

RETHINKING THE POWER OF NOLLE PROSEQUI IN NIGERIA: THE CASE OF STATE V. ILORI

Ogidi Henry Tobechukwu (corresponding author)

School of General Studies
Delta State Polytechnic, Ogwashi-Uku
PMB 1030, Delta-State Nigeria

Rev.Fr Stephen C Chukwuma

School of General Studies
Delta State Polytechnic, Ogwashi-Uku
PMB 1030, Delta-State Nigeria

ABSTRACT: *The Attorney General enjoys several constitutional and statutorily conferred powers amongst which is the power to initiate, take over and terminate legal proceedings in all courts in Nigeria except a court martial. The power to terminate legal proceedings (also known as the power of nolle prosequi) have continued to dominate legal and political discourse because of the perceived abuse of the power by succeeding Attorney Generals. With the pronouncement regarding the powers of the Attorney General in **State v Ilori**, the question often asked is whether the Attorney General is above the jurisdiction of the courts. To answer this question, this paper examines the decision in **State v. Ilori** against the clear provisions of the constitution and proffers solution out of the quagmire.*

KEYWORDS: Attorney general, Nolle prosequi, State v. Ilori

INTRODUCTION

The Attorney General of the State or of the Federation enjoys certain constitutional powers conferred by section 211¹ and section 174 respectively. According to section 174²(same as section 211) provides that the Attorney General shall have power to:

(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than court-martial,

¹ Section 211 of the 1999 constitution as amended defines the powers of the Attorney General of a state

² Section 174 which confers similar powers is concerned with the powers of the Attorney General of the federation

in respect of any offence created by or under any Act of the National Assembly;

(b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person. (2) The powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department. (3) In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

These tripartite powers that consist of; the power to institute and undertake, to take over and continue and to discontinue any legal proceedings have been subject to legal scrutiny but none as much as the power to terminate legal proceedings.³ The power of nolle which is of common law origin confers on the Attorney General the power to terminate legal proceedings against an accused person. This power which is an extension of the royal prerogative of the monarch in England is exercised by the Attorney General.⁴ Accordingly the courts in England have declared that this power is not subject to judicial review but to the expectation that the Attorney General “will never prostitute those functions which he has to perform.”⁵

Other jurisdictions with colonial links to England have also adopted this model of conferring the power of nolle prosequi to the attorney general or any authority performing the role of the Attorney General.⁶ Likewise the power of nolle prosequi has been firmly established under Nigerian legal jurisprudence for over five decades. However, it was not until recently that the propriety of conferring such power has become the centre focus of legal arguments.

In the present fourth republic, the powers of nolle prosequi have been used by the various Attorneys’-General to terminate corruption proceedings against prominent politicians accused of stealing billions of naira. Under the erstwhile Minister of Justice and Attorney General of the

³ The power to discontinue criminal proceeding is referred to as power of nolle prosequi which means do not pursue. Both will be used interchangeably throughout this work.

⁴ see Osita Mba, 2010, Judicial Review of the Prosecutorial powers of the Attorney-General in England and Wales and Nigeria: an imperative of the Rule of law, Oxford University Comparative law forum 2. Retrieved from www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2056290. On 12/ 12/ 2013.

⁵ Lord Justice Smith in the English case of R v. Comptroller-General of Patents (1899) 1 Q.B. 909

⁶ Under the Nigeria (Constitution) Order-in-Council 1960, S.I. 1960 No. 1652, the powers were conferred on the Director of Public Prosecutions.

Federation⁷, Michael Aondoakaa, several corruption cases initiated by the EFCC⁸(Economic and Financial Crimes Commission) against politicians who were alleged to have enriched themselves with their respective states resources were discontinued by the Attorney General in the exercise of this constitutionally granted power without any cogent reasons. The thinking of Nigerians was that the Attorney General was simply shielding⁹ his friends and political colleagues from the law which he had sworn to uphold. When the Attorney General was replaced, the legal community breathed a sigh of relief. The removal¹⁰ of Michael Aondoakaa seem to have made little change as the present Minister of justice and Attorney General Mohammed Bello Adoke has continued to exercise the power of *nolle prosequi* as his predecessor.¹¹

