USMANU DANFODIYO UNIVERSITY, SOKOTO

(POSTGRADUATE SCHOOL)

A CRITICAL ANALYSIS OF THE POWERS OF ATTORNEY GENERAL OF THE FEDERATION UNDER THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (AS AMENDED)

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DEDICATION

This research work is dedicated to my parent, whom I am well pleased with for taking care of my needs and responsibilities throughout my up-bringing. May God bless them with Jannatul-Firdaus (Paradise) Amen.

CERTIFICATION

This dissertation by Ibrahim Sama'ila has met the requirements for the award of the degree of master of laws (L.L.M) of the Usmanu Danfodiyo University, Sokoto and is approved for its contribution to knowledge.

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LIST OF ABBREVIATIONS

1. ACJA	Administration of Criminal Justice ACT.
2. AG	Attorney General.
3. AGF	Attorney General of the Federation.
4. All FWLR	All Federation Weekly Law Report.
5. CAP	Chapter.
6. CPA	Criminal Procedure Act.
7. CPC	Criminal Procedure Code.
8. DPP	Director public prosecution.
9. Ed	Edition.
10. Ibid	In the same source as the one that has just been mentioned.
11. INEC	Independent National Electoral Commission.
12. JSC	Justice of the Supreme Court.
13. LFN	Laws of Federation of Nigeria.
14. NCLR	Nigerian Constitutional Law Report.
15. NWLR	Nigerian weekly Law Report.
16. Para	Paragraph.
17. PP	Pages.
18. Pt	Part.
19. S	Section.
20. SC	Supreme Court.
21. SS	Sections.
22. WRN	Weekly Report of Nigeria.

ABSTRACT

This dissertation critically evaluates the Powers of the Attorney General of the Federation under the amended 1999 constitution of the Federal Republic of Nigeria. The main objective of this research work is to examine the extent at which the provisions of the constitution are adequate in regulating to Powers of Attorney General in Nigeria among other issues affecting same. The Powers of Attorney General of the Federation Generated and is still Generating intense controversies among many legal experts. The Power is considered to be excessive in that the Attorney General has Power to discontinue any Criminal proceedings before any Court in Nigeria except court martial. This Power is premised on the fact that the Attorney General cannot be questioned and need not to adduce any reasons for his actions. This may be abused by the said officer. The controversies the Powers had generated are that the Power may be abused. The research adopted doctrinal research Methodology. Observation revealed that the provisions of the Constitution relating to the Powers of the Attorney General are not adequate. Therefore it is generally recommended that all the provisions relating to the Powers of the Attorney General should be amended to fill in the gaps left.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

This study intends to critically analyse the power and functions of Attorneys-General of the Federation under the 1999 Constitution of the Federal Republic of Nigeria (as amended).

The Constitution divides the office of the Attorney-General into Federal and State Attorneys - General. It confers on both the Attorney-General of the Federation and that of a State with certain powers and functions. The most prominent powers of the Attorney- General are the powers to institute or terminate criminal proceedings before any court in Nigeria or State as the case may be. In Nigeria, the Attorney-General is both a cabinet member and also the Minister of Justice. The same is the situation on in States where the Attorney-General serves as the Commissioner of Justice. This has been the prevailing situation in Nigeria both under Military and democratic regimes. There have been agitations to separate the office of the Attorney General from that of Minister of justice with various reasons advanced. Conversely, there have been agitations also for maintaining the offices as they exist.

The office of Attorney-General in Nigeria is provided under the Constitution. He is the Chief Law Officer of the Federation or of States as the case may be. However, although the office of the Attorney-General in Nigeria is provided by the Constitution and may be a creation of the Constitution, it is of common law origin. In

fact, the office predates constitutional development in Nigeria in that it is one of the legacies of our common law heritage[1].

Under common law an Attorney-General was seen as a counsel and in that sense both the King of England had an Attorney-General so also private individuals had Attorney-General who was considered a general agent or representative[2]. Also statute of earliest Minister provided that certain persons may consult a General Attorney to sue for them in all pleas in the Circuit of Justice and that such Attorney-General Shall have full powers in all pleas moved during the Circuit until the pleas be determined or that the master removed[3].

1.2 Statement of the Problem

The power and functions of the Attorney-General of the Federation under the Constitution is a subject of intense controversies among many legal experts. The power is considered to be excessive in that the Attorney-General has power to discontinue any criminal proceedings before any Court in Nigeria. This power is premised on the fact that the Attorney-General cannot be questioned and need not to adduce any reasons for his actions. This may be abused by the said officer. The controversies the powers of the Federal Attorney General had generated is indeed a problem in the sense that such powers may be abused in that there may be political undertone in criminal proceedings exercise of such powers. An accused may be

[1]. Mba, O. (2010) Judicial Review of the Prosecutorial powers of the Attorney-General in England Wales
and Nigeria. An Imperative of the Rule of Law available at Ouclf.jus.comp.org accessed on 25/12/2015 at
4:00pm
[2]. *Ibid*.
[3]. Mba, O. *Op-cit* p. 2.

discharge on the application of the Attorney-General without him assigning any reason for such decision.

Additionally, there is problem of prosecutorial powers in that a particular case may not be instituted by the Attorney General who is the officer under the law to institute criminal proceedings in Nigeria. Thus, the powers may be abused[4].

Another problem has to the with whether having regard to the provisions and general character of the constitution of the federal republic of Nigeria, 1999 (as amended), the powers of Attorney General in Nigeria is absolute as interpreted by supreme court of Nigeria in the case between the *state vs Ilori* (1983) 1 SCNLR. P 94 this is always a problem considering the fact that the Ilori case (supra) is the land Mark case relating to powers of Attorney General.

Another problem intend to address by this present dissertation is whether having taking cognizance to local situation and circumstance in Nigeria, it is proper to allow the discipline of erring Attorneys General to remain solely in the hand of his appointer and the court of public opinion. The judgment of the Supreme Court in the case of *State v Ilori*[5] has been exploited by the successive Attorneys-General to undermine it, it is argued that the indiscriminate use of prosecutorial powers to the political advantage of the Government in power may undermine the function of the judiciary. The position of Attorney-General is occupied by political appointees, 'who always dance to the tune of Mr. President thus; something urgently needs to be done in the area of administration of Justice in Nigeria.

[4] Okorafour, D.U (2009): "Establishment of the Independent Office of the Attorney General" available at articulatedave.blogspot.com accessed on 28/12/2015 at 5.00pm
[5]. (1983) 2 S.C.N.L.R pat 94 at page 115.

1.3 Aim and Objectives of the Study

The main aim of this study is to critically analyse the powers and functions of the Attorney-General under the 1999 Constitution of the Federal Republic of Nigeria (as amended). Thus, the objectives of this study are as follows:

1. To critically examine the provisions of the 1999 Constitution (as amended) relating to the power and functions of the Attorney-General of the Federation.

2. To Proffer solutions and suggestions for the reform of the constitution in such a manner that would not allow for overriding control of the president and state Governor in the appointment and removal of Attorney General

3. To offer solution/suggestion for the judicial restatement of the law as regard the powers of Attorney General in Nigeria.

4. to make a critique of the powers and functions of Attorney General as judicially examine and establish in the case of *state vs Ilori (1983) 2 S.C. P. 155*

5. To make a critique of the powers and functions of Attorney General as judicially examine and decided by the Supreme Court in the case between *Abacha vs State* relating to powers of the Attorney General.

1.4 Justification of the Study

The focal point of this study which extends to the vex question of whether the office of A.G. should be distinct from that of the Minster of Justice is an emerging area in the administration of Justice in this country. The powers of the Attorney-General as

currently contained in the 1999 Constitution (as amended) do not add any credence to the effective and efficient administration of Justice in Nigeria.

The reason is strongly and directly associated with the powers and functions conferred on the Attorney-General and the fusion of the said two offices. Thus, this study will examine such powers as well the rationality or otherwise for the fusion of the offices with a view of proffering solutions for the proper and effective administration of criminal Justice in the country. Thus, the study will be relevant and useful to proponents and exponents of carving out from the office of the A.G. of the Federation, a distinct office of Minister of Justice as well as to legislators.

1.5 Scope and Limitations of the Study

This study focuses on the powers and functions of the Attorney-General, under the 1999 Constitution, thus, the relevant provisions of 1999 Constitution will form the nucleus of this study. Additionally, although the work is centered on the 1999 Constitution of the Federal Republic of Nigeria (as amended), other analogous Constitutions would also be consulted where necessary. Reference will also extend to other relevant legislation such as the Administration of Criminal Justice System Act, 2015. Although the study is based on the 1999 Constitution (as amended).

The powers and functions of the Attorney-General of the Federation under the 1999 Constitution (as amended) is the main focus of this study, the powers and functions of the Attorneys-General of the States may be examined where it becomes necessary.

1.6 Research Methodology

The methodology to be employed in this research work is doctrinal. The adoption of this method is justified in that it is the most prevalent. It is a consultation of primary and secondary sources available in both public and academic libraries. Thus, books, statutes, law reports, encyclopedia, Magazines, Newsletter, among others available in the library would be consulted.

Additionally, the available resources on the Internet would also be consulted for a simple reason that there is plethora of legal materials on the internet; most of the researches are now done online across the globe.

1.7 Literature Review

In order to pull together literatures within the area of this study so as to ascertain the extent other literatures had treated the topic being analyzed the following literatures were uncovered and they would prove invaluable in this study.

Osamor B[6], in his book, Fundamental of Criminal Procedure Law in Nigeria examines some sections of the 1999 Constitution relating to the prosecutorial powers of the Attorney-General. The author dwelt so much on the powers of the Attorney-General to institute, take over, and continue and discontinue criminal proceedings in Nigeria. This study is relevant to the work at hand. Unfortunately, the book did not traced the origin and historical background of the Attorney General of the

[6]. Osamor, B: Fundamental of Criminal procedure Law in Nigeria (1st Edition), (dee-sage Nigeria Limited, Bwari Abuja 2004) P. 110-125

Federation. Similarly the author did not make any critiques of the powers of Attorney General

Imhanobe O[7], discusses the power of Attorney-General to institute criminal proceedings, discontinuance and take over same. The author also discusses abuse of legal process, delegation of powers of the Attorney-General. These items are relevant to this study.

However, the author did not also take into account arguments of whether the powers of Attorney General are subject to judicial review or not. The author examined issues such as history, origin, establishment, qualifications, appointment, tenure and removal of the Attorney-General. What marks this study out form this book is that this study will do a critique of the vex issue of powers of Attorney General of the Federation.

Omorekegie E B,[8] in his paper entitled "powers Attorney-General over public prosecutions" examines the power of the Attorney-General over public persecutions under the 1999 Constitution. In doing so, he discussed the power of the Attorney-General to institute; take over and continue, and terminate criminal proceedings before any Court in Nigeria except the Court Martial. The author concluded that the judicial attitude toward the Attorney-General's power over public prosecution is supportive of the current status quo as it relates to the powers vested on the A.G. under the Nigerian 1999 Constitution (as amended). However, the Author did not

[7]. Imha Nobe, O.S: (2008), the Lawyer's desk book (Vol. 1), (1st edition), (Temple Legal Consult Abuja, 2008). P. 233-239.

[8]. Omoregie E.B: Powers of the Attorney-General over Public Prosecution under the Nigerian Constitution the need for judicial restatement: A Faculty of Law lecture series, University of Benn, 4 November, 2004. available at www.http/Attorney-General .org accessed on 28/1/2015 at 4:00pm

make any critiques of the powers of Attorney General and whether the powers are absolute or not.

Assudaisiy A[9], in his article titled, Prosecutorial Powers of the Attorney-General" examines the meaning of the phrase "Attorney-General". The author goes further to trace the origin of the office of the Attorney-General, the powers of the Attorney-General under the 1999 Constitution (as amended). But his work fall short having not make any critiques in such powers and finally did not discuss about the issue of judicial review of powers of Attorney General.

Edosomwan C U,[10] in his paper titled 'Powers of the Attorney- General in Perspectives' discussed the historical perspective of the office of Attorney-General. He traced the evolution of the office of the Attorney-General to the present time. The power conferred on both Attorney-General of the Federation and that of the State are discussed by the author. The author also discussed the delegation of powers by Attorney-General. He concluded that the powers of the Attorney-General are very wide and expansive. This discussion by the author under this paper are indeed relevant to this study. But what make it different with the present work at hand is that, the study intends to critically analyzed the powers of Attorney General.

[9]. Assudaisiy, A: Prosecution Powers of the Attorney-General (2012), Article on Matters of Islamic Teaching Law and Politics, on prosecutorial Powers of the Attorney-General also available online http//abdullateefas-sudaisiy.blogspot.com accessed on 10/1/2016 at 12:00pm

[10]. Edosomwan, C. U: powers of the Nigerian Attorney-General in prospective; a paper presented by Hon. Charles Suwensuyi Esomwan SAN, Attorney-General and Commissioner for Justice, Edo State of Nigeria on 4th October, 2006 available at www.Attorney-General .org accessed on 12/1/2016 at 1:00pm

Duru[11] O. In his paper titled "the powers and duties of the Attorney-General under Nigerian Law". He discussed the powers conferred on both Attorney General of the Federation and that of a State. Similarly also, the powers to institute, overtake, continue and discontinue were also discussed. However I found that the powers and function of both Attorney General of the Federation and that of a State discussed by the author relevant to this research work or Dissertation, and similarly the author discussed the other officers under the department of the Attorney General. To this end a gap exist in his work. In the same vein also the author did not make any discussion on the procedure, qualification, appointment, tenure and removal of Attorney General from office.

Francis T,[12] in his article titled "An appraisal of the Powers of the Attorney-General of the Federation with respect to Criminal Proceedings under the Nigerian Constitution", examines the powers of the Attorney-General of the Federation to institute, take over, and discontinue the proceedings and also the limitations of the power of the Attorney-General. More so, the author did not stop at that he also discussed the delegation of power of Attorney-General where he categorized the mode of delegation by Attorney-General into personal and delegated. Similarly, the discussion by the author under this paper is indeed relevant to this study.

[11]. Duru, O. (2012) the Powers and duties of the Attorney-General under the Nigerian Law. Published online also available at SSRN: http://ssrn.com accessed on 12/1/2016 at 4:00pm
[12]. Francis, T, (2008): 'An Appraisal of the Power of the Attorney-General of the Federation with respect to Criminal proceedings under the Nigerian Constitution': vol. 34 May 2008. available at www.nigerianlawguru.com accessed on 12/1/2016 at 1:00pm

Mba, O,[13] in his article titled "Judicial Review of the Prosecutorial Powers of the Attorney-General in England, Wales, and Nigeria: An Imperative of the Rules of Law" discusses the powers of Attorney-General by making reference to common law of England and Wales and Nigerian Constitution. The author said in his paper that the Attorney-General as the Chief Law Officer of the State is the Chief Legal Adviser to the State and specifically in all Court proceedings. He went on to discuss the power extensively that in many Jurisdictions, including Nigeria, the Constitution confers on the officer with similar powers as under common law prerogative to exercise ultimate control over prosecution.

Similarly, the author discussed the power of Attorney-General under English Law, common law, and English statute and under Nigerian Law. Under Nigerian Law, the author discussed the powers under 1963 Constitution, 1979 Constitution and finally under 1999 Constitution of the Federal Republic of Nigeria. The author also discussed extensively the power of Director Public Prosecutions under the Department of Attorney-General of the Federation.

The article of the author is found relevant to this study, but unfortunately gap exist this is because, the author did not make critiques on the powers of Attorney General under the constitution and this is what make this work different from the work of the author, as this work intends to make a critiques on such powers.

Mamman T,[14] in his book titled Course Hand Book on Criminal Procedure, discusses the powers of the Attorney-General under the 1999 Constitution. In doing he also

[13]. Mba, O: *Op-cit* p. 2.
[14]. Mamman, T, (2008): Course Hand Book on Criminal Procedure (1st edition) Council of Legal

examined the delegation of powers by the Attorney-General. He also discussed the power of *Nolle prosequi* vested to the Attorney-General.

Similarly, the author did not stop at that he went further to discuss some of the officers under the department of the Attorney- General. In reviewing the book, I found that the author also discussed, other officers of the Department of Attorney-General such as solicitor-General, Director of Public prosecution, Registrar General, Administrar-General. In the same vein also the author discussed the issue of fusion or separating the office of Attorney-General from that of the Minister of Justice. But unfortunately the author did not discuss anything about the origin and evolution of the office of Attorney General and more importantly he did not make critiques on such powers, it is this the present work at hand intends to address.

Yola A A,[15] in his article titled 'Over View of all the Departments in the Federal Ministry of Justice' in a journal of Contemporary Legal Issues, discusses some of the officers under the Department of Attorney-General. He also discussed how the Attorney- General and Minister of Justice is appointed, I found the article of the author relevant to this study, other issues discussed by the author is other officers under the departments of Attorney General. The officers include, Solicitors General, Director of Public Prosecution, Director civil litigation etc.

Education Law School, Abuja. Page 12-13.

[15]. Yola, A.A: 'Overview of all the Departments in the Federal Ministry of Justice' in a Journal of Contemporary Legal Issues, a publication of the Federal Ministry of Justice. Vol. 4 No. 4 2002, page 1-22.

Okoroafor, D.U.,[16] in his paper titled "Establishment of the Independent office of the Attorney-General", discussed the various functions of the Attorney-General. Similarly the author traced the historical origin of the office of the Attorney-General. He also discussed the powers and functions of the Attorney-General. The author also discussed the implications of the fusion of the office of the Attorney-General and that of the Minister of Justice. Thus, I found the article of the author relevant to this study. But however, some gaps exists in his work, because the work at hand differed from the work of the author. The present work intends to make a critiques of such powers of the Attorney General which is lacking in the work of the above author.

1.8 Organizational Layout

This Dissertation consists of five chapters as follows:

Chapter One comprises of the background of the study, aim and objectives of the study, scope and limitations, statement of the problems, justification of the study, literature, review, and research methodology

Chapter Two, discusses the history of the office of the Attorney-General which comprises of the introduction, history of the office of the Attorney-General of the Federation, origin of the office of the Attorney-General, establishment of the office of the Attorney-General, qualification, appointment, tenure and removal of Attorney-General, this would be followed by a conclusion.

Chapter Three is an appraisal of the powers and functions of the Attorney-General under the 1999 Constitution (as amended). This consist of the introduction, powers

[16]. Okoroafor, D.U. *Op-cit* p. 7.

of the Attorney-General to institute and undertake proceedings powers to take-over and continue criminal proceedings, powers to discontinue proceedings at any stage before judgment, delegation of the power by the Attorney-General, restrictions and limitation on the powers of Attorney-General under 1999 constitution and grounds for judicial review of the prosecutorial power of the Attorney-General. This will, go further to explain the judicial attitude to the powers of the Attorney-General over public prosecutions, critiques of judicial attitudes of the Attorney-General, suggestions to the critiques before drawing a conclusion.

