

**A CRITIQUE OF THE POWERS OF ATTORNEY GENERAL IN  
THE ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA**

**BY**

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**AUGUST, 2015.**

**DECLARATION:**

I solemnly declare that this dissertation entitled “*A Critique of the Powers of Attorney General in the Administration of Criminal Justice in Nigeria*” is the product of my own ideas and it has not been presented to the best of my knowledge any where before. All ideas from previous writers have been duly acknowledged. I remain solely responsible for all views expressed and errors herein.

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***Date***

**CERTIFICATION:**

This dissertation entitled *A Critique of the Powers of Attorney General in the Administration of Justice in Nigeria* meets the regulations governing the award of the degree of L.L.M. of Ahmadu Bello University and is approved for its contribution to knowledge and literary presentation.

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## **DEDICATION:**

This Dissertation is dedicated to my parents for giving birth to me and giving me the necessary discipline to scale through the turbulent waters of life.

## **ACKNOWLEDGEMENTS:**

In the name of Allah - the beneficent, the Merciful - Peace and blessing of Allah be upon His Messenger Muhammad (S.A.W.), His family, companions and the righteous people, Ameen.

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The librarians of the Law Library Ahmadu Bello University Zaria, particularly Alhaji Maye; the Librarians of the Nigerian Law School Kano Campus, Bagauda and the Librarians of Mudi speaking Library Aminu Kano Centre for Democratic Research and Training Mambayya House, Bayero University Kano also deserve my commendation. I thank you so much for your co-operation and assistance in the course of my research to the successful completion of this dissertation.

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## **ABSTRACTS:**

In the system of Administration of Justice in Nigeria, Attorney General occupies a very prominent position. As the Chief Law Officer and Minister for Justice, Attorney General exercises a controlling authority in the conduct of any civil proceeding affecting government or any of its agencies. For example, no garnishee order affecting public funds in the hand of any public functionary or any corporation or organization shall be executed without the prior consent of the Attorney General. In Criminal Cases, the Attorney General as the Chief Law prosecutor for the state, has power to institute and undertake, take over and continue or discontinue any criminal proceeding instituted by him or any other person or authority what so ever. In the exercise of the aforementioned powers, the Supreme Court of Nigeria had held that the Attorney General is a master unto himself, law unto himself, and is under no control – judicial or otherwise whatsoever. The exercise of his discretion in that regard is final and irreversible by even his appointer and is subject only to public condemnation in the court of public opinion. This dissertation however, questions the validity of the above position of the Supreme Court based on the general character of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the historical development of the powers of Attorney General under the same Constitution, the Nigeria's local circumstances and the Rules of Interpretation of statute/ Constitutional provisions. The dissertation therefore, calls for the judicial restatement of the law and makes recommendations for the reform of the Constitution in such a manner that would ensure the redemption of the office of Attorney General from the exclusive control of the executives and curb political influence on the performance of his duties. The dissertation also questions the constitutionality of the requirement for the consent of Attorney General in the enforcement of garnishee orders against government or any of its agencies under S. 84(1 & 3) of the Sheriffs and Civil Process Act Cap.S6 Laws of the Federation of Nigeria, 2004 and calls for the repeal of the same...

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## LIST OF ABBREVIATION:

AT-AL.	-	And others
A.C.	-	Appeal Cases.
A.G.	-	Attorney General
All F. W. L. R.	-	All Federation Weekly Law Report.
ALL .E.R	-	All England Law Report
ALL .N.L.R.	-	All Nigerian Law Report
C.A.	-	Court of Appeal
Cap.	-	Chapter
C.P.A.	-	Criminal Procedure Act
C.P.C.	-	Criminal Procedure Code
Ed.	-	Editor
Eds.	-	Editors
E.g.	-	Example
Ibid.	-	same as above
I.G.P.	-	Inspector General of Police
N.C.C.	-	Nigerian Criminal Cases.
N.C.L.R.	-	Nigerian Constitutional Law Report.
N.N.L.R.	-	Northern Nigeria Law Report
N.S.C.Q.R.	-	Nigerian Supreme Court quarterly Report.
N.W.L.R.	-	Nigerian Weekly Law Report
Op. cit.	-	Opere Citato
S. C.	-	Supreme Court Cases
S.C.M.	-	Supreme Court Monthly
Supra	-	The same as above.
U.I.LR	-	University of Ibadan Law Report

U.S.A - United State of America  
Vol. - Volume.