Despite the public outcry and outrage, legal practitioners have been dissuaded from challenging the actions of the Attorney General because it is universally acknowledged on the basis of the Supreme Court judgment in *State v Ilori*¹² that the Attorney General is a law unto himself. The often repeated dictum of the Supreme Court is that the:

The pre-eminent and incontestable position of the Attorney-General, under the common law, as the chief law officer of the State, either generally as a legal adviser or specially in all court proceedings to which the State is a party, has long been recognised by the courts, In regard to these powers, and subject only to ultimate control by public opinion and that of Parliament or the Legislature, the Attorney-General has, at common law, been a master unto himself, law unto himself and under no control whatsoever, judicial or otherwise, vis-a-vis his powers of instituting or discontinuing criminal proceedings. These powers of the Attorney-General are not confined to cases where the State is a party. In the exercise of his powers to discontinue a criminal case or to enter a nolle prosequi, he can extend this to cases instituted by

⁷By virtue of section 195 and 150 of the 1999 constitution (as amended) and section 180 and section 138 of the 1979 constitution, the Attorney-General is the chief law officer as well as the commissioner of the state or minister of the federal republic respectively.

⁸ Established by the Economic and Financial Crimes Commission Act of 2004 to fight corruption

⁹ See Olugbenga Ademodi, Michael Aondoakaa: The Minister of Injustice, retrieved from www.Nigeriaworld.com on the 12th/12/2013

¹⁰ The Attorney General may not have been removed because of the abuse of powers. Many media houses explained his removal on the ground that his loyalty to the newly sworn in President was in doubt.

¹¹see Ikechukwu Eze, Alex Echiejina,(May 24th 2009) Halliburton and deepening roots of corruption in Nigeria, retrieved from www.businessdayonline.com.

¹² S.C. 42/1982

any other person or authority. This is a power vested in the Attorney-General by the common law and it is not subject to review by any court of law. It is, no doubt, a great ministerial prerogative coupled with grave responsibilities.

Since the Supreme Court is the final court in Nigeria, Nigerians have resorted to advocating for constitutional amendment to check the power of the Attorney General. The options of persuading the Supreme Court to overrule itself have not been pursued. This suggests two things. First, that the Supreme Court judgment is sound. In that case the only reasonable recourse is through the legislature. The second seem more probable, which is that the Nigerian Supreme court is often reluctant to overrule itself. In fact since the creation of the Supreme Court in 1963, there is only one known instance where the court has reversed itself.¹³

We argue that the facts and law calls for a reversal of the decision by the Supreme Court whenever the opportunity arises.

The Supreme Court Judgment in State v Ilori

The appellant as plaintiff instituted a criminal proceedings against the director of Public Prosecution of Lagos State and two investigating police officers for offences of conspiracy to bring a false accusation against him contrary to section 125 of the Criminal Code (Cap 31) Laws of Lagos State and conspiracy to injure him in his trade or profession by maliciously procuring the seizure and detention of the properties of his clients contrary to section 518(4) of the criminal code. The appellants case rested on the prior dismissal of the charge brought against him by the DPP of inducing delivery of money, contrary to section 419 of the Criminal Code, and one count of stealing contrary to section 390 of the Criminal Code, Cap. 31, Laws of Lagos State by the Court of Appeal. In the course of the case against the DPP and the two policemen, the Attorney-General of Lagos state entered a plea of nolle prosequi. The appellant challenged the power and propriety of Attorney's-General entry of a plea of a nolle prosequi in that case and urged the court to allow him present evidence of bad faith against the Attorney General in order to show that the Attorney General's decision did not accord with section 191(3) which required him to have regard for "the public interest, the interests of justice and the need to prevent abuse of legal process" in exercising his powers under section 191. The court declined to hear such evidence and ruled that the Attorney- General has "the right to discontinue any criminal proceedings instituted by him or any other person at any stage before judgment."

¹³ Bucknor-Maclean v. Inlaks nig.Ltd(1980) 8-11 sc 181

Dissatisfied with the ruling of the High Court, the appellant proceeded to the Court of Appeal. The Court of Appeal while conceding *“that by virtue of sub -section (3) of section 191 of the 1979 Constitution, the position in Nigeria is now different from the position at common law held that “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.”* The appeal was however dismissed for failure to get a judge’s consent as required by the law.