Chapter Four is a critique of the judicial attitude to the power of Attorney General over public prosecution. This chapter consist of the introduction, judicial attitude to the powers of Attorney General over public prosecution, critique of judicial attitude to the Attorney General constitutional power over public prosecution, suggestion to the critiques, and finally draw a conclusion.

Chapter Five, consists of Summary, Findings, Recommendations and Conclusions.

CHAPTER TWO

THE OFFICE OF THE ATTORNEY GENERAL OF THE FEDERATION

2.0 Introduction

The office of the Attorney-general in Nigeria is constitutionally provided for. He is the Chief Law officer of the Federation or of a State as the case may be. He also perform some political roles, albeit the Constitution of the Federal Republic of Nigeria 1999 (as amended) makes copious provisions regarding the powers of the Attorney-General. Unfortunately, as we shall soon see, the extent of such powers has been a subject of much polemics, resulting in an avalanche of judicial authorities. However, these decisions do not appear to have finally laid the matter to rest.

The office of the Attorney-General of the Federation or that of Attorney-General of the States of the Federation are also sacrosanct. Similarly the Attorney-General of the Federation as a government appointee and a member of the President's cabinet, he is subject to the President's directions, whims and caprices. He can not flout the President's direction without risking his removal from office.

This chapter intends to trace the history of the office of the Attorney-General of the Federation; the origin of the phrase "Attorney-General"; establishment of the office of the Attorney-General; examining the offices under the Department of the Attorney-General of the Federation, which includes Solicitor-General of the Federation, Director of Public Prosecution, Registrar-General, Administrar-General, and other officers under the Department of the Attorney-General. Finally, in this

chapter shall also examine the qualification, appointment, tenure, and removal of the Attorney-General.

2.1 Origin of the Office of the Attorney-General

The phrase "Attorney-General" is defined in the light of the United State's Constitution as follows:

> "The Attorney-General as Head of the Department of Justice and Chief law officer of the Federal Government represents the United States in legal matters generally and gives advice and opinion to the President and to the heads of executive department of the government when so requested. The Attorney-General appears in person to represent the Government in the US Supreme Court in cases of exceptional gravity and impotence[1] .

The exact origin of the office appears unknown. A learned author, Stephen, F[2]. expressed the view that apart from the King, other persons had Attorney-General in early times and that the expression simply meant no more than a general agent or representative.[3] In the United Kingdom, the office of the Attorney-General originated in 1315 when the Crown began to appoint an individual to prosecute it's business in the Court of Common Pleas.[4] The appointment is usually by letters patent under the great seal. At first, an individual is not given a specific title in the letters patent. But in 1327, he was designated "King's attorney". In the patents granted during the reign of Edward II and Edward III the powers of the King's Attorney were limited, either in respect of the Court which he was to practice, the area over which

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[1]. Assudaisiy, A: prosecutional powers of the Attorney-General (2012), Article on matters of Islamic Teaching law and politics on prosecutorial powers of the Attorney-General available at http//abdullateefas-Sudaisy.blogspot accessd on 28/02/2015 at 7:00pm

[2] . Stephen, F. (1909) History of the Criminal Law of England (Vol. 2) p. 499

[3]. *Ibid*

[4]. *Ibid*

his authority extended or the business with which he was entrusted[5]. In 1452, the title of the office was replaced with the phrase "Attorney-General" and at the same time, he was empowered to appoint deputies. By the sixteenth century, he became the most important officer in the Legal Department of the State and the Chief Representative of the Crown in the Courts[6].

In Mary land, United States of America, the origin of the office of Attorney-General is traceable to the constitutional provision of the United State. The office was abolished by constitutional amendment in 1817. the General Assembly re-introduced the office by statute[7]. By article VI section 3 of 1851, the Attorney-General's office was fulfilled by a State's Attorney in each country and Baltimore city the office of the Attorney-General was later re-established by article V section 1 of the 1864 American Constitution.[8]

2.2 History of the Office of the Attorney-General of England and Nigeria

The history of the Office of the Attorney-General can be traced back to England in the thirteen century and the early beginning of the legal profession itself. The sovereign was unable to appear in person in his own courts to plead in any case affecting his interests. It was therefore necessary for an Attorney to plead the sovereign's case. It was the responsibility of the King's attorney to maintain the interest of the sovereign before the Royal Courts. The first written record of a professional Attorney appearing on behalf of the sovereign is Lawrence del Brook in

[5] *Op-cit* p. 3
[6]. www.attoney-general.gov.uk, last visited on 30/02/2015 at 3:00pm.
[7]. Chapter 146, Act of 1817 of the Constitution of United States.
[8]. Mary Land Manual Online, mdmanualmdarchivest.state.md. visited on 30/02/2015 at 4:00pm

1243. The sort of work that Lawrence Del brook was engaged in as could be gleaned form the Court records include initiating actions to recover rents and lands; proceeding against those who pronounced a sentence of ex-communication against a royal servant, investigating homicides to hear and determine what pertained to the Crown.[9]

Between 1254 and 1268, there was a record of atleast thirty cases in which this Attorney was engaged by the crown.[10]

Professor Sayles refer to Lawrence Delbrook being paid a regular fee of twenty pounds a year "for using the King's affairs of his pleas before him.[11]

In 1461, The first record of the title of Attorney-General appeared when the King's Attorney John Herbert was described as the "Attorney-General of England". In the patent of his appointment, Herbert was summoned, along with other Judges to the House of Lords to advice on legal matters.[12] By the beginning of the sixteenth century, it was the Attorney-General who was consulted by the Government regarding points of law and who had the conduct of important state trials. Notably the political duties currently attached to the office of the Attorney-General were not present in this early period of the office's history[13].

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[9]. Okoroafor, D.U (2009): Establishment of the independent office of the Attorney-General available at www.Attorney-General accessed on 2/03/2015 at v12:30pm
[10]. See note 9
[11]. Edosomwan, c.u powers of the Nigerian Attorney-General in prospective; a paper presents by Hon. Charles Suwensuyi Esomwan SAN, Attorney-General and Commissioner for Justice, Edo State of Nigeria on 4th October, 2015 available at www.Attorney-General .org accessed on 03/03/2015 at 5:00pm
[12] *Ibid*
[13]. *Ibid*

However, as the function of sovereignty became more complex and extensive and acquired a more public character, it was natural that the functions of the King's attorney should become wider. The responsibility of the Attorney-General steadily expanded to include the representation of the sovereign in his courts for the protection of his rights and interests whenever that was necessary and the discharge of the sovereigns responsibilities for the prosecution of crime[14].

The office of the Attorney-General was transplanted to the British Colonies including Nigeria with the reception of English law[15]. The first set of Attorney-General in Nigeria was drawn from the English Bar. They were appointed by the United Kingdom (UK) government as ex-officio members of the Executive and Legislative Councils prior the independence of Nigeria and played a substantial role in the Executive and has often been key members of Cabinet, but with the attainment of independence their positions, functions, powers, and duties were given constitutional backing Nigeria in the first post-colonial period Constitution which still exist till today.[16]

In 1739, Chief Justice Wilmot delivering a House of Lord's decision concurred to by all his colleagues said.

[14]. See note 11
[15]. *Ibid*
[16]. See note 15

> The King is entrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community for the resenting and punishing of all offences which affect the community and for that reason, proceeding and *advindicature at poenam* are called in the law, the pleas or suits of the crown…..As indictments and, information granted by the king's bench are the king's suits and under his control. Informations filed by his Attorney-General are most emphatically his suits because they are the immediate emanations of his will and pleasure[17].

Tracing the historical evolution of the Attorney-General Professor Sayles opined that although the sovereign is in theory, the fountain of justice and supreme, there are so many case reported in the year books in which the King was a Litigant in his own Courts and presumably abided by their decisions. According to him, since it was inconceivable for the king To appear in person to the suits, they could only sue and be sued by their Attorneys-the Attorney-General[18].

In 1311, the practice of appointing the King's Attorney by letters patent was established. The first appointee to the office of the King's Attorney was Robert Poun but it was only in 1315 that the first formal appointment is recorded of a specially designated King's Attorney William of Langely[19].

Mention must however be made of the fact that before this time, a peculiar situation arose after the demise of Del Brook in 1274 during the tenure of his successor-Walter of Wimborne who was appointed justice of the King's bench only two years after his appointment as King's Attorney[20].

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[17]. Wilkes, R.V: (1768) E.R p. 23.
[18] Edosomwan, C.U: *op-cit*, p. 3
[19]. *Ibid*
[20]. *Ibid*

As a result, some of the King's pleas were assigned to professional Attorney or to the care of Clerks of Court to sue on the King's behalf but the ones affecting the sovereign were delivered by Walter of Wimborne, in person to the King's Sergeants[21].

However, in quite a number of these pleas, the new King's Attorney cum royal justice appeared in Court himself to plead the King's cause thus creating a conflict of interest and roles where in some cases the new King's Attorney adjudged the very case in which he had earlier personally participated as King's legal representative[22]. However this practice was abolished in 1290 with the appointment of Richard de Brettiville as King's Attorney. It is important to observe that during this period, the King's Attorney did not have any political functions to perform as the Attorney-General perform today, His responsibility was simply to maintain the Crown's interests before the Court[23]. Also, during this time, the practice was that the King's Attorney was appointed and assigned to a particular Court for instance, John de Narton was appointed in 1312 as King's Attorney in the King's Bench and shortly thereafter in 1315 William of Langely was appointed as King's Attorney, this practice continued unabated throughout the reign of Edward III[24].

However, with the coronation of Henry IV in 1399, the foundation for the modern structure of a single King's Attorney with the right of audience in all the royal courts

[21]. Okoroafor, U.D *op-cit* p. 3
[22]. See note 21
[23]. *Ibid*
[24]. Edosomwan, C.U *op-cit* p. 10

was instituted. Again, the King's Attorney began to have terms of appointment from the appointment of William de Lodington in 1399. before then the King's Attorney had general supervision over the King's affairs in the Royal Court. Subsequent appointments of the King's Attorney followed the same or similar terms of appointments[25].

In 1461, with the patent appointing John Herbert the authority of the King's Attorney to appoint one or more deputies was introduced for the first time. However, the tenure of office was irregular, with the result that some of the King's Attorney, by custom held appointment as the King's legal representative during the pleasure of the sovereign, some others were appointed[26]. Significantly during the reigns of King Henry V and Henry Vi, the appointment of the King's Attorney was done ad vitam. However, there has been a complete reversal as patent of modern Attorney-General now make provisions for appointment "during our pleasure".

In 1461, the expression "Attorney-General of England was used for the first time in the patent of appointment of John Herbert. This is the earliest instance of the adoption and use of the term Attorney-General. It was also in this year that the first King's Solicitor-Richard Fowler was appointed and this was original precursor of the modern day office of the Solicitor-General[27]. Albeit, The point must be made that in 1515, the office of the King's Solicitor became the office of the Solicitor-General of the King and the first Solicitor was John first[28].

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[25]. *Ibid*
[26]. *Ibid*
[27]. See note 26
[28]. *Ibid*

There appears to be some confusion as to whether there was any distinction between the services performed by the King's Attorney and those of the King's sergeants or whether the offices were one and the same. The general opinion among legal scholars, with some dissenting voices is that the ranks of King's Attorney and sergeant were distinguishable[29].

During the early stages of development of these offices, the role performed by the King's Attorney resembled those now performed by the modern day Solicitor while resort was had to the King's sergeant in difficult cases involving the exercise of high intellectual ability and forensic skill.

Again whereas the Sergeant were paid 20 pounds a year for their services the Attorneys were paid 10 pounds a year. Finally whereas the Sergeants could take private cases, the King's Attorney could not[30].

It is noteworthy that the King's Sergeants were superior to the King's Attorney and infact took precedence over the Attorney at this stage in the history of the legal profession[31]. But this pre-eminence of the King's Sergeants began to decline during the 16th century. By 1545, it had become clear that the rule requiring a new Judge to hold the position of King's Sergeant had become a mere procedural formality. Thus, from about the time of pre-permanence of Sir Edward Coke as the Chief Justice of England, the Court of King's Bench, the pre-eminent position of the King's Sergeant had been supplanted by the Attorney-General and even the Solicitor-General whose duties and responsibilities were looked upon as providing the right caliber of persons

[29]. See note 28
[30]. Mathew, T: (1937) For Lawyers and Others (1st edition), p. 197
[31]. *Ibid*

to fill the positions. Indeed, it must be said that the specialized nature of the Sergeants qualifications and invariably, the restriction of his sphere of operation to, principally, the Court of Common Plea, enabled, as it were, the Attorney-General to establish their positions as Chief Law Officers of the Crown[32].

It also important to observe that the now very wide and expansive powers of the Attorney-General in England did not come about in one fell swoop. They developed with the development of historical evolution of the office. By the turn of 19th Century, it had become clear that the Attorney-General had control over all criminal prosecutions in England. Even in civil matters, all suits for or against Government or any Department of Government were instituted by or against the Attorney-General.

Still on criminal prosecutions, so wide were the powers of the Attorney-General that by the Public Bodies Corrupt Practices Act 1889 and the Prevention of Crime Act 1906, the fiat or consent of the Attorney-General was required before certain Litigation could be instituted in a Court of Law.

Proceeding could be commenced and in some cases as in the Lunacy Act 1890, the consent of the Attorney-General [33] was declared necessary before certain penalties could be recovered. Again, it was necessary to obtain the Attorney-General's fiat for certain appeals to the House of Lords.

I have taken time to cite legislation bordering on the office of the Attorney-General in England because of their bearing on the constitutional nature of the powers of the Attorney-General in Nigeria. The pre 1900 legislation cited above are Statutes of

[32]. See note 31
[33]. See note 32

General Application. Little doubt therefore that the Attorney-General in pre-independence Nigeria continued to perform the same roles, mutatis mutandis as those enunciated above with respect to Nigeria. Constitutional development in Nigeria with regards to the office of the Attorney-General took cognizance of those legislation as well as the nature and ambit of the powers of Attorney-General in England. Thus, the current 1999 Constitution (as amended) of the Federal Republic of Nigeria is substantially a replication of the position in England.

2.3 Establishment of the Office of the Attorney-General

Although the office of the Attorney-General in Nigeria is provided for in the Constitution, it is of common law origin, historically, though from the Republic Constitution which came into existence following the exist of colonial rule in Nigeria and under the 1999 Constitution (as amended) the office of the A.G can be said to be a creation of the constitution.[34].

The office of the Attorney-General of the federation or states of the federation are sacrosanct. The Attorney-General of state or of the federation as the case may be is the Chief law Officer of the level of government under which he exercises his powers[35].

In Nigeria, the offices of the Attorney-General of the Federation and Attorneys-General of States are established respectively by section 150(1) and section 195(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The section provide as follows: (1) There shall be an Attorney-General of the Federation who

[34]. Edosomwan, C.U *op-cit*, p. 15
[35]. Assudisiy, A. *op-cit* p. 3

shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation[36].

Similarly, section 195(1) of the Constitution provide that

> "There shall be an Attorney-General for each State who shall be the Chief Law Officer of the State and Commissioner for Justice the Government of that State.

It is clear from the wording of the above provisions that an office of the Attorney-General of the Federation and that of States shall exist. This is to say that the Federation of Nigeria can not exist without the existence of the office of the Attorney-General. In the same vein each State of the Federation must establish the office of Attorney-General and Commissioner of Justice in their respective states, since it is a provision of the Constitution, it became paramount importance to recognize and respect the office of the Attorney-General, because of the powers conferred on the occupant of that office. More also the word used in the above provisions of the Constitution is "shall" the word shall expresses and conveyed something that must exist and can not be dispensed with. Finally, the office of the Attorney-General shall be established in the Federation of Nigeria and in all the 36 States of the Federation.

[36]. Section 150(1) of the 1999 constitution of the Federal Republic of Nigeria

2.4 Qualification, Appointment, Tenure and Removal of the Attorney-General

2.4.1 Qualification

The qualification of a person to be appointed as an Attorney-General is expressly provided in the 1999 Constitution of the Federal Republic of Nigeria (as amended). It is provided as follows:

> A person shall not be qualified to hold or perform the function of the office of the Attorney-General of the federation, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than ten years"[37].

Similarly it is also provided as follows

> A person shall not be qualified to hold or perform the function of the office of the Attorney-General of a state unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than ten years"[38].

From the wording of the above provisions, it is clear and settled that

(i) Before a person is qualified to hold office or perform the function of either Attorney-General of the Federation or Attorney-General of a State respectively, as the case may be held, must be a legal practitioner in Nigeria that is to say he must have undergone and graduated from a law degree programme from a recognized University or institution and must successfully pass all the required courses.

[37]. Section 150(2) of the 1999 Constitution
[38]. Section 195(2) of the 1999 Constitution

(ii) He must also attend Nigerian Law School, a person who attend law school in another country other than in Nigeria, is not qualified to practice in Nigeria. If he want or wish to practice in Nigeria he must attend the Nigerian law school.

(iii) He must also qualified to practice as a legal practitioner and finally,

(iv) He must be atleast 10 years post call practicing in Nigeria as a legal practitioner,

After attaining or possessing the above conditions or qualities then such a person said to be qualified to hold the office or perform the functions of the office of Attorney-General of either the Federation or State, as the case may be depending on the capacity he is appointed.

2.4.2 Appointment

The Nigerian Ministry of Justice is the legal arm of the Federal Government of Nigeria, primarily concerned with bringing cases before the judiciary on behalf of the federation. It is headed by the Attorney-General who is also a Minister of Justice[39].

The Attorney-General of the Federation is appointed by the President of the Federal Republic of Nigeria, subject to the confirmation of the Senate. Accordingly, the Hon. Attorney-General of the Federation and Minister of Justice who is the Chief Law Officer of the Federation by virtue of section 150 of the 1999 Constitution of the

[39]. Yola, A.A: 'overview of all the departments in the Federal Ministry of Justice' in a Journal of Contemporary Legal Issue, a publication of the Federal Ministry of justice. Vol. 4 No 4, 2002, p. 1

Federal Republic of Nigeria (as amended) head the Ministry assisted by the Solicitor-General of the Federation and Permanent Secretary who is a career Civil Servant[40].

