



MONDAY ESSAY  
*With*  
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 **LEGAL**  
*The Law Through Expert Voices*



**TWO HATS, ONE HEAD & THE WEIGHT OF  
RESPONSIBILITY: THE OFFICE OF THE  
ATTORNEY-GENERAL**

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# INTRODUCTION

*Firm and resolute must be his (her) demeanour, and above all humble in the performance of his functions. His humility must evoke respect and admiration. Not all will appreciate nor even understand why an Attorney-General takes a particular stand on an issue of public importance. The light in the law he sees may be the darkness seen by his political colleagues. With patience and God's guidance, with faith in God's guardianship, with blessed assurance in God's grace, the Attorney-General may yet win over his detractors and win the hearts of his enemies – and make friends of his foes.<sup>1</sup>*

Historically, the Office of the Attorney-General as an institution was inherited from the British Colonial Administration, with that person being an unelected ex-officio member of the Executive Council (Governor's Cabinet); the legal draftsman to the Governor and the legal advisor to the Governor. The Attorney-General was then responsible for drafting of Bills that went to the Legislative Council and though the drafting was practically done by a legal drafts-person, Bills were not sent out of the Office without the approval of the Attorney-General.

The Office of the Attorney-General as we have it in our current constitution dates back to 1842 starting as an office meant to “separate the judicial functions from those of the executive”<sup>2</sup> before metamorphosing into the office of the judicial assessor,<sup>3</sup> and then to the position of Queen's Advocate<sup>4</sup> and finally substituted as the offices of the Attorney-General, Solicitor-General and Crown Counsel with the latter two being given the same powers as the Attorney-General with the authorization to perform any of the functions of the Attorney-General.<sup>5</sup> The Law Officers of the United Kingdom actually embody the true source and nature of the Office of the Attorney-General as currently created by **Article 88 of the 1992 Constitution**.

## **The Office of the Attorney-General Under the 1992 Constitution**

**Article 88** provides that “*There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal advisor to Government.*”<sup>6</sup> It further provides that “*The Attorney-General shall discharge such other duties of a legal nature as may be referred or assigned to him by the President, or imposed on him by this Constitution or any other law.*”<sup>7</sup> **Clause (3) of Article 88 states that** “*The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.*”

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1 V.C.R.A.C. Crabbe, R.P. Baffour Memorial Lectures dated 29 November 2013.

2 Proceedings of the Select Committee on West African Forts per evidence of Mr. Robert Roberts.

3 Supreme Court Ordinance, 1853 sections 9, 10, 11 and 12.

4 Law Officers Ordinance, 1894 (No. 11 of 1894).

5 Law Officers Ordinance, 1894 (as amended in 1913).

It is further stated in **clause (4)** that “All offences prosecuted in the name of the republic of Ghana shall be at the suit of the Attorney-General or any other person authorized by him in accordance with any law”. **Article 88(5)** states that “the Attorney-General shall be responsible for the institution and conduct of all civil cases on behalf of the State; and all civil proceedings against the State shall be instituted against the Attorney-General as defendant.” Finally, **clause (6)** states that the “Attorney-General shall have audience in all courts in Ghana.”

The Attorney-General under the constitution holds a **unique position** in that he is appointed a Minister under **Article 78** - a ministerial position he earns by virtue of the appointment as Attorney-General. He is not Attorney-General because he has been appointed a Minister but is rather a Minister because he has been appointed Attorney-General. The fact that the Attorney-General has been singled out in the constitution and his functions clearly stated bears testimony to the faith that the framers of the constitution had in the unique office.

The controls of prosecutions are vested in the holder of the Office of the Attorney-General and such office holder is supported in all his multifarious responsibilities by a Solicitor-General. Of course, in Ghana, the Legislative Drafting Division of the Attorney-General’s Office is responsible for drafting of Bills under the direct “supervision” of the Attorney-General. Also, the Director of Public Prosecutions acts under the direction of the Attorney-General performing functions which include tendering advice to the police force and government departments about issues of prosecution policy; causing the police to report to him/her on a wide range of cases and finally arranging the prosecution of particularly serious cases including murder cases. That notwithstanding, the Attorney-General answers in Parliament for the actions and inactions of these officers.

Regarding the Attorney-General as a defendant, though **clause (5) of Article 88** states that all civil proceedings against the State shall be instituted against the Attorney-General as defendant, the Supreme Court<sup>8</sup> has decided that a realistic view of the provision would mean that all the constitutionally established independent bodies such as CHRAJ and Electoral Commission could sue and be sued on their own relating to their functions through counsel of their choice. With regard to the Judiciary and the Legislature, where their position on an issue is in conflict with that of the Attorney-General, they might proceed on their own by Counsel of their choice.

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<sup>6</sup> 1992 Constitution, Article 88(1).

<sup>7</sup> Ibid, Article 88(2).

<sup>8</sup> Amegatcher v Attorney-General [2012] 1 SC GLR 679.

## Two hats – One head: The Attorney-General

The **Campbell Case of 1924** in the UK tells the story of important features of the varied and onerous functions of the Office of the Attorney-General. It highlights clearly that an Attorney-General wears two (2) hats: ***a legal hat and a political hat***. Most importantly, it highlights that the Attorney-General ***“operates in no-man’s land between law and politics”*** and is subject to frequent political pressures and to the rigours of ministerial answerability to Parliament for most of his actions. That notwithstanding, the occupier of the high office of the Attorney-General is expected to interpret the public interest independently of any considerations of party advantage or loyalty to ministerial colleagues having his conscience as a guide.