Also not satisfied with the decision of the Court of Appeal, the appellant approached the Supreme Court. The major issue considered by the Supreme Court was the interpretation to be placed on section 191(3) of the 1979 Constitution that is if the subsection have altered the common law position that the powers of the Attorney-General to enter a plea of nolle is not subject to judicial review. The subsection provides that *“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.”* The Supreme Court of a full bench comprising of justices Fatayi Williams (CJN) as he then was, Ayo Irikefe, Chukwuweike Idigbe, Kayode Eso, Anthony Aniagolu, Augustine Nnamani and Muhammadu Uwais unequivocally answered in the negative. According to the court held per Justice Eso, who delivered the lead judgment:

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 restatement 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 Constitution

has in no way altered the pre-1979 constitutional position of the Attorney-General.

A Critical Analysis of the Judgment

The Supreme Court established in the case that section 191(3) which provides that “*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*” does not alter the position at common law as advocated by the appellant. According to the Supreme Court, the Attorney-General’s power is not subject to judicial review but to the “public opinion, and the reaction of his appointor.” To support this conclusion, the Supreme Court drew comparison with the Attorney-General’s power to delegate under the 1979 constitution and at common law. Under the common law the Attorney-General has the power to delegate his powers to officers under him in the same manner which section 191 provides that the Attorney-General may delegate. According to the Supreme Court as the position regarding the delegation of the Attorney-General’s power in England is the same as that of Nigeria so also is the law regulating the Attorney-General’s unquestionable power to enter a plea of nolle. Consequently, section 191(3) is a mere restatement of the common law position in England.

In our opinion the judgment with all due respect was reached *per in curium*. The Supreme Court in reaching its conclusion premised its argument that the position at common law is the same under the 1979 Nigerian constitution. Although Nigeria has continued to retain the vestiges of colonialism, there are institutional differences between Nigeria that makes this premise and the conclusion erroneous. England practices a parliamentary system of government where the ultimate authority lies with the legislature. The Attorney General is an elected member of the Parliament as well as part of the executive who is deemed to be exercising the monarch’s prerogative. It is understandable for the Attorney General’s power not to be subject to judicial review at that time. Apart from the fact that it will give one arm (the judiciary) supervisory powers over the officers of the legislature and executive which is against the doctrine of legislative supremacy, the Attorney-General’s power is checked by the members of parliament who had to because of the principle of collective responsibility, those making up the shadow government, and more importantly by the electorate since he is an elected official. Clearly, the position in Nigeria is vastly different. Not only is the Attorney General not elected but more importantly the Nigeria system of government is based on constitutional supremacy. One of the corollary of this is that Nigerian laws especially the constitution is superior to all legal authorities including common law provisions.¹⁴ Another is that the concept that any authority is a law unto itself is a strange and perverse one in a constitutional democracy.

¹⁴ Section 1 of the 1979 constitution

Another factor which precipitated the error reached in the case is the failure of the Supreme Court to consider the intent of the drafters in inserting section 191(3) *vis a vis* the other provisions of the constitution in deciding the case before it. In a Critique, Omoregie¹⁵ states that such discretion is much too wide to be consistent with the intendment of the framers of the constitution or to be consistent with the tenet of constitutional democracy, which is founded on the need to forestall the exercise or blossoming of arbitrariness in government. Interestingly, the Supreme Court failed to give full consideration to Section 6 of the 1979 constitution despite the section forming part of the basis of the decision of the court of appeal. Section 6 in defining the power of the courts states that:

The judicial powers vested in accordance with the foregoing provisions of this section -

- (a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law*
- (b) shall extend, to all matters between persons, or between government or authority and to any persons 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;*
- (c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;*
- (d) shall not, as from the date when this section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law.*

From the foregoing, the courts have the right to hear “*all matters between persons, or between government or authority and to any persons 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.*” For all intent and purposes, without the express exclusion of the jurisdiction of the court, the manner in which the Attorney General exercises a constitutionally conferred power affects the civil rights and obligations of persons generally and thus within the power of judicial

