹

The challenges include delay in the conclusion of cases prosecuted due to reasons such as hostile, uncooperative and unavailable witnesses, shortage of anti-corruption courts, frequent transfers of magistrates, high turn-over of investigators and bottlenecks in extradition processes. Another noted challenge is the lack of capacity building of staff.²⁰

5.8. Are there any pieces of academic research which have examined the efficacy of an OSP and considered challenges, successes and failures?

The DPP has the power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the IGP shall comply with any such direction.²¹ The DPP relies on investigations conducted by the police and other institutions with investigatory powers to conduct investigations based on which the DPP can commence prosecutions. The police have been cited for being reluctant to investigate certain cases, and furthermore being accused of preventing certain investigations from proceeding.²²

Criticism has also been levelled against the DPP for the wide range of prosecutorial discretion that it enjoys under the Constitution in the selection of cases, interference with private prosecution and withdrawal of cases.²³ It has been argued that the basis for which the DPP exercises its prosecutorial discretion may not be objective.²⁴

Another challenge of the office of the DPP is stated as the inadequacy of human resources which is evident in the low number of trained prosecutors serving with the office of the DPP.²⁵

5.9. Conclusions:

¹⁴ The superior courts of Kenya, according to article 162(2) of the Kenya Constitution, 2010 are the Supreme Court, the Court of Appeals, the High Court and other courts with powers equivalent to the High Court.

¹⁵ *Ibid.*, article 156 (1).

¹⁶ *Ibid.*, article 156 (2).

¹⁷ *Ibid.*, article 156 (4)(b).

¹⁸ *Ibid.*, article 156 (4)(a) & (7).

¹⁹ Katto Wambua, opinion on *allafrica.com* dated 18th May, 2012.

²⁰ Report of the Taskforce on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, presented to the President, dated October, 2015; presented to Uhuru Kenyatta, President of the Republic of Kenya; p. 24.

²¹ Constitution of Kenya, article 157(4).

²² Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, Springer International Publishing, Switzerland, 2015; discussing prosecutions related to post-election violence in Kenya; p.136. & p.111

²³ Sosteness Francis Materu, *The Post-Election Violence in Kenya, Domestic and International Legal Responses*, International Criminal Justice Series, Vol 2, Asser Press, 2015, p.131.

²⁴ Sosteness Francis Materu, *supra* note 21, p. 132.

²⁵ *Ibid.*, p. 112.

- (1) The Kenyan DPP is being blocked by law enforcement agencies which fail to refer cases for prosecution. This suggests that an OSP should have investigative powers of its own, or a power to compel other authorities to investigate.
- (2) The wide range of prosecutorial discretion of the DPP may be addressed by bolstering the transparency and accountability of that office over its decisions to prosecute (or more particularly, not to prosecute). The DPP (and investigators) should be required to report on the conclusion of investigations where those investigations do not result in prosecution. This would serve two purposes: (a) it would aid in ensuring that decisions to end investigations are made with integrity; and (b) it would allow those who had been under investigation to have their names cleared, since being investigated carries significant reputational damage.
- (3) The low number of trained prosecutors is functional of a lack of investment into the DPP in Kenya. It is essential for the effectiveness of such an office that it is properly financially resourced and that funds are budgeted for recruitment of sufficient prosecutors.
- (4) The above analysis indicates that the DPP could do with closer collaboration with the law enforcement agencies, preparation of a strategic plan (which is public) and closer interaction with the executive to ensure that its infrastructural and capacity needs are adequately budgeted for.

6. SOUTH AFRICA

6.1. Overview

The South African Constitution establishes a single National Prosecution Authority (“NPA”) with a National Director of Public Prosecutions (the “NDPP”) as the head and other Directors of Public Prosecution, all appointed by the President.²⁶ The Constitution also allows for the appointment of other prosecutors under the NPA through an Act of Parliament.²⁷ Whereas the NDPP is appointed by the President only, the DPPs are also appointed by the President, but in consultation with the Minister of Justice and the NDPP.²⁸ Prosecutors are appointed on the recommendation of the NDPP or his designated members in the National Prosecuting Authority.²⁹

6.2. Qualification for Appointment as NDPP

The Constitution does not specify the qualifications for DPPs and transfers the power to make this determination to Parliament through an Act of Parliament. The National Prosecution Authority Act which was enacted pursuant to article 179 of the Constitution provides that a South African citizen may be appointed to the position of NDPP if he or she possesses the legal qualifications to practice in South Africa and is a fit and proper person based on his or her experience, conscientiousness and integrity to be entrusted with the responsibilities of the office.³⁰

6.3. Powers of the NDPP

The National Prosecuting Authority has the power to institute criminal proceedings and carry out other incidental functions on behalf of the state.³¹ The NDPP is given the additional power to carry out investigations he may deem necessary in respect of a prosecution or prosecution process of a case or matter.³² The National Prosecution Authority Act, No 32 of 1998 allows the President to establish by proclamation not more than 3 investigating directorates under the NPA in respect of specific (categories of) offences. The investigation powers of the NDPP in relation to the specified offences are carried out through the investigating directorates.

6.4. How does South Africa seek to guarantee the independence of the NPA (‘OSP’)?

²⁶ Constitution of the Republic of South Africa, No. 108 of 1996, article 179(a), hereinafter referred to as the South African Constitution.

²⁷ *Ibid.*, art. 179 (b).

²⁸ *Ibid.*, article 179(a) & NPA Act, section 10.

²⁹ National Prosecuting Authority Act, No 32 of 1998, hereinafter referred to as the NPA Act, section 13 (a).

³⁰ NPA Act, section 9.

³¹ Constitution of South Africa, art. 179 (2).

³² NPA Act, section 22 (4)(a)(i).

