Global Journal of Politics and Law Research
Vol.4, No.4, pp.10-19, July 2016
Published by European Centre for Research Training and Development UK (www.eajournals.org)

JURISPRUDENTIAL APPRAISAL OF NOLLE PROSEQUI IN NIGERIA

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ABSTRACT: *The Latin phrase nolle prosequi which means I do not want to prosecute or I do not want to continue to prosecute is used in the temporary or total termination of criminal or civil cases before judgment in most of the countries that are within Common law jurisdictions. This concept or practice which has its prominence now in the trial of criminal matters is the basis of the power of the Attorney-General to terminate criminal cases before judgment in Nigeria. This position of the law received its strongest endorsement in the much quoted case of Ilori v. State[1]. In this case, the Supreme Court amongst other ratios held that the Attorney-General can enter nolle as many times as he wishes over a matter and that this decision cannot be questioned by the court or any other person. We take exception to this view that the Attorney-General cannot be required to place before the court the reason for his action in the light of the clear provisions of sections160 and 191 of the 1979 Constitution of Nigeria with similar provisions as in sections 174 and 211 of the current 1999 Constitution as amended, which depart slightly from the original Common Law position of the law. This is the crux of this paper where we gave reasons why the apex court should overrule itself on the issue.*

KEYWORDS: Nolle Prosequi, Attorney-General, Common Law, Jurisdiction.

INTRODUCTION

Nolle Prosequi which is a Latin phrase means I do not want to prosecute or I do not want to continue the prosecution and it is used by the prosecuting authority before judgment is entered in the matter. In most Common Law Countries, it is employed in both criminal and civil proceedings[2] but it is mostly used in criminal trials.

This concept is the basis of the power of an Attorney-General in Common Law Countries to discontinue criminal trials before judgment and probably end the matter or re-prosecute same as the case may be. The Supreme Court of Nigeria in the popular case of *Ilori v. State*[3] reinstated the application of this concept or practice in Nigeria which it stated has Common Law origin in addition to constitutional backing from 1960 to 1979. In its judgment, the court made far reaching pronouncements which in our view is not the intendments of the drafters of the 1979 Constitution upon which the decision was anchored[4].

This is the crux of this work and we intend to look at the meaning of *nolle* from all perspectives, some relevant texts and case laws where it has been discussed particularly the *Ilori case* which gave rise to this research. We shall thereafter make our recommendations and conclude.

[1] S.C. 42/1982, reported in 1983) 1 SCNCR 94 or (1981) 14 N.S.C.C 69. It shall hereunder be referred to as *Ilori's Case*.
[2] See http://en.wikipedia.org/wiki/Nolle-Prosequi accessed on 20th May, 2016
[3] See note 1 *Supra*
[4] Sections 160 and 191 of the 1979 Constitution which were the basis of the decision had similar provisions as sections *174 and 211 of the 1999 Constitution of Nigeria (as amended)*

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

Nolle Prosequi And Its Application.

Knowledge of the phrase *nolle* and its use under our jurisdiction can best be appreciated if we look at the dictionaries and some relevant cases. According to *Osborn's Concise Law Dictionary 10th edition*[5], *nolle prosequi:*

> Historically, is an acknowledgment or undertaking entered on record by the plaintiff in action, to forbear to proceed in the action, either wholly or partially; superseded by the modern practice of discontinuance. In criminal prosecutions by indictment or information, a *nolle prosequi* to stay proceeding may be entered by leave of the Attorney –General at any time before judgment; it is not equivalent to an acquittal and is no bar to a new indictment for the same offence. The powers of the Attorney-General are not subject to control by the court. (RV Comptroller of Patents (1899) 1Q.B 909 at 914)

Here, three important issues are highlighted. One, that the phrase refers originally to an undertaking by a plaintiff to forbear wholly or partially his claim in court. Two, that it has been superseded by its use mainly in criminal trials and three that it is used by the office of the Attorney-General who cannot be controlled by the Court. It is important to note, that the case of *RV Comptroller of Patents*[6] cited in the above definition was heavily relied upon by Kazeem J.C.A. when he delivered the Lead Judgment in *Ilori's case* at the Court of Appeal but as we shall see, the Supreme Court refused to adopt the reasoning of the Court of Appeal on the issue of the effect of *S.191 (3) of the 1979 Constitution of Nigeria* on the powers of the State Attorney-General vis-à-vis the Common Law position in Britain which influenced the Supreme Court considerably[7].