The Attorney-General is required to exercise his functions independently of any pressure, but in doing so must not ignore issues of public policy and interest which he can only gather by relating well with colleagues and the public in general. Wearing the political hat, the Attorney-General will definitely confer with colleagues in the law and in politics, however in traveling that road he must be minded by the morality of the law as espoused by constitutional supremacy and less of the morality of the Government because ***“Governments may constrain the law but the law restrains the Government.”***<sup>9</sup> It must be admitted that it is always a difficult task for an Attorney-General to maintain the appearance of impartiality in a matter which has a high political content.

**Article 88** does not elaborate the standards by which the discretion of the Attorney-General should be judged, thus, it must be read within the context of the existing laws and of the constitution in general. The Legal Profession Act and the Code of Conduct of lawyers are and should be deemed as binding on the Attorney-General as leader of the Bar and legal profession. Furthermore, ensuring that the Attorney-General exercises the discretion of the Office in accordance with the law and the conventions of the office depend largely on a strong Parliament; a strong Bar Association nurtured to protect the Constitution; Faculties and Schools of Law where academic freedom is encouraged; an active and fearless press and finally, a public opinion capable of playing the role of a watchdog.

### The onerous weight of varied responsibility

A former Attorney-General of the UK, Sir Patrick Hastings, in 1924 as contained in his autobiography sought to paint a picture of the burdensome responsibilities of the Office of the Attorney-General as follows: *“my day began at seven o’clock in the morning and I rarely got to bed before five the next morning. The day was spent in one long rush between the Law Courts, government departments and the House of Commons. The night or rather the early morning, was needed in order to get ready for the next day. Nothing that I began was I ever allowed to finish; and nothing was ever finished until something else was begun. Being an Attorney-General, as it was in those days, is my idea of hell.”*

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<sup>9</sup> Ibid at note 1.

The diversity of an Attorney-General's work is one that is greatly overlooked. Aside the usual court room and other dispute resolution hustle and the proffering of legal advice, he has to take many decisions in person rather than delegating them down the line. This is largely due to the fact that the Attorney-General acts as a guardian of the public interest. He is the only person, in respect of criminal trials, who can enter a *nolle prosequi* to stop the trial of all manner of offences once proceedings have started, if he considers that the public interest would best be served by taking that action. In all these matters, the Attorney-General's actions may be questioned in Parliament and are sometimes challenged in court, albeit mostly unsuccessful.

According to Sir Hartley Shawcross (*a former Attorney General of the UK*) in the first post-war Labour administration, the true jurisprudence is that the duty of the Attorney-General in deciding whether or not to authorise a prosecution is to acquaint himself with all the relevant facts; the effect the prosecution would have (*be it successful or not as the case may be*) on the public morale and order; and considerations affecting public policy in general. He is not obliged to consult with colleagues in Government though doing so may be necessary only for the purpose of informing him of particular considerations which might affect his own decision rather than telling him what decision he should take.

Article 88 is not intended to exhaust the nature and functions of the Attorney-General in his unique position and the integrity required of the holder of the Office. As the custodian of the public interest, he is obliged to act within the forum of his own conscience acting independently of any form of pressure not even from the courts. The courts should not, in the absence of criminality, question the Attorney-General's reasons for acting or refusing to act. They should not question his reasons directly or indirectly or try to deduce the basis for his reasoning as doing so would amount to assuming the mantle of Parliament. The Attorney-General in truth and in fact, does not have a duty to prosecute but rather a discretion to prosecute.

## Conclusion

For all intents and purposes, integrity is the hallmark of the holder of the Office of the Attorney-General, with public interest being the truth he bears. His duty is to advise and not necessarily to dictate and in like fashion, he must not allow himself to be dictated to. Though, under the 1957 independence constitution the Office of the Attorney-General was a Civil Service Post in a bid to make the office a non-political one, the 1992 Constitution making the holder of the office a political appointee does not in any way abdicate for him the morality of the office.

Whatever the political persuasions of an Attorney-General, these persuasions do not have a place in the legal and moral perspective so as to affect the official action. In the performance of his functions, the exercise of discretion is a dynamic element in the decision-making process with the central element being the legislative goals; the legal rules and the values of society. Indeed, justice is the handmaiden of the law and loyalty is the key to professional, legal and constitutional principles.<sup>10</sup> Above all, the service of a holder of the Office of the Attorney-General should be for God and country.

*God bless!*



#### ABOUT THE AUTHOR

REGINALD NII ODOI is a Barrister and Solicitor of Ghana who obtained his Master of Laws (LLM) Degree from Harvard Law School in Cambridge, USA. He is also a proud alumnus of Kwame Nkrumah University of Science and Technology (KNUST) where he graduated with First Class Honors and notably served as the President of the Law Students' Union and the Legal Affairs Commissioner of the SRC, amongst others. He was called to the Ghana Bar in 2016. His research areas include Comparative Constitutional Law; Corporate & Commercial Law; International Investment Law and Arbitration and International Law. His goal is to contribute to re-envisioning the way effective lawyering could be done in today's world.