Similarly, the Attorney-General and Commissioner of Justice of State is appointed by Governor of that State subject to the confirmation of the State House of Assembly of that State[41]. It is clear by the above provision that the President or Governor of a particular State may nominate any body he want who is qualified to be appointed as an Attorney-General either of the Federation or state depending who is appointing him and after nominating that person, the President will submit the name of that person to Senate for confirmation. Once the President submitted the name of that person to be appointed as an Attorney-General and Minister of Justice, the Senate shall invite that person for the purpose of screening him and after a screening if he pass successfully the Senate will confirm him. After confirmation by the Senate then the President will appoint that person as an Attorney-General and Minister of Justice. But if the Senate rejected him, the President has to nominate another person and submit his name to the Senate.

In the case of Attorney-General and Commissioner of Justice, the Governor of that State will nominate anybody he want provided that he is qualified to be appointed or to hold the office of the Attorney-General and Commissioner of Justice of the State. He will submit the name of that person to State House of Assembly for confirmation, if the house confirm that person then the Governor can appoint him to that position

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[40]. *Ibid*
[41]. *Ibid*

of Attorney-General and Commissioner of Justice but if the Senate reject him, then the Governor has to nominate another person. Thus, from the forgoing provision it is clear that the constitution did not expressly provided for mode of appointment of Attorney General of the Federation and procedure is not expressly spell out in the constitution. Therefore this problems need to be address in the constitution by amending it to include the procedure and the mode of appointment of Attorney General.

The constitution only made provision that president or governor of a State as the case may be can appoint an Attorney General but the constitution did not went further to specifically provide for who the Attorney General.

2.4.3 Tenure

The United States of America (USA) Attorney-General is the Chief Law Enforcement Officer for the Federal Government and as the head of the justice department, considered to be part of president's cabinet, the US Attorney-General is nominated by the president but then confirmed by the US Senate. There is no set term of office. The US Attorney-General serves at the pleasure of the president[42].

So, up to 8 years unless they are nominated by more than one president. In Nigeria there is no express provisions in the 1999 Constitution of the Federal Republic of Nigeria as regard to tenure of office, not even in the 1999 Constitution, previous Constitution of the Federal Republic of Nigeria such as 1960 Constitution, 1963

[42]. http://en.m.wikipedia.org/wiki/attorney visited on 05/October, 2015.

Constitution, 1979 Constitution all does not carry express provision as regard to the tenure of office of Attorney General[43].

However, there is no set term of the tenure of office of both Attorney General of the Federation and Attorney General of a State under the Nigerian Constitution. The Attorney General serves at the pleasure of the President or Governor. In Nigeria experience and practice, the tenure of office of either the Attorney General of the Federation or Attorney General of a State lies mainly with the President or Governor who appointed him. The Attorney General may retain his office even where the President or Governor finished his 1st tenure in Office. The President or Governor may nominate him for the second tenure.

The 1999 Constitution of the Federal Republic of Nigeria makes provision for the tenure of office of President and Governor as follows:

The 1999 Constitution provides for the President and the State Governors, a four-year term of office commencing from the date when the person takes the Oath of allegiance and the Oath of office as follows:

> Subject to the provisions of subsection (1) of this section the President shall vacate his office at the expiation of a period of four year commencing from the date when the person takes the Oath of allegiance"[44].

[43]. *Ibid*.
[44]. Section 135(2)(a) of the 1999 Constitution.

Similarly it is also provided with regard to the Governor as follows:

> Subject to the provisions of subsection (1) of this section, the Governor shall vacate his office at the expiration of period of four years commencing from the date when the person takes the oath of allegiance and Oath of office[45].

Thus, in practice, after the expiration of tenure of office of President or Governor all the members of his cabinet which include the A.G. will be dissolved if they contested for the second term and lost in the election. Therefore from the wording of sections 135(2)(a) and 180(2)(a) of the 1999 Constitution of the Federal republic of Nigeria which deals with the tenure of office of Mr. President and Governor of a State, one will come to the conclusion that by practice in Nigeria once the President and Governor finishes their tenure, the tenure of their cabinet members automatically comes to an end.

Finally by implication we can say that the tenure of office of Attorney-General of the Federation of Attorney-General of a State can be inferred to that of the President or Governor except where he is removed by the President or Governor who appointed him before the expiration of the tenure of that President or Governor.

Finally, neither the 1999 Constitution (as amended) nor the previous Constitution makes any provision as regard to the tenure of office of the Attorney-General of the Federation or State, therefore their tenure is the same with other Ministers or Commissioners. Note: The A.G. of Federation or that of a State are members of the Cabinet being Minister or Commissioner, their tenure therefore is that with other Minister or Commissioner. It is therefore imperative to state here that this is another

[45]. Section 180(2).

gap left in by the constitution for failure to expressly provided for the tenure or term of office of Attorney General of the Federation or state at the case may be.

2.4.4 Removal

There is no express provision in the 1999 Constitution of the Federal Republic of Nigeria (as amended) that boarders on removal of the Attorney-General in office. In practice the removal of Attorney-General from office lies mainly in the hand of either President or Governor of a State, this is to say that Attorney-General may be removed at anytime the President or Governor wishes. Also the A.G. may be removed, if there is a public outcry or protest calling for his removal if the president or Governor considers the ground of the agitation to be reasonable.

However the removal of an Attorney-General may be as a result of any allege act of gross misconduct, negligence of duty, incapacitation or incompetence[46]. Similarly in Nigeria the removal of Attorney-General of the Federation or of a state can be done using the public service Rules on the basis that while the AGF is a Minister of Justice and that of a State being a Commissioner for Justice, are subject to civil service Rules the necessary independence, which necessitated the removal violation of any of the rules renders then liable to be removed. Thus, the non inclusion of the express provision of the mode or procedure of removal from office of the Attorney General led to the manipulations of office by the appointer against the appointee, any time the president so wish will just remove the Attorney General. Therefore this is a great lacuna which need to be addressed.

[46]. Okoroafor, U.D *op-cit* p. 5.

2.5 Conclusion

A lot has been said and written about the origin of the office of the Attorney-General and establishment of his office. From this chapter we have seen how the office of the Attorney-General originated and we were able to trace the historic background of the office of the Attorney-General. In most jurisdictions, the Attorney-General is the main legal adviser to the Government, and in some jurisdictions may also have executive responsibility for law enforcement, public prosecutions or even ministerial responsibility for legal affairs generally. In practice, the extent to which the Attorney-General personally provides legal advice to the Government varies between jurisdictions. The term was originally used to refer to any person who hold a general power of attorney to represent a principal in all matters in the common law traditions, anyone who represents the State especially in criminal prosecutions. It was shown that under common law a government may design some official as the Permanent Attorney-General, anyone who comes to represent the State in the same way may, in the past be referred to as such, even if only for a particular case. Today, however in most jurisdictions the term is largely reserved as a title for the permanently appointed Attorney-General of the Federation or State, as is the case in Nigeria.

Similarly, the office of the Attorney-General of the Federation through its various Departments provide services to the public. Its basic objectives are to provide legal services to the Federal Government, other Ministries, Extra-Ministerial Departments and Agencies in carrying out it's activities. It tries to maintain the highest ethical and professional standard as well as promoting the deals of equity, fairness and justice. It

also engages in programmes that sustain a health, relationship with all arms and tiers of Government. The Ministry of Justice throughout its various Departments has been able to intensify and sustain its efforts in providing legal services to the nation and making justice accessible to all. The Ministry is therefore committed to effective and efficient planning, proper management of cases to produce sound governance as envisage by the constitution of the federal Republic of Nigeria.

CHAPTER THREE

AN APPRAISAL OF THE POWERS AND FUNCTIONS OF THE ATTORNEY GENERAL OF FEDERATION UNDER THE 1999 CONSTITUTION

3.0 Introduction

This chapter intends to look at the powers of Attorney-General to Institute and undertake to takeover and continue criminal proceedings and more so, powers to discontinue proceeding at any stage before judgment (power of *Nolle Prosequi*). The Chapter will also make an attempt to look at the power or delegation by Attorney-General and as well as restrictions place on such powers. The chapter will also look at the grounds for judicial review of the prosecutorial powers of the Nigerian Attorney-General under the 1999 Constitution. The Chapter will also look at judicial attitude to the power of Attorney-General over public prosecution. And finally the chapter will look at the critiques of judicial attitude to the powers of Attorney-General and bring out the suggestion to those critique.

However, the Attorney-General is the Chief Law Officer of the Federation or a State as the case may be. The Attorney-General's authority is enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Section 174 and Section 211 empowers the Federal and States Attorney-General respectively to institute, takeover

or discontinue criminal proceedings against any person in any court of law in Nigeria except a Court Martial[1].

The authority of the Attorney-General to institute, takeover or discontinue criminal proceedings is derived from the 1999 Constitution. Consequently, the authority of any other agency or person to institute criminal proceedings is subject to the overriding constitutional powers of the Attorney-General. The Federal Attorney-General exercises, his powers in the case of violations of federal laws. That is laws covering matters in respect of which the National Assembly has authority to legislate over (Matters contained in Part 1,2nd Schedule to the 1999 Constitution i.e. Exclusive Legislative List). Attorney General of State exercise their powers in the cases of violations of State laws, that is the laws governing matters in respect of which the States House of Assembly have authority to legislate on, e.g (matters contained in part 2, 2nd Schedule to the 1999 constitution i.e Concurrent Legislative List)

It should be noted that not all laws made by the National Assembly create Federal Offences. The National Assembly may make laws that are to take effect as State laws. Such laws are deemed to be State Laws. The State Attorney-General, therefore has the power, without express delegation from the Federal Attorney-General, to prosecute persons who violate the provisions of these Laws. In ***Emelogu v the State***[2]. The supreme court held that a State Attorney General could prosecute an accused on under armed Robbery (special provisions) Decree 1970 though the enactment is a Federal Legislation, as it is meant to operate within the State, such Law is usually

1 *State v Adili* (1989) S.C. (pt 1) 1 at p.7

2 (1988)2 NWLR (pt. 78) 524.

deemed to be a Law made by State's Legislative body. Finally the position of the Nigerian Constitutional Law on the power of the Attorney-General over public prosecution seems to have been settled long ago following the decision of the Supreme Court in the land mark case of ***State v Ilori & others***[3].

However, the recent decision of the same apex court in the controversial case of ***Abacha v State***[4] appears to seriously question the law espoused in the ***Ilori*** case. The supreme Court held that the Attorney General is a Law unto himself in taking decision on matters under Section 174 and Section 2011 of the constitution. He cannot be questioned, nor his action be reviewed. The supreme Court further held that Section 191(3) which provides that the Attorney General "shall have regards to public interest, the interest of Justice and the need to prevent abuse of legal process" is merely declaratory and not directory. If the Attorney General therefore disregards the provisions the only sanction against him is removal by his appointor or adverse critism by the public. The effect of *nolle,* when effectively entered is a discharge of the accused person and not an acquittal. However, the recent decision of the same apex Court in the controversial case of ***Abacha v State***[4] appears to seriously question the Law espoused in the ***Ilori*** cases.

This chapter will also attempt to review these two leading but apparently conflicting cases. It would be shown that the ***Ilori's*** case is an unsatisfactory Statement of the law as it is founded on the wrong premise that the Attorney-General has been conferred wide and unbridled discretionary power over public presentation by the

3 (1983) 14 N.S.C.C. P. 69

4 (2002) 11 NWLR PT. 779, P.437

Nigerian Constitution[129]. On the other hand the decision in the *Abacha's Case* would be shown to be Un-preferable either as it fails to set a discernable standard finally we shall formulate a whole new view on the proper interpretation to be placed on the power over public prosecution conferred on the Attorney-General under the Nigeria constitution.

3.1 Power to Institute and Undertake Proceedings

By section 174(1)(a) and 211 (1) (a) of the 1999 Constitution (as amended) both the Federal and State Attorneys General can institute criminal proceedings in any court established under any Act in Nigeria, except a Court Martial.

The Federal-Attorney can institute criminal proceedings in respects of offences created by federal legislation, while the State Attorney-General can institute proceedings in respect of offences created by the State Laws.

In *Anyebe v State*[5], the Supreme Court held that the Benue State Attorney-General cannot prosecute a person who allegedly violated Section 4 of the Firearms Act, 1958 (amended by the Firearms (amendment) Decree No. 31 of 1966). That it was a Federal Law, which created a Federal offence, which was therefore within the authority of the Federal Attorney-General. The Court however, ruled that a State's Attorney-General can prosecute a violation of a Federal Law where the Federal Attorney-General expressly delegates his authority to the State's Attorney-General. As this was not the case, the Supreme Court allowed the appeal. Conversely, the

5 (1986) 1 SC P. 87

Federal Attorney-General cannot prosecute violations of State law except with the express delegation of authority to prosecute from the State's Attorney-General.

Therefore, it is paramount important to look at the provision of the Section 174 and 211. Section 211 of the 1999 Constitution provide as follows: The Attorney-General of a State shall have power "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"[6].

Similarly the Constitution also provides as follows: that the Attorney-General of the Federation shall have power "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 act of the National Assembly[7]"

It is clear from the foregoing provisions that the Attorney General has powers to institute and undertake against any person before any court of law in Nigeria except a court-martial. We shall now examine these powers as conferred by the 1999 constitution (as amended).

The Attorney-General can institute and undertake criminal proceedings against any person in any Court of Law in Nigeria except a Court-Martial. This authority is not withstanding any provisions contained in any other Laws in force in Nigeria. Such other Laws will be null and void to any extent that their provisions are inconsistence

6 Section 211(1) (a)

7 Section 174(1) (a)

with the provisions in Section 211(1) (a) and Section 174(1) (a) of the 1999 Constitution (as amended).

Consequently in the *State v Okpegboro*[8], the High Court rejected the contention that a charge drafted, signed and filed by a pupil State Counsel before a Magistrate's Court was not valid, although section 78(b) Criminal Procedure Act requires that a charge before a magistrate should be signed by a police officer. the Court held;

> i. That the provisions of the Constitution supersedes section 78(b) Criminal Procedure Act and Section 108 of Administration of Criminal Justice Act, 2015.
>
> ii. That since pupil State counsels were officer in the Attorney General's department they could valid exercise such powers of the Attorney-General as are delegated to them, which in this case was the power to institute criminal proceedings.

However, the Attorney-General may exercise his power either personally or delegate the powers to any Officer of his Department. Where the Attorney General delegate his powers to the Director of Public Prosecution (DPP), the DPP cannot sub-delegate the power. Nevertheless, a State Counsel can represent the Attorney General including signing a charge or information[9].

In the exercise of his power of the institution and undertaking criminal proceedings, there are no hard and fast rules as to what legal considerations should guide the Attorney General. He is only expected to exercise his discretion in the best interest of justice base on his subjective conscience. Fola Arthur worry however observed that:

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8 (1980) (2) NCR. P. 291

9 Imhanobe, O. S. (2008) The Lawyer's Desk Book (vol.1, (1st edn.), (Temple Legal Consult Abuja) 234 P.234

> The decision to prosecute ought to be primarily geared towards the public benefits in terms of protecting public norms and social cohesion by underlining the principle of accountability as a deterrent to other who might be incline to break the law. In concrete terms, there is in the decision to prosecute serious implication for the personal circumstances of the alleged offender and the machinery of justice itself. For a suspect he is immediately and sadly uprooted from the serenity and relative stability of his future. The psychological impact on his family situation can be devastating coupled with the financial strain of hiring legal council, the real possibility of loss of his Liberty. Or more fundamentally the real possibility of loss of life and opprobrium of society which tends to immediately pass judgment as to his probable guilt even before all the facts are in.[10]

Therefore, strict interpretation of section 174 (1)(a) and 211(1)(a) of the constitution, suggest that the Attorney General has unqualified discretion to institute, undertake, takeover and continue criminal prosecution against any person no matter who that person is. The person could be innocent, a serving president, vice president, State Governor or his Deputy, and indeed every other person. However, in the interpretation of statute, especially constitution, the court only aimed at getting the correct meaning of the law been interpreted[11] This is more so, when literal interpretation of a statute, do not always lead to a correct interpretation and correct intention of the lawmakers. Where literal interpretation of a statutes would produced unreasonable, absurd and undesirable result, it is the duty of an interpreter of the Law to flex the words and interpret the same in such a manner that would avoid the absurdity and arrived at the correct intention of the Lawmakers[12] constitutional provisions in particular, are not interpreted in isolation. It is usually interpreted as a whole according to its context, its objectives and in such a manner that would justify the hopes and aspiration of those who have made strenuous effort to provide the

[10] Worry F.A (2000), the prosecutor in public prosecution, Josadeen Nigeria Limited, Lagos P. 41
[11] Supra note 6
[12] *Adesanya vs President of the Federal Republic of Nigeria (1981) 5 SC P. 112 at 134*

constitution for the purpose of good governance and well fare of the state on the principle of freedom, equality and justice and for the purpose of consolidating the unity of people[13]. Therefore, base on these important rule or principle of interpretation, the interpretation above cannot in anyway represent the position of the Law.it will be absurd for any court to hold that Attorney General has unfettered power to institute criminal proceedings against any person even when such person does not commit any offence or reasonably suspected having committed a criminal offence. General scheme of the constitution of Nigeria, 1999 indicates that the powers of Attorney General in criminal cases, is not without any limitation. Under the constitution, every person has a right to personal liberty and should not be deprived of such liberty unless he commit an offence or reasonably suspected of having committed a criminal offence.[14]

An Attorney General has neither power nor authority to proceed against any person who does not commit an offence or reasonably suspected of having committed a criminal offence. In *Muhammed Abacha Vs State*[15], the right of appellant to personal liberty and freedom from arbitrary prosecution was upheld against Attorney General of Lagos State.

Similarly, and Attorney General in Nigeria has no authority to bring a criminal charge or charges against the person of a sitting president, Vice President, Governor and his Deputy because, the enjoy immunity from criminal prosecution within the

[13] Supra note 7
[14] Section 36 (8) Section 36 (6)(c) of the Constitution of Nigeria, 1999 (as Amended) *Abacha vs State (2002)II S.C.Q.R Part 345 at P. 3*53
[15] *(2002) FWLR Part (108) P. 355*

period they continue to hold office[16] where therefore, a criminal prosecution is instituted against those persons, the charges or charges will be said aside as incompetent.[17] This immunity is however, not absolute. It is limited only to the period within which the continue to hold their respective offices and does not extend to the members of their families.[18]

A president, Vice president, Governor or Deputy Governor, who commits a criminal offence during the tenure of his office is answerable to Law and could after leaving the office tried for an offence in the same manner as every other person what so ever. A criminal investigation against any of the above mentioned officers could therefore be conducted and the result be preserved for the purpose of prosecution of any officers either at the expiry of tenure, after impeachment or when he/she is found to be incompetent to continue to hold his office and other person is appointed to serve in his place. From there on, he could be prosecuted for the offence committed while in office.[19]

3.2 Powers to Take Over and Continue Criminal Proceedings

The Constitution also stipulates that: "The Attorney-General of State has power to take over and continue any such criminal proceedings that may have been instituted by any other authority or person"[20]. It was also provided as follows that the

[16] Section 308 Constitution of the federal Republic of Nigeria, 1999 Fawehinmi vs IGP (2002) FWLR
[17] Fawhinmi vs IGP (2002) FWLR Part 108 P. 1355
[18] *Ibid*
[19] *Ibid*

20 Section 211(1) (b) of the 1999 Constitution

Attorney-General of the Federation shall have power: "to takeover and continue any such criminal proceedings that may have been Instituted by any other authority"[21].