The *Black's Law Dictionary 9th edition*[8], defines *nolle* as a Latin phrase meaning "Not to wish to prosecute. A legal notice that a law suit or prosecution has been abandoned". Here it is viewed also as a device for the premature termination of a matter whether civil or criminal. By far, the explanation which is most apt in our appreciation of this concept is one given in an Encyclopaedia[9]. It states:

> In America the term '*nolle prosequi*' bears the same meaning as in England with one exception. The attorney-general has not the same discretion with which English law invest him. Although in some States the prosecuting officer may enter a *nolle presequi* at his discretion, in others the leave of the court must be obtained".

In yet another explanation it has been put forward that:

> Nolle prosequi is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further either as to some of the counts of the indictment, or as to part of a divisible count or as to some of the persons accused, or altogether. It is a judicial determination in favour of

[5] M. Woodley, (London: Sweet & Maxwell, 2005) p.277
[6] (1899) 1.Q B 909 at 914
[7] Section *211 (3) of the 1999 Constitution* is same as the said section *191 (3) of the 1979 Constitution.*
[8] B.A Garner, (Dallas Taxas: West Publishing Co. 2004)p.1147
[9] *17 Encyclopaedia Britannica 9th ed*, 1907. Cited in *Black's Law Dictionary, Ibid.*

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

accused and against conviction, but it is not an acquittal, nor is it equivalent to a pardon.[10]

A perusal of the above quotes shows all the features of *nolle prosequi* from the point of view of those who brought English Law to this Country. Of particular significance is the distinction made of the powers of the Attorney-General in Britain and Untied States of America. This important distinction is that in U.S.A, the Attorney-General must seek the leave (opinion) of the court before entering a *nolle* whereas in England it is at his own discretion only. This is the flank we will be going when we look at *Ilori's case.*

A part from the *Ilori's case*, which is the subject of this paper, Nigerian Courts have held that it is within the powers of the State or Federal Attorney-General to enter *nolle prosequi* in criminal matters[11].

State v. S.O, Ilori & Ors

This case has its history from October 26, 1978, when the Director of Public Prosecutions of Lagos State filed an information to prosecute Mr. Fred Egbe, a Lagos lawyer. The offences were for inducing delivery of money by false pretences and stealing contrary to sections 419 and 390 of the *Criminal Code Cap.31, Laws of Lagos State*. On the application of Mr. Egbe, the information was quashed by the Court of Appeal. Following Mr. Egbe's victory at the Court of Appeal, he on May 8, 1979 wrote to the Attorney-General of Lagos State to prosecute the Director of Public Prosecutions of Lagos State and the two Police officers who handled the case against him for the offences of conspiracy to bring false accusations against him contrary to *S. 125 of the Criminal Code* and conspiracy to injure him in his trade or profession contrary to *section 518 (4)* of the same State Code. By a letter dated January 9, 1980, the Attorney-General declined to prosecute the DPP and the two police personnel. As a result of this refusal, Mr. Egbe then decided to initiate private prosecution of the three officers at the High Court, Lagos State. This he did on April 11, 1980 and on June 9 1980, the Attorney-General of Lagos State entered a *nolle prosequi* discontinuing Mr. Egbe's case against the DPP and the two police officers who investigated the earlier matter against him. On June 10, 1980, Justice Oladipo Williams (as he then was) of the State High Court discontinued the case relying on *S.191 (3) of the 1979 Constitution of Nigeria* which empowered the State Attorney-General to enter a *nolle.*

Mr. Fred Egbe who shall be hereinafter referred to as "the appellant," who was dissatisfied with the High Court ruling appealed to the Court of Appeal, Lagos on the ground that the trial Court should have taken evidence and examined his allegations, against the Attorney-General of malice and extraneous consideration in pursuance of the provisions of section 191 (3) of the 1979 Constitution. The Court of Appeal on its own took up the point of not obtaining the leave of the Judge of the High Court by the appellant before filing his papers for private prosecution and upon which it dismissed the appeal at the Court of Appeal.

