IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2026

CORAM: BAFFOE-BONNIE CJ (PRESIDING)
PWAMANG JSC
LOVELACE-JOHNSON (MS.) JSC
KULENDI JSC
GAEWU JSC
DZAMEFE JSC
SUURBAAREH JSC

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WRIT
NO. J1/3/2026

29TH JULY, 2026

NOAH EPHRAEM TETTEH ADAMTEY	.....	PLAINTIFF
VRS		
ATTORNEY-GENERAL	.....	DEFENDANT

1. GHANA CENTER FOR DEMOCRATIC DEVELOPMENT LBG
2. TRANSPARENCY INTERNATIONAL GHANA LBG
3. GHANA ANTI-CORRUPTION COALITION LBG
4. DEMOCRACY HUB LBG
5. STAR-GHANA FOUNDATION LBG
6. NORSAAC
7. PEN PLUS BYTES LBG
8. AFRICA CENTRE FOR ENERGY POLICY LBG
9. ODEKRO PMO FOUNDATION LBG
10. A ROCHA GHANA LBG
11. PARLIAMENTARY NETWORK AFRICA LBG
12. IMANI CENTRE FOR POLICY & EDUCATION
13. ONEGHANA MOVEMENT LBG
14. AFRICA EDUCATION WATCH LBG

AMICI CURIAE

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JUDGMENT

BAFFOE-BONNIE CJ:

PART ONE: THE SUIT

The Writ

1) By a writ filed on 8th December 2025, the plaintiff, a legal practitioner and citizen of Ghana, invoked the original jurisdiction of this Court under Articles 2(1) and 130(1) of the 1992 Constitution. He seeks eight reliefs. In the form pleaded, they are:

   (a) A declaration that, on a true and proper interpretation of Articles 1(2), 88, 93(2) and 296 of the 1992 Constitution, prosecutorial authority in Ghana is vested exclusively in the Attorney-General and cannot be exercised independently for, or in parallel with, the Attorney-General.

   (b) A declaration that the Office of the Special Prosecutor Act, 2017 (Act 459), to the extent that it purports to confer original, autonomous or insulated prosecutorial authority on the Office of the Special Prosecutor, is inconsistent with and in contravention of Articles 1(2), 88(3) and (4), 93(2) and 296 of the Constitution and is therefore null, void and of no effect.

   (c) A declaration that sections 3(3) and 4 of Act 959, in purporting to make the Office of the Special Prosecutor independent of the Attorney-General in the initiation, conduct and termination of prosecutions, violate the Constitution.

   (d) A declaration that Parliament lacks the authority to enact legislation creating a prosecutorial body with powers equivalent to, or independent of, the Attorney-General, absent a constitutional amendment in accordance with Articles 289 and 290.

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(e) A declaration that Parliament acted *ultra vires* its legislative authority under Article 93(2) in purporting, through Act 959, to compel a permanent delegation of the Attorney-General's prosecutorial powers to the Office of the Special Prosecutor.

(f) A declaration that any statutory delegation of prosecutorial authority made pursuant to Act 959 does not bind subsequent Attorneys-General and lapses upon the assumption of office by a new Attorney-General unless re-authorised by that Attorney-General.

(g) An order striking down or severing the provisions of Act 959 that confer autonomous prosecutorial authority on the Office of the Special Prosecutor or insulate it from the Attorney-General's constitutional control.

(h) Any further orders or directions that this Honourable Court considers just, equitable and necessary to preserve the integrity of the Constitution and the prosecutorial architecture established under Article 88.

2) Two matters of form require highlighting at the outset. First, in relief (b) the plaintiff cites the Act he impugns as "Act 459". That is a typographical error for the Office of the Special Prosecutor Act, 2017 (Act 959), and we treat it as such. CHECK THAT THE ORIGINAL WRIT AS FILED HAS THIS TYPO.

3) The second matter is of substance: we return to it in Part Three. Under his third relief, the plaintiff cites section 3(3) of Act 959 as one of the two provisions which he says make the Office of the Special Prosecutor (which we will call "the OSP") independent of the Attorney-General in initiating, conducting and terminating prosecutions, contrary to Article 88. Section 3(3) is the provision which requires the OSP to publish, twice yearly, in two daily newspapers of national circulation and on its website, a list of the corruption

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cases it has investigated and prosecuted. It must publish with that list the numbers of acquittals, convictions and pending cases, and the value of proceeds recovered. It is a transparency and reporting provision. On its face it has nothing to do with independence in initiating, conducting or terminating prosecutions. The provision which confers on the OSP the function of prosecution is subsection (1) of section 3, and in particular paragraphs (a), (b) and (c) of that subsection. The plaintiff's argument, as developed in his statement of case and in oral argument, was directed at the conferment of the function and not at the duty to publish. We deal with this matter further at paragraph 119 below.

The Parties

4) The plaintiff sues in his own name. The Attorney-General is the sole defendant, as the officer against whom civil proceedings against the State are instituted under Article 88(5) of the Constitution.

The OSP's Application for Joinder

5) On 15th December 2025, the OSP applied to be joined as a defendant on the ground that the writ impugns its statutory foundation and that it was a necessary party. On 27th January 2026, we dismissed the application. We held that the State, represented by the Attorney-General, was the only proper defendant under Article 88(5) of the Constitution, and that the OSP was not a necessary party.

The Defendant's Position

6) The defendant, though the sole party against whom the writ is directed, does not oppose the plaintiff. He supports the plaintiff on his own separate grounds. On 8th April 2026, he obtained an extension of time and filed his statement of case, in which he asks this Court to declare that Parliament, through Act 959, acted *ultra vires* the Constitution in three respects. First, it compelled him to authorise the OSP to prosecute. Second, it varied his prosecutorial powers so as to divest him of control and oversight in respect of prosecutions mounted by the OSP. Third, it donated his prosecutorial power to the OSP,

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a juridical person, when the Constitution contemplates the authorisation only of natural persons.

7) The consequence is that the writ, as filed, stood undefended. Both the plaintiff and the defendant sought the invalidation of provisions of an Act sponsored, drafted and laid before Parliament by a previous Attorney-General.

The Amici

8) On 5th May 2026, fourteen civil society organisations, jointly, applied for leave to file an amicus brief. They are the Ghana Center for Democratic Development, Transparency International Ghana, the Ghana Anti-Corruption Coalition, Democracy Hub, Star Ghana Foundation, NORSAAC, Pen Plus Bytes, the Africa Centre for Energy Policy, the Odekro PMO Foundation, A Rocha Ghana, Parliamentary Network Africa, IMANI Centre for Policy and Education, OneGhana Movement, and Africa Education Watch. On 19th May 2026, we granted these CSOs leave to file the amicus.

9) The presence of the amici supplied the adversarial dimension which the alignment of the plaintiff and the defendant had removed, and we record our appreciation of the assistance we have received from their brief.

The Joint Memorandum of Issues

10) On 26th April 2026, the plaintiff and the defendant filed a Joint Memorandum of Issues. As they framed them, the issues were:

(a) Whether the prosecutorial powers of the Republic vest in the Attorney-General alone.

(b) Whether the Office of the Special Prosecutor Act compels the Attorney-General to authorise the OSP to prosecute an offence.

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(c) Whether Parliament may compel the Attorney-General to authorise a person to prosecute an offence.

(d) Whether the Office of the Special Prosecutor Act varies the Attorney-General's prosecutorial powers.

(e) Whether Parliament may, by ordinary legislation, vary the Attorney-General's prosecutorial powers.

(f) Whether prosecutorial power may be delegated to a juridical person.

(g) Any other issue which this Court may deem necessary.

11) We state the substance of those issues under a fuller set of questions set out at paragraph 33 below. We show at paragraph 34 how each of the issues in the Joint Memorandum is answered, so that no party is left in doubt that the whole of what was submitted for our decision has been decided.

PART TWO: THE ARGUMENTS OF THE PARTIES

12) We set out here, once and in full, the cases of the plaintiff, the defendant and the amici. Our purpose in gathering them in one place is that the analysis in Part Three is the reasoning of this Court, and not a recital of the arguments of the parties.

The Plaintiff's Arguments

13) The plaintiff's case may be grouped into four parts. They are: first, the character of the prosecutorial mandate; second, the mode by which another person may be authorised to exercise it; third, the limits on the competence of Parliament; and fourth, the duration of any authorisation given.

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14) **On the character of the prosecutorial mandate,** the plaintiff submits that Article 88(3) of the Constitution vests the prosecutorial mandate in the Attorney-General exclusively and personally. He points to the imperative "shall" and to the word "all" in the sentence "The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences"; and submits that the two words together establish an exclusive constitutional mandate operating on two levels. First, the Attorney-General is the sole officer in whom prosecutorial power is constituted. Second, as a matter of what he calls procedural constitutionalism, criminal prosecutions must commence in the manner prescribed by Article 88(3), that is, by or at the suit of the Attorney-General. He relies on the constitutional history from 1957 onward and on the deliberate introduction of the word "all" from 1969, and submits that the framers of the 1992 Constitution carried that language forward with a settled meaning. For that he cites *J.H. Mensah v. Attorney-General* [1996-97] SCGLR 320, and *Martin Amidu v. President Kufuor and Attorney-General* [2001-2002] SCGLR 138. He submits that the office of Attorney-General is, in its constitutional design, personal to the officeholder, and that the authority which Article 88 confers attaches to the individual who holds the office at the material time.

15) **On the mode by which the Attorney-General may authorise another person to prosecute,** the plaintiff accepts that Article 88(4) permits the Attorney-General to authorise another person to prosecute at the suit of that person and in the name of the Republic. He submits, however, that any such ability derives solely from, and remains subordinate to, the discretionary authorisation of the Attorney-General. He submits that the discretion is a discretionary power within the meaning of Article 296, and that the words "in accordance with any law" in Article 88(4) must accordingly be read as requiring a Constitutional Instrument laid before Parliament in terms of Article 296(c). He submits further that the authorisation must be case specific, so that the Attorney-General addresses his mind to the particular matter and the particular person, and that a standing or general authorisation is inconsistent with the personal character of the discretion. In the alternative, he submits that if "in accordance with any law" does accommodate an

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Act of Parliament, the Act must be one passed at the behest of an Attorney-General, and its effect must terminate when that Attorney-General leaves office.

16) **On the competence of Parliament to enact Act 959,** the plaintiff submits that Parliament could not, by ordinary legislation, create a prosecutorial authority independent of the Attorney-General and vest it with prosecutorial power. He submits that sections 3 and 4 of Act 959 do exactly that, and that they violate the constitutional design in three ways. They treat the Attorney-General's constitutional mandate as a transferable commodity which Parliament may reassign. They convert a constitutionally permissible subordinate delegation into a parallel and independent prosecutorial authority insulated from the Attorney-General. Further, they immunise the delegate, the Special Prosecutor, from the Attorney-General's direction, supervision and revocation. To that end, sections 3 and 4 of Act 959 divest the Attorney-General of the essence of his constitutional mandate.

17) Put together, the plaintiff submits that Parliament has usurped the Attorney-General's discretion and turned it into, in his words, "a compelled, irreversible and permanent statutory grant of authority", with the consequence that "the office of the Special Prosecutor becomes a fully independent prosecutorial entity, exercising a portion of the Attorney-General's constitutional mandate yet shielded from the Attorney-General's control". He cites *Amegatcher v. Attorney-General [2012] 1 SCGLR 679* for the principle that where the Constitution commits a function to a particular officeholder, no other organ may interfere with, dilute or usurp it, and *Stephen Kwaku Asare v. The Attorney-General*, Writ No. J1/6/2011, judgment delivered on 22nd May 2012, for the proposition that Parliament cannot reassign or alter powers expressly vested by the Constitution without first amending it. He relies also on the American authorities of *Panama Refining Co. v. Ryan* 293 US 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States* 295 US 495 (1935). He contends that a change of this character could be effected only by amendment of the Constitution under Articles 289 and 290, and that Parliament acting under Article 93(2) had no competence to effect it.

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18) **On the lapse of an authorisation when the Attorney-General who gave it leaves office,** the plaintiff submits that any authorisation given by a sitting Attorney-General under Article 88(4) lapses by constitutional implication upon the assumption of office by a new Attorney-General, unless and until the successor expressly renews or affirms it. The premise is the same as that of his first submission, namely that the Article 88 authority attaches personally to the sitting Attorney-General and not to the office. He submits that in enacting Act 959, Parliament purported to bind all future Attorneys-General, and that it had no power so to do.

19) The plaintiff then prays for the reliefs set out at paragraph 1.

The Defendant's Arguments

20) The defendant Attorney-General supports the outcome for which the plaintiff contends, but arrives at it by a different route. His case may be summed under four heads.

21) **On whether Act 959 compels him to authorise the OSP to prosecute,** he submits that the phrase in section 4(2) of Act 959, "the Office shall for the purposes of this Act be authorised by the Attorney-General", shows that Parliament purports to compel him to authorise the OSP to prosecute. He relies on section 42 of the Interpretation Act, 2009 (Act 792), by which "shall" in an enactment is to be construed as imperative and mandatory. He relies further on the explanatory memorandum which accompanied the Bill that became Act 959, and in particular on the passage which described the intention to confer independent prosecutorial power on the OSP. He submits that the true intention of Parliament, so gathered, was to make the delegation mandatory rather than permissive. He concedes, in reliance on *Liverpool Borough Bank v. Turner* (1861) 30 LJ Ch 379, and on the writing of V.C.R.A.C. Crabbe, that "shall" is not invariably imperative and may in some contexts be directory only, but he submits that the context here points the other way.

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22) **On whether Act 959 varies his constitutional powers under Article 88,** he submits that section 4(2) compels him to abandon the constitutional duty imposed by Article 88(3) to be responsible for the prosecution of all criminal offences. He submits that by the terms of the Act he is now responsible only for the prosecution of those offences which the OSP is not prosecuting, and that Act 959 has thereby converted what the framers intended to be a delegation into a donation. He submits that a delegation leaves the delegate in control while a donation does not, and that the mark of the difference is the insulation of the OSP from his direction and supervision by section 4(1). He develops the theme. The essential tools by which a prosecution is controlled, he says, are the plea bargain and the entry of a *nolle prosequi*, and both belong to him alone. No other person he authorises may conclude a plea agreement without recourse to him, yet section 71 of Act 959 permits the OSP to do so, and section 80(2) also purports to hand OSP the power to enter *nolle prosequi* as well. He adds that the Special Prosecutor is appointed by the President under section 13, so that the President rather than he is the true donor of the power. And he observes that the OSP never took any step to obtain the traditional *fiat* or executive instrument from him before beginning to act. He relies on *Appiagyei-Atua and Two Others v. Attorney-General*, Suit No. J1/14/2022, judgment delivered on 31st May 2023, for the proposition that where Parliament has by ordinary legislation sought to vary a provision of the Constitution, this Court will declare the legislation unconstitutional.

23) **On whether an authorisation may be given to a juridical person,** he submits that Article 88(4) contemplates the authorisation of natural persons only. According to this argument, Act 959 did not make the Special Prosecutor, who is a human being, the recipient of the prosecutorial power. It made the OSP, an artificial person, the recipient. He relies on *Prohibitions Del Roy* (1607) 77 ER 1342 for the proposition that a function requiring the exercise of legal judgment cannot be committed to one who does not possess the artificial reason of the law. From that he submits that prosecutorial functions must be exercised through natural persons and not through offices, departments or

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institutions. He submits that only human beings are enrolled as lawyers, and that the practice of law entails an inseparable mix of long learning and experience, the application of reason and the exercise of judgment. The power to initiate and conduct prosecutions is therefore given, he says, to a human being and not to an office. He relies also on section 3 of the Legal Profession Act, 1930 (Act 32), by which only a natural person may be enrolled as a lawyer.

24) **On the constitutional history of the office of Attorney-General,** he traces the office of Attorney-General from the 1957 Constitution, through the 1969 and 1979 Constitutions, to the present, and submits that the deliberate introduction of the word "all", which now finds expression in Article 88(3), "leaves no doubt that no prosecutorial power is left for another person to exercise". He submits that the jurisprudence of this Court has consistently affirmed that exclusive vesting.