The Executive arm of government exercises substantial amounts of control of the NDPP and the National Prosecution Authority. The NDPP is not totally independent of the executive as he must determine a prosecution policy with the concurrence of the Cabinet member or minister responsible for justice and in consultation with the DPPs.³³ The prosecution policy as determined must be observed in all prosecution processes.³⁴

The NDPP shall hold office for a non-renewable term of 10 years but must vacate his or her office on attaining 65 years.³⁵ The President, may however retain the NDPP or a DPP for an aggregate period not exceeding 2 years after the attainment of 65 years but the NDPP's tenure must not exceed 10 years in total.³⁶ The President's sole discretion in retaining a DPP may be used as a means of ensuring that the NDPP or DPP courts favour with the President.

The President controls the NDPP and deputy NDPPs through the power to provisionally suspend such an officer pending an enquiry into the person's fitness to hold such a position.³⁷ The President may also remove the NDPP or a DPP for misconduct; continued ill-health; incapacity to carry out his or her duties of office efficiently; or on account that he or she no longer qualifies to be appointed to the position.³⁸

Furthermore, the Cabinet member responsible for the administration of justice exercises final responsibility over the prosecuting authority.³⁹ The NDPP has the power to review a decision to prosecute or not to prosecute after consultation with the relevant DPP and after taking representations from the accused person, the complainant and other relevant person or party.⁴⁰ All other matters apart from the prosecution function of the NDPP, the determination of the prosecution policy and the review of a decision to prosecute or not are to be determined through an Act of Parliament. The Constitution therefore delegates the determination of the functions and powers of the NDPP and the prosecuting authority to Parliament.

The NPA Act attempts to control the President's power to remove the NDPP or a DPP by providing that the president shall communicate the removal of the NDPP or DPP to Parliament which shall within 30 days after receiving the message pass a resolution on whether restoring the NDPP or a DPP to his position is recommended and the President shall restore the NDPP or DPP to his office if so resolved by Parliament.⁴¹ This check using the requirement for Parliament's ratification of the President's action may not work in practice where the President's party holds a majority in Parliament. The NDPP or deputy NDPP may or may not receive his salary during the period of his temporary suspension which decision remains with the President.⁴²

The President may also remove the NDPP or his deputy where each of the respective houses of Parliament in the same session requests that the President removes the NDPP or his deputy upon the same grounds as the President may on his own remove the NDPP or the deputy NDPP.⁴³

The NPA Act tries to give a semblance of independence to the NPA by providing that subject to the Constitution, the arms of government are not to interfere, hinder or obstruct the NPA.⁴⁴ Given that various portions of the Act gives the executive and the legislature power to direct, control and even remove the NDPP and other DPPs, the formal independence sought to be provided in section 32(1) of the NPA Act is rendered nugatory.

³³ Constitution of South Africa, art. 179 (5) (a).

³⁴ *Ibid.*

³⁵ NPA Act, section 25(1).

³⁶ *Ibid.*, section 12(1) &(4).

³⁷ *Ibid.*, section 12(6)(a)

³⁸ *Ibid.*

³⁹ Constitution of South Africa, article, 179 (6).

⁴⁰ *Ibid.*, 179 (5)(d).

⁴¹ NPA Act, section 12(b) – (d).

⁴² *Ibid.*, section 12(e).

⁴³ *Ibid.*, section 12(7).

⁴⁴ *Ibid.*, section 32(1)(b).

6.5. What constitutional protection is given to the DPP ('OSP')?

No formal constitutional protection is given to the NDPP or DPPs. What the Constitution provides is for the national legislature that is the NPA Act to ensure that the NPA exercises its functions without fear, favour or prejudice.⁴⁵

6.6. What is the relationship between the OSP in such jurisdictions and the Attorney-General?

The South African Constitution does not provide for an office of Attorney-General. The NPA Act repealed the Attorney-General Act, No. 92 of 1992.⁴⁶ The transitional provisions of the NPA provided for the conversion of the position of an attorney-general to a DPP.⁴⁷

6.7. What commentary or criticism has been made of the OSP and how it functions, as well as its effectiveness?

Unhealthy competition between the police and investigating directorate because of shared investigatory powers has been one of the main criticisms of the NPA.⁴⁸ South Africa's NDPPs have over the years been involved or connected to political events creating the perception that their independence is compromised.⁴⁹

6.8. Are there any pieces of academic research which have examined the efficacy of an OSP and considered challenges, successes and failures?

The mode of appointment of the NDPP and other DPPs has been argued as limiting the independence of the NPA.⁵⁰ It has also been argued that the NDPP's discretionary power to refuse to prosecute after a review of a case does not promote justice. Further, certain academics consider that any decision over prosecution may not be amenable to judicial review under South African law. This again impacts on accountability.

It is reported that the NDPP currently has a tendency to decline prosecution.⁵¹ Some commentators have argued that the appointment of the NDPP by the President undermines the independence of the NPA.⁵² The provisional suspension powers as well as the removal powers of the President over the NDPP are subject to abuse and serve to weaken the independence of the NPA and the NDPP.⁵³ A case in point is where the NDPP, Vusi Pikoli was suspended by Thabo Mbeki for what official communiqué from the President's office termed "irretrievable breakdown" in the working relationship between the NDPP and the Minister of Justice and Constitutional Development.⁵⁴

6.9. Conclusions

- (1) The South African system allows for too much interference by the government of the day with the NPA. The appointment and suspension system gives great power to the president, and the cabinet can interfere with prosecution policy, which must be approved by them.
- (2) The Constitution does not provide any additional protection of the independence of the NPA. It is established by statute.

⁴⁵ South African Constitution, article 179(4).

⁴⁶ *Ibid*, section 44, schedule to the NPA Act.

⁴⁷ *Ibid*. section 43.