¹⁵ Power of the Attorney General Over Public Prosecution Under the Nigerian Constitution Need for a Judicial Restatement. University of Benin, Faculty of Law Lecture Series No. 4, November, 2004 pg 7

review. To hold that the power of the Attorney General is unquestionable is to inadvertently rob the courts of the constitutionally granted as well as limit to which the citizens can enforce and enjoy their fundamental human rights. A perusal of section 265 of the 1979 which states that “no proceedings or determination of the committee or any matter relating thereto shall be entertained or questioned by the court” is an obvious example of how the drafters of the constitution restricts the court’s power of judicial review.¹⁶ Section 191(3) bears no semblance of this. Even where the jurisdiction of the court is ousted, the attitude of the Supreme Court is to restrict the operation of the ouster clause as much as possible. In *Inakoju vs. Adeleke*¹⁷, It ruled proactively in spite of the ouster clause in Section 188(10) of the Constitution. According to Tobi, J.S.C., who delivered the lead judgment “*Ouster clauses are generally regarded as antithesis to democracy as the judicial system regards them as unusual and unfriendly. When ouster clauses are provided in statutes, the courts invoke section 6 as barometer to police their constitutionality or constitutionalism.*”

Equally worthy of mention is the Supreme Court failure to consider the use of the word “shall” as used in the constitution under consideration. Under the 1979 constitution as in many statutes, the word “shall” is primarily used to indicate mandatory obligations while “may” is used where the legislature intend to allow the exercise of some discretion.¹⁸ Yet, the Supreme Court found it easier to adopt the dictum in the English case of *Julius v. Lord Bishop of Oxford*¹⁹ where the word “shall” was interpreted as “directory, promissory and enabling as against its own judgment in *Mokelu v. Federal Commissioner for Works and Housing*²⁰ where the Supreme Court expressly stated that the “word ‘may’ is an enabling or permissive word” relying on the dictum of an English court, the Supreme Court reached the conclusion that the word shall as used in the subsection does not indicate any obligation. Again, the Supreme court failed to take cognizance of the Privy Council’s judgment in *Akintola v. Adegbenro*²¹ where the court per Viscount Radcliffe established that “...it is in the end the wording of the constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated...” the Supreme Court reiterated this position in *Garba v. University of Maiduguri*²² where it opined that “*their construction is not to be guided by the construction of other constitutions in other common law jurisdictions unless similar provisions are in pari material were in question*”

¹⁶ Section 188(10) of the 1999 Constitution(as amended)

¹⁷ (2007) All FWLR (Pt. 353) 3

¹⁸ Onochie v Odogwu(2006) 6 NWLR pt. 975

¹⁹ [1874-80] All E.R Rep

²⁰ (1976) 3S.C 38

²¹ (1962) 1 All. NLR. 442

²² (1986) 1 NWLR (pt. 18) 500

Finally, the Supreme Court seemed to have overlooked the effect of unbridled power in a democracy such as ours. The overall import of the Supreme Court judgment is that although the Attorney General may have regard to the public interest, the interest of justice and the need not to abuse the legal processes, he is not under any legal obligation to. According to the Supreme Court, the decision whether or not to discontinue a criminal proceeding, and what constitutes public interest, the interest of justice is at the sole discretion of the Attorney General. What then is the fate of justice and that of the citizenry if the Attorney General abuses his powers? The Supreme Court provides three answers.

The first is that since the entry of a nolle prosequi does not act as a bar to bringing a new suit against the person in whose favour the nolle is entered, the Attorney General may subsequently do so. A learned writer²³ argues that this may not only be unfair to the accused person but in fact infringe his fundamental human rights as it relates to the double jeopardy provisions. In practice, at least in Nigeria, in most cases more often than not, the entry of a nolle prosequi spells doom for any hope of any future successful prosecution. Loss of evidence, loss of confidence by witnesses in the judicial system is likely to be insurmountable obstacles for even the most dogged prosecutor.

The second is that the Attorney General is subject to public opinion and the National Assembly. Suffice it to say that the experiences of the fourth republic show conclusively that these measures cannot rein in any Attorney General who wishes to abuse his office. Again as suggested by a learned writer²⁴, the role of the Attorney General includes translating the policy of the government into legal position. It therefore means that if the executive may not be interested in checking the Attorney General's power. A frightening possibility is that the executive arm will wield all powers in respect to criminal law cases.²⁵

The Supreme Court seems to suggest a third remedy. According to Justice Eso "*a person who has suffered from the unjust exercise of his powers by an unscrupulous Attorney-General is not without remedy for he can invoke other proceedings against the Attorney-General.*" Justice

²³ 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

<http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/DELIMITING%20THE%20SCOPE%20OF%20THE%20POWERS%20OF%20THE%20ATTORNEY%20GENERAL%20TO%20RE%20CHARGE%20AN%20ACCUSED%20PERSON%20AFTER%20A%20NOLLE%20PROSEQUI%20HAD%20BEEN%20ENTERED.pdf>

²⁴ Mark J. Freiman(2002), Convergence Of Law And Policy And The Role Of The Attorney General Supreme Court Law Review 16 S.C.L.R. (2nd series) vol 16

²⁵ The combined power of prerogative of mercy and unchecked power of the Attorney General may result in over concentration of powers in the hands of the executive.