25) **On the relief he asks of this Court,** the Attorney-General asks that sections 3 and 4 of Act 959 be declared inconsistent with the Constitution and struck down. In the alternative, and in the course of oral argument, he invited us to restore what he described as the traditional route of authorisation by Executive Instrument under the Criminal and Other Offences (Procedure) Act, 1960 (Act 30). He asked for a consequential order directing him to issue such an instrument to the OSP within one week.

The Amici's Arguments

26) The amici oppose the writ and ask this Court to hold Act 959 consistent with the Constitution. Their case is developed under seven heads.

27) **On the distinction between the responsibility clause and the machinery clause,** the amici submit that Article 88(3) is a responsibility clause and Article 88(4) is a machinery clause, and that the two must be read together and not collapsed into one another. The framers, having imposed on the Attorney-General exclusive responsibility for the initiation and conduct of all criminal prosecutions, provided in the very next clause

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for the exercise of that function by any other person authorised by him in accordance with any law. They add that Article 88(4) speaks of a person authorised and not of a person to whom power is delegated, and that the difference is not merely verbal. One who is authorised acts in the name and on behalf of the person who authorised him, so that his act is in law the act of the authoriser, who remains the constitutional locus of the decision. The constitutional design is one of exclusive responsibility coupled with permissive devolution of function. They accept the Attorney-General's tracing of the history of Article 88(3), but submit that it does not track the development of Article 88(4), so that his historical argument, however accurate as to the responsibility clause, says nothing about the machinery clause.

28) **On the internal contrast between clause (4) and clause (5) of Article 88,** in criminal matters, the amici submit, the framers of the Constitution included express words permitting prosecution at the suit of a person the Attorney-General authorises. In civil matters they included no such words. Within a single article the framers showed that they knew how to vest a function without qualification when they meant to, and they did not do so in clause (4).

29) **On whether section 4(2) of Act 959 compels the Attorney-General to authorise the OSP to prosecute, and on how the language of section 78 and section 81(1) of the same Act shows that section 4(2) of Act 959 does not,** the amici argue as follows. Section 4(2) of Act 959 does not compel the Attorney-General to authorise the OSP to prosecute. The provision opens with the words "Subject to clause (4) of article 88 of the Constitution", and it is cast in the passive voice. They contrast two other provisions of the same Act. Section 78 uses the active commanding voice: "The Minister shall, within ninety days upon the assumption of office of the Special Prosecutor, in consultation with the Board, by legislative instrument, make Regulations." Section 81(1) uses the discretionary voice: "The Attorney-General may, on the coming into force of this Act, authorise the Office of the Special Prosecutor to handle any investigation or prosecution ... being handled by..." the Economic and Organised Crime Office, the Prosecutions

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Division of the Attorney-General's Office, or public prosecutors appointed under section 56 of Act 30. In sum, the amici point to three drafting choices in one Act, by one drafter. From that contrast the amici conclude that section 4(2) of Act 959 was never meant to command.

30) **On the legislative record of Act 959,** the amici submit that the plaintiff and the defendant have failed to engage the whole of the legislative record. The passage of the explanatory memorandum on which the Attorney-General relies explains Clause (4) of the Bill in its original form, as laid by the then Attorney-General in July 2017. It does not explain what Parliament enacted. The Hansard for 1st and 2nd November 2017 records that Parliament was troubled that the original clause was inconsistent with Article 88(4), and that it re-stated and re-worded the clause to bring it into conformity, producing the express subordination now found in section 4(2). They submit that the memorandum, which under Article 106(2)(b) explains the Bill at the moment of laying, is not amended when the Bill is amended, and that in respect of provisions altered on the floor it is the record of a discarded text.

31) **On the mode by which authorisation may be given,** the amici submit that the words "any law" in Article 88(4) means any law within Article 11(1) of the Constitution, and that no particular mode is prescribed. Where legislation prescribes a mode, that mode governs. Where it does not, reference is had to the general body of laws. They point to a settled pattern of Ghanaian legislative practice since 1993, comprising at least nine distinct drafting models by which the authorisation of persons other than the Attorney-General to prosecute offences has been provided for. The pattern runs across the police, the Economic and Organised Crime Office, the Narcotics Control Commission, the Securities and Exchange Commission, the Bank of Ghana, the Customs Division of the Ghana Revenue Authority, the Food and Drugs Authority, the National Pensions Regulatory Authority, the Environmental Protection Authority, the revenue and tax statutes, and the Metropolitan, Municipal and District Assemblies.

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32) **On authorisation to juridical persons and on institutional continuity,** the amici submit that *Prohibitions Del Roy* decided only that a judicial function could not be discharged by the King in his own person, because he was not learned in the artificial reason of the law. It did not decide that institutional bodies may not exercise executive functions. They point to section 46 of the Interpretation Act and to Article 295 of the Constitution, both of which give "person" a meaning which includes a body corporate. They submit that the fact that an officeholder has discretion in the exercise of an institutional power does not make the power personal to him. A Minister who has discretion to make regulations does not by that discretion cause her regulations to lapse when she leaves office, and a judge does not cause his orders to cease to have effect on his retirement. They illustrate the point by reference to the appointment of Justices of this Court, who are appointed by the President under Article 144(2) on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. No one suggests that the President is thereby the source of the judicial power vested in the Judiciary by Article 125. Appointment fills an office; it does not supply the source of the function.

33) **On the consequences of accepting the plaintiff's and the defendant's readings of Article 88 and Act 959,** the amici submit that the readings advanced by the plaintiff and by the defendant, if accepted, would produce a cascade of consequences destructive of the constitutional and administrative life of the Republic and which the framers cannot have intended. They set the consequences out in detail, and we return to them at paragraph 98. They submit, finally, that any defect in Act 959, if one were found, could be cured by reading down or by severance, and that wholesale invalidation is a remedy of last resort available only where no less intrusive remedy can cure the defect.

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PART THREE: ISSUES AND ANALYSES

The Questions for Decision

34) The critical questions on which this case turn stand in a sequence, and each of them depends upon the answers to those before it. Whether the OSP holds a valid authorisation cannot be determined until it is settled whether the prosecutorial function may be exercised by any person other than the Attorney-General, by whom it may be exercised, and in what form his authorisation must be given. We therefore take the questions in the order of their logical priority, and not in the manner or order in which the parties framed them in the Memorandum of Issues. We ask, in turn:

i) Issue 1: whether prosecutorial authority under the Constitution is exclusive to and personal to the Attorney-General;

ii) Issue 2: whether Article 88(4) permits the exercise of the prosecutorial function by a body corporate;

iii) Issue 3: whether Article 88(4) mandates a particular mode, instrument or form by which the Attorney-General must authorise another person to prosecute;

iv) Issue 4: whether the Attorney-General has in fact authorised the OSP to prosecute, and whether that authorisation is in accordance with law;

v) Issue 5: whether the Attorney-General's discretion to authorise prosecution is subject to Article 296;

vi) Issue 6: whether sections 3 and 4 of Act 959 compel the Attorney-General to authorise the OSP to prosecute, vary his powers, or otherwise exceed the legislative competence of Parliament;

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vii) Issue 7: whether the Attorney-General retains control over prosecutions conducted by the OSP;

viii) Issue 8: whether authorisation to prosecute, once given, lapses when the Attorney-General who gave it leaves office; and

ix) Issue 9: the validity of prosecutions conducted by the OSP since its inception.

35) As indicated, these questions reframe the memorandum of issues.

i) Issue (a) of the memorandum of issues, whether prosecutorial powers vest in the Attorney-General alone, is answered in the new Issue 1.

ii) Issues (b) and (c) of the memorandum of issues, whether the Act compels the Attorney-General to authorise the OSP to prosecute and whether Parliament may compel him to do so, are answered in the new Issue 6.

iii) Issues (d) and (e) of the memorandum of issues, whether the Act varies his prosecutorial powers and whether Parliament may vary them by ordinary legislation, are answered in the new Issue 6 and Issue 7.

iv) Issue (f) of the memorandum of issues, whether prosecutorial power may be delegated to a juridical person, is answered in the new Issue 2.

v) Issue (g) of the memorandum of issues leaves open any other issue which this Court may deem necessary. The further questions we find necessary to decide are the new Issues 3, 4, 5, 8 and 9.

None of those questions was framed by the parties, and none can be avoided. The reliefs sought cannot be disposed of without deciding in what form an authorisation must be given, whether one has been given to the OSP, what standards govern the exercise of the discretion to give it, whether it survives a change of Attorney-General, and what becomes of the prosecutions the OSP has already initiated. The consequential orders which those answers require fall within relief (h) endorsed on the writ.

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The Approach to Interpretation

36) In the jurisprudence of this Court the approach to the interpretation of enactments is purposive. It is a conscious and deliberate approach directed at giving effect to the object of the enactment. Words take their meaning from their context and from the company they keep. We therefore proceed from the text, read in its context, to the object or purpose for which the provision was established. We do not ascertain the meaning of words and clauses in isolation. In this jurisdiction, words take their colour and their effect from their context and from the design and aim of the enactment in which they occur.

37) In respect of the Constitution we are guided by principles fashioned through decades of jurisprudence in this Court, both before and after the coming into force of the present Constitution. The foundation is section 10(4) of the Interpretation Act, 2009 (Act 792), which requires that a provision of the Constitution or of any other law be construed or interpreted in a manner

(a) that promotes the rule of law and the values of good governance;
(b) that advances human rights and fundamental freedoms;
(c) that permits the creative development of the provisions of the Constitution and the laws of Ghana; and
(d) that avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and of the laws of Ghana.

38) On that foundation, we have recognised the unique character of the Constitution as a living organism which must be nurtured progressively for the development of the country. We do not approach its interpretation and enforcement in a mechanical fashion. In *Benneth v. The Republic* [1974] 2 GLR 47, Apaloo JA, as he then was, admonished against a narrow and strict interpretation of constitutional provisions which may not reflect the policy reasons behind them. What he there counselled was given statutory form thirty-five years later in section 10(4) of Act 792.

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39) This Court has since held consistently that the Constitution is a dynamic document which encompasses our very essence, and that its meaning and application require an approach which is sensitive to context and open to development. The classic statement is that of Sowah JSC in *Tuffour v. Attorney-General* [1980] GLR 637 at 647:

> A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.

40) The approach has been restated and reaffirmed in a long line of decisions of this Court. In *Kuenyehia v. Archer* [1993-1994] GLR 525 this Court held:

> A constitutional instrument is a document sui generis to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. It appears that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping an eye always on the aspirations of the future and not overlooking the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one.

41) In *Asare v. Attorney-General*, Civil Appeal No. J1/15/2014, judgment delivered on 14th October 2015, Gbadegbe JSC carried the theme further:

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It is important to remind ourselves that we are dealing with our national Constitution, not an ordinary Act of Parliament. It is a document that expresses our sovereign will and embodies our soul. It creates authorities and vests certain powers in them. It gives certain rights to persons as well as bodies of persons and imposes obligations as much as it confers privileges and powers. All these privileges and powers must be exercised and enforced not only in accordance with the letter, but also with the spirit, of the Constitution. Accordingly, in interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together logically to form a rational, internally consistent framework. And because the framework has a purpose, the parts are also to work together dynamically, each contributing something towards achieving the intended goal. Each provision must therefore be capable of operating without coming into conflict with any other.

42) That last passage from *Asare v. Attorney-General* governs the central question in this suit. It requires that the provisions of the Constitution work together as parts of a functioning whole, that they fit together logically, and that each provision be capable of operating without coming into conflict with any other. The plaintiff invites us to read Article 88(3) in a way which would deprive Article 88(4) of any operation or effect. Such a reading would set one clause of a single article against the clause which immediately follows it. That is a construction of Article 88 we will not accept.

43) We employ the same purposive and contextual approach, and not a literalist one, in the interpretation of other enactments. Section 10(4) of Act 792 requires us to do so. The remaining subsections of section 10, together with section 13, prescribe the aids to interpretation. They include

(a) a report of a Commission, committee or other body appointed by the Government or authorised by Parliament which has been presented to the Government or laid before Parliament, together with any Government White Paper;

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(b) a relevant treaty, agreement, convention or other international instrument ratified by Parliament or referred to in the enactment, and the preparatory work relating to it; and

(c) an agreement declared by the enactment to be a relevant document for its purposes.

44) Where the language of an enactment is considered ambiguous or obscure, the court is required to take cognisance of

(a) the legislative antecedents of the enactment;

(b) the explanatory memorandum of the Bill and the arrangement of sections which accompanied the Bill;

(c) pre-parliamentary materials relating to the enactment;

(d) a textbook or other work of reference, a report or a memorandum published by authority in reference to the enactment, and the papers laid before Parliament in reference to the enactment; and

(e) the parliamentary debates prior to the passing of the Bill in Parliament, where the legislative intent behind the ambiguous or obscure words is clearly disclosed in the parliamentary debate.

45) Section 13 of Act 792 further provides that the long title and the preamble form part of an Act and are intended to assist in explaining its intent and object. We shall have occasion to rely upon the long title of Act 959, which states that the OSP is to prosecute corruption and corruption-related offences on the authority of the Attorney-General.

46) Therefore, where this Court is called upon to decide whether an enactment of Parliament is consistent with the Constitution, we examine the meaning and purpose of the relevant provisions of the Constitution and the meaning and effect of the provisions of the enactment said to violate them. We then adopt an interpretation which gives effect to every beneficial purpose the Constitution was designed to serve and which conforms with

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the purpose the statute was enacted to achieve. In that way the statute is harmonised with the objects of the Constitution wherever that is possible. Where the two cannot be reconciled, the statute must yield.

47) The presumption of constitutionality attaches to every enactment of Parliament, and the burden lies upon the party who challenges it to displace that presumption. In *Amegatcher v. Attorney-General (No. 2)* [2012] 2 SCGLR 933, Atuguba JSC put it thus, that "until the contrary is proved legislation is presumed to be constitutional, and that it is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative." We now apply that approach to the nine questions, taking them in the order set out above.

Issue 1: whether prosecutorial authority under the Constitution is exclusive to and personal to the Attorney-General

48) Article 88 establishes the office of Attorney-General and prescribes the functions which its holder is to discharge. By clause (1) he is a Minister of State and the principal legal adviser to the Government. By clause (2) he discharges such other duties of a legal nature as the President may refer or assign to him, or as this Constitution or any other law may impose. Clauses (3) to (6) set out his functions in the prosecution of criminal offences, in civil proceedings on behalf of and against the State, and his right of audience in all courts. Clauses (3), (4) and (5) are central to this suit. We set the article out in full.

> (1) There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government.
> (2) 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.
> (3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.
> (4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with any law.

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(5) 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.
(6) The Attorney-General shall have audience in all courts in Ghana.

49) The words upon which this suit turns are few. In clause (3), that the Attorney-General "shall be responsible for the initiation and conduct of all prosecutions of criminal offences". In clause (4), that offences prosecuted in the name of the Republic shall be at his suit "or any other person authorised by him in accordance with any law". What those two provisions do, and how they relate to one another, is the question we must decide.

50) The plaintiff reads clause (3) as the provision which vests the prosecutorial function, and treats clause (4) as no more than a direction identifying at whose suit a prosecution may be brought. On that reading clause (3) would have already conferred the whole of the prosecutorial function on the Attorney-General alone, and the words of clause (4) which permit prosecution at the suit of a person he authorises would have no operation or effect. We do not accept that reading. The two clauses do different work, and we now identify what each of them does.

51) The two clauses are differently worded because they do different things. Clause (3) does not provide that the Attorney-General shall initiate and conduct all prosecutions. It provides that he shall be responsible for their initiation and conduct. To be responsible for a thing is to answer for it, and a person may answer for what is done by others as readily as for what he does himself. Clause (3) is therefore the responsibility clause of Article 88. It fixes upon the Attorney-General an exclusive constitutional accountability for every prosecution brought in the name of the Republic, and he bears that accountability whether he conducts the prosecution himself or another conducts it on his authority. Clause (4) supplies the machinery by which the prosecutorial function is exercised. It provides that prosecutions in the name of the Republic proceed at the suit of the Attorney-General or of any other person authorised by him in accordance with any law. Read so, each clause has work of its own and neither conflicts with the other. That

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is what *Asare v. Attorney-General* requires of us, that the parts fit together logically and that each provision be capable of operating without coming into conflict with any other. The responsibility does not move. The function may be exercised by any other person the Attorney-General authorises in accordance with any law.