⁴⁸ Mark Shaw, *Crime and Policing in Post-apartheid South Africa: Transforming Under Fire*, Hurst & Co. London, 2002, p. 150. The Directorate for Special Operations, also referred to as 'The Scorpions' was established through the National Prosecuting Authority Amendment Act No 61 of 2000 and came into operation in January 2001. The Scorpions although now dissolved was cited for creating tension between the NPA and the police.

⁴⁹ Jean Redpath, *Failing to Prosecute? Assessing the state of the National Prosecuting Authority of South Africa*, Institute for Political Studies, Pretoria, 2012, p. 19.

⁵⁰ Jens Christian Keuthen, *The South African Prosecution Service: Linchpin of the South African Criminal Justice System?* Dissertation for fulfillment of requirement of Master of Laws (LL.M) at the University of Cape Town, p.. 23.

⁵¹ Jean Redpath, p. 41.

⁵² *Ibid.*, p. vi-vii.

⁵³ Nico Horn, *The Independence of the Prosecutorial authority of South Africa and Namibia: A comparative study*, p. 130.

⁵⁴ *Ibid*.

- (3) Failure to demarcate the investigatory powers of the various investigative agencies has led to “unhealthy competition” (in other words a turf war) between agencies.
- (4) The discretion not to prosecute may not be scrutinized through judicial review or some similar mechanism.
- (5) The President’s powers of suspension also severely impact on the independence of the office.

7. TANZANIA

7.1. Overview

The office of Director of Public Prosecutions was established through an amendment to the Tanzanian Constitution 2005.⁵⁵

7.2. Qualification for Appointment as DPP

The Constitution does not specify who appoints the DPP but in practice, the President appoints the DPP while the A-G may also appoint an acting DPP.⁵⁶ This practice of the appointment of the DPP by the President may be due to the repealed section 89 of the Criminal Procedure Act, 1985 which gave this power of appointment to the President. To qualify as a DPP, one must be a public officer qualified as an advocate or a person qualified to be registered as an advocate and in addition to any of the two qualifications, has continuously held those qualifications for a period of not less than ten years.⁵⁷ One cannot be appointed a DPP unless that person can be appointed as a judge of the High Court.⁵⁸

7.3. Powers of the DPP

The DPP is vested with the power to institute, prosecute and supervise all criminal prosecutions.⁵⁹ The DPP also has powers to direct officers under him to exercise the powers granted him/her under the Constitution or to instruct any other officer to do so.⁶⁰ The DPP is the head of operations in relation to prosecutions and coordination of investigation conducted by the investigative organs. The DPP supervises officers in the office of the DPP and other officers who conduct prosecutions under his instructions and also has powers to do anything incidental to the conduct of prosecution.⁶¹ In the performance of his duties, the DPP has the power to delegate any Law Officer which includes the Attorney-General or state attorneys to carry out prosecution.⁶² The DPP shall also represent government in all criminal appeals in the High Court and Court of Appeal.⁶³

7.4. How does Tanzania seek to guarantee the independence of the DPP?

The Constitution provides that the DPP shall be free and shall not be interfered with by any person or authority in the exercise of his powers.⁶⁴ The DPP is to have regard to the need to dispensing justice, preventing the misuse of procedures for dispensing justice and the public interest.⁶⁵ The powers of the DPP are somehow limited by the requirement of the DPP to exercise his powers as may be prescribed by any law enacted or to be enacted by Parliament.⁶⁶

One such law regulating the powers of the DPP is the Office of the Attorney General (Discharge of Duties) Act, 2005 (the “Attorney General Act”) which provides in section 11(1) that the DPP shall have regard to directions of a general or specific nature given by the Attorney General in relation to Government policy or the supervision of officers within the Directorate of Public Prosecutions. This seeming control over how the DPP exercises control and authority over officers in his directorate is watered down by section 11(2) which provides that the preceding

⁵⁵ Constitution of the United Republic of Tanzania, 1977, (hereinafter Constitution of Tanzania), Act No. 1 of 2005, art 12.

⁵⁶ National Prosecutions Service Act, 2008, section 6. This Act applies only to prosecution in mainland Tanzania.

⁵⁷ Constitution of Tanzania, 1977, article 59B(1)& 59(2).

⁵⁸ National Prosecutions Service Act, 19(2).

⁵⁹ Constitution of Tanzania, article 59B(2).

⁶⁰ *Ibid.*, article 59B(3).

⁶¹ Office of the Attorney General (Discharge of Duties) Act, 2005, section 10(1)(a) &(d).

⁶² *Ibid.*, section 10(2)(a).

⁶³ *Ibid.*, section 10(3)

⁶⁴ *Ibid.* & Constitution of Tanzania, article 59B(4).

⁶⁵ Constitution of Tanzania, article 59B(4).

⁶⁶ *Ibid.*, article 59(5).

section shall not be construed as abrogating or in any way limiting the powers of the DPP in relation to public prosecutions. The National Prosecutions Service Act, 2008 was also made pursuant to the power granted Parliament to make laws prescribing how the DPP shall exercise his powers and providing for other aspects of the office of the DPP.

Furthermore, the ways in which the DPP may be removed whittle away any little independence that the DPP may have. The DPP may be removed for an inability to perform due to illness or any other cause or a breach of the code of ethics provided in the Office of the Attorney-General (Discharge of Duties) Act, 2005 or other law concerning ethics of public officials.⁶⁷ One such rule of ethics in the Attorney General Act which may be a ground for the removal of the DPP is that the DPP is to handle matters without undue delay, risk or unnecessary expense to the Government.⁶⁸ Moreover the A-G is vested with the power to initiate the removal process of the DPP by advising the President to that effect.⁶⁹ The President if he considers the matter has to be investigated shall appoint a special tribunal consisting of 3 persons nominated by the Attorney-General.⁷⁰ The members of the special tribunal must be qualified for appointment as a High Court judge or a Court of Appeal judge and the President shall remove the DPP on their recommendations.⁷¹