Therefore the Attorney-General has power to takes over the prosecution of any case. His discretion here is absolute[22]. The Federal or State' Attorney's-General can also take over and continue any Criminal Proceedings that may have been Instituted by any other authorized persons or authority against any person in any Court in Nigeria except a Court-Martial. It is immaterial that a competent person or authority has already instituted the Criminal Proceedings. It is not also immaterial that the earlier Criminal proceedings have not been terminated before the Attorney-General takes over and continues prosecution in another Court or the same Court[23].

In *Amafule* (Supra), the Police instituted criminal proceedings against the accused person in the Magistrate Court, while the case was still pending, the Attorney-General filed an information in the High Court against the accused persons on the same facts for the same offences. The accused persons challenged the Attorney-General's action on the ground that it amounted to an abuse of legal process for the Attorney-General to institute another charge against them without having discontinued the earlier charge in the Magistrate Court. The Supreme Court noted that the Attorney-General ought to have terminated the proceedings at the Magistrate Court, before filing fresh charges at the High Court, but that failure to do so did not amount to an abuse of legal process.

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21 Section 174(1) (b) of the 1999 Constitution

22 *Amaefule v the State* (1988) 2 NWLR (Pt 75) P. 156

23 Osamor, B. Fundamental of Criminal Procedure Law in Nigeria (1st edn.) (Dee-Sage Nig. Ltd, Bwari Abuja 2004) P.113

However, in *Edet v the State*,[24] the Supreme Court later decided that it was not proper for the prosecution to file two charges based on the same fact in different Courts as it amounts to an abuse of court process.

Although the traditional position under the common Law is that the Attorney General is in criminal cases, the sole guarding of public interest and chief Law prosecutor for the state, the business of enforcing criminal and ensuring the sustenance of peace inn Nigeria, is not the exclusive preserve of the Attorney General. Indeed criminal Law by it is nature, is address to all classes of society as the rule that they are bound to obey on pain of punishment to ensure order and maintenance of peaceful co-existence of society. This is so because, the peace of the society is the responsibility of every one, and as par as protection against crime is concerned every one is the others keeper.[25] It is for this reason that the legislature in Nigeria confers power of Public prosecution not only on the Attorney General but also on other authority such as Police under section 23 Act[26], the economic and financial crimes commission (EFCC) under section 12 (2)(a) of the economic and financial crimes commission is (establishment) Act,[27] The independent curropt practices and other related offences commission (ICPC)[28], the National Drug Law Enforcement Agency under section 7(1) & 8(2)(a) of the National Drug Law Enforcement Agency Act,[29] to mention a few.

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24 (1988) 12 S.C (Pt 1) 103 at P. 113
[25] Police Act Cap P. 19, Laws of the Federation of Nigeria, 2004
[26] *Ibid*
[27] Cap E. 1 Laws of the Federation of Nigeria Vol. 5 (2004)
[28] Independent Corrupt practices and other related offences commission Act. No. 5 2000
[29] Cap. N 30, Laws of the Federation Of Nigeria 2004

Subject to the consent and reluctance of the Attorney General to prosecute, a private person can also prosecute under section 77-78 and section 340-343 of the criminal procedure Act,[30] section 143 and 185 of the criminal procedure code[31] applicable to the southern Northern states of Nigeria respectively. The rules are promulgated by the legislatures who are representative of the society and have so made the same for the benefits of the society. The power of the police to prosecute for criminal offences is provided under section 23 of the Police Act[32]

> Subject to the provisions of section 174 and
> 211 of the constitution, of the federal Republic
> Of Nigeria, 1999 (which relate to the Power of the
> Attorney General of the Federation and of a state
> To institute criminal proceedings against any person
> Before any court of law in Nigeria) any police officer
> May conduct in person all prosecution before any court,
> Whether or not the information or complaint is
> Laid in his name.

Police power to prosecute as can be seen from the above section is subject to the overriding control of Attorney General. He has authority to take over and continue any criminal prosecution instituted by the police. The overriding power of the Attorney General is granted to him because of his traditional position as the chief law officer, chief law prosecutor, and custodian of public trust for justice. Thus, where for example, the prosecutorial power off the police is used as an instrument for the harassment of innocent citizens, Attorney General has unfettered discretion to intervene and take over the prosecution as he deems fit.

[30] Cap. C 41 Laws of the Federation of Nigeria 2004
[31] Cap C. 42, *Ibid*
[32] Cap p. 19, *Ibid*

The power of the Attorney General to take over and continue criminal prosecution is categorically stated and provided in the constitution as ealier mentioned. A practice, this power of the Attorney general is not usually exercised. But Attorney General has unfettered discretion to exercise the same and often does, exercise the power in the following situation:

1. Where the Attorney general has received a petition from a complainant or victim of a crime in a case being handled by the police or other prosecutors based on incompetence, bias or prejudice. This may in practice arised where a complainant or victim of a crime alleges that the prosecuting police officer is bribed to compromised the criminal prosecution against a particular accused person.[33]. If on the review of the petition the Attorney General agrees with the complainant he may order for the taking over of the case by officers of his department or do it himself. [34]

2. Where it occurs to the Attorney General that a public Prosecutor in a particular case has his/her personal interest in the matter either for or against the accused person. Example can be seen in a situation where the police insist on the prosecution of a suspect without any sufficient basis to justify the intended prosecution. In such a situation, if the accused person petition the Attorney General that his prosecution is malicious and on review of the case, the Attorney General agrees with the accused, he may order for the taking over of the case or order for the termination of charge or charges against the

[33] Worry, F. A. Op-cit P. 50
[34] *Ibid*

accused.[35] In practice, this situation may arise for instance, where an accused person complain to the Attorney General that he is being prosecuted for a false allegation of criminal trespass to a landed property in his lawful possession in a dispute involving competing claims of right to the title of the property, where a debtor is falsely accused of criminal breach of trust when the dispute involves purely contract of loan between him and a complaining creditor to the police.[36] Neither of these factual situations disclosed a criminal offence. And if police insist on prosecuting a suspect in such circumstances, one of the ways through which he could protect himself from such arbitrary prosecution, is a petition to the Attorney General for the purpose of his intervention.[37]

3. Where the Attorney General considers it desirable in the exercise of his powers as chief law officer prosecutor of a state or the federation in the interest and need to prevent abuse of legal process.[38]

3.3 Power to Discontinue Proceedings at any Stage before Judgment (Power of *Nolle Prosequi*)

The powers of Attorney-General of the Federation or State is provided in the Constitution. The Constitution provided as follows that the Attorney-General of a State shall have power "to discontinue at any stage before judgment is delivered any

[35] *Ibid*
[36] *Ibid*
[37] *Ibid*
[38] *Ibid*

such criminal proceedings Instituted or undertaken by him or any other authority or person.[39]"

It is also stipulated in the same Constitution that Attorney-General shall have power "To discontinue at any stage before judgment is delivered any such criminal proceedings Institute or undertaken by him or any other authority as person.[40]"

Therefore by provision of the above Constitution the Attorney-General of the Federation or State has power to discontinue at any stage before judgment any criminal proceedings. This is generally referred to as the power of *nolle prosequi*.

Nolle prosequi means the power to discontinue a pending criminal action. The power is also provided in the Criminal Procedure Act, Administration of Criminal Justice Act as well as Criminal Procedure code for both Attorney General of the Federation and State Attorneys General to enter *nolle prosequi.* The power is personal to an incumbent Attorney-General and cannot be delegated when there is no incumbent Attorney-General in the case of *Attorney-General, Kaduna v Hassan*[41] the Court commenting on a *nolle prosequi* entered by the Solicitor General when there was no incumbent Attorney General of Kaduna State held that: where there is no incumbent Attorney-General, no other Officer of his Department, not even the Director of Public Prosecution (DPP) or Solicitor-General can validly exercise the power of the *nolle* on the Attorney-General's behalf.

39 Section 211(1) (c) of the 1999 Constitution

40 Section 174(1) (c) of the 1999 Constitution

41 (1985) 2 NWLR at P. 483

However, the above is undoubtedly the most controversial power of the Attorney's-General. This is because the Constitution empowers the Attorney General to criminal proceedings, at any time before judgment against any person in Court in Nigeria except a Court-Martial, but the constitution did not prescribe the mode of exercise of this power.

More so, Section 73(1) of the Criminal procedure Act and Section 107(1)-(4) of Administration of Criminal Justice Act 2015 empowers the Attorney General of the Federation to discontinue criminal proceeding at any stage before judgment. Similarly in the same vein, the State Attorney General has these powers under Section 253(1) of the Criminal Procedure Code as it operates in the northern States. Section 107 of Administration of criminal Justice Act 2015 provides as follows:

> In any criminal proceedings for an offence created by an Act of the National of Assembly, at any stage of the proceedings before judgment, the Attorney General of the Federation may discontinue the proceedings either by stating in court or informing the court in writing that the Attorney General of the Federation intends that the proceedings shall not continue and based on the notice the suspect shall immediately be discharged in respect of the charge or information for which the discontinuance is entered.
>
> 2. Where the suspect:
> a. Has been committed to prison, he shall be releases, or
> b. Is on bail, the recognizance shall be discharged
>
> 3. Where the suspect is not:
>
> a. Before the Court when the discontinuance is entered, the registrar or other proper officer of the Court shall immediately cause notice in writing of the entry of the discontinuance to be given to the officer in charge of the prison or other place in

> which the suspect may be detained and the notice shall be sufficient authority to discharge the suspect, or
>
> (b) In custody the court shall immediately cause notice in his writing to be given to the suspect and his sureties and shall in either case cause a similar notice in writing to be given to any witnesses bound over to prosecute.
>
> (4) Where discontinuance is entered in accordance with the provisions of this Section, the discharge of a suspect shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

In analyzing the above provisions, it is clear that Attorney General can discontinue criminal proceedings by:

1. Attending Court personally and stating orally that the State intends to discontinue criminal proceedings; or

2. By informing the court in writing, through a delegate, that the State intends to discontinue criminal proceedings. Thus the mode of exercising the power to enter the *nolle prosequi* can be summed up:

a. Personally

The Attorney-General may personally come to Court and orally inform the court that he wishes to discontinue proceedings. When an application to discontinue criminal proceedings is made orally, the Attorney-General must be present in Court and make the application himself. However, when the application is in writing, the Attorney-General does not need to be present in person.

b. Delegated

The Attorney-General may delegate his power to any officer of his Department. This must be in writing. In the *State v Chukwurah & Ors*[42] during the trial of the accused persons, the Prosecutor, a State Counsel, made an oral application that the State intends to discontinue the criminal proceedings against the accused persons pursuant to section 73 of the Criminal Procedure Act and Section 107(a) Administration of Criminal Justice Act 2015. The application of the Prosecutor was refused by the Court on the ground that any officer of the Department of the Attorney-General delegated to enter a *nolle* must do so in Writing and not orally.

When the Attorney-General withdraws from criminal prosecutor either personally or through an officer of his Department (armed with a written authority) he is not under an obligation to State reasons for the withdrawal. However this does not apply to Police Prosecutors Section 75(1)(b) of the Criminal Procedure Act and Section 108(3) of Administration of Criminal Justice Act provides that when the Police withdraw from criminal prosecutor they must inform the Court of the reasons for withdraw and the Court must consent[43].

Similarly to further analyze the above provisions it will be understood that there is very wide range of gaps in the said Laws regarding to tenure of office of the Attorney General this is because the Act does not provide for the express provision of the tenure of office of Attorney General. However, this lack of expression may spring controversy to that effect. It may be argue that all the above provisions did not contain any express provisions on the mode of exercising the powers of Attorney

42 (1964) NWLR P. 64

43 Osamor, B. op-cit P.10

General this is another lacuna in said provisions. It may also be argue that the provisions of the above Laws do not contain any provision to the effect relating to removal of Attorney General from office. However, this is fundamental lacuna in the said Laws which may create controversies and uncertainties to that effect.

Generally, all the provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended), Administration of Criminal Justice Act 2015, Criminal Procedure Code did not expressly provide for the tenure of office of the Attorney General as well as mode of his removal from office. From the foregoing analysis it deemed necessary to review, or amend the provisions of the above Laws so as to fill in the gaps left.

3.4 Effect of Discontinuance of Criminal Proceedings (*Nolle Prosequi)*

Section 108 (1)-(5) of the Administration of Criminal Justice Act, 2015 Provides as follows:

> In any trial or proceedings before a Court, a prosecutor, may, or on the instructions of the Attorney General of the Federation, in case of offence against an Act of the National Assembly, may, at any stage before judgment is pronounced withdraw the charge against any defendant either generally or in respect of one or more of the offences with which the defendant is charged.
>
> (2) On the withdrawal, where it is made:
>
> (a) Before the defendant is called upon to make his defense, he shall be discharged of the offence.
>
> (b) After the defendant is called upon to make his defense, he shall be discharged of the offence,
>
> (c) After the defendant is called upon to make his defense, he shall be acquitted of the offence.

> (3) in any trial before a court in which the prosecutor withdraws in respect of the prosecution of an offence before the defendant is called upon to make his defense, the Court may in its discretion order the defendant to be acquitted if it is satisfied on the merits of the case that the order is proper one, and when an order of acquittal is made, the court shall endorse its reason for making the order on the record.
>
> (4) Where a private prosecutor withdraws form a prosecution for an offence under the provisions of this section, the court may, in its discretion, award costs against the prosecutor.
>
> (5) A discharge of a defendant under this section does not operate as a bar to subsequent proceedings against him on account of the same facts, except as otherwise provided under this section.

In analyzing the above provisions it is clear from the wordings that,

i. All proceeding against the accused person shall he stayed and he shall be discharged in respect of the charge or information for which the ***Nolle*** is entered[44].

ii. Such discharge shall not operate as a bar to any subsequent charge against the accused person on the same facts[45].

In ***Clarke & Anor v. Attorney-General Lagos***[46], the effect of a ***Nolle*** was held to be a mere discharge and not an acquittal

iii. If the accused person has been committed to prison he shall be released; and

iv. If the accused person is on bail the recognizance shall be discharged[47].

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44 Section 108 (5) of ACJA 2015

45 Section 108 (4) of ACJA 2015

46 (1986) 1 QLRN P. 119

A *nolle prosequi* operates as a mere discharge and never as an acquittal. Consequently an accused person who is discharged upon the entry of a *Nolle prosequi* cannot claim the defense of *autre fois acquit*[48]. In the State v illori,[49] the Supreme Court held that;

> a *nolle prosequi* is only a temporary proceedings, which has the effect only of a stay and not of quashing of the indictment, which technically may later be prosecuted without a fresh indictment".

This decision was considered and applied in *Clarke & Anor v. Attorney-General Lagos State (Supra).* In that case the applicants were arraigned and charged with the offence of conspiracy to steal an Aircraft. After the testimony of 5 witnesses and a visit to the *Locus in quo*, the Prosecutors applied to withdraw the charge.

The applicants were discharged but were promptly re-arrested on stepping out of the Court hall. The Attorney-General of Lagos State latter brought new charges (substantially the same as the various one) against them in another Court. They brought an application against the Attorney-General of Lagos State for an order for leave to restrain him and his servants from prosecuting them the second time.

The Court held that;

> i. The practice and procedure in our court and in fact in the law in Nigeria shows that a trial is complete when both parties are heard on merit;

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47 Section 107 (2) (a)(b) of ACJA 2015

48 Section 36(a) 1999 Constitution

49 (1983) 1 S.C.N.L.R. 94 at P 115

ii. A trial is also complete where a party with full opportunities to present its case fails or refuses to do so in the course of proceedings;

iii. Where, in a criminal trial, The prosecution after calling some of its witnesses is unable or fails to call the rest and decides to withdraw from further prosecution or discontinue with the proceedings, whether the discharge of the accused person amounts to an acquittal will depend on the fact and the circumstances of the proceedings;

iv. Under Section 75 of the Criminal Procedure Act and Section 108(2)(a) of the Administration of Criminal Justice Act, 2015 a withdrawal by the prosecutor before the accused is called upon to enter upon his defense entitles the court to discharge but not to acquit the accused person;

v. The Attorney-General has not given reason for the withdrawal from prosecution and indeed he is not under any obligation to give any reason; and

vi. The court is not competent to restrain the State's Attorney-General from continuing with new charges. The application was dismissed.

3.5 Withdrawal from Prosecution Pursuant to Section 75 Criminal Procedure Act and Section 108 (1)(2)(3) of Administration of Criminal Justice Act, 2015.

A withdrawal from criminal prosecution by any prosecutor, with the consent of the Court or on the instruction of the Attorney General of the Federation or State Attorney-General may operate as a discharge or an acquittal[50].

Whether it amounts to a discharge or an acquittal depends on the stage of proceedings when the withdrawal is made.

50 Osamor, B. op-cit P.16

The proviso to section 75(b) of the Criminal Procedure Act and Section 108(3) of the Administration of Criminal Justice Act, 2015 further provides that even where the withdrawal takes place before the accused person is called upon to make his defense, a Court may in his discretion order the accused to be acquitted if he is satisfied upon the merits of the case that such order is a proper one. The Court must, however, endorse his reasons for making such order on the record of proceedings.

3.6 Delegations of the Power of Attorney-General

The provision of the 1999 Constitution (as amended) permit the Attorney-General of the Federation and States respectively to delegate their powers to (institute, take over and discontinue criminal proceedings) against any person in any court of law in Nigeria except a Court Martial.

The powers conferred upon the Attorney-General of a State under subsection (1) of this section may be exercised by him in person or through officers of his department[51]". Similarly the powers conferred upon the Attorney-General of the Federation under subsection (1) Section 174 of this section may be exercised by him in person or through officers of his department[52]. Therefore the Attorney-General may exercise the powers conferred upon him by the Constitution

i. Personally or

ii. Through officer in his Department.