In the lead Judgment by Kazeem J.C.A (as he then was), the Court while lifting section 191 of the 1979 Constitution held thus:

[10] See 22A C.J.S. *Criminal Law* 419 at 1, (1989) cited in *Black's Law Dictionary* p.1147 *Ibid*.
[11] See *Abubakar Audu v. A.G of the Federation* (2013) F.W.L.R (part 667) S.C 607, *Abacha v. F.R.N (*2014) 6 N.W.L.R (part 1402) S.C 43,- *Odunayo v. State* (2014) 12 .N.W.L.R (part 1420) C.A 1

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

It was decided in *RV Comptroller of Patents (1899) 1 Q.B. 909 at page 914*, that in England when the Attorney-General in exercising his functions as an officer of the Crown such functions were not subject to review by the Court of Queen's Bench Division or any other Court. But in this country, the powers of the Attorney-General are provided for under section 191 of the 1979 Constitution as follows:

1. The Attorney-General of a State shall have power:

   (a) To institute and undertake criminal proceedings against any person before any Court of law in Nigeria other than a court-martial in respect of any offence created by or under any law of the House of Assembly;

   (b). To take over and continue any such criminal proceedings that may have been instituted by any other authority or person;

   (c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

1. The powers conferred upon the Attorney-General under subsection (1) of this section may be exercised by him in person or through officers of his department.

2. In exercising his powers under this section the Attorney-General shall have regard to the public interest, the interests of justice and the need to prevent abuse of legal process.

Unlike section 104 (2) of the 1963 Constitution subsection (3) hereof now specifically provides for the additional safeguards which the Attorney-General should show regard for when exercising his power under subsection(2). These are the public interest, the interest of justice and the need to prevent abuse of legal process. Hence whenever an aggrieved person complains of an infraction of his fundamental right and that the Attorney-General has failed to have regard for those safeguards in exercising his powers, and he can successfully prove it, I am of the opinion that the courts in this country in exercise of their wide powers under section 6 (6) (b) of the 1979 Constitution can inquire into such complaint and grant appropriate remedies.

The Court of Appeal further held that:

In filing a notice of discontinuance in respect of a purported private prosecution…. The Attorney-General… is presumed to have taken into consideration unless the contrary is shown public interest, the interest of Justice and the need to prevent abuse of legal process as provided for under sub-section (3) of section 191 of the 1979 Constitution…..[12].

[12] For the avoidance of confusion section *191 of the 1979 Constitution of Nigeria* is the same as section 211 of the *1999 Constitution (as amended)*

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

Concluding his judgment, Kazeem J.C.A stated:

> Until the appellant has been able to establish in the proceedings here that they acted maliciously or that they were motivated by ill-will against him or that they did not act in the interest of justice, the appellant cannot ask the court to go behind the certificate of discontinuance filed by the Attorney-General under section 191 (1) (c) of the 1979 Constitution to discontinue the case.

By this judgment, the Court of Appeal created a distinction between the situation at common law, the pre-1979 Constitutions and the situation following the coming into force of section 191 of the 1979 Constitution. And that is that the Attorney-General under the 1979 Constitution must before exercising power of *nolle* under *S. 191 (3) of the 1979 Constitution* place facts before the Court showing that he had, had regard to public interest, interests of justice and the need to prevent abuse of legal process. The Common Law position which predate the 1979 Constitution did not make such demands on the Attorney-General at State or Federal level. The appellant who also lost at the Court of Appeal, mainly for not obtaining the leave of the judge of the High Court for private prosecution now appealed to the Supreme Court.

The main issue before the apex Court was the effect of S. 191 (3) of the 1979 Constitution on the powers of the state Attorney-General to enter a *nolle* in Nigeria compared to the pre-1979 condition[13].