7.5. What constitutional protection is given to the DPP?

No constitutional protection is given the DPP except that the DPP has the same terms and conditions as those of a High Court judge.⁷² Similarly to a High Court judge, a DPP may retire on attaining 55 years but shall retire on attaining 60 years.⁷³ Notwithstanding the decision of a judge to retire, the President may direct that such a judge continues in service.⁷⁴ The President may also extend the term for a judge who is to vacate his position on attaining 60 years.⁷⁵

7.6. What is the relationship between the OSP in such jurisdictions and the Attorney-General?

The qualifications for appointment as an Attorney-General are the same as that of a DPP.⁷⁶ The Attorney-General serves as the Government's adviser on matters of law and performs any other functions pertaining or connected to law which may be referred or assigned by the President or which may be entrusted him under the Constitution or **by any law**.⁷⁷ The Attorney-General Act which is the "any law" providing for additional functions of the A-G provides that "without prejudice to" articles 59 and 59B (on the DPP) of the Tanzanian Constitution, the duties of the A-G shall include the **control of** "all criminal prosecutions in the country".⁷⁸ This provision effectively brings the functions of the DPP to "institute, prosecute and supervise all criminal prosecutions" in the country under the control of the A-G.

The National Prosecutions Service (the "Service") of which the DPP is the head is staffed with state attorneys.⁷⁹ It is not clear who appoints the state attorneys but what is clear is that senior officers of the Service are appointed by the Deputy A-G.⁸⁰ The A-G also has the power to appoint an acting DPP in the absence of the DPP by reason of illness, other cause or vacancy.⁸¹ This provision effectively brings the Service under the control of the executive through the A-G.

⁶⁷ National Prosecutions Service Act, section 19(3).

⁶⁸ Attorney General Act, Sched., para. 5(2).

⁶⁹ National Prosecutions Service Act, section 19(4).

⁷⁰ *Ibid.*, section 19(4) & (5).

⁷¹ *Ibid.*, section 19(5) & (7).

⁷² *Ibid.*, section 19(1).

⁷³ Constitution of Tanzania, article 110(1) & (2).

⁷⁴ Constitution of Tanzania, article 110(2) & (3).

⁷⁵ *Ibid.*

⁷⁶ Attorney General Act, section 29(2).

⁷⁷ Attorney General Act, section 29(3).

⁷⁸ Attorney General Act, section 8(1) (h).

⁷⁹ National Prosecution Service Act, section 5(1).

⁸⁰ *Ibid.*, section 7(1).

⁸¹ *Ibid.*, section 6.

The A-G appoints qualified persons as state attorneys and directs the state attorneys on the nature of their functions in the instrument appointing them.⁸² The Office of the A-G has the power to enforce the code of ethics set out for state attorneys and to discipline state attorneys in relation to the code of ethics.⁸³ However, where a breach of the code of ethics is made by a state attorney outside of the office of the A-G, the Deputy A-G may recommend to the head of that agency or department for disciplinary action to be taken against such officer.⁸⁴

7.7. What commentary or criticism has been made of the Office of the DPP and how it functions, as well as its effectiveness?

The office of the DPP has been criticized as understaffed and ill-equipped therefore contributing to a large backlog of cases in the courts.⁸⁵

The office of the DPP has been likened to a department operated under the Attorney General's Office.⁸⁶ It has also been argued that the administrative set up of the DPP with the DPP effectively being controlled by the Attorney-General does not provide for the independence of the DPP.⁸⁷ It is alleged that the government of Tanzania uses the office of the DPP to control the criminal prosecutions of high profile political persons to suit its own devices.⁸⁸ It is further alleged that the A-G intentionally stifled the office of the DPP through the control of the office of the DPP's budget and through cutting down the number of state attorneys employed at the office of the DPP.⁸⁹ The executive's control of the office of the DPP through the A-G is evidenced in the number of DPPs Tanzania has had (believed to be ten, which, given the length of time they serve, is considered by one commentator to be too many).⁹⁰

7.8. Are there any pieces of academic research which have examined the efficacy of an OSP and considered challenges, successes and failures?

The OSP, it is observed, has budgetary constraints as well as very few lawyers of state attorneys allocated to it.⁹¹

7.9. Conclusions

- (1) The DPP suffers from a severe lack of independence, being under the control of the AG and subject to any other laws enacted by Parliament that seek to impact on the office's control.
- (2) There is no Constitutional backing to the independence of the office.
- (3) Tanzania is a prime example of an office lacking resources, being understaffed, and that leading directly to a backlog of cases.
- (4) The control of the AG has led to direct undermining of the office through budget cuts.
- (5) The lack of independence and presidential control has led to the office being seen as an illegitimate means of exercising political control over opponents.

⁸² Attorney General Act, sections 24 & 25.

⁸³ *Ibid.*, section 28.

⁸⁴ *Ibid.*, section 28(4).

⁸⁵ Katto Wambua, opinion on allafrica.com dated 18th May, 2012 & Etannibi E O Alemika, *Prosecution in Sierra Leone, Tanzania and Zambia*, Institute for Security Studies, Policy Brief Nr 14, October 2009, p.3.

⁸⁶ Kokuhumbya Angela, *The Independence of the Office of the Director of Public Prosecutions in Tanzania*, LLM Dissertation, Univ. of Dar es Salaam, November 2010, p. 12.

⁸⁷ *Ibid.*, p. vi.

⁸⁸ *Ibid.*, p. 10.

⁸⁹ *Ibid.*, p. 92.

⁹⁰ *Ibid.*, p. 9.

⁹¹ Tibasana M.L., *Effective Administration of the Police and Prosecution in Criminal Justice: The Practice and Experience of the United Republic of Tanzania*, 120th International Senior Seminar Participants' Papers, p. 60.