51 Section 2 of 211 1999 Constitution

52 Section 2 of 211 1999 Constitution

Although it is not desirable, the Attorney-General can validly delegate the entire powers conferred upon him by the Constitution to an officer in his Department. In *Ibrahim v the State*[53], it was held;

> i. That the Attorney-General can validly delegate all his powers to an officer in his department and
>
> ii. That where an Attorney-General delegated all his constitutional powers to the director of public prosecutions, in writing by gazette, that the charges filed on behalf of the Attorney-General could be signed by the State Counsel.

However, when the office of the Attorney-General is vacant (i.e there is no incumbent in office) the Attorney-General's power cannot be exercised by any officer of his Department. In *Attorney-General Kaduna State v Hassan*[54], there was no incumbent Attorney-General when the Solicitor General purportedly exercised similar powers of the Attorney-General under the 1979 Constitution. It was held that:

> i. The power of the Attorney-General are personal to him;
>
> ii. The power can only be exercised by another if the Attorney-General delegates them to that person; and
>
> iii. Before such delegation can take place. There must be an incumbent Attorney-General who can be the donor of the powers.

This case was distinguished in *Attorney-General Federation v. All Nigeria Peoples Party*[55], where the office of the Attorney-General filed an appeal at a time when there was no incumbent Attorney-General. The Supreme Court drew a distinction

53 (1986) 1 NWLR (Pt18) P.650

54 (1985) 2 NWLR (Pt 8) P 483

55 (2003) 18 NWLR (Pt 851) P 182

between the constitutional functions of the Attorney-General which are personal to the Attorney-General and the office of the Attorney-General which is a legal person created by section 150(1) of the 1999 Constitution.

The Attorney-General's liberty to delegate any or all of his constitutional powers, as the case may be, is only limited by the requirement that the delegate must be an officer in his Department. "Officers in his department" will clearly include States Counsel of all grades, which are from pupil State Counsel (Lawyers on National youth service) to the Director of Public Prosecutions and may also include a Minister of State For the Justice (the office of the Minister of the State for Ministry of Justice is not a creation of the 1999 Constitution).

There are decisions, where it has been argued, extend the liberty of the Attorney-General to delegate his constitutional power, to include delegation to private legal practioners. In *Director of Public Prosecution v Akozor,*[56] it was held that the Federal Supreme Court made a distinction between the power of the D.P.P to commence criminal proceedings by instituting, undertaking or taking over criminal proceedings and the power to appear for the State after the commencement of proceedings. After the commencement of proceedings the former can be undertaken by the D.P.P in person or delegated to an officer of his Department. The latter can be undertaken by the D.P.P or delegated to officer of his department and private legal practitioners.

56 (1962) 1 NWLR P 235

The Supreme Court in *Tukur v Government of Gongola State*[57], cited this case with approval where it was stated by Oputa, JSC, that

> If a private legal practitioner can appear for the State in criminal proceedings despite the restrictions of the public interest, interest of justice and the need to prevent abuse of legal process then their appearance for the State in civil proceedings was beyond question.

The logic behind this is unmistakable, if gold can rust then how much more ordinary metal[58]. It is also noteworthy that in *Nafiu Rabiu v the State*[59], and the *State v Gwonto*[60], the State engaged the services of Private Legal Practioners.

The recent decision of the Supreme Court in the *State v Aibang Bee*[61], rested the position that the Attorney-General can commence and be responsible for criminal prosecutions, but can brief Private legal Practioners to appear on behalf of the Attorney-General, either alone or together with a member of the Attorney-General's staff.

It is however, respectfully submitted that there is no place for such proposition in the clear and un ambiguous Sections 174(2) and 211(2) of the 1999 constitution (as amended). The power conferred by section 211(1) of the Constitution can only be exercised by the Attorney-General personally or delegated to officers in his Department. This by no stretch of imagination or application of the rules of

57 (1988) 1 NWLR (pt. 68) P. 77 at P. 150

58 Osamor, B. op-cit P. 20

59 (1980) (2) N.C.R. P. 117

60 (1983) 1 S.C.N.L.R. P. 142

61 (1983) 7 S.C. (Pt.1) P. 96 at 130

interpretation includes Private Legal Practitioners. However, section 108 (4)-(5) of Administration of Criminal Justice Act 2015 provide as follows: that

> (4) Where a private prosecutor withdraws from a prosecution for an offence under the provision of this Section, the Court may, in its discretion, award costs against the prosecutor.
>
> (5) A discharge of a dependant under this Section does not operate as a bar to subsequent proceedings against him on account of the same facts, except as otherwise provided under this Section.

Therefore from the wordings of the above provisions particularly subsection 4 it is clear that a private prosecutor can withdraw from a prosecution for an offence, but however, where withdrawal occurs, the court has discretion to award costs against the prosecutor. The separation of the Attorney-General's power to "Commence Criminal Proceedings" by instituting undertaken or taking over criminal proceedings, and the power "to appear for the State" after the commencement of the proceedings is actually a distinction without a difference. The Constitution empowers the Attorney-General;

i. Not only to institute but also to undertake criminal proceedings;

ii. Not only to takeover but also to continue criminal proceedings and

iii. To discontinue criminal proceedings at any stage before judgment

All these powers are conferred by the Constitution on the Attorney-General to undertake, to continue and discontinue criminal proceedings can only mean to prosecute criminal proceedings. If the Attorney-General cannot delegate the

constitutional powers to institute, take over or discontinue criminal prosecutions to a private legal practioner, then by parity of reasoning the Attorney-General cannot delegate the constitutional power to undertake or continue criminal prosecutions to a private legal practioner. To draw such a distinction will be splitting hairs[62]. There seems to be no constitutional bases for distinguishing the power of the Attorney-General to Institute or takeover criminal proceedings and his power to undertake or continue criminal proceedings to justify the conclusion that he delegate the later but not the former.

All the powers are vested in the Attorney-General by subsection (1) of Section174 and 211 of the 1999 Constitution. Subsection (2) of the same sections allows the Attorney-General the liberty to delegate these powers subject only to the limitation that the delegate must be "an officer in the department" of the Attorney-General. No private legal practioner can come under his definition[63].

The current practice where private legal practioners appear in all the courts representing the Federal Government is not provided in the Constitution it was only provided in the Administration of Criminal Justice Act, 2015 and it is submitted that judicial authorities such as *D.P.P v Akozor* and *Tukur v. Government of Gongola State* that was considered to not to be good Laws before are now good laws in this regard.

62 Osamor, B. op-cit P. 22

63 *Comptroller, Nigeria Prison Services v Adekenye* (1999) 5 NWLR (Pt. 602) P. 167

3.7 Restriction and Limitation on the Powers of Attorney-General under the 1999 Constitution (As Amended)

The Supreme Court in the case of *State v. llori (supra)*, was called upon to give judicial interpretation to the legal force and effect of sections174 (3) and 211(3) which provide that; "in exercising his powers under this Section, the Attorney-General of a State shall have regard to public interest, the interest of justice and the need to prevent abuse of legal process".

This means that the Attorney-General must use of his constitutional power, must be influenced by the interest of the public, justice and the need to protect the legal authority against any form of abuse[64]. In other words, in the exercise of the powers conferred on him by the constitution the Attorney-General is unchallenged and unchallengeable.

3.7.1 Abuse of Court Process

Attainment of administration of justice under any legal system is dependent on how much the Court are able to ensure orderliness and instill discipline and respect of the Institution. Thus stake-holders, Judges and Counsel are minister in the temple of justice. They must work hand in hand to achieve the desired objectives of maintaining justice among litigants in Courts to prevent abuse of judicial or Court process. Since these are notable practices that disrupt speedy administration of

64 Assudaisiy, A: prosecutional powers of the Attorney General 2012, available at http//Abdullateefas-sudaisiy.blogspot.com accessed on 2/2016/ at 4:oopm

justice in Courts. In *Dingyadi v INEC*[65], concerning abuse of court process, the Supreme Court remarked that:

> The concept of abuse of judicial process is imprecise. It involves circumstance or situation of infinite variety and conditions. It's one common feature is the improper uses of the judicial process in litigation too interferes with the due administration of justice. It is recognized that the abuse of judicial process may lie in both a proper or improper use of judicial process in litigation. But the employment of judicial process is only regarded generally as abuse when a party improperly uses the judicial process to the irritation and the annoyance of his opponent and the efficient and effective administration of justice. This will arise in Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue.

Similarly in *Adeniyi v Akinyele*[66]. The Court of appeal cited the definition given to the term "abuse" of court process by Oputa JSC in *Amefule Anor v, State*[67] as follows:

> that Abuse of court process is a term generally applied to a proceeding which is wanting in Bonafide and is frivolous, vexatious, or oppressive. Abuse of process can also mean abuse of legal procedure or improper use of legal process. The term abuse of legal process has an element of malice in it. It thus has to be a malicious perversion of a regularly issued process, civil or criminal, for a purpose and to obtain a result not lawfully warranted or properly attainable thereby.

65 (2010) All FWLR (pt. 550) P. 1204

66 (2010) All FWLR (pt. 503) P. 1257 at 1286

67 (1998) 2 NWLR (pt. 75) P. 156

Also in *Ministry of Works v Tomas (Nig) Ltd*[68], abuse of court process was defined as follows: "Abuse of court process means abuse of the legal procedure or improper use of the legal process. It always involves some bias, malice, some deliberateness, and some desire to misuse or prevent the system of administration of justice".

3.7.2 Public Interest

The Constitution wants the Attorney-General to consider public interest in the exercise of his duties. The Court is in the best position to ensure that the Minster or a Commissioner for Justice observe this fundamental principle which limits their prosecutorial power under the law.

Public interest is the common well-being or general welfare. Public interest is central to policy debates, politics, democracy and the nature of the government itself. The pragmatic definition of public interest can be seen as follows; "Something in which the public, the community at large has some pecuniary interest or some interest by which their legal rights or liabilities are affected[69]".

On the parameters to determine whether or not the Attorney-General complies with this rule, the Supreme Court held in *State v Ilori[70] (supra),* that the discretionary power of the Attorney-General to start and discontinue Criminal proceedings cannot be challenged, despite the clear provision of Section 174(3). In his erudite submission, justice Kayode ESO, JSC said

68 (2002) 2 NWLR (pt. 752) P. 740 at 754 - 755

69 Black's Law Dictionary (6th edition)

70 (1983) 1 SCNJ P. 94

> It is no doubt a great ministerial prerogative coupled with great responsibilities it is my opinion that the decision of the court in ***llori's*** case was reached ***per incuriam*** and every attempt must be made towards its revision in the interest of justice and the rule of law. This decision is bad because it clearly offends the intendment of the provision of Section174(3) of the constitution which mandates the Attorney-General of the Federation to consider public interest, interest of justice and prevent abuse of judicial process in the exercise of his prosecutional powers.

It is submitted that while the Attorney-General discretion to institute, takeover or discontinue criminal proceedings may be absolute, the question whether that discretion was exercised in the public interest, interest of justice or with due regard to the legal process can be validly raised by an aggrieved party. This need is further underscored by the fact that the Attorney-General is almost always a political appointee and usually a member of the ruling party. It is therefore inconceivable that the Constitution would have intended such enormous powers to be vested in the Attorney-General, unfettered. Unbridled power is easily susceptible to abuse and there is the need to interpret the provision of Subsections (3) of Section 174 and 211 of the 1999 Constitution (as amended) by our Courts as mandatory and not declaratory.

The only limitation to the Attorney General's power appears to be the requirement of the consent of a High Court Judge before the Attorney-General can file an information or prefer a charge in the High Court of the Southern and Northern States respectively. The Attorney-General, like any other prosecution most obtain the consent of a judge of the High Court before the filing of a criminal charge in the States High Courts Nationwide failure to obtain such consent is fatal to the charge.

Also in the case of *Abacha & Ors v the State*[71], the Attorney-General of Lagos State, commenced criminal proceedings by a letter written to the Registrar of the Court. The Supreme Court approved this procedure.

3.8 Other Functions and Powers of Attorney-General of the Federation and States Attorney General of the Federation and State Attorney General

The Attorney-General is the Chief Legal Adviser to the Government in that capacity. He advises the Government, Government Departments, Statutory Boards and Public Corporations in respect of all legal matters. He conducts prosecutions in criminal cases and appears on behalf of the Government, Government Department Stationary Boards and Public Corporations in any Court or tribunal[72].

3.8.1 Criminal Matters

The function of Attorney-General in criminal matters cannot be over emphasized the Attorney-General of the Federation or State plays an important role with regard to criminal matters and in certain instances acts in a quasi-judicial manner. He tenders advise either upon advice being sought or on his own initiative to Federal Government Departments or states Departments in the case of Attorney General of the State, officers of the Police Armed Forces, Paramilitary Security Agencies and officers[73], in Statutory Board and Public Corporations in respect of any criminal

71 (2001) 3 NWLR (pt. 699) P. 35

72 http:llen.m.wikepedia.org/wiki.attorneylast visited on 10 October, 2015

73 *Ibid*

matters of importance or difficulty. Specific provisions have been included mainly in the Criminal Procedure Act no 75 of 1979 (as amended) from time to time). However, regarding a State Attorney General, all indictments against persons accused of serious criminal offences are forwarded to High Court in the name of Attorney-General. And that the prosecution shall be conducted by the Attorney-General or solicitor-General or State counsel generally or specially authorized by the Attorney-General in that behalf[74]. Other power vested in the Attorney-General of a include; direct the Police to institute criminal proceedings in the magistrate's court, the power to grant sanction, to institute criminal prosecutions in respect of certain criminal offences and to grant sanction to appeal from an order of acquittal by a magistrate. The power to tender a pardon to accomplices. The Attorney-General has also power to call for the original record of Magistrates Courts and High Courts[75]. Power to quash a committed made by a magistrate in non summary proceedings and issue instructions to a magistrate[76].

The Attorney-General also has power to direct a magistrate to commit an accused who has been discharged in non-summary proceedings. The Attorney-General also has power to order a Magistrate in non-summary proceedings to take further evidence as may be specified or to record the evidence of any expert witness[77].

The Attorney-General has power to transform any inquiry into or trial of any criminal offence from any Court place to any other court or place. Similarly the

74 *Ibid*

75 *Ibid*

76 *Ibid*

77 See note 49

Attorney-General has power to decide the Magistrate Court having jurisdiction to try a case when opinion is sought by a magistrate who is in doubt[78].

The Attorney-General of the Federation also makes his recommendation to his Excellency the President as to whether or not the sentence of death passed on an accused may be carried out[79].

3.8.2 Powers of Attorney-General In Civil Matters

With regard to civil matters, the Attorney-General advises the government, Government Department statutory Boards and public corporations in respect of all legal matters as well as appears for them in any court or tribunal[80]. The Attorney-General's views are sought and approval obtained with regard to legal matters in respect of major agreements including foreign loan agreements.

All actions by or against the Federal Government are filed by or against the Attorney-General requires that before any action is filed against the Attorney-General, a Minister, Secretary or a Public officer a months' notice of action should be given. The purpose of such notice is to afford the Attorney-General an opportunity of considering whether the claim is justified and if so whether relief should be granted to such person without the necessity of his having to resort to litigation.

78 See note 53

79 *Ibid*

80 *Ibid*

3.9 Grounds for Judicial Review of the Prosecutorial Powers of the Nigerian Attorney-General under the 1999 Constitution

The three classic ground for the judicial review enunciated by a lord Diplock in his speech in the *GCHQ case*[81], are as follows: According to him: judicial review has developed to a stage today when one can conveniently classify under the three heads. The ground upon which Administrative action is subject to control judicial review. The first ground is illegality. This is ground for judicial review means that decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not a justiciable question to be decided in the event of the dispute, by those persons, the judges by whom the judicial of the State is exercisable[82].

The second is irrationality. This is also referred to as "Wednesbury unreasonableness. It applied to a decision which is so outrageous in its defiance of the logic or of accepted moral standard that no sensible person who had apply his mind to the question to be decided could have arrive at it[83]".

The third is procedural impropriety. Rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to the judicial review under

81 Mba, O. (2010) Judicial Review of the Prosecutorial Powers of Attorney General in England, wales and Nigera Available at ouclf.jus.com.org accessed on 26/12 2015 at 5:00pm Supra at P. 17

82 Mba O, op-cit P.38

83 (1985) AC 374 at P. 410

this head covers also failure by administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice[84],

It is important to bear in mind that judicial review, the name implies, is not an appeal against the merits of the impugned decision but a review of the decision making process itself.

Nevertheless, while there is no reason to rule out in rationality and procedural irregularity as grounds for the judicial review of the Attorney-General's prosecutorial decision in principle, it is difficult to envisage a successful attack on those grounds in view of the width of the prosecutorial discretion[85]. Although each case will no doubt be decided on its own merit, it is well establish that the judicial prosecutorial decisions, where already available in principle in relation to other prosecutors, is an exceptional remedy[86]. Therefore the threshold of a successful challenged of the Attorney-General decision must be equally high, if not higher, in view of the quasi-judicial character of his office. However as lord Bingham observed in Mohit[87].

> It is one thing to conclude that the court must be very sparing in their grant of relief to those seeking to challenge the decision not to prosecute or to discontinue a prosecution, and quite another to hold that such decision are immune from any review at all. Considerably lower where the decision is not to

84 See note 38

85 Mba, O. Supra at P. 18

86 See note 61

87 *Ibid*

> prosecute rather to prosecute[88], this is because in the former the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal and therefore the judicial review affords the only possible remedy"[89]. Some of the grounds for judicial review of the prosecutorial powers of the Director of public prosecutions under the constitution of ***FIJI***, which are very similar to the powers of the English and Nigeria Attorney-General, were listed in ***Matalulu v D.P.P***[90], in a passage that was cited and endorsed by the Privy Council in ***Mohit***, and adopted by the House of Lords in R (Corner House Research and Another) v Director of Serious Fraud Office (The BAE case),

The Supreme Court of Fiji Stated that a purported exercise of power would be reviewable if it were made:

> 1. In excess of DPP's constitutional or statutory grant of power such as an attempt to institute proceeding in a Court established by a disciplinary Law.
>
> 2. When, contrary to the provision of the constitution the DPP could be shown to have acted under the direction or control or another person or authority and to have failed to exercise his or her own independent description- if the DPP were to act upon a political instruction the decision could be amenable to review.
>
> 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinue in consideration of the payment of a bribe.
>
> 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the Court involve.
>
> 5. Where the DPP has fettered his or her discretion by a rigid policy - e.g. one that precludes prosecution of a specific class of offences.