**CHAPTER ONE:**  
**GENERAL INTRODUCTION:**

**1.1 Background of the Study:** The Constitution of the Federal Republic of Nigeria provides for the office of Attorney General and bestowed him with the powers of public prosecution which shall be exercised in the best interest of the State.<sup>1</sup> The powers were granted on the legal assumption that the independence, strength of character, professionalism and integrity of the Attorney General would not allow him to misuse the powers for any whimsical purpose whatsoever. That lofty expectation of the law notwithstanding, democratic experiences in Nigeria, has shown that the officer usually styled as the Minister/Commissioner of justice of the federation or the states as the case may be and invariably appointed on the basis of political consideration; has typically proved to be more of a political Minister/Commissioner than an officer of law committed to upholding the demand of justice for which his powers were in the first place granted.<sup>2</sup> From the first, second, third to the present fourth Republic, Nigeria's Democratic history is replete with instances where the powers of Attorney General were used for whimsical purpose such as the prosecution of political opponents upon trumped up charges and the discontinuance of prosecution instituted by the police and other law enforcement agencies against government's party activists solely on political ground. In fact, it was this abuse of powers by the Federal and Regional Attorneys General of the First Republic which led to the rejected recommendation of the 1979 Constitution Drafting Committee that the powers of the Attorney General to take

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<sup>1</sup> SS. 150, 195, 174(3) and 211(3), *Constitution of the Federal Republic of Nigeria*, 1999 (as amended)

<sup>2</sup> Ekundayo A.A.M., (1988), *Constitutional Provisions of Nolle Prosequi, A blessing or a curse*, Nigerian Instituted of Advanced Legal Studies, Lagos, pp. 21-2.

over or discontinue criminal proceeding be exercised only with the consent of the authority that instituted the proceeding in the first place.<sup>3</sup>

Added to the above problem is the seeming lopsidedness in recent times in the prosecution of criminal offences as it affects the privileged and less privileged members of the society. On a day to day basis in Nigeria, Magistrates and other inferior courts are inundated with minor cases of stealing, cheating, criminal breach of trust and traffic offences committed by Nigerians who in most cases belong to the less privileged class of the society. In fact, some months back, a Magistrate Court sitting in Lagos attracted attention when she sentenced hundreds of Nigerians, some of whom under aged, to different terms of imprisonment without option of fine for minor traffic and environmental offences. On the contrary, the prosecution of most blue or white collar offences hardly attracted the same level of success or determined prosecution. The prosecutions of several persons alleged to have committed serious crimes of official corruption have dragged on for years without success.<sup>4</sup>

Two factors seem responsible for the above situation – the overriding powers of the president and state governors in the appointment and removal of Attorney General and the refusal of the judiciary in Nigeria to invoke the power of judicial review on the exercise of powers by the Attorney General on the ground that the powers are absolute and subject to no judicial review what so ever.<sup>5</sup>

The above background facts therefore, motivated the desire of writing this dissertation. The dissertation looked at the aforementioned problems and offered

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<sup>3</sup> Nwabueze B. O., (1985) , *Nigeria's Presidential Constitution: The Second Experiment in Constitutional Democracy*, Longman, London, p. 309.

<sup>4</sup> Babalola A., (2015), *The need to separate office of the Minister of Justice from the Attorney General of the Federation*, Babaji/AppData/Local/Temp/Low/CTLH4X.htm, 12/05/2015.

<sup>5</sup> *State vs Ilori* (1983) 2 S.C. p. 155.

suggestions towards solving the same and achieving a better administration of criminal justice in Nigeria.