52) The structure of Article 88 puts the matter beyond doubt, and here we accept the submission of the amici. In clause (4), which deals with criminal prosecutions, the framers included express words permitting proceedings at the suit of a person authorised by the Attorney-General. In clause (5), which deals with civil cases, they included no such words. The two clauses stand side by side in a single article. Where words appear in the one and are absent from the other, both the inclusion and the omission are deliberate. The plaintiff's reading requires us to treat the words in clause (4) as though the framers had never written them.

53) Clause (5) points the same way, and more strongly. That clause contains no words permitting any person other than the Attorney-General to sue on behalf of the State, yet constitutional commissions and other statutory bodies have since 1993 sued and been sued in their own names. It could not be otherwise, for on a stricter construction no such body could come before a court in its own name at all. *Amegatcher v. Attorney-General* shows it of the independent commissions established under the Constitution, and *Afenyo-Markin v. Speaker of Parliament and Attorney-General*, 29th November 2024, shows it of the other branches of government in matters of their own internal governance. If clause (5) bears that construction without any permissive words, clause (4), which contains them, must bear the construction we have given it.

54) The plaintiff urges that "shall" in clause (3), read with "all", makes the mandate exclusive and personal. We agree that it is exclusive. We do not agree that it is personal. Article 88 creates an office, and the holder of an office discharges its functions through those who serve in it. On the plaintiff's reading the Attorney-General would have to sign every charge

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sheet laid in the Republic and appear at every criminal trial. No Attorney-General has ever done so, and none could.

55) The Attorney-General's argument from constitutional history does not assist him. He is right that the word "all" entered the responsibility provision in 1969 and has remained there since. But the provision permitting prosecution at the suit of an authorised person has stood alongside it throughout the same period. The history he relies on is the history of both provisions, not of one. It shows successive framers retaining the two together, which is the opposite of what he must establish.

56) We accordingly hold that responsibility for the initiation and conduct of all prosecutions of criminal offences lies exclusively with the Attorney-General under Article 88(3), and that the function of initiating and conducting a prosecution may under Article 88(4) be exercised by any other person he authorises in accordance with any law.

Issue 2: whether Article 88(4) permits the exercise of the prosecutorial function by a body corporate

57) The defendant submits that only a natural person may be authorised under Article 88(4). He puts it in two ways. First, on the authority of *Prohibitions Del Roy* (1607) 77 ER 1342, that a function calling for legal learning and judgment cannot be committed to an artificial person. Second, on section 3 of the Legal Profession Act, 1930 (Act 32), that only a natural person may be enrolled as a lawyer, and therefore that only a natural person can conduct a prosecution.

58) *Prohibitions Del Roy* arose in the reign of King James. The Archbishop of Canterbury asked the King what matters the ecclesiastical judges might decide, and in particular what was to happen where the law gave no express authority. The King answered that he might decide such matters in his own royal person, that the judges were no more than his delegates, and that he could take from them any case he chose to determine himself.

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59) Lord Coke, Chief Justice of the Court of Common Pleas, held otherwise. The King in his own person could not adjudge any case, criminal or civil. Cases were to be determined in a court of justice by judges sworn to execute justice according to the law and custom of England. The King had his own court in the Upper House of Parliament, to which appeals lay from the Common Pleas through the King's Bench. Though he might sit in the King's Bench, he could not take a case out of any of his courts and give judgment upon it himself. Were he to give judgment, the party aggrieved would have no remedy against him. And the King was not learned in the laws of England, which are not decided by natural reason but by the artificial reason and judgment of law, requiring long study and experience.

60) The decision in *Prohibitions Del Roy* offended the King, as it was bound to. It has endured because of what it settled: that adjudication belongs to the courts and not to the executive, that a judge must be qualified to judge, and that no man is beyond the reach of a remedy. Those are the foundations of judicial independence and of the separation of powers. *Prohibitions Del Roy* says nothing about who may prosecute. The court was never asked whether a prosecution may be brought in the name of an institution, and it did not answer that question. The defendant asks us to take a decision about the King's claim to sit as a judge and make it govern the capacity of a statutory office to bring a criminal charge. A holding about who may judge, does not decide who may prosecute; a decision on the first, says nothing about the second.

61) The argument from the Legal Profession Act fares no better. Section 3 of Act 32 provides who may be enrolled as a lawyer. It does not provide who may be authorised under Article 88(4), and no question of enrolment arises when an authorisation is given. The premise is sound but the conclusion does not follow from it. Only a human being can be enrolled, and only a human being can stand in court and address a judge. It does not follow that the authority under which that human being appears must have been given to him personally rather than to the office in which he serves.

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62) The question is in any event answered by the ordinary meaning of the word the framers used. Article 295 of the Constitution defines "person" to include a body corporate. Section 46 of the Interpretation Act, 2009 (Act 792) is to the same effect. Nothing in Article 88(4) displaces those definitions, and the defendant points to nothing in the article which would. His objection is not drawn from the text of the Constitution at all. It rests on a 17th Century English decision and on an enactment about enrolment at the Bar.

63) At any rate, the defendant's argument does not conform to practice. The Attorney-General's own Department is not a natural person. Neither is the Ghana Police Service, nor the Economic and Organised Crime Office. Each prosecutes at the suit of the Republic through lawyers and officers holding rank within it. In the case of the OSP those are the prosecutorial ranks created by L.I. 2373, which we describe at paragraph 74 below. What is committed to the institution is the function. What is exercised within it is the judgment of the individual conducting the case. On the defendant's reading, none of those prosecutions could have been brought, and the Republic would have been without a prosecuting service since 1993. It may be answered that the officers who prosecute for those institutions are themselves authorised, and are named individually in the instrument authorising them. That is true of some and not of others, and it does not assist the defendant. Section 56 of Act 30, which we set out at paragraph 70 below, and whose provision embodies the practice the defendant invokes, permits the Attorney-General to appoint public officers to be public prosecutors generally, or for any specified class of criminal cause or matter, or for any specified area, and permits him separately to appoint a named legal practitioner for a particular cause. Parliament thus provided for appointment by class as well as by name. Were authorisation confined to a person identified by name, the first of those limbs could never be used. The ranks created by the third schedule of L.I. 2373 are that same model applied to the OSP.

64) We hold that "person" in Article 88(4) bears its ordinary meaning and includes a body corporate. The Office is a body corporate under section 1 of Act 959 and is capable of

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receiving an authorisation. Whether it has received one is a different question, which we answer at Issue 4.

Issue 3: whether Article 88(4) mandates a particular mode, instrument or form by which the Attorney-General must authorise another person to prosecute

65) The plaintiff submits, in reliance on Article 296(c), that authorisation must be effected by a Constitutional Instrument. The defendant submits that the mode is an Executive Instrument, and invites us to direct that one be issued within a week.

66) Article 88(4) requires that the person be "authorised by him in accordance with any law". The phrase is general by design. It names no form and no instrument. It requires that whatever vehicle is chosen be law, within the meaning of Article 11(1). Article 11(1) recognises as sources of law the Constitution itself, enactments made by or under the authority of Parliament, orders, rules and regulations made by a person or authority under a power conferred by the Constitution or any other law, the existing law, and the common law. Any of these will satisfy Article 88(4). Where a specific law prescribes a specific mode, that mode governs. Where none does, reference is had to the general body of laws.

67) That reading is confirmed by the legislative record. During the passage of the Bill, Dr. Dominic Ayine, a Member of Parliament (now the Attorney-General) proposed that the instrument by which the authorisation was to be given be prescribed. Parliament did not adopt the proposal. Parliament therefore had the question of mode before it, and declined to fix one. It is not for this Court to supply what Parliament deliberately withheld.

68) The plaintiff's reliance on Article 296(c) does not overcome the generality of "any law". Article 296(c) requires that regulations be published, by constitutional or statutory instrument, to govern the exercise of a discretionary power vested in a person or authority which is not a judge or other judicial officer. Whether the discretion under Article 88(4) is one within the reach of Article 296 is a question we answer at Issue 5. But even if it

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were, clause (c) would prescribe the form of the regulations governing the exercise of the discretion. It would not prescribe the form in which the discretion is exercised, and it would not convert "in accordance with any law" into "by a Constitutional Instrument".

69) The defendant's invitation to direct the issue of an Executive Instrument fails on grounds of its own, and we set them out because the invitation was pressed with force.

70) First, we cannot both hold that no mode is prescribed and then prescribe one. Second, a direction to authorise the OSP presupposes that no authorisation exists, and, as we hold at Issue 4, that is not the position. Third, a direction requiring the Attorney-General to authorise the OSP within a stated time would do by judicial order the very thing we hold at Issue 6 that Parliament may not do by statute. If the legislature may not command the exercise of that discretion, neither may we. Fourth, and decisively as a matter of constitutional machinery, Article 297(d) provides that where a power is conferred to make a constitutional or statutory instrument, regulation, rule, resolution or direction, the power includes the power, exercisable in the same manner, to amend or revoke it. What has been created by legislative instrument, laid before Parliament and subject to annulment under Article 11(7), may be amended or replaced only by a like legislative instrument. To substitute an executive instrument would not be to proceed "in the same manner". The principle is established in the reasoning of this Court in *Stephen Nii Bortey Okane and Others v. Electoral Commission of Ghana and Attorney-General*, Writ No. J1/2/2011, judgment delivered on 23rd June 2011, which adopts the analysis of Kpegah JSC in *Philip Kwaku Apaloo v. Electoral Commission* [2001-2002] SCGLR 1 at 34 to 35.

71) It follows that the Attorney-General remains free to issue an executive instrument, a fiat or a directive to supplement or particularise the authorisation now in force, and free to amend or revoke that authorisation by a further legislative instrument. What he may not do is displace a legislative instrument by an executive instrument, and what we may not do is direct him to attempt it.

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72) We add a word about section 56 of Act 30, because the consequences of this judgment for other public prosecutors must be plain. Section 56 provides that the Attorney-General may appoint by executive instrument, generally or for any specified class of criminal cause or matter or for any specified area, public officers to be public prosecutors, and may appoint any legal practitioner in writing to be a public prosecutor in a particular cause or matter. That is the general and long-established statutory machinery through which the Attorney-General has authorised, and continues to authorise, police prosecutors, revenue and customs prosecutors and a great range of other prosecutors of the State. Nothing in this judgment disturbs it. Where Parliament has provided an authorising framework of its own, as it has for the OSP, that framework operates in its own field. Where it has not, section 56 continues to supply the ordinary machinery, and it does so consistently with Article 88(4). The one does not exclude the other. We hold, for the avoidance of any doubt, that this judgment does not impugn the authority of any prosecutor authorised under section 56 or under any other statutory provision.

73) Article 88(4) prescribes no particular mode of authorisation. Any law within Article 11(1) will serve that purpose.

Issue 4: whether the Attorney-General has in fact authorised the OSP to prosecute, and whether that authorisation is in accordance with law

74) The OSP has been authorised to prosecute. The authorisation does not rest on any single instrument. It is cumulative and it is complete. It rests on Act 959, on the two legislative instruments the former Attorney-General made under that Act, and on the continuing engagement which the Act requires of him.

75) **Act 959, the enabling Act of Parliament,** is the law in accordance with which the authorisation has been given. We are careful about how we put this, because Parliament cannot itself authorise under Article 88(4). What Parliament may do, and what it did, is

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to enact the law in accordance with which the Attorney-General authorises. Act 959 identifies the Attorney-General as the source of the authorisation. It defines its scope by reference to corruption and corruption-related offences. Its long title states that the OSP is to prosecute those offences "on the authority of the Attorney-General". Section 4(2) subordinates the authorisation expressly to Article 88(4). Act 959 is a law within Article 11(1)(b). It received the assent of the President on 2nd January 2018 and was published in the Gazette on 3rd January 2018.

76) **The first instrument, the Office of the Special Prosecutor Regulations, 2018 (L.I. 2373),** that the Attorney-General made in exercise of the power conferred by section 78 of Act 959, was published in the Gazette on 26th November 2018 and entered into force on 22nd December 2018. The Third Schedule establishes a corps of prosecutorial ranks running from Assistant Prosecutor through Prosecutor, Senior Prosecutor and Principal Prosecutor to Chief of Special Prosecutors, with equivalences to police ranks from Assistant Superintendent to Deputy Commissioner. Regulation 15 provides that the OSP shall have the ranks specified in the Third Schedule. The holder of such an office exercises the function when the Special Prosecutor assigns responsibility to him under section 14(3) of the Act, which permits that assignment but leaves the Special Prosecutor answerable for how the responsibility assigned is exercised.

77) **The second instrument, the Office of the Special Prosecutor (Operations) Regulations, 2018 (L.I. 2374),** was made by the Attorney-General on 23rd November 2018, in exercise of the power conferred by section 78 of Act 959. It was published and came into force on the same dates as L.I. 2373. Regulation 11, headed "Decision to prosecute", provides that the Special Prosecutor or an authorised officer shall, upon considering the facts and evidence gathered from an investigation, take a decision whether or not to prosecute. By that instrument the Attorney-General committed the prosecutorial judgment to the holders of the offices she had created by L.I. 2373.

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78) **The continuing statutory engagement of the Attorney-General with the OSP,** solidifies our position that prosecutorial authority was donated by the former to the latter. He nominates the Special Prosecutor for appointment by the President, subject to the approval of a majority of all the members of Parliament, under section 13(3). He nominates the Deputy Special Prosecutor under section 16(2). He receives from the OSP, within thirty days of the conclusion of every prosecution and of every confiscation or realisation of property, a written report on the outcome, under section 3(2). Ten percent of every amount realised under a confiscation or pecuniary penalty order is paid to his Office under section 66(2). The OSP does not stand outside the constitutional sphere of the Attorney-General. It stands within it, in a relationship the Act itself prescribes.

79) Taken together, Act 959, the two instruments and that continuing engagement constitute an authorisation given by the Attorney-General, in accordance with laws within the meaning of Article 11(1), to the OSP and to the officers holding the prosecutorial ranks created by L.I. 2373, to initiate and conduct prosecutions of corruption and corruption-related offences at the suit of the Republic.

80) We now deal with a subsidiary question about the vires of the two instruments. Section 78 of Act 959 obliges the Attorney-General to make Regulations and lists in paragraphs (a) to (j) ten specific subjects. Paragraph (k) is a residual power to provide "generally for the effective implementation of this Act". Neither the creation of prosecutorial ranks nor the decision to prosecute appears among the ten specific subjects. It may therefore be said that regulation 15 of L.I. 2373 and regulation 11 of L.I. 2374 lie outside the enabling power. We do not accept the argument.

81) Both provisions fall within paragraph (k) of section 78 of Act 959. In that sense, the object of the OSP Act, stated in section 2, includes the prosecution of specific cases of alleged or suspected corruption. Section 3(1) is expressed throughout in the language of investigation and prosecution. Regulations which establish the ranks by which an Office prosecutes, and which provide for the taking of the decision to prosecute, are regulations

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providing for the effective implementation of such an Act. Nor can paragraph (k) be confined by construction to matters of the same character as those in paragraphs (a) to (j), for those paragraphs are not of one character. They range from the tracing of tainted property, through the procedure for the submission of complaints, to reporting to the public on convictions secured. There is no genus by which the residual power may be limited, and since section 78 is the only power of subordinate legislation in the Act, paragraph (k) must carry whatever else the working of the Act requires.