88 See *Wayte v United States* (1985) 470 us 598 at 607

89 See *R (Pretty) v Director of Public Prosecutions* (2002) 1 AC 800 and Matalulu (2003) 5 LRC 712 at 736

90 (2003) 4 LRC at P. 712

The next question is whether the prosecutorial powers or decisions of the Attorney-General is subject to judicial review or subject to question by the Court assuming that the Attorney-General does not take into consideration the interest of Justice, public interest and the need to prevent an abuse of process in the exercise of his powers, to say terminate proceedings by entering a *nolle prosequi* can the court interfere and strike down the exercise of such powers? put alternatively can the Attorney-General who says he does not went to go on with criminal case be compelled to go on by Court.

It has been long recognized that the courts do not question or review the exercise of the powers of the Attorney-General.

In the old English *case of Exparte Newton*[91]. Compbell C.J said of the Attorney-General in England;

> If he (The Attorney-General) refuses to hear and consider an application for a fiat, we would compel him by mandamus to consider. But when he has heard and considered and refused we cannot interfere[92]".

In the House of Commons on February 16, 1959, the Prime Minister of England Mr. Harold Macmillan Stated:[93]

> It is an established principle of Government in this country that the decision as to whether any citizen should be prosecuted or whether any prosecution be discontinued should be a matter, where a public as opposed to a private prosecution is concerned for the prosecution authorities to decide on the merit of the case.

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91 (1855) 119 ER 323

92 *R v Allen* (1862) 1 B & S 850 at 852

93 H. E. Debates Vol. 600 Col. 31

The case of *Exparte Newton* and the statement of Prime Minister Harold Macmillan exemplify the attitude of the Courts and Government to the exercise of the Attorney-General powers. In Nigeria the position is much the same. According to a learned author who is the then Inspector General of Police in Nigeria,[94] the Attorney General has absolute discretion in exercising his powers over criminal prosecution[95]. Indeed, the Attorney-General has a choice as to whom to prosecute or whether to prosecute or not. The Courts have long held this to be position of the law[96].

The power was held to be very beyond judicial control and beyond judicial review. This view thrived regardless of the seeming strictures in the Constitutional provision requiring that the Attorney-General "Shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process" before the exercise of his powers over public prosecution[97]. In the fairly recent case of Col. *Haliru Akilu & Anor. v Chief Gani Fewehimi*[98], the Court of appeal per Ogundere JCA held:

> As the abuse of power by the minister of State, if any, is the responsibility of the political power that appointed him, it is to that extent, not justiciable as the court does not question or review the exercise of the power or decision of the Attorney-General

From the foregoing, it is clear that the Attorney-General cannot be compelled to go on with a criminal case which he does not intend to prosecute if he has entered a *nolle* as the Courts cannot question the exercise of his powers once he has come to a decision.

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94 Ehindero, S.G Police and the Law in Nigeria (1986)

95 *Ibid* at P.114

96 R v Olayiwola (1959) 4 RSC 119

97 Section 174 (3) and 211 (3) Supra of the 1999 Constitution

98 (1983) 1 SCNLR 94

However, it is suggested here that an aggrieved party should be able to get an order of *Mandamus* against the Attorney-General to come to a decision on whether to enter a *nolle* or not, where the proceedings are unnecessarily delayed because of some inability, as it were, of the Attorney-General to immediately come to a decision on whether to continue with proceedings or terminate them though there is no Nigeria authority on this issue the suggestion find support in the diction Campbell C.J in the *Exparte Newton case (Supra).*

Again, as the Court of Kings Bench did in 1862 in the case of *R v Allen*[99],to the effect that If any question arises of an abuse of power or of an injustice occasioned by the entering of a *nolle*, the Attorney-General should be held accountable to the High Court of Parliament. But unfortunately, even England, the opportunities of the House of Commons to challenge the Attorney-General's exercise of his powers are now few and far between and is dictated largely by the emphasis of English law. Now places on personal responsibility of the Attorney-General[100].

Along the same lines, the Court of Appeal in Nigeria in the case of *Akilu v Fawehimi in (Supra)* observed per Ogundere JCA (as he then was):

> If he (the Attorney-General) refuses to hear and consider an application for a fiat, we would compel him by *Mandamus* to hear and consider. The Attorney-General may be made responsible to parliament. If he has made an improper decision, the crown may and if properly advised, dismiss him but he cannot review his decision.

99 (1862) (Bands 850 at 855)

100 Edward, J: The Law Officers of the Crown (1962)at P.447

Again, the Supreme Court in the case of *State v. llori (supra)* expressed similar sentiments when it concluded per Kayode ESO, J.S.C that the only sanction against an Attorney-General who misuses his power is the reaction of his appointer who may remove him from office or re-assign him.

Oluwatoyin Doherty in her Book expressed the view that a person aggrieved by the Attorney-General's of his powers of *nolle prosequi* can institute separate proceedings e.g. civil proceedings against the Attorney-General. This certainly finds support in the case of *Attorney-General Kaduna State v Hassan*[101] and in the diction of Kayode ESO, J.S.C in *State v. llori (supra)* but it is doubtful what measure of good this will do to an aggrieved person who desires only that justice be done in the matter by bringing the perpetrators of the crime against him to book. What meaning will a declaration simplicita or even damages make to such an aggrieved person?

However another option, it is a simple one. It is to wait for another Government and another Attorney-General to assume office if such new Attorney-General is favourably disposed to prosecuting the person in whose case a *nolle* had been entered. This is because the entry of a *nolle* has the effect of only a discharge and not an acquittal. consequently such accused person can be re-arraigned, on the same facts after entry of a *nolle* and consequent termination of proceedings. This proposition finds support in the case of *State v. llori (supra)* where Aniagolu JSC said a *nolle prosequi* is only a temporary proceeding which has the effect only of a

101 (1985) 2 NWLR (Pt. 8) 483

stay not of the quashing of the indictment which technically may later be prosecuted without a fresh indictment[102].

It is important to bear in mind that the provisions of Sections 174(3) and 211(3) of the 1999 Constitution (as amended) came into play upon a determination of the ground for judicial review of the prosecutorial powers, although English case law is not binding on Nigerian courts[103], they constitute very strong persuasive precedents, as like judgment of the Supreme Court in *Ilori* demonstrates.

Therefore applying lord Dip lock's grounds for judicial review to Section 174(3) and 211(3) of the 1999 constitution (as amended) a prosecutorial decision taken without demonstrable due regard to the Public interest, Justice and the need to prevent abuse of legal process should in principle be open to attack on the grounds of illegality and or irrationality and or procedural irregularity depending on the facts of each case. The Attorney-General enjoyed a position of omnipotence in the exercise of prerogative powers vested in them. Accordingly successive Attorney-General, with the help of deferential judges (many of whom had been Attorney-General in the past) won some epic legal battles in leading authorities that firmly established that the powers of the Attorney-General are not subject to judicial review. Notable amongst these are *R v Allen*[104]*(Allen)* *R v Comptroller-General of Patents*[105] and *Gouriet v*

102 Edosomwan, C. U: powers of the Nigerian Attorney General available at www.attorney general.org accessed on 14/01/2016 at 4:00pm.

103 See *Alli v Okulaja* (1970) 2 All NLR at 35

104 (1862) 1 B & S 850, 121 ER Pt. 929. See also *R v Prosser* (1848) 11 Bear 306; 50 ER P. 834

105 (1899) 1 QB 909 (CA) (Exofficio Informations)

Union of Post Office Workers (Gouriet).[106] However, the Judgment in *Gouriet* is a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised with the progressive development of judicial review, the Courts have been more willing to review the exercise of discretionary power, whether derived from statute or the prerogative. This change in judicial attitude reached its climax in *Council of Civil Service Union v Minister for the Civil Service*[107] in which the House of Lords laid the view that all prerogative powers are beyond judicial review to rest. The respondent had, in exercise of her prerogative powers, changed the terms and conditions of service of the Government Communications Headquarters staff without consulting with the Unions. The union then sought Judicial review of the decision on the ground of unfairness. In an affidavit, the Secretary to the Cabinet claimed that prior consultation could have disrupted and exposed vulnerable areas of operations the house of lords accepted the respondent explanation that the requirement of national security outweighed those of fairness. However they held that her decision would have otherwise been vitiated by her failure to consult, and would have been amenable to judicial review even though she acted by virtue of a prerogative power.

Lord Dip lock could see no reason why simply because a decision-making power is derived from common law and not a statutory source, it should for that reason only be immune from judicial review. Rather as Lord Scar man put it: the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercise is justifiable,

106 (1978) AC 435 (HL) (Relator Actions)

107 (1985) AC 374 (HL) (GCHQ)

that is to say if it a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power today. Therefore the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not the source but its subject matter[108].

The prerogative prosecutorial powers of the Attorney-General were not expressly considered in this case. However, necessary implication of the decision is that these powers are now subject to judicial review in the same way as the prosecutorial powers of others that have long been subject to judicial review and the statutory prosecutorial powers of the Attorney-General that should have long been subject to judicial review the ***Gouriet*** line of cases conferred immunity from judicial review on the Attorney-General simply because his prosecutional powers derive from the prerogative rather than statute but the basis of this privilege was in the GCHO case overwhelmed by the developing modern law of judicial review[109]. This contention enjoys considerable support from the decision of a very strong bench of the Law Lords sitting as the Judicial Committee of the Privy Council in ***Mohit v D.P.P*** of Mauritius. In that case the Mauritian D.P.P, who enjoys similar prosecutorial Powers to the English Attorney General, filed a ***nolle prosequi*** and terminated the proceedings each time the Appellant tried to bring a Private prosecution against a senior politician. The Appellant requested leave to apply for judicial review from the Supreme Court of Mauritius but the Court upheld the DPP's argument that the effect of the decision in ***Gouriet*** was that the exercise of the DPP's power was not

108 GCHQ (1985) AC 374 (HL) P. 407

109 GCHQ (1985) AC 374 (HC) at 407

amenable to judicial review. However, on appeal to the Privy Council the D.P.P in an apparent attempt to avoid the adverse implication of the *GCHQ case* for the *Gouriet* precedent, supported the decision of the Supreme Court by relying less on the source of the power to enter a *nolle prosequi* than on the nature of the decision to enter one invoking lord scar man's statement that the controlling factor in determining whether the exercise of prerogative power is justiciable is its subject matter-the DPP contended that a prosecutorial decision involves the assessment of factors which the courts cannot and should not seek to review[110]. The Privy Council emphatically rejected this contention and refused to disturb the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review.

The fact that the key cases discussed in this research work including *Gouriet*, *llori* and *Mohit*, all related to aborted private prosecution justified the assertion by Professor Isabella Okagbue that the Attorney-General's power to stop prosecution renders largely illusory the significance of the right of private prosecution as the last bastion of the citizen against an oppressive executive.[111] She further concluded that whichever position one adopts on the issue of whether or not the Attorney-General's prosecutorial powers should be subject to judicial review, a case can be more strongly made that in relation to private prosecution the individual should not be arbitrarily deprived of his right to seek justice and an appeal against such attempt should properly lie to the courts. Therefore the availability of judicial review of the

110 (2006) UKPC 20, (2006), WLR 3343 (Mohit) (Lords Bingham, Hoffmann, Hope, Carswell and Brown)

111 *Mohit* (2006) UKPC 20 2006 1 WLR P.3343 at 3354

exercise of the Attorney General's prosecutorial powers will restore private prosecution to its pride of place.

With the importance of private prosecution to the administration of justice and the rule of law being directly proportional to corruption and ineptitude of the executive, the case for private prosecution is undoubtedly stronger in Nigeria, where the Supreme Courts has remarkably extended the right to any person who cares to prosecute an offender[112]. As justice Aniagolu observes in *llori*. But the current situation as regard to prosecution, there is now current situation on the position backing for Private prosecution on ther section 107 (5) of the administration of Criminal Justice Act, 2015 as observed earlier in this research work where it has been shown that, under the provision of the ACJA, 2015. A prosecution by a private practioner is now obtainable under the Act. The provision has now been incorporated under Section 106 (a) (b)(c) of the ACJA, 2015. The Section provide as follows:

> Subject to the provisions of the constitution, relating to the powers of prosecution by the Attorney General of the Federation, prosecution of all offences in any court shall be undertaken by:
>
> (a) The Attorney General of the Federation or a Law officer in his Ministry or Department;
>
> (b) A Legal practioner authorized by the Attorney General of the Federation;
>
> (c) A Legal practioner authorized to prosecute by his Act or any Act of the National Assembly.

Therefore, from the wordings of the above provision it is clear and settled that the private practitioner duly authorized by the Attorney General can represent the

112 See *Fawehinmi v Akilu* (1987) 4 NWLR 797, 832 (Justice Obaseki)

Attorney General of the Federation in prosecution of cases before any court in relation to Act established by the National Assembly. In further analysis of the above Section it is imperative to state here that, a private practitioner can come within the meaning and provision of the above Act. Similarly it is the intendment of the framers of the above Act to include the private practioner as one of the officers under the Department of Attorney General of the Federation, Thus, the earlier position that the private practitioners cannot represent or prosecute on behalf of the Attorney General is now settled, and by implication private practitioners are now considered under Department of the Attorney General of the Federation.

3.10 Conclusion

Therefore, it is imperative to know that the powers of Attorney General discussed in this chapter are not granted to him to be exercised for sentimental and abuse purposes but it is to be in the best interest of justice. Thus, the discretion conferred on the Attorney General in the exercise of such powers was only granted so as to provide him with liberty to consider alternative decisions in the enforcement of the Law. However, if the Attorney General and other Prosecutors have little or no discretion in the discharge of their duties, they will be forced to prosecute all cases brought to them by any law enforcement agencies and the enforcement process may be chaotic. Thus, in the exercise of his powers, whether in the institutions and undertaking of criminal proceedings, or taking over and continuing criminal proceedings instituted by any other authority or person, or discontinuing any such criminal proceedings. The Attorney General is expected by the Constitution to have

regard to public interest, the interest of justice and need to prevent abuse of legal process.

CHAPTER FOUR

A CRITIQUE OF THE JUDICIAL ATTITUDE TO THE POWER OF ATTORNEY GENERAL OVER PUBLIC PROSECUTION

4.1 Introduction

This chapter intends to make critiques to powers of Attorney General over public prosecution. To leading cases *state vs Ilori* (Supra) and *Abacha vs State* will also be critically examine relating to the powers of Attorney General, with sole aim of providing solutions to the critique. Similarly the discussion will revealed that the two cases are in conflict between each other and Supreme Court need to rethink and revise the decision in the above two conflicting cases relating to the power of Attorney General

4.2 Judicial Attitude to the Power of Attorney-General over Public Prosecution

Judicial attitude seemed for a long time to be decidedly supportive of the notion that the power exercisable by the Attorney-General over public prosecution in Nigeria is one of obsolete discretion indeed, the power was held to be beyond judicial control. view thrived regardless of the seeming strictures in the constitutional provision requiring that the Attorney-General "Shall have regard to the public interest, interest of justice and the need to prevent abuse of legal process" before the exercise of his power over public prosecution[113]. The locus classical which illustrates this judicial attitude is the case of *State v llori & ORS*[114].

In that case, the plaintiff instituted an action in the High Court seeking to show that the Attorney-General of Lagos State was biased in a criminal proceeding against the

113 Section 174 (3) 199 Constitution.

114 See note 88.

plaintiff and that the Attorney-General was by virtue of the provision of section 191(3) of the 1979 Constitution not competent to discontinue the proceedings. The High Court held that the Attorney-General had the right to discontinue any criminal proceedings instituted by him or any other person at any stage before judgment. The Appellant appealed to the Court of appeal, which held that the trial Court should have taken evidence and examined allegations against the Attorney-General of malice.

On appeal to the Supreme Court the Court held that the words "Shall have regard to public interest" in section 191(3)1979 Constitution are not a curtailment of the Attorney-General's absolute discretion, but merely declaratory of those powers. Furthermore, the Court held that the Attorney-General is still not subject to any control in so far as the exercise of his powers under the Constitution is concerned; and except for public opinion and the reaction of his appointer he is still, in so far as the exercise of those powers are concerned, a law unto himself. The Court then held that the remedy for abuse of power by the Attorney-General lies in separate proceedings against him by the person diversely affected. Finally the Court held that section 191(3) of the 1979 constitution has in no way altered the pre-1979 Constitutional power of the Attorney-General to enter a *Nolle prosequi*.

Recently in *Abacha* v *State*[94] (*Supra*) the Supreme Court appeared to have towed a completely different path from, that which it threaded in the *llori's case*. Regrettably, however, the court, with respect, in explicably stopped short of categorically overruling it's decision in the *llori*,s *case*. Yet, in the *Abacha's case* the Court

fundamentally distorted the foundation upon which the *llori's case* was laid over two decades earlier. The *Abacha's case* is here under summarized.

On 4th June, 1996, Alhaja Kudirat Abiola, wife of the chief M.K.O Abiola was gruesomely murdered. She was shot dead in her car in Ikeja, Lagos. Three years later in 1999 after the cessation of military rule, the appellant, son of General Sani Abacha and three others were arrested for the murder. The Attorney-General Lagos State, through the State Director of Public Prosecution (D.P.P) by a letter to the Chief Registrar of the High Court of Lagos State filed information against the Appellant and the other three suspects. Essentially, the charges contained in the information were for murder, conspiracy to commit murder and accessory after the fact to murder contrary to section 324, 319(1) and 322 respectively of the Criminal Code-cap 32, laws of Lagos State, 1994).

In preferring the information the Attorney-General expressly stated in writing that he was acting pursuant to the power conferred on him by section 211(1) (a) of the Constitution of the Federal Republic of Nigeria 1999, (as amended) which provides in subsection (1) as follows:

> Section 211(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 of the House of Assembly.

When the information came up for trial at the Lagos High Court the appellant moved that the indictment against him be quashed on the ground, inter alia, that the proof of evidence does not disclose a prima facie case against the appellant requiring him to

stand trial before the High Court or any other court. That the ingredients of all the alleged offences and list of witnesses disclosed that the information is an abuse of process, that the statement of the offences Disclose in the information are pre judicial to the appellant's right to fair hearing.

In refusing the appellant's application at the High Court, the trial judge held that among other things, information without procedural defect couldn't be quashed. Dissatisfied, the Appellant appealed to the court of appeal, which court, while dismissing the appeal, held that the appellant had taken a premature step of challenging the indictment when he could await the time for no case submission to move that he had no case to answer still dissatisfied the appellant appeal to the Supreme Court.