8. UGANDA

8.1. Overview

The Director of Public Prosecutions is a constitutionally established position.⁹² The DPP is appointed by the President on the recommendation of the Public Service Commission and with the approval of parliament.⁹³ The DPP is to abide by the provisions in the Leadership Code Act, 2002 dealing with standards and declaration of assets for public officers.⁹⁴

8.2. Qualification for Appointment as NDPP

Only a person qualified to be appointed a High Court judge can be appointed a DPP.⁹⁵

8.3. Powers of the DPP

The DPP has power to direct the police to investigate any criminal matter; to institute criminal proceedings in any court with jurisdiction against any person or authority and to take over and continue any criminal proceedings against instituted by another person or authority. The DPP may delegate these functions or powers to other officers with general or specific instructions.⁹⁶

The DPP also has the power to discontinue a criminal proceeding instituted by him or by any person or authority at any stage before judgment with the consent of the Court and this power can only be exercised by the DPP exclusively and is not delegable.⁹⁷

The DPP in the exercise of his powers is to have regard to the public interest, administration of justice and the need to prevent abuse of legal process.⁹⁸

The DPP's powers under the Constitution are further elaborated in various legislations such as the Anti-Corruption Act, 2009, the Criminal Code Act, 1950 and the Trial by Indictment Act, 1970.

8.4. How does Uganda seek to guarantee the independence of the DPP?

The Constitution mandates that the DPP shall not be subject to the direction or control of any person or authority in the exercise of his functions.⁹⁹

8.5. What constitutional protection is given to the DPP?

The DPP is provided with the same terms and conditions as those of a High Court judge.¹⁰⁰ Flowing from the terms and conditions for a High Court judge, the DPP once appointed may retire at 60 years but shall vacate his office on attaining the age of 65 years.¹⁰¹ The DPP may only be removed from office for the inability to perform his functions due to infirmity of body or mind; misbehavior or misconduct or incompetence.¹⁰²

To kickstart the removal of the DPP, cabinet or the Public Service Commission shall recommend the removal of the DPP to the President who shall set up a tribunal consisting of 3 persons who have held positions or are judges or who are advocates of at least 10 years standing to investigate the matter and make recommendations for the removal of the DPP based on the grounds for the removal of the DPP under the Constitution or otherwise.¹⁰³ The President shall then act on the recommendations of the tribunal.¹⁰⁴ While the matter is referred

⁹² Uganda Constitution, 1995, article 120(1).

⁹³ *Ibid.*

⁹⁴ Leadership Code Act, 2002, Sched. 3(29).

⁹⁵ Uganda Constitution, article 120(2).

⁹⁶ *Ibid.*, article 120(3) (a)-(b) & 4(a).

⁹⁷ *Ibid.*, article 120(3) (d) & 4(b).

⁹⁸ *Ibid.*, article 120(5).

⁹⁹ *Ibid.*, article 120(6).

¹⁰⁰ *Ibid.*, article 120(7).

¹⁰¹ *Ibid.*, article 144(1).

¹⁰² *Ibid.*, article 144(2) (a)-(c).

¹⁰³ *Ibid.*, article 144(3), (4) (c).

¹⁰⁴ *Ibid.*, article 144(3).

to the tribunal, the President shall suspend the DPP until the tribunal makes its recommendations but the suspension shall cease to have effect should the tribunal recommend that the DPP should not be removed.¹⁰⁵

8.6. What is the relationship between the OSP in such jurisdictions and the Attorney-General?

The office of the Attorney General is also constitutionally established and the A-G serves as the principal legal advisor of government.¹⁰⁶ There does not seem to be any relationship between the A-G and the DPP in the exercise of their respective functions except that the DPP may delegate such powers as he can delegate under the Constitution to a member of the A-G's chambers to prosecute cases in the High Court.¹⁰⁷

8.7. What commentary or criticism has been made of the OSP and how it functions, as well as its effectiveness?

There is a dearth of commentary on the effectiveness of the DPP and how it functions. Commentary on the DPP simply looks at the structure and functions of the DPP.

8.8. Are there any pieces of academic research which have examined the efficacy of an OSP and considered challenges, successes and failures?

Very little or no discussion is made on the office of the DPP.

8.9. Conclusion

- (1) The relatively simple system in place in Uganda separates the DPP from the AG and guarantees the DPP's independence under the Constitution. This is a solid starting point for independence.
- (2) The office has no investigative function, and is therefore, like Kenya, reliant on the investigating authorities to bring cases to it to be prosecuted. There is no academic discussion that we have found of the efficacy of the system in bringing forward corruption cases.
- (3) Uganda continues to recover from years of dictatorship and a lack of freedom of expression. This may impact on the lack of data about the effectiveness of the DPP.

9. JAMAICA

9.1. Overview

The office of the Director of Public Prosecutions is a constitutionally established as a public office.¹⁰⁸ The DPP is appointed on the advice of the Governor-General acting on the advice of the Public Service Commission.¹⁰⁹

9.2. Qualification for Appointment as DPP

Only a person qualified to be appointed as a judge of the Supreme Court can be appointed a DPP.¹¹⁰

9.3. Powers of the DPP

The DPP has power to institute and undertake criminal proceedings against any person in any court except in martial court.¹¹¹ Note that in Jamaica a private person can commence a prosecution. The DPP may take over and continue criminal proceedings instituted by another person or authority and also has the power to discontinue criminal proceedings at any time before judgment is given and the exercise of these two powers are vested exclusively in the DPP.¹¹² The DPP also has exclusive powers of *nolle prosequi* (similar to those in Ghana).

¹⁰⁵ *Ibid.*, article 144(5) & (6).

¹⁰⁶ *Ibid.*, article 119 (1) & (3).

¹⁰⁷ Trial on Indictments Act, 1970, section 136.

¹⁰⁸ Jamaica (Constitution) Order in Council, 1962, hereinafter called the Jamaican Constitution, article 94(1).

¹⁰⁹ *Ibid.*, article 125 (1)

¹¹⁰ *Ibid.*, article 94(2).