In addressing or answering the above question against the prayers of the appellant, Kayode Eso, J.S.C who read the Lead Judgment of the Court[14] opined:

> All these cases have shown (referring to cases cited before the Court) that both in England and in this country before 1979 Constitution, what guided the Attorney-General in the exercise of his discretion whether in the institution or in the discontinuance of a case were public interest, interests of justice and the need to prevent abuse of legal process. When sub-section (3) of section 191 prescribes what the Attorney-General '*shall have regard to'* therefore in the exercise of his powers under S.191 of the 1979 Constitution, what had obtained at common law and under the Constitutions which preceded the 1979 Constitutions. It is merely a restatement of the common law in the 1979 Constitution. In other words, under the provision of sub-section (1) of section 191 of the 1979 Constitution the Attorney-General as in the period before the 1979 Constitution, still has an unquestioned discretion in the exercise of his powers to institute or discontinue criminal proceedings. His common law pre-eminent and incontestable position in this regard is still preserved by that provision and notwithstanding sub-section (3) thereof, which is a statement of the law up to 1979, he is still not subject to any control, in so far as the exercise of his powers under S. 191 of the Constitution is concerned, and except for public opinion, and the reaction of his appointor, he is still, in so far as the exercise of those powers are concerned, law unto himself. To my mind therefore sub-section (3) of 191 of the 1979 has in no way altered the pre-1979 Constitutional position of the Attorney-General.

[13] What applied at State level also applied at Federal under S.160 (3), 1979 Constitution.
[14] Other Justices who sat over the appeal were Fatayi Williams C.J.N, Ayo Irikefe J.S.C Chukwunweike Idigbe .J.S.C; Anthony Aniagolu J.S.C, Augustine Nnamani .J.S.C and Muhammad Uwais .J.S.C. i.e. full court.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

Continuing, the learned Justice of the Supreme Court held: "The test to be adopted under sub-section (3) of S.191 of the 1979 is the same test that was adopted in examining the exercise of his discretion prior to 1979. It is subjective. It is exercise of his discretion according to his own judgment".

From the above judgment, the Supreme Court has clearly established the following: that S. 191 (3) of the 1979 Constitution did not alter the position of the Attorney-General at common law and he is not bound to state what constitutes public interest, interests of justice and the need to prevent abuse of legal process while acting under the section. He is also a law unto himself and can only mine the feelings of his appointor and of course public opinion. It is a subjective exercise not subject to questioning by any person or authority. It is on the basis of the issues raised in the judgment above that we shall attempt to state what we consider what should have been the position of the Court.

Assessment of the Judgment

On the issue that S.191 (3) of the 1979 Constitution did not alter the common law position of the power of the Attorney-General in a State in Nigeria, it is our view that the said sub-section (3) of S.191 of the 1979 Constitution intended a radical departure from the common law position. Our reasons are as follows:

First, the pre-1979 Constitutions of Nigeria were based on the cabinet or parliamentary system of government with its complexities and absurdities such as the fusion of the Executive and the Legislature thereby putting into serious question the observance of the doctrine of separation of powers. Under the cabinet system, the parliament is not only sovereign but also supreme and the Queen can do no wrong. Under that system where the Attorney-General is merely an extension of the powers of the Crown masquerading as servant of public interest, the Attorney-General could be described as "law unto himself" not subject to give reasons for his actions while entering a *nolle*. The 1979 Constitution came as a brand new system of government which is the presidential system. Under the presidential system, things are radically different as the doctrine of separation of powers is more manifest and checks and balances enshrined herein to avoid abuse of power by any of the three arms of government. To show that it would not be business as usual the *1979 Constitution in section 191 (3)* provided for statutory safeguard, that is condition precedent that the Attorney-General must satisfy as he carries his duty of entering a *nolle*. If the drafters of the Constitution had wanted the common law position to persist, there would have been no need to insert the phrase "shall have regard to the public interest, the interests of justice and the need to prevent abuse of legal process".

The expression "shall" is a command which is mandatory and the same Court has in a number of cases held that the wording of the Constitution should be given their full meanings without importation of "other constitutions in other common law jurisdictions unless similar provisions in pari material were in question".[15] One wonders why the Supreme Court refused the reasoning of Kazeem J.C.A when at the Court of Appeal he contended that the pre-1979 common law position had been modified by sub-section (3) of S.191 of the 1979 Constitution.