82) The breadth of paragraph (k) does not revive the contention that Parliament compelled the Attorney-General to authorise the OSP to prosecute. Section 78 imposes a duty to make Regulations. It imposes no duty as to what those Regulations must contain in the matter of authorisation. Paragraphs (a) to (j) fix the subjects on which she must make provision. Paragraph (k) leaves to her own judgment what the effective implementation of the Act requires. She could have regulated the ten specified subjects and gone no further and she would have discharged the section 78 duty in full. That she went further, and created the prosecutorial ranks and provided for the decision to prosecute, was her own choice. That choice is the exercise of the discretion which Article 88(4) requires of her. Section 78 mandates the Attorney-General to legislate. It does not compel any Attorney-General to authorise the OSP to prosecute.

83) In any event, the question of vires does not arise. Neither instrument confers prosecutorial power on the OSP. The power to authorise is conferred on the Attorney-General by Article 88(4) and requires no enabling statute. The Constitution supplied the authority. Section 78 supplied the vehicle. Even if either Regulations were treated as exceeding section 78, the instrument would remain her own, made in writing, published in the Gazette and laid before Parliament, and it would still evidence her authorisation under Article 88(4).

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Issue 5: whether the Attorney-General's discretion to authorise prosecution is subject to Article 296

84) Article 296 applies where a discretionary power is vested in a person or authority. Clauses (a) and (b) require that the discretion be exercised fairly and candidly and not arbitrarily, capriciously or in bad faith or by resort to bias. Clause (c) requires that regulations be published, by constitutional or statutory instrument, to govern the exercise of the power where it is vested in a person or authority which is not a judge or other judicial officer.

85) Clause (c) does not apply to the discretion to authorise another person under Article 88(4). This Court so held, in relation to the cognate discretion to enter a *nolle prosequi*, in *Gregory Afoko v. Attorney-General*, Writ No. J1/8/2019, judgment delivered on 19th June 2019. The Court held that the discretion is executive in character rather than quasi-judicial, and that Article 296(c) is restricted to discretion that is quasi-judicial in nature. That reasoning applies with equal force to the discretion to authorise another person to prosecute. The decision to authorise is executive. It entrusts prosecutorial work. It is not the determination of a case between parties. It falls outside Article 296(c).

86) Clauses (a) and (b) are another matter. This Court held in *Gregory Afoko v. Attorney-General*, following Date-Bah JSC in *Ransford France (No 3) v. Electoral Commission and Attorney-General* [2012] 1 SCGLR 705 at 723, that although clause (c) does not apply, the person affected retains the right to subject the exercise of the discretion to the standards of fairness, candour, impartiality and freedom from arbitrariness and caprice imposed by clauses (a) and (b). Those clauses, read with Article 23, assure fairness and impartiality in administrative processes. A decision of the Attorney-General to grant, to withhold, to vary or to revoke the authorisation of the OSP is the exercise of a discretionary power vested by the Constitution. It must satisfy those standards and it is amenable to review on that footing.

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87) We add, for completeness, that a claim founded on Article 23 standing alone lies to the High Court under Article 33 and not to this Court, as *Gregory Afoko v. Attorney-General* also confirms.

Issue 6: whether sections 3 and 4 of Act 959 compel the Attorney-General to authorise the OSP to prosecute, vary his powers, or otherwise exceed the legislative competence of Parliament

88) The plaintiff and the defendant read section 4(2) as an act of compulsion by Parliament directed at the Attorney-General. We are of a different view.

89) Section 4(2) provides: "Subject to clause (4) of article 88 of the Constitution, the Office shall for the purposes of this Act be authorised by the Attorney-General to initiate and conduct the prosecution of corruption and corruption-related offences." Four features of the drafting are decisive.

90) First, the subsection opens with an express subordination to Article 88(4). A Parliament intending to compel the Attorney-General to authorise the OSP would not begin the compelling provision by subordinating it to the Attorney-General's own constitutional discretion.

91) Second, the subsection is in the passive voice. It does not say "the Attorney-General shall authorise". It says "the Office shall be authorised". The active commanding voice is present elsewhere in the Act, and Parliament used it where it meant it, in section 78. The discretionary voice is also present, in section 81(1), where Parliament wrote that the Attorney-General "may" authorise the OSP to handle matters then being handled by the Economic and Organised Crime Office, by the Prosecutions Division of the Attorney-General's Office, or by public prosecutors appointed under section 56 of Act 30. Three drafting choices, one Act, one drafter. Parliament compelled where it meant to compel, permitted where it meant to permit, and in section 4(2) did neither. Section 4(2) identifies the source and the scope of the authorisation. It does not command it.

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92) Third, section 42 of the Interpretation Act presumes that "shall" is imperative, but the presumption yields to context. The defendant himself concedes the point by his citation of *Liverpool Borough Bank v. Turner*. Section 4(2) speaks of a state of affairs which the Act contemplates and for which it provides the framework. It does not direct the Attorney-General to do anything.

93) Fourth, the defendant's reliance on the explanatory memorandum addresses a text which Parliament rejected. The memorandum described Clause (4) of the Bill as laid in July 2017. The Hansard for 1st and 2nd November 2017 records the concern of Parliament that the clause was inconsistent with Article 88(4) and records its re-drafting to produce the express subordination now found in section 4(2). A memorandum tendered under Article 106(2)(b) explains the Bill at the moment of its laying. It is not amended when the Bill is amended on the floor. In respect of provisions so altered its evidentiary value falls away and it becomes the record of a discarded text. We are invited to construe an enacted provision by reference to language describing a rejected clause. We decline the invitation.

94) We turn to the contention that the Act varies the Attorney-General's prosecutorial powers, which is issue (d) of the joint memorandum. It does not. Section 3 is a functions provision. It states what the OSP is to do, within the framework of authorisation established by section 4. It does not confer prosecutorial power. It presupposes it. As for section 14(2), the plaintiff and the defendant have read it out of its setting. It provides that "despite subsection (1)" the Special Prosecutor shall have full authority and control over the investigation, initiation and conduct of proceedings under section 3(1). Subsection (1) provides that the Special Prosecutor is accountable to the Board in the performance of his functions under the Act. Section 14(2) is therefore addressed to the Board and not to the Attorney-General. What it secures is that the Board, which governs the OSP and to which the Special Prosecutor is otherwise accountable, shall not direct him in the conduct of a particular case. Section 6(2), which forbids the Board to interfere in the day to day functions of the OSP, is to the same effect. Not a word of section 14(2) touches the

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Attorney-General, and the subsection cannot be made to carry a meaning which its own opening words exclude.

95) Section 4 situates the OSP in relation to the Attorney-General rather than apart from him. Subsection (1) opens with the words "Except as otherwise provided in the Constitution". Subsection (2) opens with the words "Subject to clause (4) of article 88 of the Constitution". Each subsection carries a constitutional saving in its own opening words. Where the plaintiff and the defendant read section 4 as expelling the Attorney-General, its text keeps him in.

96) Nor is the Attorney-General required to abandon responsibility for the offences the OSP prosecutes. He retains the responsibility imposed by Article 88(3) over every prosecution in the Republic, including every prosecution brought by the OSP. He retains the power of termination which we describe under Issue 7. To authorise is not to abdicate. Since 1993 the Attorney-General has discharged the constitutional responsibility for prosecutions through a network of authorised officers, including State Attorneys of his own Department, police prosecutors acting under *fiat*, and revenue and customs officers acting under statute. Each exercises a portion of the prosecutorial function. None divests the Attorney-General of the responsibility.

97) It follows that nothing in sections 3 and 4 removes the Attorney-General's constitutional responsibility, alters the mode of authorisation, compels him to authorise the OSP, or varies the powers which Article 88 confers on him. Nothing in them therefore exceeds the legislative competence of Parliament under Article 93(2). Since we find no inconsistency between those provisions and the Constitution, Article 1(2), which renders void any law found to be inconsistent with the Constitution, is not engaged. The presumption of constitutionality is not displaced.

98) The Attorney-General's reliance on *Appiagyei-Atua and Two Others v. Attorney-General* does not assist him, though we accept the principle for which he cites it. In that case the

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Imposition of Restrictions Act, 2020 (Act 1012) took the supervisory power over emergency measures which the Constitution places in Parliament and gave it, during a declared emergency, to the Executive. A function was moved from the branch in which the Constitution had lodged it to another. Nothing of that kind has happened here. Act 959 leaves the responsibility imposed by Article 88(3) exactly where the Constitution placed it, and provides for the exercise of the function by a person the Attorney-General authorises, which is what Article 88(4) itself contemplates. The principle in *Appiagyei-Atua and Two Others v. Attorney-General* strikes at a statute which varies the Constitution. It has nothing to say to a statute which works within it.

99) The language of the 'donation' argument by the defendant also mistakes the constitutional relationship. Article 88(4) speaks of a person authorised by the Attorney-General, not of a person to whom his power has been given away. We accept the submission of the *amici* on this. One who prosecutes on the authority of the Attorney-General prosecutes in the name of the Republic and on his authority, and what that person does is in law done under the responsibility which Article 88(3) fixes on the Attorney-General and nowhere else. Authorisation lends a hand. It does not subtract a duty.

100) We record, because the *amici* demonstrated it in detail and because it bears upon the reasonableness of the readings urged upon us, what the consequences of accepting those readings would be. Every prosecution begun during the tenure of an Attorney-General and not concluded within it would abate on his departure or removal. Appeals would collapse before determination. Accused persons would move for discharge whenever an Attorney-General left office. Every state attorney would become *functus officio* on the succession and the pleadings filed would become nugatory. Civil proceedings involving the Republic would terminate midway. Legal advice given by an Attorney-General would cease to have effect when he left office. And every specialised prosecuting authority created by Parliament since 1993 would stand on doubtful constitutional footing. They include the Economic and Organised Crime Office under the

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Economic and Organised Crime Office Act, 2010 (Act 804), the Narcotics Control Commission under the Narcotics Control Commission Act, 2020 (Act 1019), the Securities and Exchange Commission under the Securities Industry Act, 2016 (Act 929), the Bank of Ghana under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), the Customs Division of the Ghana Revenue Authority under the Customs Act, 2015 (Act 891), the Ghana Revenue Authority under the Revenue Administration Act, 2016 (Act 915), the Food and Drugs Authority, the National Pensions Regulatory Authority, the Environmental Protection Authority and the Metropolitan, Municipal and District Assemblies. Parliament has proceeded on the contrary assumption throughout. As recently as 2022, by the Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079), it inserted section 162B(2) into Act 30, legislating for prosecutors alongside the scheme it had created in 2017 for the OSP.

101) These agencies exist to perform the executive function of the execution and maintenance of law which Article 58(2) commits to the Executive. The creation of specialised agencies to prosecute specialised offences under the authority of the Attorney-General is an ordinary and constitutionally regular expression of that function. The OSP sits within that established pattern and is not distinguishable from the other agencies in any material respect.

Issue 7: whether the Attorney-General retains control over prosecutions conducted by the OSP

102) The plaintiff describes the OSP as independent of the Attorney-General, autonomous of him, insulated from him, and outside his control and supervision. The OSP is not, and has never been.

103) The Attorney-General retains the power to enter a *nolle prosequi* in any prosecution brought by the OSP and thereby to terminate it. That power is not a concession we make in order to save the Act. It is a power this Court has already held to be implied and inherent in Article 88(3), on the ground that the Constitution has not by any express

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provision taken away the power provided under section 54 of Act 30. *Gregory Afoko v. Attorney-General* so decided.

104) Because the power is inherent in Article 88(3), it could not have been removed by ordinary legislation, and Act 959 did not attempt to remove it. Section 80(2) of Act 959 amends sections 54 and 55 of Act 30 by inserting the words "or Special Prosecutor" after "Attorney-General" wherever they appear, and inserts into section 54 a new subsection (2A) requiring the Special Prosecutor to state reasons for entering a *nolle prosequi*. After amendment, the opening words of section 54 read:

> In any criminal case, and at any stage thereof before verdict or judgment, and in the case of preliminary proceedings before the District Court, whether the accused has or has not been committed for trial, the Attorney-General or Special Prosecutor may enter a nolle prosequi, either by stating in Court or by informing the Court in writing that the State intends that the proceedings should not continue.

105) The amendment is additive. It is not substitutive. The Attorney-General remains where the Constitution placed him. The Special Prosecutor is placed alongside him, and is burdened by a duty to give reasons where the Attorney-General does not. Section 55, as amended, permits either officer to vest the section 54 power, by order in writing, in a person appointed to sign indictments or to represent the State at trials on indictment, and to revoke that order in writing.

106) The consequence is that no prosecution brought by the OSP can proceed to verdict if the Attorney-General determines that the interest of the State requires otherwise. That is real and continuing control. An office subject to such a power is not autonomous, not insulated and not beyond supervision. The plaintiff's premise fails on the terms of the Act and on the Constitution, as this Court has construed it.

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107) The argument built on the plea bargain does not touch the question before us. Whether the OSP may conclude a plea agreement without the consent of the Attorney-General is a question about the extent of its powers once it is prosecuting. It is not a question whether it holds an authorisation to prosecute at all, which is the question this suit raises. Parliament has in any event legislated on the matter since Act 959. By the Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079) it inserted section 162B(2) into Act 30, providing that a prosecutor who is not an officer of the Office of the Attorney-General shall not conclude a plea agreement without his consent. Parliament plainly did not legislate on the footing that a prosecutor outside the Attorney-General's Office is beyond his reach in the matter of plea agreements. The precise relationship between that provision and the plea bargain provision of Act 959 (section 71) does not arise in this writ, and we express no opinion on it.

108) Attorney-General's control is therefore real, but it is not unaccountable. As we hold at Issue 5, its exercise is governed by Article 296(a) and (b). He must act fairly and candidly. He must not act arbitrarily, capriciously or from bias, and he must act in accordance with due process of law. He accordingly retains his constitutional responsibility, and he answers for the manner in which he discharges it. The OSP, for its part, holds an authorisation that stands until it is lawfully revoked, and that may not be withdrawn without reason given. That is the balance struck by Article 88 and kept by Act 959.

Issue 8: whether authorisation to prosecute, once given, lapses when the Attorney-General who gave it leaves office

109) The plaintiff submits that an authorisation given under Article 88(4) lapses by constitutional implication when a successor assumes office unless expressly renewed. The submission cannot stand.

110) The Office of the Attorney-General is a public office. Its holder for the time being exercises the powers of the office, and those powers are of the office and not of the individual.

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Article 88 designates the holder of a constitutional office, not the person for the time being in it. An authorisation granted by the Attorney-General is granted by the office and endures until amended or revoked in the manner in which it was granted, as Article 297(d) provides and as section 21(2) of the Interpretation Act provides to like effect. Nothing in the constitutional text supports a doctrine by which an authorisation lapses automatically.

111) The rule of perpetual succession applies to executive power as it applies to every institutional public power. If it were otherwise, no regulation made by a Minister would survive her tenure, no order of a judge would survive his retirement, and no appointment made by a President would survive his term. The *amici* put the matter well by their illustration from the appointment of Justices of this Court. Justices are appointed by the President under Article 144(2), on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. No one suggests that the President is thereby the source of the judicial power which Article 125 vests in the Judiciary. Appointment fills an office. It does not supply the source of the function. The same holds for the appointment of the Special Prosecutor, and the constitutional text puts it beyond argument. The power to appoint a person to hold or to act in an office in the public services is vested in the President by Article 195(1), and Article 195(2) permits him to delegate that power. That is the formula replicated in sections 13 and 16 of Act 959. The combined effect of Articles 195 and 88 is that the President appoints the Special Prosecutor to the office, while the Attorney-General authorises the exercise of the prosecutorial function. The two are distinct acts under distinct provisions, and neither is the source of the other.

112) The two authorities on which the plaintiff founds this part of his case do not bear the weight he places on them. *J.H. Mensah v. Attorney-General* decides that the tenure of a Minister of State expires with the constitutional term of the President who appointed him, so that a Minister in a first term is not continued automatically into a second without fresh parliamentary approval. It establishes no general rule that every executive mandate,

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discretion or authorisation lapses when the officer who conferred it leaves office. The question there was the retention of a Minister in office. The question here is the continued validity of what a Minister did while he held it. *Martin Amidu v. President Kufuor and Attorney-General* is further still from the point. It decided whether a suit might be brought against a sitting President notwithstanding the immunity conferred by Article 57(4), and whether the President was bound to consult the Council of State before certain appointments. Neither case touches the durability of an authorisation given under Article 88(4).