¹¹¹ *Ibid.*, article 94(3)(a).

¹¹² *Ibid.*, article 94(3)(b)-(c) & (5)..

All the powers of the DPP are delegable.¹¹³

9.4. How does Jamaica seek to guarantee the independence of the DPP?

The Constitution mandates that the DPP shall not be subject to the direction or control of any person or authority in the exercise of his functions.¹¹⁴

9.5. What constitutional protection is given to the DPP?

The Constitution protects the DPP by providing that the emoluments and terms and conditions of service other than allowances of the DPP shall not be altered to his disadvantage during his term of office.¹¹⁵ The salary of the DPP is charged to the Consolidated Fund.¹¹⁶ The DPP once appointed may hold office until he attains the age of 60 years but his tenure may be extended to his attaining 65 years by the Governor-General acting on the recommendation of the Prime Minister and after consultation with the Leader of the Opposition.¹¹⁷ The involvement of the Leader of the Opposition for the extension of the DPP's tenure ensures that the executive does not use the likelihood of extensions of tenure as a means of controlling the DPP.

The DPP may be removed by the Governor-General for inability to discharge the powers of his office or for misbehavior subject to a detailed removal process.¹¹⁸ The Prime Minister first has to make a recommendation to the Governor-General for the removal of the DPP on any of the permitted grounds.¹¹⁹ The Governor-General is then to set up a tribunal consisting of 3 members who hold or have held positions as judges having unlimited criminal and civil jurisdiction in some part of the Commonwealth which shall enquire into the matter and make recommendations to the Governor-General.¹²⁰ This may be one of the strongest protection given a DPP in any jurisdiction as the set-up of the tribunal infers that the members of the tribunal shall be judges of superior courts in any other Commonwealth jurisdiction as it is usually the case that superior courts have unlimited jurisdiction in criminal and civil matters. This reduces the risk of arbitrary removals as a 'foreign' judge may have no incentive to be biased in recommending the removal of a DPP.

9.6. What is the relationship between the OSP in such jurisdictions and the Attorney-General?

The office of the Attorney General is also constitutionally established and the A-G serves as the principal legal advisor of government.¹²¹ There is no constitutionally mandated relationship between the office of the DPP and the office of the A-G.

9.7. What commentary or criticism has been made of the OSP and how it functions, as well as its effectiveness?

It has been suggested that the effectiveness of the DPP is limited by the fact that it does not have investigative powers which powers reside in the police service.¹²² There may be a "systematic weakness in investigations" on the part of the police and the police are sometimes unwilling to conduct effective investigations or even carry out any investigations at all.¹²³

9.8. Are there any pieces of academic research which have examined the efficacy of an OSP and considered challenges, successes and failures?

No academic research on the OSP (DPP) was found in our desktop study.

9.9. Conclusions

¹¹³ *Ibid.*, article 94(4).

¹¹⁴ *Ibid.*, article 94(6).

¹¹⁵ *Ibid.*, article 95(1).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, article 96(1).

¹¹⁸ *Ibid.*, article 96(4).

¹¹⁹ *Ibid.*, article 96(6).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, article 79(1).

¹²² Chevigny, Whitman, & Chevigny, The Americas Watch Committee, Human Rights in Jamaica, Human Rights Watch, September 1986, p. 27.

¹²³ *Ibid.*, p. 28.

- (1) The appointment of the DPP by the Governor-General (a largely celebratory role), on the recommendation of the Public Services Commission, may impact (positively) on the independence of the office. The Prime Minister (who like the UK Prime Minister is the head of government) has no role to play.
- (2) The Office is similar to that in Kenya, and the lack of investigative functions has been similarly criticized.
- (3) There is a clear separation of the DPP and the AG.
- (4) Security of tenure has been reasonably well considered with ring-fenced funding and a removal/retirement process that is robust.

Figure 1: Comparison Chart

		Kenya	South Africa	Tanzania	Uganda	Jamaica
1.	DPP office?	YES	YES	YES	YES	YES
2.	Created by Constitution?	YES	YES	YES	YES	YES
3.	Who appoints the DPP?	Appointed by President with approval of National Assembly	(NDPP) President only	Appointed by President in practice	Appointed by President on the recommendation of the Public Service Commission with the approval of Parliament.	Governor-General on the recommendation of the Public Service Commission.
4.	In charge of all prosecutions?	Shares prosecution function with other bodies specified by law.	YES	YES	YES	YES
5.	Have investigation powers?	No, but can direct the police to investigate	YES	YES	YES	No but can recommend to the police to investigate
6.	Independence?	Formal and substantive Independence	Formal independence but lacks substantive independence	Formal independence but lacks substantive independence	Formal and substantive Independence	Formal and substantive Independence
7.	Independent of A-G?	YES	(There is no A-G but N/DPP is under the control of the Minister responsible for justice.	NO. A-G controls the conduct of criminal proceedings, staffs and budget	YES	YES
7.	Specified tenure	YES	YES	YES, by reference to a legislative Act.	YES	YES
8.	Grounds for removal provided by Constitution?	YES	NO. Provided in a legislative Act.	NO. Provided in a legislative Act.	YES	YES
9.	Removal process	By President but first with petition by PSC and recommendation by special tribunal to be set up.	By president with recommendation or ratification by Parliament	By President but first with petition by A-G and recommendation by special tribunal to be set up.	By President but first with petition by PSC and recommendation by special tribunal to be set up.	By Governor-General but first with recommendation by Prime Minister and special tribunal to be set up.

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10. Challenges to Setting up an OSP

The setting up of the OSP is not without challenges. The main hurdle the government has to cross is how it can cede part of the power to prosecute which is vested in the Attorney-General by the Constitution, 1992 to the OSP. The A-G is responsible for the initiation and conduct of all criminal prosecutions.¹²⁴ The A-G has the power to prosecute including the power to discontinue criminal proceedings at any stage before criminal proceedings.¹²⁵ This specific power to discontinue criminal proceeding (“*nolle prosequi*”) is provided for by an Act and not by the Constitution although it flows from the general power of the A-G over the conduct of criminal prosecutions.