In further contention that the powers of the Attorney-General under S.191 (3) of the 1979 Constitution were subject to judicial review, it is necessary to appreciate that the said

[15] *Garba v. University of Maiduguri* (1986) 1 N.W.L.R (pt 18) 500, *Attorney-General of Abia & 35 Ors v. AG of the Federation* (2002) 6 N.W.L.R (pt 763) 264 S.C

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

Constitution allocated powers specifically to the three arms of government. For instance, section 4 allocated legislative powers to the legislature; section 5 allocated executive powers to the executive while judicial powers went to the judiciary in section 6.[16]

Section *6 (6) (b) of the 1979 Constitution* for the avoidance of doubt provided that the judicial powers vested in accordance with the foregoing provisions of this section

> shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

Implicit in this provision is that the Courts stand as arbiters in disputes between persons and authorities in Nigeria. By saying or stating that the Attorney-General is not bound to furnish the Court with reason for entering *a nolle*, the Supreme Court appears to have abdicated in playing its role of adjudicating in disputes which is its constitutional role. Few examples will make us clearer. Suppose a person is being tried for armed robbery and in the course of proceedings, the Attorney-General discovers that from the *Proof of Evidence*, the defendant pleaded *abibi* which was not investigated by the police and which is fatal to his case. And he wants to enter *a nolle* to enable the prosecution confirm the veracity of the plea of *alibi*. If we take the position of the Supreme Court, he will merely file a *nolle* and the charge will be dropped and accused discharged. This exercise will leave every person in confusion, particularly the accused, the complainant, the court and the general public. But if the Attorney-General were to act in compliance with the new provision in section 191 (3) of the 1979 Constitution, he will explain in his certificate of *nolle* to let the Court know that he wants to confirm the veracity of the *alibi* or otherwise because it is in the public interest and of course in the interest of justice to do this. The Court will judicially look at the reason to know whether his reason can be judicially granted or not. Where the reason will be prejudicial to any of the parties involved, the court will not grant the *nolle* and ask the Attorney-General to conclude his case. In the above scenario, if the *nolle* is granted and the case is terminated and after verifying the veracity of the *alibi* the Attorney-General discovers that the defendant was not at the scene of crime, he will not come back to the Court to re-prosecute but if the *alibi* is negatived he will come back to Court[17]. Here justice is done to both parties, that is the state authority and the accused depending on whose side the investigation favoured. Here the safeguard envisaged in S. 191 (3) would have restored the confidence of every person that the proper thing has been done to ensure that public interest and that of justice are served.

Another scenario is where a person is charged with offence of corruption and he has made confessional statement to the police or any other law enforcement agency. The Attorney-General steps in to take the prosecution and in the next adjournment he files a *nolle* without stating reason for the application. The Court has seen the confessional statement and all that in its file comprised in the *Proof of Evidence.* If we take the view of the Supreme Court in *Ilori's case*, the case will be terminated and the felon will be discharged. We do not think that the

[16] The same provisions are captured in sections 4, 5 and 6 of the *1999 Constitution of Nigeria (as amended)*.

[17] This will depend on the stage of the case at the court because if the prosecution has closed its case and defence has opened, the accused will be acquitted. See section *108 (2) (b) of Administration of Criminal Justice Act 2015*, though not directly on *nolle presequi* but on withdrawal of matters by the prosecution under S.108. See also *C.O.P V. Edward Ogun* (1975) 5 U.I.L.R 152 at 155 where the Court held that the Court may acquit the defendant where the prosecutor withdraws the charge before it closes it case, if the judge is of the view that there is no merit in the case of the prosecution.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

drafters of S. 191 (3) of the 1979 Constitution did not know what they wanted when they requested that the Attorney-General shall have regard to the three issues in filing *nolle*. Now if the Attorney-General fails to furnish the Court with compelling reasons as to why a *nolle* in this matter, the court shall call upon him to go on with the prosecution of the case to a logical conclusion. It is not the intention of the legislature that the court should allow an offender to go unpunished or to punish an innocent man, that is not the spirit of the 1979[18].

On the view of the Supreme Court that the Attorney-General is a law unto himself and can only be controlled by public opinion and fear of his appintor, it is our view that, that is elevating him above all persons and authorities created by the 1979 Constitution. It is instructive to point out that the powers of the Governor[19] and those of the President[20] were enumerated in the constitution with necessary checks and balances and none of them could have been described in the way and manner the aper Court painted the Attorney-General who was an appointee of the above Chief Executive. Perhaps it was this misconstruction of S. 191 (3) that led the court to the avoidable conclusion that the Attorney-General is a law into himself and therefore not subject to judicial review. We contend, with respect, that if the actions and inactions of the Governor, the President, the Parliament and of course the Judiciary were subject to judicial review under that constitution that the case of the Attorney-General could not be different being an extension of the executive.