113) The successor Attorney-General is not without means of intervention. He may amend the authorisation by further legislative instrument under Article 297(d). He may narrow its scope. He may revoke it and re-issue it in different terms. Any such step must satisfy Article 296(a) and (b) and must proceed in the manner prescribed by Article 297(d), by an instrument of the same kind as that by which the authorisation was made. Until so amended or revoked, the authorisation stands.

Issue 9: the validity of prosecutions conducted by the OSP since its inception

114) Two conclusions follow from what we have held. Sections 3 and 4 of Act 959 are consistent with the Constitution. The OSP holds an authorisation under Article 88(4).

115) The authorisation has been complete in every element since 22 December 2018, when L.I. 2373 and L.I. 2374 entered into force. Nothing turns on the period between the coming into force of Act 959 on 3 January 2018 and that date. The Act was in force throughout that period, and it directed that the OSP prosecute on the authority of the Attorney-General. The instruments made in November 2018 created no authority out of nothing. They particularised, by establishing the ranks and committing the prosecutorial decision to their holders, an authorisation whose source and scope the Act had already fixed. An instrument which perfects an authorisation contemplated by the statute under which it is made operates upon the office as that statute constituted it. Anything lawfully

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begun by the OSP before those instruments came into force was therefore begun under an authority the Act had already conferred and the instruments afterwards completed, and is not to be impeached on that ground.

116) We accordingly hold that every prosecution instituted by the OSP, and every conviction, confiscation order, freezing order, seizure, plea entered under section 71 of Act 959, and other order or proceeding conducted by or before the OSP from its inception, is valid. We so declare in exercise of the request made under relief (h).

Constitutional Questions in Courts Below

117) Whether an Act of Parliament is inconsistent with the Constitution is committed exclusively to this Court by Articles 2(1) and 130(1). Where the question arises before any other court, Article 130(2) requires that court to stay the proceedings and refer it. No court below may decide it, whatever the procedural vehicle in which it is raised. Any ruling or order of a court below which is inconsistent with the interpretation given in this judgment is nullified to the extent of the inconsistency.

The Provisions Impugned

118) We return to the matter flagged at paragraph 3. Relief (c) attacks sections 3(3) and 4 of Act 959. Section 3(3) is the half yearly publication duty. Nothing in it bears upon independence in initiating, conducting or terminating prosecutions, and no argument was addressed to it. The provision which confers the prosecutorial function is section 3(1), and it is against the conferment of that function, and against section 4, that the plaintiff's argument was in truth directed. We have accordingly considered section 3 as a whole, together with section 4, and we hold both to be consistent with the Constitution. Had it been necessary to confine ourselves to the provisions as pleaded, the result would have been the same, for a duty to publish what one has prosecuted cannot be unconstitutional unless the prosecution itself was unconstitutional in the first place.

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PART FOUR: OBSERVATIONS AND RECOMMENDATION

119) We offer three observations before we make our order, and with the first of them a recommendation. They form no part of the reasons for our decision. They are addressed to the political branches and to the executive officers of the State, whose responsibility it is to legislate for the machinery of prosecution and to operate it.

120) First, the pattern of legislative practice under Article 88(4) since 1993 discloses at least nine distinct drafting models by which Parliament has provided for the authorisation of persons other than the Attorney-General to prosecute in the name of the Republic. Some rest on appointment by executive instrument under section 56 of Act 30. Some rest on grants in the enabling legislation of specialised agencies. Some, as here, combine several. The profusion is a source of uncertainty. It has produced this litigation and it will produce more. We invite the Attorney-General and Parliament to consider a general framework, by whatever instrument is thought appropriate, prescribing with clarity the mode by which the authorisation of the Attorney-General is to be granted, evidenced, varied and revoked across the whole of the prosecuting apparatus of the State. Such a framework would serve the State, the accused and the courts well. Its transparency should not depend upon the identity of the Attorney-General for the time being in office, because Article 88 designates an office and not a person. Neither should a decision turn merely on the fact that the enabling legislation of a specialised agency has created a crime.

121) Second, the Attorney-General remains free at any time to issue any further instrument he considers appropriate, whether to supplement, to particularise, to vary, to replace, or to revoke the authorisations now in force. That freedom is subject to two constraints we have set out. A legislative instrument may be amended or replaced only by a further legislative instrument, as Article 297(d) requires. And every exercise of the discretion, whether to grant, to vary, to withhold or to revoke, is subject to Article 296(a) and (b).

122) Third, an Attorney-General who terminates a prosecution brought by the OSP answers for that termination not only to this Court, and not only to the standards which Article

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296(a) and (b) impose, but also to Parliament and, ultimately, to the people. The power of *nolle prosequi* is a solemn one. It is committed to the Attorney-General not for his own convenience, nor for the convenience of any Government, but for the ordered administration of the Criminal Law of the Republic. This Court expects that it will not be exercised lightly in a prosecution for corruption, and that where it is exercised the reasons will withstand the scrutiny both of the courts and of the public.

DISPOSITION

123) For the reasons given, we hold and declare:

(a) That on a true and proper interpretation of Articles 1(2), 88, 93(2) and 296 of the Constitution, responsibility for the initiation and conduct of all prosecutions of criminal offences is vested exclusively in the Attorney-General, and no person may exercise the prosecutorial function of the Republic independently of the Attorney-General or in parallel with him. Any person other than the Attorney-General who prosecutes in the name of the Republic does so only as a person authorised by him in accordance with any law, under his continuing responsibility, and subject to his power to terminate the prosecution.

(b) That sections 3 and 4 of the Office of the Special Prosecutor Act, 2017 (Act 959) are consistent with the Constitution and are not void.

(c) That the Office of the Special Prosecutor holds an authorisation given by the Attorney-General in accordance with law within the meaning of Article 88(4) of the Constitution, to initiate and conduct the prosecution of corruption and corruption-related offences, and that the authorisation subsists until amended or revoked in the manner in which it was given.

(d) That, in respect of prosecutions, the Office of the Special Prosecutor is not independent of the Attorney-General, not autonomous of him, not insulated

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from him and not outside his supervision, and does not exercise prosecutorial authority in parallel with him.

(e) That the Attorney-General retains, as a power inherent in Article 88(3), the power to enter a *nolle prosequi* in any prosecution brought by the Office of the Special Prosecutor and thereby to terminate it, and that the exercise of that power is subject to Article 296(a) and (b) of the Constitution.

(f) That all prosecutions instituted by the Office of the Special Prosecutor, and all convictions, confiscation orders, freezing orders, seizures, pleas entered under section 71 of Act 959, and other orders and proceedings conducted by or before the OSP from its inception, are valid.

(g) That nothing in this judgment impugns the authority of any prosecutor authorised by the Attorney-General under section 56 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) or under any other law.

(h) That any ruling or order of any court below this Court which is inconsistent with the interpretation given in this judgment is, to the extent of the inconsistency, nullified.

(i) Relief (a) is granted in the terms of paragraph 124(a). Relief (h) is granted in the terms of paragraphs 124(b) to (h). Reliefs (b), (c), (d), (e), (f) and (g) are dismissed.

(j) There shall be no order as to costs.

124) A final word. The plaintiff is a private legal practitioner. He brought this action in his own name and at his own expense. He raised a question of real constitutional importance which had unsettled the administration of criminal justice in the Republic, and he has

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enabled this Court to settle it. That the reliefs have not been granted in the form in which he sought them does not diminish the service he has rendered. We commend him.

(SGD.) **P. BAFFOE-BONNIE**
(CHIEF JUSTICE)

(SGD.) **G. PWAMANG**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **A. LOVELACE-JOHNSON (MS.)**
(JUSTICE OF THE SUPREME COURT)

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(SGD.) **E. Y. GAEWU**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **S. DZAMEFE**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **G. S. SUURBAAREH**
(JUSTICE OF THE SUPREME COURT)

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CONCURRING OPINION

KULENDI JSC:

Every prosecution in this Republic is brought in a name which belongs to no one and to all. It is not the Attorney-General who accuses; nor the Special Prosecutor; nor any officer holding a warrant of appointment. It is the Republic and the Republic is the people. The question before us in this case is not who owns that name. It is who may speak it, upon whose authority, and by what law. A Constitution which entrusts one officer with responsibility for that name has not thereby required him to utter it alone.

INTRODUCTION:

1. I have had the considerable benefit of reading the illuminating opinion proferred by the learned Chief Justice and I am in substantial agreement with the conclusions reached therein, particularly the conclusion that the Office of the Special Prosecutor Act, 2017 (Act 959) is consistent with the constitutional framework established by Article 88 of the 1992 Constitution.

2. My own route to that conclusion, however, differs in some respects from that of the venerable Chief Justice. Given the considerable public interest which this suit has attracted, and the constitutional importance of the questions it raises, I consider it appropriate to set out my own respectful views.

3. The factual and procedural background giving rise to the invocation of this Court's original jurisdiction under Articles 2(1) and 130(1) of the Constitution has been meticulously and exhaustively narrated in the opinion of the learned Chief Justice. I do not therefore propose to rehash those largely uncontested matters at any length.

4. It suffices to observe that the Plaintiff seeks declarations impugning the constitutionality of sections 3 and 4 of Act 959, principally upon the footing that those provisions impermissibly derogate from the prosecutorial powers vested in the Attorney-General by

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Article 88 of the Constitution. The Attorney-General, adopting a concessionary position, substantially aligned himself with the Plaintiff's constitutional challenge.

5. That concession requires a word of comment. A concession made by a party, even by the Attorney-General, upon a question of constitutional interpretation neither binds this Court nor relieves us of our independent interpretive responsibility under Article 130(1). The meaning of the Constitution is not a matter within the prerogative of litigants. Where the parties on both sides of the record agree upon a construction, the Court's obligation to satisfy itself independently of the correctness of that construction is heightened rather than diminished.

6. It is for that reason that I consider it fitting to acknowledge the invaluable assistance rendered to the Court by the Amici Curiae, comprising fourteen distinguished civil society organisations. Notwithstanding the concessionary position adopted by the Defendant, the Amici filed extensive written submissions extending to some 256 pages, supported by a wealth of constitutional authority, comparative jurisprudence, historical material and academic commentary. Their participation ensured that the constitutional questions presented were subjected to the fullest possible adversarial and jurisprudential scrutiny, and the Court's deliberations were greatly enriched thereby.

7. From the outset it has appeared to me that the constitutional question before this Court cannot properly be answered by examining Article 88 of the 1992 Constitution in isolation. That provision must be situated within the historical evolution of the office of the Attorney-General in Ghana's Republican constitutional order. Constitutions are seldom drafted in a vacuum. They are ordinarily the product of institutional continuity, constitutional experience and legislative practice.

8. I therefore propose to proceed in four stages. First, I trace the constitutional history of the prosecutorial function from 1960 to the present. Secondly, I identify with precision the questions which in truth arise for determination. Thirdly, I construe Article 88(4), and in particular the phrases "authorized by him" and "in accordance with any law". Fourthly, I apply that construction to sections 3 and 4 of Act 959.

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THE HISTORICAL EVOLUTION OF THE PROSECUTORIAL FUNCTION:

9. In his seminal work, *Of the Vocation of Our Age for Legislation and Jurisprudence* (1814), the German jurist Friedrich Carl von Savigny observed as follows:

> *"In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.*
>
> ...
>
> *But this organic connection of law with the being and character of the people is also manifested in the progress of the times; and here again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality."*

10. It is from Savigny's Historical School of Jurisprudence that the concept of the *Volksgeist*, the spirit of the people, emerged as the ultimate source of the legitimacy and content of a nation's fundamental law, upon the view that law is an organic product of the customs, traditions, historical experience and collective consciousness of a people. That philosophy of law supplies the jurisprudential scaffolding for the proposition that a constitution derives its normative force not merely from the formal fact of its enactment, but from the extent to which it "embodies the will of a people", "mirrors their history", and "contains

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within it their aspirations and their hopes for a better and fuller life": [see *Tuffuor v Attorney-General* [1980] GLR 637, per Sowah JSC.]

11. I invoke Savigny not for any general theory of legal origins, but for a narrower and strictly interpretive purpose. If a Constitution is the sedimented product of a people's institutional experience rather than an act of invention *ex nihilo*, then the language which successive Constitutions carry forward is not inert. It arrives in the later instrument already bearing the meaning which practice has given it. Two interpretive consequences follow, and they are the obverse of each other.

12. The first is a presumption of continuity. Where successive Constitutions substantially reproduce the language governing a Constitutional office, a Court should be slow to construe the later instrument as having silently repudiated a settled Constitutional practice, unless that intention is made manifest by clear Constitutional language. The second is a presumption that deliberate departures are meaningful. Where the framers of a later Constitution reproduce an earlier formula but consciously alter or delete part of it, the alteration is to be taken as intended to work a change. These two propositions are not in tension. Each is an application of the same premise, namely, that Constitutional drafting within a continuous tradition is a deliberate act, so that what is retained is retained purposefully and what is removed is removed purposefully. Both will be material to the construction of Article 88(4), and I shall return to each.

13. The office of the Attorney-General has, since the inauguration of the First Republic, occupied a singular position within Ghana's constitutional architecture. It has consistently served not merely as the principal legal adviser to the Government, but as the constitutional repository of the Republic's prosecutorial authority. Whilst the precise language employed by successive Constitutions has evolved, one theme has remained constant throughout Ghana's constitutional history, namely, that criminal prosecutions are undertaken on behalf of the Republic under the constitutional responsibility of the Attorney-General.

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14. The earliest Republican expression of that arrangement is found in Article 47 of the 1960 Constitution:

> ***47. (1)*** *There shall be an Attorney-General, who shall be a Minister of Ghana or other person appointed by the President.*
>
> ***(2) Subject to the directions of the President****, there shall be vested in the Attorney-General responsibility for the initiation, conduct and discontinuance of civil proceedings by the Republic and prosecutions for criminal offences, and for the defence of civil proceedings brought against the Republic.*
>
> ***(3)*** *The office of the Attorney-General shall become vacant,*
>
> *(a) if his appointment is revoked by the President;*
>
> *(b) on the acceptance by the President of his resignation from office; or*
>
> *(c) immediately before the assumption of office of a President.*

15. Two features of that provision are of present significance. The first is the choice of the word *responsibility*. As early as 1960, the Constitution vested in the Attorney-General **responsibility** for the initiation, conduct and discontinuance of criminal prosecutions. What it conspicuously did not provide was that every prosecution must be undertaken by the Attorney-General personally. That distinction was deliberate. Responsibility denotes ultimate constitutional accountability for the prosecutorial function; personal execution would have required the Attorney-General **himself** to conduct every prosecution before every court in the Republic, a construction which would have been administratively impossible and which no one has ever suggested was intended.

16. That distinction between ultimate prosecutorial responsibility and the personal conduct of criminal proceedings received immediate legislative expression in Section 56 of the

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Criminal and Other Offences (Procedure) Act, 1960 (Act 30), which in its current revision provides:

> ***"56. Public Prosecutors***
>
> *(1) Subject to article 88 of the Constitution, the Attorney-General may, by executive instrument appoint generally, or for a specified class of criminal cause or matter, or for a specified area, public officers to be public prosecutors, and may appoint a legal practitioner in writing to be a public prosecutor in a particular criminal cause or matter.*
>
> *(2) A public prosecutor appointed under subsection (1) may appear and plead before a Court or Tribunal designated by the Attorney-General in the executive instrument or in writing.*
>
> *(3) The Attorney-General may give express directions in writing to the public prosecutor."*

17. The opening words of subsection (1), referring to Article 88 of the present Constitution, are of course a consequential adaptation effected by the current revision; the section as originally enacted could not have referred to a provision which did not then exist. The substance of the section, however, has stood since 1960, and it is that substance which matters for present purposes.

18. Although the Constitution vested responsibility for the initiation and conduct of criminal prosecutions in the Attorney-General, Parliament evidently appreciated that the practical administration of criminal justice demanded a broader institutional arrangement through which that responsibility could be effectively discharged. Section 56 supplied the legislative machinery by which the Attorney-General's constitutional mandate could be implemented without requiring his personal appearance in every criminal proceeding throughout the Republic.