## **1.2. Statement of the Research Problems:**

This dissertation seeks to resolve questions about the powers of Attorney General as follows:

1. Whether in view of the political situation and the local circumstance in Nigeria, it is desirable to maintain the absolute prerogative of the president and state governors in the appointment and removal of a person as Attorney General?
2. Whether having regard to the provisions and the general character of the Constitution of the Federal Republic of Nigeria, 1999, the powers of Attorney General in Nigeria is absolute as interpreted by the Supreme Court in the case of the *State vs. Ilori (1983) 1 SCNLR. P.94*.
3. Whether in view of the inherent dangers of ascribing to the Attorney-General the omnipotence to do what he likes with prosecution in the third world countries such as Nigeria; it would amount to an abrogation of duty by court to permit the vagaries of the Attorney-General's thought to be a determinant in the operation of the constitution.
4. Whether having regard to the local 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.
5. Whether the requirement for the consent of the Attorney General before the enforcement of garnishee orders against the government and its agencies under section 84(1 & 2) of the Sheriffs and Civil Process Act Cap. S.6 *Laws of the Federation of Nigeria, 2004* is constitutional.

### **1.3. Aims and Objectives of the Research:**

This dissertation, aims at realizing the following objectives:

1. Making a critique of the powers of Attorney General as judicially interpreted by the Supreme Court in the case of the *State vs. Ilori* (1983) 2 S.C. p.155 in the light of the inherent powers of court under the provisions of section 6 of the constitution of the Federal Republic of Nigeria, 1999, the general character of the constitution and the local circumstance in Nigeria.
2. Offering suggestion for the judicial restatement of the law as regards the powers of Attorney General In Nigeria.
3. Advocating for the reform of the constitution in such a manner that will not allow for overriding control of the president and state governors in the appointment and removal of Attorney General.
4. Offering suggestion for the repeal of section 84(1) & (3) of the Sheriffs and Civil Process Act, Cap. S. 6 Laws of the Federation of Nigeria, 2004.

### **1.4. Justification of the Research:**

This dissertation is justified by the fact that the Nigerian constitution and indeed any other law enacted by the legislature is subject to periodic review for the purpose of making it conform to the social, economic and political reality of the society where it applies. At present in Nigeria, there are agitations for the reform of the constitution in such a manner that will free the office of Attorney General from the political influence of the president and state governors. We believe that our recommendations in this dissertation will be useful to the legislature in that regard. It is also hoped that this dissertation will be useful to the courts, lawyers, judges, law teachers, students and to the humanity in our collective search for justice and fairness.

### **1.5 Scope and Limitations:**

This dissertation in the main, deals with the powers of Attorney General in the prosecution of criminal cases. It examines the historical development of those powers, their general character and scope in Nigeria. The dissertation also discusses problems associated with the judicial attitude to applications for the judicial review of the exercise of the powers by the Attorney General in Nigeria. It has done so in the light of the historical development of the powers under the Constitution, the rules of statutory/Constitutional interpretation, and the concept of separation of powers entrenched in the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The dissertation also discusses the powers of Attorney General in the execution of garnishee orders against government or any of its agencies.

### **1.6. Research Methodology:**

This dissertation specifically adopted doctrinal method of research. That is to say, in an attempt to achieve the purpose of the study, the dissertation waded through and analyzed relevant laws, judicial decisions, books, published articles, papers and periodicals before arriving at our conclusion. Where necessary, the experience derived by the writer from legal practice was used to improve the quality of the dissertation.

### **1.7. Literature Review:**

The writings of experts who said something relevant to the subject of this dissertation are hereunder produced and reviewed as follows:

Adebayo M.A., while writing on the powers of Attorney General in the institution and conduct of criminal prosecution, observed that the powers of Attorney General are too wide and subject to whimsical exploitation by the

political class in Nigeria. He opined that as the Attorney General combines the office of the Chief Law Officer and Chief Legal adviser to the government of either the Federation or the State (which automatically makes him a member of the executive council) it will be very difficult for him to go against the will of his appointer in matters of personal interest to the appointer. This arrangement according to him is very dangerous to the administration of criminal justice in Nigeria since the powers of the Attorney General may be invoked by the executive to compromise criminal prosecution against their political supporters; whilst at the same time using the power to whimsical advantage in haunting political opponents with criminal prosecution. He therefore, suggested that as the powers of Attorney General is not reviewable by any court of law in Nigeria, “the provisions of section 174 and 211 of the Constitution should be amended to allow the court to have the power to review the exercise of the powers of Attorney General where it is found out to be grossly abused or where the exercise of such power will engender injustice to any member of the public.”<sup>6</sup>