On the issue of the Attorney-General being controlled by public opinion and fear of his appointor, we state that the Court acted as if they were strangers to the country. Since the attainment of independence in 1960, how many of our Ministers and Commissioners have left office due to negative public opinion over their actions and inactions? The answer is that none had resigned appointments on account of negative public opinion in the country. In similar vein, if the Attorney-General is acting to protect the political and other interests of his appointor, why would he be afraid of what the appointor will do to him for entering a *nolle*. The point we are putting forward is that an Attorney-General whose actions are left to be controlled by fear of his appointor and public opinion without more, can thoroughly abuse his powers to the detriment of criminal of justice system. As some commentators[21] have opined: "it therefore means that if the executive may not be interested in checking the Attorney-General's powers, a frightening possibility is that the executive arm will wield all powers in respect to criminal cases". This is obviously dangerous as the Governor and the President also have power to grant pardon under prerogative of mercy. Hence, we submit with respect that section 191 (3) of the Constitution interpreted in *Ilori's Case* never intended that any person, what more the Attorney-General should be a law unto himself.

On the view of the court that the decision to enter a *nolle* is purely a subjective one which only the Attorney-General can exercise, we submit with respect that it is not logical because a decision that can adversely affect the civil rights and obligations of a citizen cannot be arrived at subjectively. It is *quasi*-judicial function which must be objectively done and in which the court should look into and that is why we contend that the Attorney-General is obliged by S.191 (3) to make full disclosure of the reason for his action.

[18] And by extension that of 1999 which has similar provisions on the subject matter.
[19] See sections 162 ,70 and 173 etc which help to control the Governor.
[20] See sections – 122, 132, 135 and etc which have controlling effect on the President
[21] See D.H Tobechukwu and Rev. Fr. S.C Chukwuma, "Rethinking The Power of *Nolle Prosequi* In Nigeria: The Case of State v. Ilori," available at http://www. eajournals.org/ wp-content/up loads/Rethinking -the –power-of –*Nolle-prosequi*-in-Nigeria, pdf-accessed on May 18, 2016.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

Before we conclude, it is important to note that some commentators have frowned at certain aspects of the judgment in *Ilori's case* not bordering on the issues we have addressed herein. A commentator[22] has criticized a portion of the judgment under review which states thus:

> Indeed if after a *nolle prosequi* has been entered and the court has acted upon it, a fresh or further proceedings on the same indictment are commenced, there is nothing to stop the Attorney-General from entering yet another *nolle prosequi*. This he can do as many times as the proceedings rear their head.

The author's contention being that the above quote in the Supreme Court Judgment appear to have forgoten the notion of double jeopardy and presumption of innocence guaranteed under the Constitution of Nigeria. His suggestions if taken will check the number of times an Attorney-General may judiciously enter a *nolle* in a particular case looking at the constitution and case laws in Nigeria as it concerns the right of an accused person.

It is his view, which we share, that the power of the Attorney-General to enter a *nolle prosequi* is not indefinite in a case where certain irreversible steps have been taken in the case by the prosecution before the application for a *nolle prosequi*[23].

In yet another comment, [24] it has been suggested that since the calls for an amendment of the 1999 Constitution to do away with the judgment in *Ilori's case,* has not yielded any result, that the Supreme Court should overrule itself. This suggestion followed the Kenyan experience which is a common law country like Nigeria where her High Court in *Crispus Karanja v. Attorney-General*[25] overruled itself by holding that the power of the Attorney-General to enter a nolle is subject to judicial review. We share the views of the commentators and from this flank we shall make our recommendations.

CONCLUSION

We have tried to present the meaning, application and essence of the phrase "*nolle prosequi*" in this work. We have seen how the Nigerian Supreme *Court in Ilori v. State* interpreted the statutory provision in S. 191 (3) of the defunct *1979 Constitution* which interpretation for all intents and purposes is binding on all Nigerian Courts as the *1999 Constitution of Nigeria (as amended)* has similar provisions[26] on the power of the Attorney-General to enter a *nolle.*

There is no doubt that the fear we have over the misconstruction of S.191 (3) of the 1979 Constitution has started showing in the application of the 1999 Constitution in this Fourth

[22] A.O Enabulele "Delimiting the Scope of the Powers of the Attorney-General To Re-charge An Accused Person After A Nolle Prosequi Had Been Entered" available at http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/DELIMITING%20THE%20SCOPE%20OF%20THE%20POWERS%20OF%20THE%20ATTORNEY%20GENERAL%20TO%20RE%20%20CHARGE%20AN%20ACCUSED%20PERSON%20AFTER%20A%20NOLLE%20PROSEQUI%20HAD%20BEEN%20ENTERED.pdf accessed on 24th May, 2016.