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19. In my considered opinion, section 56 constitutes an important contemporaneous legislative exposition of the meaning of Article 47. It reveals how the first Republican Parliament, legislating within the same constitutional order and at the same moment, understood the prosecutorial responsibility vested in the Attorney-General.

20. That understanding demonstrates that, from the inception of the Republic, neither the Constitution nor Parliament contemplated a model of prosecutorial exclusivity requiring the Attorney-General personally to prosecute every criminal offence. Both proceeded upon the footing that constitutional responsibility could legitimately be discharged through duly authorised public prosecutors acting under the Attorney-General's appointment, supervision and direction.

21. The second feature of Article 47(2) is that the Attorney-General's prosecutorial responsibility was expressly made *subject to the directions of the President*. Even at its historical republican inception, therefore, the prosecutorial authority of the Attorney-General was not conceived as an autonomous or self-contained constitutional power, but as one exercised within the broader framework of executive government.

22. I shall return in due course to the significance of the disappearance of that phrase from later Constitutions, for the Plaintiff might fairly ask why, if the deletion of words is significant, the deletion of these particular words does not point towards an enlargement rather than a regulation of the Attorney-General's autonomy. I address that objection later in this opinion, when considering the wider constitutional technique which Article 88(4) employs.

23. For the present it is enough to observe that Article 47(2) illustrates a recurring and prominent feature of Ghana's constitutional architecture: the Constitution frequently assigns ultimate responsibility for a public function to a particular office holder, whilst envisaging that the day-to-day discharge of that responsibility may be undertaken within a wider institutional framework, sometimes through the coordinated efforts of other

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offices within the same arm of government, and in other instances through constitutionally prescribed interaction with institutions belonging to another branch of the State.

24. The 1960 Constitution therefore established what has remained the enduring foundation of Ghana's prosecutorial system: the Attorney-General as constitutional custodian of prosecutorial authority, bearing ultimate responsibility for its exercise, but deliberately stopping short of any requirement that every prosecution be initiated or conducted by him personally. It is therefore safe to state, as a matter of first principle, that our republican constitutional design has from its inception distinguished between the vesting of ultimate prosecutorial responsibility and the personal performance of every prosecutorial act.

25. The framework underwent a significant, though carefully calibrated, development under the Second Republican Constitution. Article 68 of the 1969 Constitution provided:

> ***(1)*** *There shall be an Attorney-General who shall be a Minister of State and the principal legal adviser to the Government.*
>
> ***(2)*** *All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or some other person authorised by him in accordance with any law governing same.*
>
> ***(3)*** *The Attorney-General shall have audience in all Courts in Ghana.*

26. The significance of Article 68 as a watershed in the constitutional treatment of the Attorney-General can hardly be overstated. For the first time in Ghana's constitutional history, the Constitution expressly recognised what had previously rested upon inference under the 1960 Constitution, namely, that prosecutions could lawfully be conducted by persons other than the Attorney-General.

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27. Equally significant, however, is that such prosecutions were not conceived as independent of the Attorney-General. They were to be undertaken by persons "*authorised by him*", thereby preserving the Attorney-General as the constitutional source of prosecutorial authority and entrenching his ultimate responsibility for all prosecutorial conduct.

28. More important still, the Constitution qualified that authorisation by the words "*in accordance with any law governing same*". Whatever the precise reach of that phrase, a question to which I shall return, it unmistakably demonstrates that Parliament was constitutionally invited to participate, by legislation, in determining the manner in which prosecutorial authority might be exercised by persons other than the Attorney-General.

29. There cannot therefore be any real contention as to whether the Constitution envisaged an interaction between the delegation of prosecutorial authority and legislative regulation. That question is answered resoundingly in the affirmative. The precise legal import and consequences of that interaction are examined later in this opinion. At this stage it is sufficient to observe that, from 1969 as from 1960, our constitutional architecture did not regard parliamentary legislation as foreign to the prosecutorial framework; it expressly incorporated legislation into that framework.

30. The Second Republic was, of course, brought to an end in January 1972. Yet the constitutional understanding which Article 68(2) had embodied survived that rupture. The Law Officers Act, 1974 (N.R.C.D. 279), enacted under the National Redemption Council, authorised officers of the Attorney-General's Department not below the rank of State Attorney, persons appointed under section 56 of Act 30, and other public officers authorised by the Attorney-General, to perform functions vested in the Attorney-General. Significantly, every such officer exercised those functions **subject to the directions of the Attorney-General**.

31. I do not, for obvious reasons, treat N.R.C.D. 279 as a legislative exposition of the 1969 Constitution by a Parliament acting under it; that instrument was not an Act of Parliament

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and the Constitution under which Article 68 had been enacted was by then suspended. Its significance is of a different and more modest order. It is evidence of the settled and continuous administrative and legal understanding, persisting across a constitutional discontinuity, that the Attorney-General's responsibility for prosecutions did not require his personal appearance in every criminal proceeding, and could be discharged through authorised officers whilst his supervisory authority was preserved.

32. Article 74 of the 1979 Constitution substantially reproduced the prosecutorial framework established under Article 68 of the 1969 Constitution:

> *(1) There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government.*
>
> *(2) 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.*
>
> *(3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.*
>
> *(4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or some other person authorised by him in accordance with any law.*
>
> *(5) The Attorney-General shall have audience in all Courts in Ghana.*

33. The 1992 Constitution continued that trajectory. Article 88 provides:

> *(1) There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government.*

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(2) 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.

(3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.

(4) 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.

(5) 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.

(6) The Attorney-General shall have audience in all courts in Ghana.

34. Our current constitutional architecture thus preserves the Attorney-General's position as the Republic's principal legal adviser and as constitutional custodian of prosecutorial authority. Whilst Article 88 elaborates the Attorney-General's civil responsibilities, it retains the essential prosecutorial architecture inherited from the 1969 and 1979 Constitutions. The constitutional language was not rewritten in any material respect suggesting an intention to abandon the settled understanding which had informed both legislative practice and prosecutorial administration for over three decades.

35. That continuity is significant. By the time the framers adopted Article 88 in 1992, section 56 of Act 30 and the Law Officers Act, 1974 (N.R.C.D. 279) had long been in place, permitting State Attorneys and other authorised public officers to perform prosecutorial functions under the Attorney-General's direction. That arrangement had operated

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continuously under successive constitutional dispensations without constitutional objection. Against that background, the substantial re-enactment of the earlier constitutional language strongly suggests an intention to preserve, rather than to repudiate, the existing relationship between the Attorney-General's prosecutorial responsibility and Parliament's legislative role in regulating its practical implementation.

THE QUESTIONS PROPERLY ARISING

36. It is against that historical background that Articles 88(3) and 88(4) must now be construed. The historical survey demonstrates two things. First, that the office of the Attorney-General has, from the inception of the Republic, consistently occupied the position of constitutional custodian of Ghana's prosecutorial authority. Secondly, that successive constitutional dispensations have consistently recognised that this responsibility may be discharged through other authorised prosecutors acting within a broader institutional framework.

37. It follows that the controversy before this Court does not in truth concern whether the Attorney-General is the constitutional repository of prosecutorial authority. Article 88(3) places that matter beyond argument:

> *"The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences."*

38. Equally, the dispute does not concern whether persons other than the Attorney-General may prosecute criminal offences. Article 88(4) expressly contemplates that possibility, providing that offences prosecuted in the name of the Republic may be prosecuted

> *"at the suit of the Attorney-General or any other person authorized by him in accordance with any law."*

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39. The real question is the relationship which Article 88(4) establishes between the Attorney-General's constitutional authority, Parliament's legislative competence, and those persons through whom prosecutorial authority may be exercised. Put differently, the Court is not called upon to determine *whether* another person may prosecute. It is called upon to determine the constitutional conditions upon which such authority may be conferred and exercised.

40. Properly analysed, the proceedings interrogate two distinct constitutional relationships. The first is the relationship between the Attorney-General and Parliament. Article 88(4) does not merely refer to persons "authorized by" the Attorney-General; it qualifies that authorisation by the words "***in accordance with any law***". Those words constitute the only express reference within Article 88 to a legislative role for Parliament in the exercise of prosecutorial authority by delegation. Whether they merely regulate the manner in which authorisation is to be granted, as both parties have urged, or whether they empower Parliament to prescribe the circumstances in which authorisation must be given, is the principal question in this case.

41. The second is the relationship between the Attorney-General and those persons authorised to prosecute. Article 88 plainly contemplates that prosecutorial authority may be exercised by persons other than the Attorney-General, but it does not expressly define the constitutional character of that authority. Must such persons remain at all times subject to the Attorney-General's direction and control? May Parliament establish specialised prosecutorial institutions possessing operational independence whilst remaining constitutionally anchored to the Attorney-General? May Parliament identify, by legislation, categories of persons or offices through whom that authority is to be exercised?

42. It is against that background that the challenge to Act 959 falls to be examined. It should be made clear at once that the Plaintiff does not contend that Parliament lacked authority to establish specialised institutions for the investigation and prosecution of corruption.

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The gravamen of the complaint is that Parliament exceeded its constitutional competence by enacting sections 3 and 4 of Act 959, which are said to compel the Attorney-General to authorise the Office of the Special Prosecutor to prosecute corruption offences whilst simultaneously insulating that Office from his constitutional control.

43. The Plaintiff therefore argues that Parliament has impermissibly varied, by ordinary legislation, the prosecutorial powers vested in the Attorney-General by Article 88.

44. Reduced to essentials, the questions for determination are these:

A. *Does Act 959 merely provide the legislative framework contemplated by the phrase "in accordance with any law" in Article 88(4), or does it impermissibly alter the constitutional character of the Attorney-General's prosecutorial powers?*

B. *Does section 4(2), in providing that the Office "shall" be authorised by the Attorney-General to prosecute corruption offences, merely regulate the exercise of a constitutional function which Article 88 itself subjects to legislation, or does it compel the Attorney-General to exercise a constitutional discretion in a manner inconsistent with the Constitution?*

C. *Does the operational independence conferred upon the Office by section 4(1) preserve the constitutional unity of prosecutorial authority under the Attorney-General, or does it establish a parallel prosecutorial authority outside the framework contemplated by Article 88.*

45. The dispute therefore concerns the proper constitutional accommodation between three propositions, each of which finds textual support within Article 88 itself: first, *that prosecutorial authority remains constitutionally vested in the Attorney-General*; secondly, *that prosecutions may lawfully be conducted by other persons authorised by the Attorney-General*; and thirdly, *that such authorisation is to occur "in accordance with any law"*.

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46. Only by first determining the relationship between those three propositions can the Court answer the issues presented. Before turning to Act 959, therefore, it is necessary to construe Article 88(4), and in particular the phrases "***authorized by him***" and "***in accordance with any law***", for it is within those words that the true controversy resides.

THE CONSTRUCTION OF ARTICLE 88(4)

47. The point of departure in every constitutional inquiry must be the constitutional text. Whilst constitutional adjudication may properly be informed by history, structure, legislative practice and broader jurisprudential considerations, those interpretive aids cannot be employed to contradict or diminish the language deliberately chosen by the framers. Their function is to illuminate the text, not to supplant it.

48. In the course of this opinion I shall have occasion to refer to the constitutional texts and jurisprudence of other jurisdictions. I do so with the caution which such material demands. Comparative authority is persuasive and never binding, and its utility diminishes as the distance between the constitutional texts compared increases.

49. There is little profit in asking how another country has resolved a question which its Constitution poses in different terms. There is considerable profit, however, in asking how other constitutional orders sharing our common law inheritance have reconciled the two impulses which lie at the heart of this case: the concentration of ultimate prosecutorial responsibility in a single accountable officer, and the creation of specialised institutions capable of prosecuting corruption without fear or favour. That tension is not peculiar to Ghana, and this Court would be the poorer for ignoring the answers which others have given to it.

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50. Article 88(4) provides:

> *"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."*

51. Properly analysed, the provision does not merely identify the person by whom prosecutions may be undertaken. It establishes a relationship between three distinct participants in the Republic's prosecutorial framework: *the Attorney-General*; *any other person so authorised*; and *Parliament*, acting through legislation.

52. It is convenient to begin by observing what the provision does not say. It does not provide that all prosecutions shall be conducted exclusively by the Attorney-General. It does not provide that Parliament may designate prosecutors by legislation independently of the Attorney-General. Nor does it provide that any person may prosecute merely upon satisfying statutory qualifications prescribed by Parliament. The Constitution deliberately combines the three actors into a single composite provision, assigning each a distinct role within the overall architecture.

53. The opening words, "*All offences prosecuted in the name of the Republic of Ghana*", establish the breadth of the provision. They admit of no distinction between classes of offences. Whether the prosecution concerns murder, robbery, economic crime or corruption, every prosecution instituted in the name of the Republic falls within the framework established by Article 88(4).

54. The Constitution next provides that such prosecutions shall be "*at the suit of the Attorney-General or any other person*". The disjunctive "or" is of considerable significance. It recognises, in express constitutional language, that the initiation and conduct of prosecutions in the name of the Republic need not invariably be undertaken by the

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Attorney-General personally. The Constitution itself therefore contemplates the existence of prosecutors other than the Attorney-General.

55. That recognition is immediately qualified by the words "*authorized by him*". Those words preserve the Attorney-General as the constitutional source from which the authority of every other prosecutor must derive. They reject any notion that another prosecutor may exercise an original or self-sustaining constitutional mandate independent of the Attorney-General. The constitutional nexus between the Attorney-General and every authorised prosecutor is therefore expressly maintained. Accordingly, prosecutorial authority exercised by another person cannot be constitutionally autonomous; it must be exercised by virtue of an authorisation emanating from the Attorney-General.

56. Had the text ended there, considerable force would attach to the Plaintiff's submission that the decision whether to authorise another prosecutor rests entirely within the personal constitutional discretion of the Attorney-General. But the text does not end there. It immediately qualifies the authorisation by the words "***in accordance with any law***".

57. In my respectful opinion, those concluding words are neither incidental nor a mere flourish. A phrase which has been retained through three of the four constitutions of the republican era cannot properly be dismissed as superfluous, and to treat it so would in my view be a serious interpretive error.

58. These words perform pivotal constitutional work and must be accorded substantive meaning. The Constitution could simply have provided that prosecutions shall be undertaken by the Attorney-General or another person authorised by him. It did not. The framers deliberately introduced legislation into the constitutional formula by requiring that the authorisation occur "***in accordance with any law***". Parliament therefore appears in Article 88(4) not by implication, but by express textual incorporation.

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59. The Plaintiff's construction places overwhelming emphasis upon the words "authorized by him", whilst treating the concluding phrase as merely regulating the procedural mechanics by which the Attorney-General's decision is to be implemented.

60. With respect, that construction encounters an immediate textual difficulty. It attributes decisive constitutional significance to one part of the provision whilst reducing another part to near redundancy. That sits uneasily with the settled principle that every word deliberately employed by the framers must, so far as possible, be given operative effect. Constitutions, no less than statutes, are not presumed to employ language in vain.

61. The presumption against surplusage, though more frequently invoked in statutory interpretation, applies with at least equal force to constitutional instruments. Given the *sui generis* character of a Constitution, where the framers have consciously inserted qualifying language the Court must presume that such language was intended to perform substantive constitutional work unless the contrary clearly appears. To construe "in accordance with any law" as adding nothing beyond procedural regulation is, in substance, to deprive those words of the very function their inclusion appears designed to achieve.

62. That principle is no invention of our own jurisprudence. In ***Marbury v Madison* 5 US (1 Cranch) 137 (1803)**, Marshall CJ observed that:

> "*it cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.*"

63. The observation has been repeated in every common law constitutional order since, and it applies with peculiar aptness to a phrase which the framers had before them, considered, amended and retained. That query is not answered by the suggestion that the phrase performs some modest procedural service; a clause is not saved from

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surplusage by being assigned work which the Constitution nowhere suggests it was meant to do.