It seems to the writer that Adebayo, M.A., did not noticed any judicial error in the decision of the Supreme Court when it held that the Constitution of the Federal Republic of Nigeria contains no provision which allows the court to review the powers of Attorney General in Nigeria. And hence, his suggestion for the review of the Constitution to allow the court exercise powers of judicial review on the exercise of powers by Attorney General in a situation where the power is found to be grossly abused. This in effect, is the area where the dissertation tries to make improvement on the view of the learned writer. The dissertation tries to show that the Constitution by its very nature contains abundant provisions which

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<sup>6</sup> Adebayo, M.A. (2012), *Administration of Criminal Justices System in Nigeria*, Princeton Publishing Co., Ikeja-Lagos, , PP. 125-127.

allowed the courts to exercise judicial review on the powers of Attorney General; and this in effect will show that the decision of the Supreme Court in the Ilorin's case was erroneous and contrary to the general character of the Constitution of the Federal Republic of Nigeria and its local circumstances

Further, it also seems to the writer that Adebayo M.A., had no allusion to the fact that appointment of the Attorney General by the President and State governors as the case may be, is also a factor which diminishes the ability of Attorneys General from the diligent enforcement of law without any political influence or bias whatsoever. We shall also improve on the argument of Adebayo from this angle.

Babalola A., in his paper<sup>7</sup> called for the review of the constitution of Nigeria in such a manner that would allow for the separation of the office of Attorney General from that of the Minister of Justice. His view is anchored on the fact that the office of Attorney General as chief law prosecutor for the state has over the years proved to be ineffective in the prosecution of criminal offences. He attributed this problem to the fusion of the office of the Attorney General with that of the Minister of Justice which make the office more political than professional concerned with the efficient and effective administration of justice. He noted that the power of the president and state governors in the like manner in the appointment and removal of the Attorney General is responsible for the problem. His idea of arguing in this line is that when the two offices are separated, the office of the Minister of Justice should continue to exercise political authorities subject to appointment by the president or state governor as the case may be; whilst the

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<sup>7</sup> Op. Cit., note 4 p. 2.

office of the Attorney General should be left the civil servants who should rise to the office by career progression as the current office of the Solicitor General.

Babalola's opinion expressed above may not however, be the effective antidote to the inefficiency of the office of Attorney General in the discharge of his duties. His view seems to ignore the fact that separation of the office of Attorney General from that of the Minister of Justice alone, may not solve the problems he highlighted having regard to the fact that a civil servant who is an employee of government, may not after all be less subordinate to the administration than be as the Attorney General in his current situation. This will therefore, direct attention to the exploration of other alternative solutions than the one proffered by Babalola.

Agaba in his book<sup>8</sup> commented on the problems with the decision in the Ilorin's case as follows:

As things stand in Nigeria, the Attorney-General remains a law unto himself and to date remains the only public officer whose actions though likely to injure a lot of citizens is not subject to review as far as prosecutorial powers are concerned. He is not answerable to any person, not to the court. Unfortunately, not because the constitution has placed him above the court, but because the Supreme Court has held that he is not subject to the court's jurisdiction as far as the exercise of his powers of public prosecution is concerned. It does not appear as if he is responsible to the parliament either. Only his appointer and the adverse public opinion. One cannot but to ask a few questions from this almighty position of the Attorney-General:

- (a) if as held by the supreme court, a citizen who falls victim of an unscrupulous Attorney-General is not entitled to a remedy by way of questioning the actions of the Attorney-General, with a view of having a review of the same, where in their lordships view lies the remedy.
- b] if the only sanction against him is removal or re-assignment by his appointer, what happens if the appointer is the engineer of the oppressive conduct of the Attorney-General perhaps against his perceive- enemies.