[23] For example, where the prosecution has closed its case and the accused has entered his defence or where the court has seen no merit of any sort in the prosecution's case.

[24] O.H Tobechukwu v. Rev. Fr. S.C. Chukwuma *Supra* note 21.

[25] High Court of Kenya Criminal Application No. 39 of 2000, The Court overruled its earlier judgment in *Alfred Njau & ors v. City Council of Nariobi* (1982-1988) I KAR 229. 4 where the court had held that the power of the Attorney-General to enter a *nolle* cannot be challenged in court nor controlled by any person.

[26] See S. 211(3) for States and S. 174 (3) for Federal.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

Republic. This is because it was observed and widely reported that the former Attorney-General of the Federation under Late President Umare Musa Yar'adua, Mr. Michael Aondouka used this power to terminate many cases of corruption during that regime[27]. This did not go down well with the ordinary Nigerian but the masses were helpless in the circumstance. If the Attorney-General had given his reasons pursuant to the phrases contained in section *174(3) of the 1999 Constitution*, Nigerians and the Courts would have been better informed as to the propriety, public interest or interest of justice element in the exercises. The only thing those actions created for the former Chief Law officer was disdain and hatred by those who are serious against corruption. But shall we leave the situation to continue as Attorneys-General come and go and do whatever they like because of the Supreme Court position in *Ilori's case*?

The answer is no. We therefore call on the Supreme Court to have a second look at that case and overrule itself if the war against corruption and political motivated violent crimes are to be nipped in the bud. It is no longer news that politicians have no conscience and can do anything to protect their own and the Attorney-General is a politician.

Our reasons for this call have been expressed in the course of the analysis of *Ilori's case* but we hereby strongly put forward the following as our reasons even if it is repetition.

First, in the United States of America from where we copied our presidential system of government, the Courts judicially review the Attorney-General's power while entering *nolle prosequi*. Rule 48 of the *US Federal Rules of Criminal Procedure* (FRCRP) now mandates that prosecutors should seek leave of the Court before dismissing a case via a *nolle prosequi*[28]. Thus, the U.S.A which is a common law Country like Nigeria is not holding unto the common law position of the Attorney-General. In the same vein, Kenya, a country in our continent and a common law country has departed from the original view that the Attorney-General cannot be controlled by the court.

Second, we are rapidly accepting democracy as a form of government. Many things are involved such as human rights protection and enforcement and of course the rule of law generally. These are complex issues that require that both the interests of the State and citizens are strictly protected. These cannot be done efficiently if one man in government has power to hold every person to ransom. The Governors and the President who are the appointors may claim ignorance of what the Attorneys-General do but more often than not, the Attorneys-General act in the interest of the Chief-Executive and that is why there is no history of an Attorney-General having been removed for entering a *nolle.* When Mr. Michael Aondoaka was dropped by President Goodluck Jonathan in 2010 when he took over power due to the illness of President Yar'adua, it was of issue of loyalty to the new President and not that the President disciplined him for abuse of power.

In the light of the foregoing, we pray the apex Court to do the needful. It is not issue of Constitutional amendment because the section interpreted in *Ilori's case* is too clear to have the meaning foist on it by the Supreme Court.

[27] See O. Ademadi, "Michael Aondoaka: Minister of Injustice" accessed from: www. Nigeriaworld.com. the 12th of December, 2013 cited by O.H. Tobechukwu & S.C Chukwuma *Supra* note 21.

[28] See http://en.wikipedia.org/wiki/Nolle-Prosequi.*(Supra)*. See also *United States v. Shoemaker* available at https://law.resource.org/pub/us/case/reporter/f.cas/0027.f.cas/0027.f.cas.1067.html accessed on 25th May, 2016 where a United States Court held that the AG.'s power is subject to judicial review.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)