Irikefe also suggest that “*an inquiry can only, if at all, be held de hors the proceedings in which the nolle was entered.*” These statements seem conflicting with of core of the judgment since any proceedings will of course involve the review of the powers and the obligations of the Attorney General which the judgment seem have precluded.²⁶

CONCLUSION

With the controversies surrounding the abuse of the power of nolle prosequi and the perceived lack of legal remedies, many Nigerians have pointed towards constitutional amendment as the solution to the perennial abuse of this power by successive Attorney Generals at both state and federal levels. Surprisingly, after three constitutional amendments of the 1999 constitution²⁷, Section 174 and 211 whose wordings the Supreme Court have held to confer an unquestionable status to the power of the Attorney-General remain unamended. Perhaps these suggest that the unquestionable power of the Attorney General is agreeable with the political class who have been the principal beneficiary of the plea of nolle prosequi. The most viable option is judicial intervention. This too is a difficult hurdle given the fact that the Nigeria Supreme Court has rarely overrules itself. But there are good grounds for overruling the judgment in the *State v Ilori*.

The judiciary in other common law jurisdictions has seen the need to curtail all political powers given the new realities and the expanding frontiers of human rights. In the African continent, the Kenyan judiciary has also seen the need to move from the common law position of the unquestionability of the Attorney-General’s to legal accountability. In a landmark judgment in the case of *Crispus Karanja v. Attorney General*²⁸, a Kenya High court overruled itself when it declared that “*On the present practice in our Criminal Justice system that a nolle prosequi cannot be challenged in Court, we find such proposition to be untenable under the Kenyan Constitution.*” The relevant part of the Kenya constitution under consideration is Section 26(3) in the aforementioned case provides that:

The Attorney – General shall have power in any case

²⁶ This must be differentiated from the case of the decision in A.G. Kaduna State v. *Hassan* (1985) 2 NWLR (Pt. 8) 483 where the crux of the case was whether the powers of the Attorney General can be delegated where there is no extant Attorney-General.

²⁷ The House of Representatives on Wednesday, 24 July, 2013 voted for the separation of the Office of the Attorney General of the Federation from the Minister of Justice. This does not still expressly give the Court the power of judicial review. See http://www.placng.org/new/search_view.php?sn=60;&&title=House%20votes%20on%20Constitution%20Amendment. Viewed on 12th/12/2013

²⁸ High Court Kenya Criminal Application No. 39 of 2000

in which he considers it desirable so to do –

- (a) to institute and undertake criminal proceedings against any person before any court (other than a court – martial) in respect of any offence alleged to have been committed by that person;*
- (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and*
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.’*

An examination of this section will reveal that it is similar to section 191 of the 1979 constitution in all respect save for the provisions of section 191(3) which requires the Attorney General to have regard for “public interest”, “interest of justice” and “the need to prevent the abuse of legal process” Despite the seeming unrestricted power of the Attorney General with the absence of any clause similar in meaning or intent with section 191(3) , the Kenya high court abandoned its earlier position in case of *Alfred Njau and others v. City Council of Nairobi*²⁹ where it held that “*The Attorney General has many powers and duties. He may stop any prosecution or indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons.....in the exercise of these powers, he is not subject to direction by his ministerial colleagues or to the control and supervision of the courts.*” Interestingly, the change in the court’s position was not precipitated by law but the new social milieu.

The unassailable conclusion is that since judiciary per the Supreme Court is inadvertently responsible for conferring on the Attorney General a power which we argue is neither tenable from the express provisions of the constitution nor from the stand point of constitutional supremacy, they should not shy away from overruling themselves when the opportunity presents itself.

²⁹ (1982-1988) 1 KAR 229. 4