In a startling and highly, controversial judgment, the Supreme Court held, inter alia, that the charge against the appellant was based on suspicion, as no linkage was shown that the appellant knew what was being planned by what he did or said at the relevant occasion. The court further held that an accused person despite the power of the Attorney-General of a State of file indictment on information, should not be indicted to face trial, which from the outset he should face. The Supreme Court held even further that the court of appeal was wrong when it opined, that a challenged to quash information should not be encouraged in his leading judgment Belgore J.S.C said[115]:

> All power to settle issue between parties is vested in courts and courts must be vigilant that genuine issues

115 *Abacha (supra)* Particularly PP.484-486

> and controversies are settled so that no accused person will be oppressed either directly or indirectly through act of prosecution if not we shall have persecution in place of prosecution. It is for this reason that an accused person, despite the power to file indictment on an information, should not be indicted to face trial that from the outset it was clear he should not face.

4.2 Critique of Judicial Attitude to the Attorney-General Constitutional Power over Public Prosecution

1. *State v. Ilori* criticized.

It is note worthy that this case dealt not only with the constitutional power of the Attorney-General to discontinue criminal prosecution, but also with the Attorney-General's power to commence criminal prosecution (or to continue same) thus, in his leading judgment, Eso JSC said[116]:

> It is one thing to point out the dangers of an Attorney-General in arriving at a decision without taking into consideration what he is expected to have regard to. However, to my mind, it would be completely wrong to regard this as a precondition to the exercise of his power under section 191 of the 1979 constitution the exercise of these powers by the Attorney-General, that is, the Institution and discontinuance of criminal proceedings cannot be questioned.

The Supreme Court while interpreting Subsection (3) of Section 191 of the 1979 constitution held the view that the expression "Shall have regard to" only enables something to be done (whatever that means) and that the expression is what is known in the interpretation statues as a "permissive language". A language, which, imports discretion but certainly does not create a condition. It is submitted with respect that such discretion is much too wide to be consistent with the intendment of the framers

116 (supra) Particularly at PP.77-79

of the tenet 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.

To be sure, the attitude of the Supreme Court in the *Ilori case* derives heavily from the old English common law attitude to the power of the *nolle Prosequi* exercisable by the Attorney-General in English law. This power has never been subject to any form of judicial review to underline the sublime nature of the power. Lord Justice Smith of the House of Lords said inter alia:

> The Attorney-General is a supreme command as regard the withholding or granting of that fiat, and no court in this kingdom has any jurisdiction over the Attorney-General of English in the matter. Why is that? It is because the Attorney-General is given high judicial functions, and it is known that a man in his position never will prostitute those functions, which he has to perform[117].

In view of the several centuries of experience in civil governance the confidence which the British people have in their Attorney-General to exercise his discretion within the bounds of civilized behavior, could be well founded.

This much can also be said of the position in the united States of America, where similar power exercise by the Attorney-General over public prosecution is not subject to judicial scrutiny[118]. Indeed, given the fact that the Attorney-General of the several States of America attain office by election, an Attorney-General who fails to

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117 *R v Comptroller-General of Patents Designs and Trade Marks (Expert Comptroller)* (1899) 1 Q B, 909 at PP 913 - 914

118 *United state v Thompson* 251 VS 457, Orobonav linscott 49 R1 443, 144 A, 52 53 and *vs Brokan* 60 Supplied 100 all cited in Oluwu the *nolle Prosequi and the Law in Nigeria* (Ibadan Domyaxs Law Publishes, 2002) pp7-8

exercise the discretion of his office in the overall interest of the public does so at the expense of his political career.

However, the situation in Nigeria is entirely different. There is no gain saying that ours is a developing country steeped in the thrones of the vices attendant to our state of underdevelopment. One notorious predilection of such a State is the high incidence of weak political ethos. Thus, those who find themselves at an advantage in the political arena use such advantage much to the annoyance and inconvenience of the masses of the people and in particular, against perceived political opponents. It's not uncommon for political appointees to subject the value of their offices to the wimps of their appointers. The Attorney-General being a political appointee is therefore not free from such unwholesome political intrigues.

It is quite common in Nigeria to find the Attorney-General refusing to exercise his power against persons heavily suspected of criminal complicity, while readily discontinuing Criminal prosecution against accused persons whose conviction for crimes alleged against them seem certain. It is often the case that in such circumstances, the Attorney-General is motivated by political consideration over and above the political interest "the interest of justice" and "the need to prevent abuse of legal process".

Consequently, it is only proper for a developing country as ours to take a cue from the experience and practice in other developing countries with similar political and economic background[119]. Only recently, the courts in Kenya have departed from the

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119 see note 94

established English common law position on the power of the Attorney-General to enter a *nolle prosequi*.

Thus, in *Crispus Karanja* v. *Attorney-General*,[120] the Court declared; on the present practice in our criminal justice system that a *nolle prosequi* cannot be challenged in Court, we find such a proposition to be untenable under the Kenyan Constitution".

We subscribe to this view in relation to the extant of the Constitution of Nigeria, 1999 (as amended) submit that the provisions of Section174 (3) and 211(3) of the Constitution place clear strictures on the discretion exercisable by Attorney-General of the Federation and of the States over public prosecution. Indeed we further submit that by virtue of those constitutional provisions the power is subject to judicial determination as to whether the Attorney-General has acted with regard to "parameters of a public interest ""interest of justice" and the need to "prevent abuse of legal process" set by those provisions of the constitution.

ii. *Abacha v State* critized

In the Abatcha case, the Supreme Court held that "An accused person despite the power of the Attorney-General of State to file indictment on an information should not be indicted to face trial which from the outset he should face[121]".

It is worthy of note that in filing the indictment, the Lagos State Attorney-General expressly stated that he was doing so pursuant to the power conferred on him by section 211 of the 1999 Constitution Even in his leading judgment Belgore J.S.C

120 See note 95

121 *Ibid*

acknowledged this and went on to declare as follows; Section 211(1) (a) of the 1999 constitution empowers the Attorney-General of State to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court martial in respect of an offence created by or under any law of the house of assembly[122]. his Lordship further went on to say that it is the duty of the State Attorney-General to prosecute any offence as provided in laws made by the State legislature as provided in section 211 of the 1999 Constitution. It is equally at his discretion to charge some offenders and decline to charge others. This power is to be exercised having regard interest of justice and the need to prevent abuse of legal process. The power is exercised only by the Attorney-General and he holds ministerial responsibility for it, not collective executive responsibility[123]."

It is strange that even in the face of these declarations, the Supreme Court could go further to hold that the indictment or information filed against the appellant ought not to have been filed. It is submitted with due respect that by so holding, the Supreme Court exercised the power of judicial review and indeed judicially reviewed the power of the Lagos State Attorney-General to have acted under section 211 of the 1999 constitution, when he filed the information against the Appellant.

By this decision, it could appear that the ***llori case*** no longer represent the law as far as the Attorney-General's power over public prosecution is concerned. However, the difficulty inherent in such a conclusion is quite obvious upon a cursory review of the ***Abacha's Case.*** Significantly, the Supreme Court did not expressly overrule ***llori***,

122 See note 97

123 Ibid

much less mention or consider it. Rather, the Court acknowledged the discretionary power of the Attorney-General over public prosecution under the constitution, but questioned the exercise of that discretion where no *"prim facie"* case has been made against an accused person to warrant the filing of information against him.

Notwithstanding that we had argued in our foregoing consideration of the *Ilori's Case* that the case leaves the Attorney-General with an unwarranted absolute discretion, we are unable to prefer the Supreme Court's decision in the *Abacha Case*. The decision in the latter case sets, with respect, no discernable standard for judicial review of the power of the Attorney-General. The Court, with further respect did not offer a useful interpretation or any interpretation at all of the provision of section 211(3) of the 1999 Constitution. Rather, it sought to query the Attorney-General on the nebulous ground of failing to find a *prima facie* case against the appellant to warrant the filling of the indictment as required by the Criminal Procedure Law of Lagos State.

The Supreme Court, again with respect, ignored the fact that the Attorney-General expressly stated that he filed the indictment pursuant to his power under section 211 of the 1999 Constitution (and not under the Criminal Procedure Law of Lagos State). Surely, the Supreme Court does not seek to be understood as holding that the statutory provision of the Criminal Procedure Law of Lagos State requiring a *prima facie* case stands superior over the express provisions of Section 211 of the

Constitution which by the same Court's decision in the *llori's case* is not subject or amenable to any review?[124]

4.3 Suggestion to the Critiques

4.3.1 A Case Against Absolute Discretion

As previously indicated, we subscribe to the firm view that the constitutional power of the Attorney-General over public prosecution is not one of absolute discretion. If this view were otherwise, the framers of the constitution would not have taken the extra step of expressly inserting provision such as sections 174(3) and 211(3) of the 1999 constitution.

In contrast to these provisions the English common law on this subject does not contain corresponding direction as to what the Attorney-General should consider while exercising his power over public prosecution including the power of *nolle prosequi*. Consequently, the view taken by the Supreme Court in the *Ilori case* when it held that the "words" "shall have regard to" public interest is not a curtailment of the Attorney-General's absolute discretion but merely declaration of those powers[125] cannot, with respect be well founded. This is so be because the court was of the belief that section 191(3) of the 1979 Constitution did not alter pre-1979 power of the Attorney-General to enter a *nolle prosequi*[126]. In any event prior to the 1979

124. See note 99

125 *State vs Ilori* (supra) ratio 1

126 Ibid, at ratio 3

Constitution, the judicial view of the power of the Attorney-General to issue *nolle prosequi* was fairly consistent in favor of the established English common law position of absolute discretion. It was therefore needless for the framers of the Constitution to have been anxious to freshly declare that power in the constitution so as to cure a mischief in the law where none existed.

Besides, the power of *nolle prosequi* is certainly not the only power to which the constitutional provisions in sections 174(3) and 211(3) of the 1999 constitution relate. These provisions cover also the power to commence and continue criminal prosecution. It is therefore unconscionable impose the narrow interpretation of the Attorney-General's power to issue a *nolle prosequi* under English law upon the broader powers conferred on the Attorney-General under the constitution.

4.3.2 A Case For Judicial Review

In the *Abacha case*, Balgore J.S.C said; all power to settle issues between parties is vested in courts and the court must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through act of prosecution; if not we shall have persecution in place of prosecution[127] in the case of *African Newspapers v Nigeria*[128], the Supreme Court held Inter alia:

> When a court is deciding whether it has jurisdiction or not over a matter before it, it should be guided by the following… nothing shall be intended to be out of the jurisdiction of the superior court, but that which

127 *Supra* at P. 437

128 (1985) 2 NWLR pt 6 P. 137

> specially appears to be so, and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged[129]. The Court further held that the judges have a duty to expound the jurisdiction of the court but it is not part of their duty to expand it[130].

And section 6(a) of the 1999 constitution provides as follows:

> The judicial powers vested in accordance with the foregoing provision of this section. Shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a Court of Law.

It is submitted that the combined interpretation of these several judicial and constitutional authorities points to the inevitable conclusion that the Courts, particularly the Superior Courts in Nigeria, are obliged to at all times to exercise their judicial powers as well as jurisdictional competence over all matters. This is especially so where there has been no express denial of such powers or competence in a written law. It is further submitted with respect, that the decision in the *Ilori's Case* undermines this trite legal position as it seeks to circumscribe the jurisdictional and or judicial powers of the court in the particular matter of the power of the Attorney-General over public prosecution, even when there is no express denial of such judicial or jurisdictional power under the Constitution.

Under our system of separation of powers, the judiciary is not permitted to make laws but to interpret them. To pronounce as did the Supreme Court in the *Ilori's case* that the power of the Attorney General over public prosecution is not subject to review when no such provision excluding judicial review exist under the constitution

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129 *Ibid* at p. 141

130 *Ibid*

is tantamount to making a Law. This, with respect is not a power, which the Supreme Court is permitted to exercise under the constitution.

4.3.3 iii. Method of judicial review

In the *Abacha's case*, the Court of Appeal said obiter that the Appellant took a premature step of challenging the indictment when he could await the time for no case submission to move that he had no case to answer[131]. The Supreme Court, however, declared this view to be wrong and held that such an objective must be taken immediately after the charge has been read to the accused person and not later. The court further held that inherent in it's power to prevent abuse of their processes, is the courts power to safeguard an accused person from oppression and prejudice such as would result if he is sent to trial pursuant to an information which discloses no offence with which he is any way linked.

With respect, the position taken by the Supreme Court is unsupportable. Under the adversary system practiced in Nigerian jurisprudence, the courts are no more than umpire in the judicial arena. They can only act upon the cases put up by the adversaries. And in the particular case of criminal prosecution, it has become an established part of our law that the prosecution must first be allowed to prove a *prima facie* case against the accused.

This the prosecution would do by calling on witnesses to testify in proof of the charge or information. There upon, the accused is allowed the opportunity of entering a no case submission, if he so desires. It is at this stage that the court would

131 *Abacha v State* (supra) at p. 452

determine if the prosecution has made out a prima-facie case against the accused to warrant the latter being called upon to enter a defence against the indictment. This procedure is time honoured and has aided the court in termination unfounded criminal proceedings[132].

Thus, the Supreme Court's decision in the ***Abacha case*** would only invite the court to join the fray and embark on a voyage of discovery without a compass. It is trite law that mere Statements made by witnesses to a crime at the police station are worthless if they are not supported by oral testimony of the persons who made them. What then is the value of the Statements of when the witnesses in the ***Abacha case*** when the witness were never given an opportunity in a trial to supply oral testimony in support thereof? Why then did the Supreme Court rely upon the bare Statements of witnesses in holding that the appellant was right to have challenged his indictment even before trial began our strong view is that such a challenged ought to have come after the prosecution and out it's case against the appellant and not before. This is at the stage of no case submission permitted under our criminal jurisprudence.

iv. How is the "interest of justice" "public interest" "and the need to prevent abuse of legal process" to be judicially construed?

We concede from the outset that the notions of "justice", "public interest" and "abuse of legal process" remain controversial to lawyers. Arguments on the true meaning of these concepts continue unabated. However, for judges, disinterested as they often are with academic legal polemics, these ideas do not pose much daunting

132 *Emedo v state* (2002) 15 NWLR pt.780 p.196

challenge. This is so because judges do not pretend to set standards that would cover a wide field. They focus more on the particular cases before them and the facts presented in those cases; but with a keen eye on the broad legal concept relevant to those cases. The notion of "public interest" on its part is also not a totally novel idea to lawyers and jurists. Our justice system is quite familiar with the concept of public policy. It is submitted that the idea of public interest is not different from the notion of public policy. Admittedly, no consensus has been achieved even judicially on the broad parameters of public policy. Yet, it seems commonsensical enough to suppose that an Attorney-General who refuses to commence criminal proceedings against his brother or discontinues a criminal proceeding against him would surely not be acting in the public sanguineous interest if the consideration for such action is the connection between the duo.

On the other hand, however, an Attorney-General who refuses to commence or discontinues criminal proceedings against an Ambassador of a foreign friendly nation may well be acting in the public interest. Therefore, implacable as the notion of "Public interest" may be, it is our view that whenever the Attorney-General would have acted, it is to be left to the courts to review the decision for the Court remains the only bastion to which the difficult task of determining the rightness or appropriateness of such a course of action should pass.

4.4 Conclusion

The decision of the Supreme Court in *Ilori's Case* has been exploited by successive Attorney-General to undermine national development by indiscriminate use of

prosecutorial powers to the political advantages of the Government in power. The position of the Attorney-General is usually occupied by political appointees who are always dancing to the tune of the Mr. President. The implication of the decision in *Ilori's case* is that an Attorney-General may institute criminal matters against persons he deem fit. This is highly condemnable because there is no way his personal interest can be completely detached from this important public function.

Against this background, this dissertation has argued that the common law doctrine which established that the prosecutorial powers of Attorney-General are not subject to review is no longer good law in England and Wales and has never incorporated into the Nigerian Constitution. Therefore any person[133] who is aggrieved by a prosecutorial decision by the Attorney-General in England, Wales and Nigeria should be able to challenge it either in a trial within trial or in a separate civil claim for judicial review in order to give effect to the rule of law.

The Constitution has already provided for the mechanism by which the activities of the Attorney-General could be put to check. The proper thing to be done here is that, in any case where public interest, interest of justice and abuse of court process are in issue, the Court should look into it and determine whether the Minister of Justice had complied with the relevant provisions of the Constitution or not.

In the foregoing analysis, we have argued that the decisions of the Supreme Court in the two cases *State v. Ilori* and *Abacha v. state* do not satisfactorily espouse the Law

133 See note 108

on the power of the Attorney-General over public prosecution. We are of the firm view that the two cases are in conflict and therefore begging for a judicial restatement by the Supreme Court of Nigeria along the lines which we have formulated, given the nascent nature of our democracy, with the attendant infirmity of our public institutions, it is dangerous for anyone holding public office to possess absolute powers. It is in this wise, therefore, that we have strenuously argued against the judicial view found in the ***Ilori case*** that the power of the Attorney-General over public prosecution is one of absolute discretion. The magnitude of the danger posed by the possession of such unbridled power is similar to the scenario of creating a State police force in Nigeria and leaving their control in the overriding power of the State Governors.

In view of the above, with respect and utmost humility, I wish to call the Supreme Court to embark on urgent review of the above decisions of the court whenever it has opportunity of having a similar issue. The Supreme Court must reverse itself in the above cases in the interest of justice and the rule of law to be sure, what we have advocated is that the Attorney-General should continue to exercise discretion in public prosecution. Such discretion should however be subjected to judicial review along the lines, I strongly believe, prescribed by sections 174(3) and 211(3) of the 1999 constitution.

CHAPTER FIVE

SUMMARY, FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Summary

This research work is centered on the Critical Analysis of the powers and functions of the Attorney General of the Federation under the 1999 Constitution of the Federal Republic of Nigeria (as amended). The power and functions of the Attorney- General of the Federation under the Constitution is a subject of intense controversies among many legal experts. The power is considered to be excessive in that the Attorney General has power to discontinue any criminal proceedings before any court in Nigeria except court martial. This power is premised on the fact that the Attorney General cannot be questioned and need not to adduce any reasons for his actions. This may be abused by the said officer. The controversies the powers of the Federal Attorney-General had generated is in the sense that such powers may be abused in that there may be political undertone in criminal proceedings exercise of such powers an accused may be discharge on the application of the Attorney-General without him assigning any reason for such decision.

Without doubt, this research work has critically appraised the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) relating to the powers and function of the Attorney General of the Federation. The provisions of Criminal Procedure Act, Administration of Criminal Justice Act, 2015 have also been examined.