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<sup>8</sup> Agaba, J.A. (2011), *Practical Approach to Criminal Litigation in Nigeria*. Panaf Press, Abuja-Nigeria (1<sup>st</sup> Ed.), P. 310 at 321.

- [c] if their lordships suggest that the only way to check the excesses of the Attorney-General is adverse Public opinion, one is tempted to ask, wherein the opinion is to be expressed, in the news papers? Must Attorney-General read every news paper or any particular news item or opinion? What of if the said adverse comment fails to move the Attorney- General into action or in action as the case may be? For how long would such unscrupulous- Attorney-General remain loose on the populace before his appointer act or before such Attorney-General chooses to resign? Unfortunately, Nigeria has not been blessed by the resignation of public/political office holders since its existence as a Nation. At least, not the office of the Attorney General.

He concluded his arguments by saying that: “it is hoped that the Supreme Court will have another opportunity to revisit this question and perhaps view the issue differently.”

Agaba in our view was only asking questions without answers or proffering solution to the identified problems for the purpose of reform. At least, the legal basis of his grouse against the decision in the Ilori’s case has not been provided. Credit to him for identifying some of the problems associated with the decision in Ilori case, but he did not take the pain to provide an elaborate discussion of the problems from the legal or historical perspective of Constitutional development of the powers of Attorney General in Nigeria. This therefore, is the area where our work improves on his work and makes further progress.

Another author who reviewed Ilori’s case is Hambali, Y.D.U. While analyzing the decision in his book<sup>9</sup>,Hambali said that the decision in Ilori’s case seem to him with respect, to mean that the Attorney-General’s possible abuse of prosecutorial

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<sup>9</sup> Hambali, Y.D.U. (2012), *Practice and Procedure of Criminal Litigation*, Foot Print Publishing Limited, Lagos – Nigeria, 1<sup>st</sup> ed. P.195.

powers is not legally reviewable. The public may not by its opinion be able to influence his appointer to remove him from office particularly, where the Attorney-General is a member of the ruling party and is a favorite of the party or his appointer. He made effort in criticizing the legal position in the case from the point of view of the rules of interpretation of statutes and constitutional provision. He concluded his argument by stating that the Supreme Court in the case, only succeeded in restating the position of the law at Common Law. Curiously in our view, Hambali Y.D.U.'s discussion of the problems in Ilori's case is limited in context to the criticism of the Attorney General's power of *nolle proequi* only. He, like Agaba, did not seem to appreciate the larger, implications of the Ilori's decision on the other subsections of section 191 of the 1979 constitution and now section 174 and 211 of the Constitution of Nigeria, 1999. In particular sub-section 1[a & b] of the Constitutions.

We share some of the writer's sentiments but, we think that his discussion of the problems did not include the contexts in which we intend to discuss the same in this dissertation. This dissertation will discuss the identified problems from the context of the human rights and the constitutional law. In particular, we shall apply the doctrine of separation of powers in articulating our position.

Osamor B., also contributed to the discourse on the problems inherent with the position of the Supreme Court in the Ilori's case. In his book<sup>10</sup>, Osamor, alluded to the position of the law in the Ilori's case. But opined in conclusion, that while the Attorney-General's powers to institute and undertake, take over and continue and to discontinue criminal prosecution may be absolute, the issue of whether the discretion of the Attorney-General in this regard has been exercised in

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<sup>10</sup> Osamor, Bob. (2004), *Fundamentals of Criminal Procedure Law in Nigeria*, Dee-sage Nigeria Limited, Abuja 1<sup>st</sup> ed. PP. 123-125.

conformity with the public interest, the interest of justice and need to prevent abuse of legal process could validly be raised in court by an aggrieved party. He said that if this is not so, then it is inconceivable that the Constitution would have intended such enormous powers for the Attorney-General.

We as well share Osamor's view. But what is the legal basis of his conclusion? That at least, is missing from his argument. He merely offered an opinion without explaining its legal basis. He too like the authors we mentioned above, was discussing these problems from the point of view of the Attorney-General's exercise of power of *nolle-prosequi* only.]