64. The Plaintiff's construction is, moreover, difficult to reconcile with the interpretive posture which this Court has consistently adopted towards our fundamental law. In ***Minister of Home Affairs v Fisher*** **[1980] AC** 319, the Judicial Committee counselled a generous and purposive construction of a Commonwealth constitution, "avoiding the austerity of tabulated legalism".

65. Though said of a chapter of guaranteed rights, the injunction is not confined to such provisions; it expresses an attitude towards constitutional language generally, and it is that attitude which *Tuffuor* carried into our own jurisprudence. To reduce an express constitutional reference to legislation into an administrative afterthought is tabulated legalism of precisely the kind against which we were warned.

66. Conversely, a construction which affords substantive meaning to "in accordance with any law" does not diminish the significance of "authorized by him". On the contrary, it permits both phrases to operate harmoniously. The Attorney-General remains the constitutional source of prosecutorial authority, whilst Parliament, acting pursuant to the constitutional invitation contained in the concluding words, may prescribe by law the institutional framework within which that authority is to be exercised.

67. It is therefore apparent, even at the purely textual level, that Article 88(4) is not concerned merely with identifying who may prosecute. It establishes a carefully balanced arrangement in which three participants perform complementary roles: the Attorney-General remains the repository of prosecutorial authority; another person may lawfully exercise that authority pursuant to his authorisation; and Parliament possesses a legislative role in prescribing the framework within which that authorisation is granted and exercised.

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68. The interpretive task is therefore not to determine which of those actors should prevail over the others, but to identify a construction which gives coherent and substantive effect to each. A construction which renders Parliament's express legislative role nugatory or cosmetic would be no less objectionable than one which deprives the Attorney-General of his constitutionally assigned role as the source of prosecutorial authority. This conclusion is reinforced by the constitutional evolution of the provision itself. As already observed, Article 68(2) of the 1969 Constitution authorised prosecutions by another person "authorised by him in accordance with any law ***governing same***".

69. The additional words "***governing same***" were at least capable of bearing the narrower construction for which the Plaintiff contends, namely, that Parliament's role was confined to prescribing the law governing the mechanics or administration of an authorisation already granted by the Attorney-General. Those qualifying words did not survive the constitutional revisions of either 1979 or 1992. Article 74(4) of the 1979 Constitution, reproduced without material alteration as Article 88(4) of the 1992 Constitution, omitted them altogether, leaving only the broader expression "in accordance with any law".

70. Where successive Constitutions substantially reproduce an existing provision whilst consciously deleting particular qualifying language, the ordinary inference is that the framers intended the later provision to operate without the limitation which the deleted words were capable of conveying.

71. I should make my position precise. I do not say that "governing same" necessarily confined Parliament's role to matters of procedure or administration; the phrase was never authoritatively construed and I express no concluded view upon it. It is sufficient for present purposes that it was capable of bearing that narrower meaning. The deliberate decision of the framers of 1979 and 1992 to excise those words, whilst retaining the remainder of the formula, points away from a construction under which Parliament's role is confined to the mechanics of an authorisation, and towards the broader constitutional language which they chose instead.

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72. The difficulty in the Plaintiff's construction becomes more apparent still when one considers the ordinary legal meaning of the phrase "in accordance with". To require that an act be done "in accordance with" a law is to require that the act conform to, comply with and be governed by that law. The phrase denotes substantive legal conformity, not merely procedural consistency. It contemplates that the law may prescribe the conditions upon which the relevant act may validly occur.

73. Had the Constitution intended merely to preserve an unrestricted discretion in the Attorney-General whilst permitting Parliament to regulate incidental procedural matters, it could readily have employed narrower language, or retained the phraseology of the 1969 Constitution. It might have provided that authorisation should be evidenced "in the manner prescribed by law", or "subject to such procedural requirements as Parliament may prescribe". It did not do so. It adopted instead the broader and more comprehensive phrase "in accordance with any law", thereby directing that the constitutional act of authorisation should itself occur **within** a legislative framework.

74. That conclusion is reinforced by comparison with constitutions which have taken a different course, and which took it in unmistakable language. Kenya's Constitution of 2010 deliberately severed the prosecutorial function from the Attorney-General altogether. Article 156 establishes the Attorney-General as principal legal adviser to the Government. Article 157 separately establishes the Director of Public Prosecutions, and Article 157(10) provides that the Director "shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

75. South Africa's Constitution of 1996 took a different course, but with equal deliberation. Section 179 establishes a single national prosecuting authority. Section 179(4) requires national legislation to ensure that the prosecuting authority exercises its functions without

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fear, favour or prejudice. Yet section 179(6) preserves in the Cabinet member responsible for the administration of justice "final responsibility over the prosecuting authority".

76. Two propositions emerge from that comparison. The first is that a framer who intends to detach prosecutorial authority from the Attorney-General knows how to say so, and says so in terms. The framers of our own Constitution, revising the prosecutorial provisions in 1979 and again in 1992 with the accumulated experience of three Republics before them, did not say so. They retained the Attorney-General as the source of prosecutorial authority and, in the same breath, retained the requirement that his authorisation occur in accordance with law. The second is that the coexistence of prosecutorial independence in operation with ministerial responsibility in law, the very combination which the Plaintiff contends is constitutionally impossible, is a familiar and deliberate feature of comparable constitutional orders rather than an anomaly to be construed away.

77. The Plaintiff's interpretation rests upon an implicit premise, namely, that once the Constitution designates a particular office holder as the repository of a constitutional power, every material aspect of that power necessarily resides exclusively in that office holder. The Plaintiff therefore reasons that because Article 88(3) vests prosecutorial responsibility in the Attorney-General, every decision relating to the authorisation of another prosecutor must equally remain within his exclusive and unqualified discretion, Parliament's participation being limited to providing the legislative scaffolding for implementing that authorisation.

78. Attractive though that premise may appear at first impression, it does not withstand examination against the broader architecture of the Constitution. It proceeds upon a conception of constitutional power which the Constitution itself repeatedly rejects.

79. A careful reading of the Constitution reveals a recurring design in which, rather than concentrating every constituent element of a constitutional function in a single office holder, the Constitution distributes the components of that function amongst different

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participants. One institution remains the repository of the power. Another advises. A third recommends. A fourth approves. Yet another prescribes, by law, the framework within which the power is to be exercised. The constitutional function remains singular; the constitutional participation is deliberately plural.

80. This technique reflects a conscious choice by the framers to ensure that significant public powers are exercised through structured institutional participation, and thus subject to checks and balances, rather than through the unregulated discretion of a single actor. The Constitution accordingly distinguishes between the repository of a constitutional power and the constitutional process by which that power is lawfully exercised. The former identifies the office in which responsibility ultimately resides; the latter identifies the participants whose involvement the Constitution itself considers indispensable to the lawful discharge of that responsibility.

81. It is convenient at this point to address the objection foreshadowed earlier in this opinion. If, as I have said, the deletion of "governing same" is significant, what is to be made of the disappearance, after 1960, of the words subjecting the Attorney-General's responsibility to the directions of the President? The answer, in my respectful view, is that the two deletions operate upon entirely different constitutional relationships. The words of Article 47(2) of the 1960 Constitution subordinated the Attorney-General to the *Executive*, and specifically to the personal directions of the President in relation to individual proceedings. Their removal from 1969 onwards freed the prosecutorial function from that species of executive command and is properly understood as a deliberate insulation of prosecutorial judgment from political direction in the individual case.

82. But that is not the relationship with which Article 88(4) is concerned. What replaced presidential direction was not an absence of regulation; it was regulation of a different and higher order. From 1969 the Constitution required that the delegation of prosecutorial authority occur "in accordance with any law", that is, by reference to general legislation,

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publicly enacted and of general application, rather than by reference to the private direction of the Head of State.

83. Far from undermining the construction I favour, the removal of executive direction supports it. The framers did not liberate the Attorney-General from all constraint; they substituted the discipline of law for the discipline of executive instruction. That is the ordinary movement of a maturing constitutional order, and it is entirely consistent with the retention, and indeed the broadening, of the legislative qualification in the same provision.

84. A clear illustration of the constitutional technique described above is found in Article 78, under which the President appoints Ministers of State. The power of appointment undoubtedly resides in the President, yet the appointment cannot lawfully take effect unless Parliament first grants its approval. Parliament does not thereby become the appointing authority, nor does the President cease to be the repository of the appointment power. The Constitution deliberately allocates complementary functions to two different participants: the President appoints; Parliament approves; each performs a distinct function designed to complete a single constitutional process.

85. The same pattern appears in Articles 144 and 145 relating to judicial appointments. The Constitution designates the President as the appointing authority, yet the exercise of that authority is not self-executing. Depending upon the judicial office concerned, the Constitution requires the advice of the Judicial Council, consultation with the Council of State and, in certain instances, the approval of Parliament. Those institutions neither exercise the President's power nor replace him as the appointing authority. They perform constitutionally assigned functions within the broader process by which judicial appointments are lawfully made.

86. The constitutional significance of that arrangement was considered by this Court in the consolidated suits entitled *Ghana Bar Association & Others v Attorney-General & Judicial*

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Council, judgment delivered on 20 July 2016, where the Court examined the relationship between the President's appointing power and the advisory and approval functions assigned to the Judicial Council, the Council of State and Parliament. Though decided in the context of judicial appointments, the Court there recognised that the Constitution frequently preserves the constitutional identity of the decision-maker whilst assigning complementary functions to other institutions. The participation of those institutions does not derogate from the authority of the designated decision-maker; it constitutes the constitutional means by which that authority is regulated and exercised. Those restraints exist not in spite of the President's authority, but because the Constitution deliberately chose to regulate the manner of its exercise.

87. Dotse JSC, in his concurring opinion in that case, observed:

"A perusal of the Constitution 1992 gives the clearest of intentions about the structured position of the President's appointment processes and powers.

1. For example, there are times when there are no limitations on his appointment powers, reference article 89 (2) (d) where the President appoints eleven (11) members of the Council of State.

2. At other times, the President is required to act in consultation with various Councils, i.e., Council of State, reference article 70 (1) of the Constitution where the President in consultation with the Council of State appoints all those constitutional office holders mentioned therein, e.g., Commissioner of CHRAJ, Auditor-General etc.

3. Thirdly, there are those appointments that he makes with the prior approval, e.g., Article 78 where Ministers of States are appointed by the President with the prior approval of Parliament.

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4. Then there are the classes of appointments that are made subject to advice and consultation and the approval of Parliament. Examples of this are the appointment of the Chief Justice and other Justices of the Supreme Court, reference articles 144 (1) and (2) of the Constitution for example."

88. The lesson emerging from these provisions is that the Constitution does not proceed upon the assumption that the repository of a constitutional power must invariably control every constituent element of its exercise. It consciously separates the ultimate responsibility for a function from the institutional process through which that responsibility is discharged.

89. Article 146, concerning the removal of the Chief Justice, furnishes perhaps the strongest illustration. The President performs the constitutional act of removal, yet he can neither initiate nor conclude that process according to personal preference. The Constitution requires a *prima facie* determination by the President acting in consultation with the Council of State, the establishment of a committee, an investigation, findings and recommendations before the power may lawfully be exercised. Significantly, notwithstanding the President's status as the ultimate decision-maker, he is bound to "*act in accordance with the recommendations of the committee*".

90. Here, then, is a constitutional power whose repository is expressly identified and whose exercise is nonetheless determined by the constitutionally prescribed participation of others. If the Plaintiff's premise were sound, Article 146 would be inexplicable.

91. Significantly, this constitutional technique is not peculiar to Ghana. Under Article 124(2) of the Constitution of India, judges of the Supreme Court are appointed by the President "after consultation with" such judges as he may deem necessary. In ***Supreme Court Advocates-on-Record Association v Union of India*** **(1993) 4 SCC 441**, the Supreme Court of India held that consultation in that context imports concurrence, with

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the result that the constitutional repository of the appointing power is bound in law by the view of an institution which the Constitution merely requires him to consult.

92. That decision has not wanted for critics, and I express no view upon its correctness in its own constitutional setting. Its value for present purposes is narrower and, I think, unanswerable: it demonstrates that a constitution may without incoherence identify the holder of a power and simultaneously subject the exercise of that power to the determinative participation of another institution. The identification of a repository is not, in constitutional law, a grant of unregulated freedom.

93. When viewed against that background, Article 88(4) assumes a significance which the Plaintiff's construction fails to acknowledge. The Plaintiff approaches "***authorized by him***" as though it existed in constitutional isolation. It does not. The Constitution immediately qualifies that authorisation by requiring that it occur "***in accordance with any law***". Those concluding words perform precisely the same constitutional function as the provisions requiring consultation, advice, recommendation or parliamentary approval elsewhere in the Constitution. They identify another constitutional participant and assign to that participant a complementary role in the exercise of the delegation of the Attorney-General's prosecutorial authority.

94. It follows that Parliament's participation under Article 88(4) is neither constitutionally anomalous nor constitutionally intrusive. Parliament does not become the repository of prosecutorial authority, any more than Parliament becomes the appointing authority under Article 78, or the Judicial Council becomes the appointing authority under Article 144, or the committee established under Article 146 becomes the removing authority.

95. In my respectful opinion, therefore, the phrase "in accordance with any law" ***empowers Parliament to prescribe the legal framework within which the Attorney-General's constitutional power of authorisation is to be exercised. Parliament may accordingly identify by legislation the classes of offences, the categories***

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or institutions of authorised prosecutors, the institutional arrangements, and the legal circumstances in which authorisation is to operate. The Attorney-General remains the constitutional source from which such authority derives and retains ultimate responsibility for prosecutions conducted in the name of the Republic. Parliament regulates the constitutional process; it does not become the constitutional repository of the prosecutorial power.

96. That construction gives harmonious and substantive effect to every phrase employed by the framers whilst preserving the integrity of Article 88 as a whole.

97. Under it, the operation of the Article may be stated as follows. Parliament, acting pursuant to Article 88(4), prescribes by legislation the institutional framework within which prosecutorial authority may be exercised, including the categories of offences, the classes of persons or institutions eligible to receive authorisation, and the legal conditions governing its exercise. The Attorney-General, in compliance with the constitutional command that authorisation be granted "***in accordance with any law***", confers the requisite authorisation. The authorised person derives his prosecutorial authority from that conferment, and undertakes the prosecution in the name of the Republic, at all times subject to the ultimate prosecutorial responsibility of the Attorney-General under Article 88(3). Each participant performs a distinct function assigned by the Constitution; none supplants the other; all contribute to a single, integrated constitutional process.

98. Once the Constitution itself directs that the Attorney-General's authorisation be exercised "***in accordance with any law***", his compliance with legislation validly enacted pursuant to that mandate cannot properly be characterised as compulsion by Parliament. It is, in truth, obedience to the Constitution.

99. The Plaintiff's argument proceeds repeatedly upon the assumption that if Parliament prescribes circumstances in which the Attorney-General is required to authorise another

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prosecutor, Parliament has thereby compelled him to exercise a constitutional discretion contrary to his own judgment.

100. With respect, that characterisation mistakes the source of the obligation. The Attorney-General does not act because Parliament has commanded him; he acts because the Constitution has itself prescribed that the act of authorisation shall occur "in accordance with any law". Where the law therefore, prescribes authorisation, his obligation to comply is born not of legislative fiat but of constitutional obedience. Parliament merely gives legislative content to the role which the Constitution has assigned to it.

101. The obligation is therefore constitutional before it is legislative. It is the Constitution which commands conformity with law; Parliament merely supplies the law with which the Constitution requires conformity by the Attorney General.

102. Once that distinction is appreciated, the Plaintiff's reliance upon the notion of parliamentary compulsion substantially loses its force. There is a material constitutional difference between Parliament directing the exercise of a power which the Constitution has left entirely to the personal discretion of another office holder, and Parliament prescribing legal conditions within a field which the Constitution has expressly remitted to legislation. The former would amount to legislative usurpation; the latter is the ordinary operation of the constitutional design.