10.1. The A-G’s Power of Nolle Prosequi

The power of *nolle prosequi* so far as it is contained in an Act can be limited by an amendment to the Criminal Procedure Act, 1963 or by an enactment of a new legislation for the A-G to exercise this power except in cases of corruption against high profile political persons or such other words of limitation which can be adopted. This will ensure that the A-G does not exercise this power of *nolle prosequi* in corruption cases when the OSP is set up and the power to prosecute such cases is delegated to the OSP.

10.2. The A-G’s Power to Initiate and Control Criminal Prosecutions

The A-G’s power to control criminal prosecutions is provided by the Constitution and so unless there is a constitutional amendment, no other office or officer can exercise this power given to the A-G without the control or the direction of the A-G.

The OSP can therefore be set up under new legislation with specific prosecutorial functions but under the control and direction of the A-G. ‘True’ independence or what has been termed “substantive independence” can only be achieved for the OSP through sheer political will of the executive.¹²⁶ The executive and/or the A-G can decide not to interfere in the work of the OSP.

This political will in the experience of South Africa and Tanzania where the executive either through the President or the A-G controls the OSP has proven to be flawed. The executive always has the tendency to bow to political pressure to intervene in the functions of the OSP. It is worthy to note that in South Africa and Tanzania, the office of the ‘OSP’ is additionally created by their respective constitutions.

It has also been suggested that instead of enacting new legislation to create the OSP, the A-G can delegate certain powers to a director of an OSP through a constitutional instrument.¹²⁷ Professor Asare¹²⁸ holds the view that an **independent** OSP cannot be created by legislation but only through a constitutional instrument barring any constitutional amendment. He bases his argument on Article 296(c) of the Constitution which provides that constitutional officers shall publish constitutional or statutory instruments to govern the exercise of their discretionary power. He posits further that the delegation of special powers of prosecution can be made by the A-G to the Special Prosecutor (the “SP”) on the grounds of article 284 of the Constitution which requires that public officers shall not put themselves in a position where their personal interests conflicts with their functions.

It is argued that even using the means of a constitutional instrument, the OSP shall not be truly independent of the A-G. This is because Article 297(d) of the Constitution, 1992 also provides that the power of an officer to make constitutional instruments conferred under the Constitution includes the power by that officer to amend or revoke the constitutional instrument.

10.3. Enactment of Anti-corruption; Anti-Bribery statutes and other relevant statutes

The government has indicated a desire to enact new legislation in which the little but scattered laws on bribery and corruption can be brought together in one consolidated statute. We recommend that other legislation such as ones for asset declaration and a code of conduct for public officers based on chapter 24 of the Constitution, 1992 are also enacted. Such legislation has been observed to play a vital role in the effectiveness of the OSP in Kenya and Uganda.

¹²⁴ Constitution of Ghana, 1992, article 88(2).

¹²⁵ Criminal Procedure Act, 1963, section 54.

¹²⁶ Ace Ankomah, *The Office of ‘Special’ Prosecutor- How Independent?* <http://www.myjoyonline.com/opinion/2017/January-25th/ace-ankomah-the-office-of-the-special-prosecutor-how-independent.ph> , 25th Jan. 2017.

¹²⁷ Asare, Stephen Kwaku, Kweky Azar backs call for Office of Independent Prosecutor; Provides Guidelines, <http://www.myjoyonline.com/politics/2017/January-25th/kweky-azar-backs-calls-for-office-of-independent-prosecutor-provides-guidelines.php> , 25th Jan. 2017.

¹²⁸ Ace Ankomah, *Ibid*

It is suggested that the consolidated law on bribery and corruption (a Bribery and Corruption Act 2017?) should provide succinct definitions for ‘corruption’ and ‘bribery’ so that the elements of those crimes are clear to aid in investigations and prosecutions and there are no ambiguities. The new act should – unlike the United Kingdom’s Bribery Act or the USA’s Foreign Corrupt Practices Act – be in plain English and understandable and accessible to all citizens. At the very least, it should have all the offences in one place and be designed to be easily socialized in society. It should capture the various forms of corruption that countless studies and international programmes have demonstrated have a crippling effect on a nation’s prosperity.

The new act’s preamble and other interpretation provisions should properly contextualize corruption and its harmful effects, so that the citizen understands why it is necessary to criminalize such activity. This will also aid consistent interpretation of the statute by lawyers who will argue over the ambit of the offences created. Ghana should also use the opportunity to introduce a new corporate or private bribery offence – since bribery between citizens is not currently outlawed in Ghana. The importance of such an offence cannot be overstated. The current system allows for an uncompetitive business environment in which self-serving clienteles are rampant, whether by way of personal favour, conflicts of interest and nepotism. It also makes it very difficult for international businesses to compete on level playing field.

Additionally, there are critical criminal procedure reforms that must be introduced in conjunction with the enactment of a new corruption law and the setting up of an OSP. Case management measures need to be brought in to allow criminal cases to be heard more speedily and efficiently.