Another writer who said something about the problems identified herein is Bwala J. In his book *Legal Topics*<sup>11</sup>, the author's view and approach to discussing the problems identified in this dissertation, to our mind, is not any different from the views of the authors we discussed earlier in this review. He too, understands the problems of the Ilori's case from the perspective of the Attorney General's power of *nolle-prosecqui* only.

Fred O.<sup>12</sup> while writing on the role of Public Bar in the administration of criminal justice explores and explained the role of the Attorney General's office in the prosecution of criminal cases; from the preparation and giving of D.P.P'S advice to the actual prosecution of a case. He identified the problems of delay, inadequate funding, poor library facilities, inadequate staffs, inadequate transportation facilities, inadequate staff training and corruption as some of the .problems affecting the efficiency of the Attorney General's office in the discharge of its duties. In conclusion, he *inter alia*, suggested for the repeal of the rule which

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<sup>11</sup> (2009), Midland Press Limited, Jos-Nigeria, 2<sup>nd</sup> ed. P. one.

<sup>12</sup> In his paper Administration of justice, Role and constraints of Public and Private Bar: In Maidu, D.C. et- al (eds.), (2010), *Judicial Adminstration and other Legal Issues in Nigeria*, Malthouse Ptrss Limited, Lagos, P. 9 at P. 13.

in some states, require the Attorney General to apply for the consent of a judge before initiating criminal prosecution at the High courts. He argued that the removal of this requirement is necessary to speed up the criminal Justice process. He said that out of experience, he had never seen where a judge refused his consent to prosecution and yet the D.P.P. is required to follow this archaic procedure before filing information.

We noticed however, that Fred in his writing has failed to appreciate the legal basis for the requirement of consent of a High Court judge before filing a criminal charge. His view that the High Court hardly refuses those applications is no excuse to the advocacy for the removal of the rule. The doctrine of the Rule of Law and fundamental human rights of general public will be better protected when the legal requirement is maintained than when it is removed. This is so because, in that process, the court always acts as a watch dog in avoiding abuse of legal process in the institution of criminal cases for any perceived breach of the law. As justice delayed is justice denied, it is also a denial of justice, if justice is hurried.<sup>13</sup>

Moronkeji O., in his paper,<sup>14</sup> examined the powers of Attorney General. Whilst reacting to the position of the omnipotence of the powers of Attorney General Nigeria, he said that “in most African countries, critical public opinion or protest on misconduct of public officers is not articulate as in developed countries of the world which led to resignation of public officers can sway Nigerian to resign. The scandal must reach the highest zenith and have the backing of the appointer before it could yield desired effect in this part of the world of sitting syndrome.”.He suggested that because there is lack of effective public opinion culture in our polity, there should be provision in the constitution which empowers

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<sup>13</sup> *Rev. Obiora Okezie v. Adichie* (2002) FWLR. Part 127 p. 1201.

<sup>14</sup> Moronkeji, O. (2000), Who is the client of Attorney General: the Government or Society, In : J.A. Yakubu (ed.), *Aministration of Justice in Nigeria*, Malthouse Press Limited Lagos, p.. 152

the courts through judicial review to look into the propriety of the grant or issue of *nulle prosequere*. Should this suggestion not find favour with the authorities, he suggested for caution in the appointment of persons to the office of Attorney General. It is his view that only persons of proven integrity and professional excellence, like those in the Rank of Senior Advocates, University Professors, Retired judges of the superior courts of records and legal practitioners of at least 15 years standing at the Bar shall be so appointed. He said that where this cannot be achieved, then an appointee shall only be commissioner of justice rather than an Attorney General.

However, the question here is that, does the constitution really deprive the courts of power to review and check the excesses of Attorney General in Nigeria? The learned justice seems to accept so and hence, his suggestion for constitutional review which will guarantee such power to the court. We do not however, share this sentiment and it is the point of our departure from the focus of his paper in this dissertation. Secondly, in our view, the learned justice fails to appreciate the fact that the problem is not with the person so appointed as Attorney General, but with the system which allows the president and state governors to completely control the functions of Attorney General through the use of their powers of appointing and removing him under the Constitution. Therefore, the fear of removal can make even those at the height of legal profession to follow the whims of their appointer to the detriment of public interest, the interest of justice and the need to avoid abuse of legal process.