103. Our constitutional order furnishes numerous illustrations of the principle, as discussed above. Where the Constitution provides that a constitutional act shall be performed following parliamentary approval, upon the advice of another body, or in accordance with procedures prescribed by law, the office holder cannot plausibly contend that compliance with those requirements amounts to submission to another institution. Such compliance is no more than fidelity to the process which the Constitution has ordained.

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104. Article 88(4) operates in precisely that manner. That the Attorney-General remains the constitutional repository of prosecutorial authority admits of no dispute. Equally, however, the Constitution has chosen not to leave the process of authorising other prosecutors entirely at large; it has expressly directed that such authorisation occur within a legal framework established by Parliament. To comply with that framework is not to surrender constitutional authority; it is to exercise that authority in the very manner prescribed by the Constitution.

105. Nor does this construction diminish the constitutional responsibility imposed upon the Attorney-General by Article 88(3). Properly analysed, clauses (3) and (4) perform complementary functions. Clause (3) identifies who bears ultimate constitutional responsibility for criminal prosecutions. Clause (4) identifies how that responsibility may constitutionally be discharged through other persons. To read clause (3) as excluding the legislative role expressly recognised in clause (4) would permit one constitutional provision to consume another, contrary to the elementary principle that constitutional provisions must be read harmoniously so that each is given its full and independent operation.

106. It is necessary, however, to guard against a construction which proves too much. If the phrase "in accordance with any law" were read as conferring upon Parliament an unbounded competence, it would follow that Parliament might by ordinary legislation require the Attorney-General to authorise any person, upon any terms, in respect of any offence, and might thereby reduce Article 88(3) to a formality. That cannot be right, and I do not hold. The constitutional space created by clause (4) is real, but it is bounded. Without attempting an exhaustive enumeration, I would identify at least four limits.

107. *First*, Parliament may not vest original prosecutorial authority in any person or institution. The authority exercised must in every case be derived from an authorisation emanating from the Attorney-General. Legislation which purported to confer prosecutorial

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power directly, dispensing with the constitutional gateway of authorisation, would offend Article 88(4) and would be void.

108. *Secondly*, Parliament may not extinguish the ultimate responsibility conferred upon the Attorney-General by Article 88(3). Since he answers for prosecutions conducted in the name of the Republic, legislation which placed an authorised prosecutor beyond every form of accountability to him, leaving him responsible in law for that of which he could neither be informed nor take account, would set clause (4) at war with clause (3) and could not stand.

109. *Thirdly*, legislation enacted under clause (4) must be general and prospective in character. It must prescribe a framework. It may not direct the initiation, conduct or discontinuance of an identified prosecution, or require or forbid authorisation in a particular case, for that would not be the prescription of a framework for the exercise of the prosecutorial function but the exercise of that function by Parliament itself.

110. *Fourthly*, such legislation remains subject to the Constitution as a whole, including in particular Article 296 in relation to any discretion which survives to be exercised, and the guarantees of Chapter Five in relation to persons affected by the prosecutions so authorised.

111. It is by reference to those limits, and not by reference to any general aversion to legislative participation, that the constitutionality of Act 959 falls to be tested.

SECTIONS 3 AND 4 OF ACT 959:

112. Having determined the constitutional relationship between the Attorney-General, Parliament and authorised prosecutors under Article 88(4), the challenge to sections 3 and 4 of Act 959 becomes considerably easier to resolve.

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113. The inquiry is a narrow one. It is no longer whether Parliament may legislate in relation to the prosecutorial framework, for the Constitution expressly contemplates legislative participation through the phrase "***in accordance with any law***". Neither is it whether the Attorney-General remains the constitutional repository of prosecutorial authority, for that proposition has remained constant throughout every republican Constitution and is expressly reaffirmed by Article 88(3). The sole question is whether, in enacting sections 3 and 4, Parliament legislated within the constitutional space created by Article 88(4), or whether it crossed the boundary by establishing a prosecutorial regime detached from the Attorney-General's constitutional authority.

114. Section 3 identifies the class of offences over which the Office of the Special Prosecutor is to exercise jurisdiction; defines the statutory functions of the Office; prescribes its investigative and prosecutorial responsibilities; establishes mechanisms for inter-agency cooperation; and imposes reporting and accountability obligations upon the Office.

115. Properly analysed, none of those provisions purports to confer upon the Office an autonomous constitutional power to prosecute. The section does not declare that prosecutorial authority is vested in the Office independently of the Attorney-General, nor does it establish the Office as a separate constitutional repository of prosecutorial power. It performs precisely the legislative function which Article 88(4) contemplates, namely, the establishment of a specialised institutional framework within which particular categories of prosecutions may be undertaken.

116. The Plaintiff attaches considerable significance to the breadth of the functions conferred upon the Office. With respect, the constitutional validity of a statutory institution cannot depend upon the extent of its statutory responsibilities. The relevant inquiry is not how many functions Parliament has assigned, but from where the authority to perform them derives. However extensive the functions enumerated in section 3, they remain statutory functions whose prosecutorial component derives constitutional legitimacy only through Article 88(4).

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117. Parliament itself appears to have proceeded upon that understanding. Section 3(2) requires the Office, within thirty days after the conclusion of each prosecution or the confiscation or realisation of property, to submit a written report on the outcome of the case to the Attorney-General. That obligation is not an incidental administrative requirement. It is a significant indication of Parliament's own appreciation that, notwithstanding the specialised functions entrusted to the Office, the Attorney-General remains the officer ultimately responsible for prosecutions undertaken in the name of the Republic. It would be difficult to reconcile such an obligation with a legislative intention to create an autonomous prosecutorial authority existing outside the framework of Article 88.

118. The Plaintiff's principal attack is directed against section 4. In approaching that provision it is useful to begin with what Parliament actually enacted, rather than with what it is alleged to have enacted. Section 4(2) provides:

> *"**Subject to clause (4) of article 88 of the Constitution**, the Office shall for the purposes of this Act be authorized by the Attorney-General to initiate and conduct the prosecution of corruption and corruption-related offences."*

119. Even a perfunctory reading demonstrates that Parliament did not purport to establish a prosecutorial authority independent of Article 88. The subsection expressly subordinates itself to Article 88(4).

120. Equally significant is Parliament's choice of language. Section 4(2) does not declare that the Office shall prosecute corruption offences by virtue of the Act alone. It provides that the Office shall *be authorised by the Attorney-General* for that purpose. Parliament therefore recognised that the constitutional source of prosecutorial authority remained the Attorney-General. That authorisation was in fact conferred, by the Office of the Special Prosecutor (Operations) Regulations, 2018 (L.I. 2374).

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121. This feature of the legislation is, in my respectful opinion, fatal to the submission that Parliament has varied the constitutional repository of prosecutorial authority. Far from creating a parallel constitutional authority, section 4(2) expressly recognises that all prosecutorial authority exercised by the Office must first pass through the constitutional gateway established by Article 88(4).

122. The Plaintiff nevertheless contends that the use of the word "shall" impermissibly compels the Attorney-General to authorise the Office, thereby depriving him of a discretion vested exclusively in his office. With respect, that submission proceeds upon the very premise which I have already rejected. The obligation imposed by section 4(2) does not arise because Parliament has chosen to command the Attorney-General. It arises because the Constitution has itself directed that his authorisation shall occur "in accordance with any law". Parliament has merely enacted the law which Article 88(4) expressly contemplated. The Attorney-General's obligation is therefore not owed to Parliament; it is owed to the Constitution.

123. Measured against the limits identified above, section 4(2) falls comfortably within Parliament's competence. It does not vest original authority in the Office; it requires authorisation by the Attorney-General. It is general and prospective; it identifies a class of offences, not a case. And it is expressly made subject to Article 88(4) itself.

124. I am not persuaded by the argument that section 4(1), which provides that the Office is not subject to the direction or control of any person or authority in the performance of its functions except as otherwise provided by the Constitution, alters that conclusion.

125. The independence thereby conferred is operational rather than constitutional. Section 4(1) itself recognises the distinction by expressly preserving the Constitution from its operation. Parliament thereby acknowledged that the operational autonomy conferred upon the Office could never override the constitutional arrangements established by Article 88.

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126. The distinction is not merely verbal, and it is worth stating what it leaves intact. Operational independence secures the Office against direction in the conduct of particular investigations and prosecutions, precisely the species of direction from which, as I have observed, the prosecutorial function was progressively insulated after 1960.

127. It does not, and could not, displace the Attorney-General's position as the constitutional source of the Office's authority, nor his ultimate responsibility under Article 88(3), nor the accountability which section 3(2) preserves, nor such powers as the Attorney-General enjoys under the general law in respect of prosecutions conducted in the name of the Republic, including the power to enter a *nolle prosequi* under the Criminal and Other Offences (Procedure) Act, 1960 (Act 30), subject however, at all times to Article 296 and the political consequences that may attach to an improper exercise of such discretion at the hands of the sovereign, the good people of Ghana.

128. The Office therefore remains bound by the Constitution; and where the Constitution assigns ultimate prosecutorial responsibility to the Attorney-General, nothing in section 4(1) may properly be construed as divesting him of that responsibility. Independence in operation is not autonomy in constitutional status.

129. That distinction is well known to the common law world, and the institutions which embody it are not novelties. In England and Wales, the Director of Public Prosecutions discharges his/her functions "under the superintendence of the Attorney General":

130. Prosecution of Offences Act 1985, section 3(1). The Serious Fraud Office, an institution created, as the Office of the Special Prosecutor was created, to confront a species of criminality thought to demand specialised investigative and prosecutorial capacity, is headed by a Director who likewise discharges his functions "under the superintendence of the Attorney General": Criminal Justice Act 1987, section 1(2).

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131. No one supposes that the Director of the Serious Fraud Office is thereby a functionary whose professional judgment lies at the disposal of the Minister. In *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, the House of Lords emphasised the Director's independence in arriving at prosecutorial decisions; yet that independence subsisted within, and by virtue of, the statutory framework which created his office and subjected it to superintendence. Independence and anchorage are not antonyms.

132. Nigeria's experience is closer still to our own. Section 174(1) of the Constitution of the Federal Republic of Nigeria 1999 vests in the Attorney-General of the Federation the power to institute and undertake criminal proceedings, and section 174(2) provides that those powers may be exercised by him in person or through officers of his department. Notwithstanding that vesting, Nigeria has by ordinary legislation established specialised anti-corruption institutions exercising prosecutorial functions, including the Independent Corrupt Practices and Other Related Offences Commission.

133. In *Attorney-General of Ondo State v Attorney-General of the Federation* (2002) 9 NWLR (Pt 772) 222, the Supreme Court of Nigeria upheld the competence of the National Assembly to establish that Commission. The challenge there was principally federal in character, and the decision is accordingly of limited direct assistance upon the question now before us. Its value lies in the Court's refusal to treat the constitutional vesting of prosecutorial power in the Attorney-General as an obstacle to the statutory creation of a specialised prosecuting institution.

134. The question has also been confronted, in a materially different constitutional setting, by the Supreme Court of the United States. In *Morrison v Olson* 487 US 654 (1988), that Court upheld provisions of the Ethics in Government Act permitting the appointment of an independent counsel to investigate and prosecute senior executive

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officers, and restricting the Attorney-General's power of removal to "*removal for good cause*". The majority held that the arrangement did not impermissibly interfere with executive power. Scalia J dissented in terms which have lost none of their force, warning that encroachments upon a unitary prosecutorial authority are seldom announced as such: "this wolf comes as a wolf".

135. I refer to that case with two qualifications, each of which matters. The first is that the American Constitution contains no analogue of Article 88(4). It does not invite legislation into the prosecutorial formula at all, and the debate in that jurisdiction therefore proceeds upon separation-of-powers premises which our own text has already resolved in express words. The independent counsel provisions there considered were in any event permitted to lapse. The second qualification is that the dissenting warning deserves to be heard rather than waved aside. It is precisely because such warnings have force that I have thought it necessary to identify above the limits beyond which Parliament may not go under Article 88(4). A construction which recognised Parliament's role but left it unbounded would deserve everything Scalia J said of it.

136. Finally, and from the opposite direction, the jurisprudence of South Africa suggests that a measure of independence for specialised anti-corruption institutions may in some constitutional orders be required rather than merely permitted.

137. In *Glenister v President of the Republic of South Africa (No 2)* [2011] ZACC 6, 2011 (3) SA 347 (CC), the Constitutional Court held that the State's constitutional obligations, read together with its international anti-corruption commitments, required the establishment of an anti-corruption entity possessing adequate structural and operational independence, and invalidated legislation which fell short of that standard; see also *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32.

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138. I do not suggest that our Constitution imposes an equivalent obligation, and that question does not arise for decision. The relevance of that jurisprudence is oblique but real. The operational insulation conferred by section 4(1) of Act 959 answers to a concern which comparable constitutional orders have treated as pressing, and it would be a curious construction of Article 88 which rendered constitutionally suspect the very feature that other constitutions have regarded as indispensable.

139. When sections 3 and 4 are read together, a coherent legislative scheme emerges. Parliament has established a specialised institution to investigate and prosecute corruption and corruption-related offences; identified the class of offences falling within its remit; required that prosecutorial authority be conferred through the constitutional mechanism prescribed by Article 88(4); preserved the Attorney-General's constitutional position by requiring authorisation from him; and maintained institutional accountability to him. Properly understood, the Act neither supplants the Attorney-General nor creates a rival constitutional prosecutorial authority. It gives legislative expression to the very arrangement which Article 88(4) contemplates.

CONCLUSION:

140. I therefore answer the three questions earlier formulated as follows.

To the first: Act 959 provides the legislative framework contemplated by the phrase "in accordance with any law" in Article 88(4). It does not alter the constitutional character of the Attorney-General's prosecutorial powers.

141. To the second: section 4(2) regulates the exercise of a constitutional function which Article 88 itself subjects to legislation. The obligation which it imposes is constitutional in origin and legislative only in form, and it does not compel the Attorney-General to exercise a discretion in a manner inconsistent with the Constitution.

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142. To the third: the operational independence conferred by section 4(1) preserves the constitutional unity of prosecutorial authority under the Attorney-General. It does not establish a parallel prosecutorial authority outside the framework of Article 88.

143. I am accordingly unable to accept the contention that Act 959 varies or diminishes the prosecutorial powers vested in the Attorney-General by the Constitution. The Act leaves untouched his status as the constitutional repository of prosecutorial authority. What it does is to prescribe, consistent with Article 88(4), the specialised institutional framework within which a particular class of prosecutions is to be undertaken through persons authorised by him. That is neither a variation nor a usurpation of constitutional power.

144. As to the reliefs sought, relief (A) seeks a declaration that

> *"on a true and proper interpretation of Articles 1(2), 88, 93(2) and 296 of the 1992 Constitution, prosecutorial authority in Ghana is vested exclusively in the Attorney-General and cannot be exercised independently of, or in parallel with, the Attorney-General."*

145. That relief is, in my view, sound in one respect and unsound in another, and I would grant it only to the extent and in the terms following: that under the 1992 Constitution the Attorney-General is the sole constitutional repository of the prosecutorial authority of the Republic, and that no person or institution may exercise prosecutorial authority in the name of the Republic otherwise than by an authorisation derived from the Attorney-General and granted in accordance with law. To the extent that relief (A) asserts that prosecutions in the name of the Republic may be conducted by no person other than the Attorney-General, or that Parliament may not by law prescribe the framework within which such authorisation is granted and exercised, it is refused.

146. All the other reliefs endorsed on the writ are dismissed.

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(SGD.) E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

COUNSEL

THE PLAINTIFF APPEARS IN PERSON

KIZITO BEYUO ESQ. FOR THE AMICI CURIAE WITH CLEMENT KODJO AKAPAME ESQ., OLIVER BARKER-VORMAWOR ESQ. AND SAMSON LARDY ANYININI ESQ.

DR. JUSTICE SREM-SAI (DEPUTY ATTORNEY-GENERAL) FOR THE DEFENDANT WITH SARAH FAFA KPODO (CHIEF STATE ATTORNEY), JOSHUA SACKEY (PRINCIPAL STATE ATTORNEY) AND GIFTY DUMELO (ASSISTANT STATE ATTORNEY).

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