10.4. Institutions with mandates relating to corruption- Possible Overlaps

None of the institutions such as the Commission on Human Right and Administrative Justice (“CHRAJ”), the Economic and Organised Crime Office (“EOCO”) or the Criminal investigations Department of the Ghana Police Service has prosecutorial functions independent of the A-G. CHRAJ has investigatory powers in relation to cases of corruption by public officers and may make such recommendations on its investigations to the A-G.¹²⁹ EOCO also has investigatory powers and prosecutorial powers for specific matters under the authority of the A-G.¹³⁰

A way to reconcile the possible overlaps will be for the OSP when set up to receive the investigatory findings or recommendations which relate to corruption and which are to be made to the A-G or over which the A-G should have oversight control under these other legislation referred to the OSP. Under the OSPs of the jurisdictions studied, particularly Kenya and Tanzania, the OSP has power to direct and coordinate the investigations of corruption-related cases. The OSP to be set up arguably cannot oversee the investigations to be conducted by CHRAJ because CHRAJ is not to be interfered or controlled by any other entity in its work. Nevertheless CHRAJ can be made to make recommendations to the OSP instead of the A-G.¹³¹

10.5. Funding of the OSP

Once set up by an Act of Parliament, the OSP can be funded from moneys approved by Parliament, and donations, grants and any other moneys that are approved by the Minister responsible for Finance, as happens with EOCO. Once again, the executive either directly or indirectly through the Parliament will need to exercise some amount of political will in order not for the OSP to be under-funded with the purpose of eliminating any independence or effectiveness that the OSP may otherwise attain.

10.6. Who qualifies to be an SP and how is the SP to be appointed?

The example of Uganda where the ‘SP’ is appointed by the President on the recommendation of the Public Service Commission with the approval of Parliament is instructive. It helps to ensure that a lot more people are involved and the chances for abuse in the appointments are lowered. Other alternatives are to follow to some extent the Jamaican system, where a commission recommends the OSP (rather than the President) for approval. The GoG has suggested approval of the OSP by the absolute majority of Parliament, which is a respectable approach.

10.7. Relationship between OSP and Law Enforcement Agencies

¹²⁹ Ghana Constitution, 1992, article 225 & Commission on Human Right and Administrative Justice Act, 1993 (Act 456), section 7(1)(vi).

¹³⁰ Economic and Organised Crime Office Act, 2010 (Act 804), section 3(a).

¹³¹ Ghana Constitution, 1992, article 225.

An apparent weakness running through the various jurisdictions under review is the reliance of the OSP on investigations carried out by the police and other law enforcement agencies (“LEA”). It is imperative for the effectiveness of the OSP that the OSP has powers to institute and direct investigations as well as its own dedicated investigative staff who should be subject exclusively to the control, authority and directions of OSP. This is because the police and other law enforcement agencies are ordinarily under the control of the executive and the executive may through its control of the LEA control the ability of the OSP to initiate or even successfully conduct criminal proceedings. These investigations and dedicated investigative staff are important in order not to render the OSP a lame duck.

The investigative powers of agencies which investigate corruption, bribery and abuse of state funds such as EOCO, with the exception of CHRAJ which is constitutionally mandated, can be placed under the authority and power of the OSP. This will ensure that the OSP has oversight and can direct the investigations conducted by these agencies or even take over and continue such investigations.

Provision should also be made for the OSP to work with foreign LEAs particularly regarding investigations, the gathering of evidence and extradition of persons alleged to have committed crimes for which the OSP has mandate.

10.8. Recommendations

From a review of the jurisdictions discussed, it is recommended that for an effective OSP whether set up by an amendment to the Constitution or set up by an Act or Parliament or some other means, the following factors must be considered:

In light of the challenges to the setting up of the OSP, it is suggested that

- (1) The OSP may be set up through an Act of Parliament or through a Constitutional Instrument immediately.
- (2) Notwithstanding the legislative framework for the office to be set up, the OSP will remain under the control of the Attorney-General, since the provisions of Art. 88 of the Constitution will take priority over any legislation in the event of any conflict.
- (3) There is a clear requirement for political will of the GoG and executive for the OSP to operate independently so as to achieve the intended purpose. A clear statement to this effect might be included by GoG in the proposed legislation.
- (4) The Constitution ought to be amended to ensure that the powers of the AG as per Art 88 are made to reflect the independence and autonomy of the OSP. The process towards constitutional amendment (including by referendum) should begin immediately. We say this particularly because we consider there to be formidable challenges to setting up a truly independent and autonomous OSP without conflicting with Art. 88 of the Constitution.
- (5) A national referendum on the Constitution, with a central issue being the creation of an independent and autonomous body to combat corruption, will bring additional focus to the issue of corruption in public consciousness and discourse. This will aid critical work that the President and GoG have committed to, around not only developing a stronger regulatory framework for tackling corruption, but addressing the underlying cultural and attitudinal challenges in the fight against corruption, primarily through education.
- (6) We consider that there is strong merit in the proposition that the various laws on bribery, corruption and related crimes be consolidated for easy accessibility, understanding and reference. This will assist the OSP in understanding its remit and also assist the public in understanding the new approach and intolerance to corruption-related offences.
- (7) The OSP should be given power to control and direct not just prosecution but the investigation of offences over which it may prosecute. This will be a further measure preventing interference by government of cases the law enforcement agencies choose to investigate diligently and towards prosecution.
- (8) The OSP should be placed within a closely co-ordinated framework of other investigating and prosecuting agencies. It is essential that extensive consideration is given as to how issues are allocated to the various agencies for investigation and/or prosecution. Overlaps between agencies should to a large extent be removed, as should discretion as to which agency does what. A central co-ordinating office

should determine the allocation of cases. Ultimately, the OSP should have the power to take over any prosecution which it considers to be within its remit.

10.9. Conclusion

Even in jurisdictions that the OSP is a creature of constitution, there have been recorded abuses of the office. This shows that the establishment of the OSP by the Constitution does not of itself ensure the effectiveness of the OSP. The Constitution should also provide various protective mechanisms for safeguarding the power of the OSP.

With the constitutional set-up and mandate of the A-G, it is difficult and unlikely that the OSP will not face the same abuse and interference in its work by the executive just as has happened in jurisdictions such as South Africa and Tanzania.

However, the establishment of the OSP through an Act of Parliament can be a stop-gap measure as Ghana considers and probably carry out a constitutional amendment to create an OSP.

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