This is because, the Constitution does not provide for same but referred the issue to the National Assembly and the States Houses of Assembly to legislate and provide for the powers and functions of the Attorney General. In the course of this research, Primary and Secondary sources were utilized. The primary data supplied the legislative instrumented that form the subject of analysis. The secondary sources were derived from Books, Articles, Journals, Newspapers and e-materials so as to support the findings of the research.

Chapter one is the introductory chapter. It provided for the background of the study and defined the problems to be investigated. It raised a number of research questions to be answered, and justification of the study. The aims and objectives to be achieved, the scope and limitations of the study have also been highlighted by this chapter. The details of the methodology employed in the writing of this research work, the review of the related literature as well as the manner in which the research work was organized were also given by this chapter.

Chapter two also served as an introductory part of this research work. It discussed the establishment of the office of the Attorney General and other officers of his department, thus, origin and history of the office of Attorney General was also discussed. Other issues discussed were qualification of the Attorney-General as well as removal of Attorney-General from office.

Chapter three and four concentrated on the normal powers of the Attorney-General under the 1999 Constitution of the Federal Republic of Nigeria (as amended). It

discussed the powers of Attorney-General extensively as well as critiques of the powers of Attorney General.

The origin of the office of the Attorney General is traced back to common law of England. In most jurisdictions, the Attorney General is the main legal adviser to the Government and in some jurisdiction may also have executive responsibility for law enforcement, Public prosecutions or even ministerial responsibility for legal affairs generally. In practice the extent to which the Attorney General personally provides legal advice to the Government varies between jurisdictions, the term was originally used to refer to any person who hold a general power of Attorney to represent a principal in all matters in the common law traditions, anyone who represents the State especially in criminal prosecutions, is such an Attorney although a Government may designed some official as the permanent Attorney General anyone who comes to represent the State in the same way, may in the past be referred to as such, even if only for an particular case. Today, however in most jurisdictions the term is largely reserved as a little of the permanently appointed Attorney General of the State.

Similarly, the office of the Attorney General of the federation through its various departments provide services to the public its basic objectives are to provide legal services to the Federal Government, other ministries, extra-ministerial department and Agencies in carrying out its activities.

More so a lot has been said and written about the powers of the Attorney General in Nigeria. The power of the Attorney General are very wide and expensive. This is especially so in criminal matters. Obviously, the reason for such powers is to put him

completely and effectively in control of criminal prosecutions in Nigeria and to accentuate this, the draftsmen of the Constitution carefully employed the use of such words as institute, undertake, takeover, continue, discontinue which show that all aspects of prosecutions are within his powers. It is hoped that Inspite of the elasticity of these provisions, Attorney General will act fairly in all matters in which they exercise their powers. Indeed this is what the third subsection of S.174 and 211 (supra) is designed to achieve.

We must also progress to the level of electing the Attorney General of the Federation as it is done in the united State. We must guarantee the autonomy of that office so that the man can take independent decision that is strictly professional. You can't be an appointee of somebody particularly this kind of our environment and try to be independent.

In Nigeria today we have adequate laws that address virtually every segment of our National life but the greatest impediment to the enforcement of these laws is that there is almost nobody doing the job of the Attorney General, which is protection of the Constitution and the laws of the Federation as the office has been subsumed in the office of the Minister of Justice who is more or less a Government appointee, lacking the necessary independence to fearlessly defend the provisions of the Constitution and of the laws. This State of affairs has made it difficult for the rule of law and Constitutional supremacy to take roots in our polity. Government officials and high profile individuals flout the provisions of our statute with impunity and get away with it because the officer charged with the protection of the Constitution and

the prosecution of infractions there to have been suffocated his appointment and job definition.

5.2 Findings

5.2.1 General Findings

The General observations from this research work is that a critical analysis of the provisions of the Constitution of the Federal Republic of Nigerian, 1999, (as amended) relating to power and functions of the Attorney- General of the Federation, Administration of Criminal Justice Act, 2015. Crimial Procedure Act, regulating the powers and functions of Attorney General in Nigeria and issues affecting same exposed a very wide range of gaps in the said laws.

Therefore, the aims or purposes for which these set of laws are meant to achieve in regulating the powers of Attorney General are defeated. While the Constitution has its own lapses in regulating the powers of Attorney General, Administration of Criminal Justice Act 2015, Criminal Procedure Act, considered in this research work for regulating the powers of Attorney General contained a lot of lacuna to that effect. As a result, the powers of Attorney General may be abused by such an Attorney-General.

5.2.2 Specific Findings

Specifically the Findings made from this Research work are as Follows:

1. The establishment of the office of the Attorney General as contain under section 150 of the provision of the 1999 Constitution of the Federal Republic of Nigeria (as

amended) is not autonomous office, this explained why there is no uniformity and effective co-ordination between the office of the Attorney General of the Federation and State offices of the Attorney General.

2. Another observation made from this work is that the prosecutorial power of Attorney General is subjected to the interference of his appointer that is President or Governor in the case of State. The Attorney General does not have independent decision that will guarantee the independence of the judicial system.
3. Similarly, the traditional appointment of Attorney General in our present justice system has immensely contributed towards the poor performance of Attorney General powers and also renders his powers in effective this is why the loyalty of the Attorney General does not lie with the people, but the President or Governor who appoint him.
4. This work made finding as to the issues of tenure of office of the Attorney General of the Federation or State as the case may be. The 1999 Constitution of the Federal Republic of Nigeria (as amended) does not contain, provide or guarantee the tenure of office of the Attorney General of either the Federation or State. Not even the previous Constitution all does not make any provision as to the tenure of office of the Attorney General of Federation or State. This left no option for a' further re-appointment and that is why no continuity and stability in the Administration of Justice system.
5. This work made an attempt to find out that neither the 1999 Constitution nor the previous Constitutions of the Federal Republic of Nigeria i.e 1960 Constitution, 1963 Constitution, and 1979 Constitution all does not make any provisions as regard to the

removal of Attorney General of the Federation or State from office. This is why there is consistent problem with the removal of the Attorney General from office. The President or Governor may remove the Attorney General at his pleasure any time he so wish and mostly the Attorney General is being removed by either President or Governor if he is not following his wishes.

6. As a result of the research carryout of the office of the Attorney General of Federation and State. I was able to make a finding that the office of the Attorney General is staved of funds, by the executive, and this deliberate attempt by the executive to make the office of the Attorney General directly or indirectly cripple by not allocating enough fund to the office so as to manipulate the Attorney General office any time they so wish.
7. Similarly also I was able to find out that going by the various decision discussed in this work including Gouriet Ilori and Mohit (supra) which established that prosecutorial powers of the Attorney General are not subject to judicial review. This is why so many Attorney General have abused such powers and court is not helping the situation.
8. The research work also discovered that mostly the Attorney General were appointed mainly on the basis of political consideration not base on experience and integrity
9. Throughout the provision of the 1999 Constitution of the Federal Republic of Nigeria (as amended) there is no provision in the Constitution placing all Governmental bodies with investigative and prosecutorial functions in the entire Criminal Justice system under the office of the Attorney General and lack of proper investigation of cases by the Police before forwarding same to the office of Attorney

General for advice or prosecution. This has undoubtedly undermined the prosecutions of cases by the office of Attorney General of the Federation or State.

10. Another finding of this dissertation is that although the position of judiciary in Nigeria remains that the powers of Attorney General is unquestionable by courts, the judiciary in other common law jurisdiction such as England, Canada and Kenya have now shifted away from that position the law as interpreted by the judiciary in those countries allows for the judicial review of the exercise of the powers by the Attorney General.

5.3 Recommendations

The following are the general and specific recommendations which will, at a very large extent, ensure the adequacy of the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Administration of Criminal Justice Act, 2015 as well as Criminal Procedure Law regulating the powers and functions of the Attorney-General in Nigeria:

Generally, all the, provisions of the Constitution, Administration of Criminal Justice Act, 2015, Criminal Procedure Law in the Federation relating to the power and functions of the Attorney General and other issues affecting same should be reviewed or amended to fill in the gaps left.

Specifically, the research provides the following recommendations:

Establishment

1. Section 150 of the Constitution that provides for the Attorney General to be a Minister of the Government of the Federation should be amended to remove the provision to allow the Attorney General office exists as an independent and autonomous office. The State office of the Attorney General shall be extensions of the Attorney General office to ensure uniformity and effective coordination. The Ministry of Justice will be responsible for political decisions and policies of Government of the day but shall not in any way give directions to the Attorney General what so ever.

Functions / Powers.

2. Section 174 of the Constitution should be retained as it contained provisions that guarantee the independence of the office of the Attorney General and the wide powers attached to the office. Nevertheless the Constitution should be amended to contain a new provision describing the office of the Attorney General as an autonomous and independent judicial body authorized and responsible to proceed against the perpetrations of Criminal offences and other punishable act, under take legal actions for the purpose of the protection of property of the Republic of Nigeria for legal remedies for the protection of the Constitution and laws of the federation.
3. There should also be provisions in the Constitution placing all Governmental bodies with investigative and prosecutorial functions of the entire Criminal Justice system under the office of the Attorney General, this will include the Police, ICPC, EFCC, Nigeria Custom, Immigration, Tax officers, Prisons, quarantine, Nafdac e.t.c. The Attorney General is to ensure that these agencies carryout their functions in accordance with the law establishing them and also assist in the prosecution of

offenders. This is to avoid over lap of functions and lack of focus in our Justice system.

For purely civil cases, it is suggested that Ministries and all other Government organizations should have their own legal departments to handle their cases in order not to unduly inundate the office of the Attorney General with cases. The population has increased, port folios of Ministries have widened, people have become more rights conscious, the Attorney General must be left alone to deal with, matters that impinge on the Public and natural interest, promote the fight against corruption and the protection of the rule of law.

Independence

4. The provisions of the Constitution must guarantee the independence of the Justice system and prohibit any Interference in the independent functioning of the Justice system as well as prohibit the use of public powers for oppression of the citizenry following the pronouncement of the court in Ilori v State (supra), that the Attorney General is subject only to the ultimate control of public opinion and that of the legislature. Therefore, the Attorney General shall report directly to the National Assembly and not to the President or any member of his cabinet.
5. To ensure that the loyalty of the Attorney General lies with the people, the appointment of the Attorney General shall be by majority votes of the senate confirming the appointment upon recommendation by the National Judicial Council.
6. The tenure of office of the Attorney General shall be granted by the Constitution and shall not be less than five years with an option for a further re-appointment for five

years and no more. This is to ensure continuity and stability in the administration of justice system and to remove all vestiges of political coloration.

7. The removal of the Attorney General shall be by motion alleging gross misconduct, negligence of duty, incapacitation or incompetence supported by 2/3 majority votes of members of the House of Representative to investigate the allegations, leveled against the Attorney General. The house shall then carryout an investigative hearing to determine the culpability or otherwise of the Attorney General. The final report of the investigative hearing shall be approved by a simple majority of the house, provided always that the Attorney General shall have the right to defend himself in person or through a legal representation of his choice to the allegations leveled against him the decision of the house shall be final.
8. In order to ensure that the office of the Attorney General is not staved of funds by the executive or indirectly crippled, the budget of the office of the Attorney General should be made a first line charge on the Federation account and paid lump sum upon approval by the National Assembly.

   The accounts of the Attorney General's office shall be audited by the Auditor General of the Federation and the report laid before the National Assembly, any financial impropriety discovered in the accounts of the office of the Attorney General shall amount to gross misconduct for which the Attorney General may be removed from office. This is to serve as a check on the office of the Attorney General against graft and official corruption.

9. The Attorney General shall be a person of integrity without any known political afflictions and must be a distinguished member of the legal profession with not less

than 15 years practical experience with knowledge of the working of the Criminal Justice system. Simply put, his appointment must be based on carreer consideration, distinction, merit and experience and not on political consideration.

10. Another recommendations by this work is that the Supreme court of Nigeria should rethink and reconsider its interpretation of section 174 (3) and 211(3) of the constitution of the federal Republic of Nigeria 1999, (as amended), so as to allow for the judicial review of the sentimental powers exercised by Attorney General. The word "shall" in the provisions of that subsection should be interpreted as creating a mandatory obligation on the Attorney General to have regard to public interest, the interest of justice and the need to prevent abuse of legal process in the discharge of his duties.

5.4 Concluding Remarks

The power and functions of Attorney General of the Federation under the 1999 Constitution of the Federal Republic of Nigeria has been critically evaluated. It has been shown that the Attorney General while exercising his powers under 1999 Constitution (as amended), the Attorney General shall have regard to Public interest, the interest of justice and the need to prevent abuse of legal process. This means that the Attorney General must in the use of his Constitutional power, be influenced by the interest of Public, Justice and the need to protect the legal Authority against any form of abuse. It was pointed out that abuse of court process means abuse of the legal procedure or improper use of the legal process. And it always involves some bias, malice, some deliberateness, some desire to misuse or prevent the system of Administration of justice. It was also pointed out that this limitations constitutes are

of the remarkable characteristic of the powers and functions of Attorney General in Nigerian as elucidated in this research work, the limitations is in reorganization of the dangerous tendency of the Attorney General to abuse such powers while exercising such powers.

The Critical analysis of the powers and functions of the Attorney General in Nigeria under the 1999 Constitution (as amended) and among other laws to that effect has discovered a wide range of gaps which almost defeated the aims for which such limitation was imposed. Thus, the discussions discovered situations where an Attorney General may abuse the powers granted to him and still within the ambit of the law according to the court. On the parameters to determine whether or not the Attorney General complies with the provisions of the Constitution that empowered him to regard the public interest and circumstance of each case.

It is also pointed out that while the Attorney General discretion to institute, take over or discontinue criminal proceedings may be absolute, the question whether that discretion was exercised in the public interest, interest of justice or with due regard to the legal process can be validly raised by an aggrieved party. This need is further underscored by the fact that the Attorney General is almost always a political appointee and usually a member of the ruling party. It is therefore inconceivable that the Constitution would have intended such enormous powers to be vested in the Attorney General unfettered. Unbridled powers is easily susceptible to abuse and there is need to interpret the provision of subsection (3) of section 174 and 211 of the 1999 Constitution of the Federal Republic (as amended) by our courts as mandatory and not declaratory.

The discussion in this research work have revealed that the mode of appointing an Attorney General in Nigeria leaves much to be desired in that the institutions are not really independence. Corruption among other things has eaten deep in the system there by affecting the Attorney General to exercise his powers efficiently and effectively. The topical issues on the powers and function of the Attorney General both apparently settled and unsettled generated and still generated controversies were critically examined.

However, the observations made in the course of this analysis are backed up with a number of recommendations. The recommendations given comprised of the general and specific ones. The recommendations when properly adopted will ensure that the powers and functions of the Attorney General in Nigeria will be free from controversies to a very large extent.

BIBLIOGRAPHY

A. BOOKS

Edward j, the law officers of the crown, (Hamilton publishers London 1st ed., 1962)

Ehindero S.G, Police and the law in Nigeria, (Spectrum Books, Ibadan Nigeria 1986).

Imhanobe, O.S, the lawyer's Desk Book (temple legal consult Abuja Nig. 1st ed., 2008).

Mamman, T, Course Hand Book on Criminal Procedure (Council of Legal Education, Law School Abuja Nig., 2008)

Mathew, T, Hand Book For Lawyer's and Others (Macmillan Press London, 1967)

Nwabueze B.O the Presidential Constitution of Nigeria, (C. Hurst & co Publishers, London, 1982)

Nwabueze, B.O, Constitutional Law in Nigeria (Ibadan Spectrum 2nd ed., 1993)

Osamor, B, Fundamental of Criminal Procedure Law in Nigeria, (Dee- Sage Nig. Ltd. Bwari Abuja 1st ed., 2004)

Stephen, F, History of the Criminal Law of England (1960)

B. ARTICLES IN JOURNALS

Omoregie E B, Power of the Attorney General Over Public Prosecution Under the Nigerian Constitution, the Need for Judicial Restatement (2004) 2 University of Benin Law Journal available at www.http//attorney general.org accessed on 28/1/2015 at 4:00pm

Yola A A, Overviw of all the Departments in the Federal Ministry of Justice (2002) 4 a Journal of Contemporary Legal Issues Federal Ministry of Justice.

C. ARTICLES IN NEWSPAPERS

Babalola C A, the Need to Separate the Office of Attorney General from that of the Minister of Justice

Daily Independent Newspaper Issues on 1st August, 2011.

World Trends and the Way Forward on the Separation of Attorney General Office From the Office of the Minister of Justice.

Public Agenda Newspaper Accra Issued on 22nd August, 2008.

National Political Conference For the Recommendation on the Separation of the Office of Attorney General from that of Minister of Justice.

Daily Trust Newspaper Issued on 5th April, 2014.

D. E- RESOURCES

Assudaisiy A, Prosecutorial Powers of the Attorney General available at http:// Abdullatee Fas- Sudaisiy, Blogspot. com Visited on 1st August, 2013.

Duru O, the Powers and Duties of the Attorney General Under the Nigerian Law available at http://ssrn.com accessed on 12/1/2016 at 4:00pm

Edosomwan C.U, Power of the Nigerian Attorney General in Nigeria available at www.attorney general.org accessed on 12/1/2016.

Francis T, An Appraisal of the Power of the Attorney General of the Federation With Respect to Criminal Proceedings Under the Nigerian Constitution available at www.nigerianlawguru.com accessed on 12/1/2016 at 1:00pm.

http://en. M. Wikipedia.org/Wiki/Attorney visited on the 5 October, 2015.

http://allafrica.com/Stories Visited on 1st November, 2015.

Marry Land Mannaul on Line available at Mdmanual/ Md Archivest. State. Md visited on 8th November, 2015

Mba O, Judicial Review of the Prosecutioal Powers of the Attorney General in England, Wales and Nigeria. Available at ouclf.jus.com.org. accessed on 25/12/2015 at 6:00pm.

Okoroafor D U, the Need to Separate the Office of the Attorney General From that of the Minister of Justice available at articulatedave.blogspot.com accessed on 28/12/2015 at 4:00pm

www. attorney general. gov. US visited on 22nd December 2015

www. attorney general. gov. Newzealand visited on 22nd December 2015.

www. attorney general. gov. Australia visited on 28th December 2015.

www. attorney general. gov. Nigeria visited on 24th December 2015.

www. attorney general . gov. UK visited on 28 Dec, 2015

www. lagostate. gov. Ng visited on 16 December, 2015

www. Jerusalam. attorney general. com visited on 26th December, 2015

www. Heraldnewspaper.com visited on 26th December 2015.

www. thisdaynewspaper.com visited on 27th December, 2015