Edoba B. Omorogie<sup>15</sup> criticized the decision of the Supreme Court in the Ilori's case and described the same as amounting to making judicial legislation without authority, which is unconstitutional. He argued that the legislators of the 1979 constitution never intended retaining the common law position on the powers of Attorney General in Nigeria. His view is that had the legislature intended doing the same, it wouldn't have inserted the provisions of sub-section 3 of the constitution. He further argued that in a country such as Nigeria, absolute discretion to Attorney General in the discharge of his duties, would surely work against public interest, the interest of justice and the need to prevent abuse of legal process. He concluded by suggesting that the prosecutorial powers of the Attorney General is subject to judicial review but only at a stage in the prosecutorial process, where an accused is allowed to make a no case submission and this is our point of disagreement with his reasoning.

The question here is that can an accused person raise preliminary objection to a criminal charge(s) against him for disclosing no course of action before making his plea to the same? The answer seems no! in the view of Edoba. The learned writer seems not to appreciate the fact that because a person has the right to freedom from arbitrary prosecution, the law does not allow him to be prosecuted for any act or omission which does not constitute an offence. What happen if this fundamental right is infringed or sought to be infringed by the Attorney General? Shouldn't such a person approach or move the court for redress?

Writing on the topic – *The Fallacy of Democracy in the Absence of Development and the Rule of Law: the Need for Enthronement of constitutional*

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<sup>15</sup> Power of the Attorney General Over Public Prosecution Under the Nigerian Constitution, need for Judicial restatement, *The Appellate Review*, Vol. No.1, September, 2009, pp. 135 – 148.

*Democracy in Nigeria*; Dankofa Y.<sup>16</sup> identified corruption in the form of bribery, regionalism and nepotism as some of the factors which undermine Nigeria's social, economic and political development. Other problems according to him are Illiteracy, poverty, colonialism, neocolonialism, bad leadership and parasitism of our leaders whose main source of Riches and social status are and have been the state. These he maintained, are some of the causes of our failure to develop a Constitutional democracy and a political culture of our own which will guarantee development, the protection of personal liberties and sustenance of the Rule of law.

In conclusion, he suggested *inter alia*, that for Nigeria to witness any meaningful development the citizens must have unfettered access to justice and that the Rule of law must be made to thrive. A situation where government and the governed are equally bound and answerable to the law must exist. He said that the courts must be available to adjudicate disputes and enforce resolutions no matter who is involved. The courts themselves must follow the laid down rules and procedures in the discharge of their duties, for it is the law that should be sovereign not the court or the ruler. Nobody should be made above the law.

The learned writer suggested about eight issues that need be considered in the current effort towards Constitutional reform in Nigeria, if the Rule of law and Constitutional democracy must be achieved. None of those suggestions however, relates to the position of the Attorney General in the scheme of administration of justice in Nigeria. The suggestions of the learned writer in our humble opinion, did not envisage the fact that absolute control of the functions of Attorney General

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<sup>16</sup> Ahmadu Bello University Zaria, *Journal of Public and International Law* Vol. 1 No.2 (2008) pp. 155-166.

by the President and State Governors, is among the factors militating against the achievement of full democratization in Nigeria.

Onyuike G.C.M.<sup>17</sup> in his reaction to the call for a Constitutional amendment which should make judicial consent a condition precedent to the exercise of the powers of *nolle prosequi* posited that a move in that direction would be disastrous. He describes such a move as draconian, ill advised, capable of creating more problems than it seeks to solve and is unnecessary. He argues that as the responsibility for the detection, investigation and prosecution of criminal offences belong to the executive arm of the government; a situation where a court is allowed to control the functions of Attorney General would amount to the transfer of the responsibility for public prosecution to the court. The Primary function of an Attorney General in public prosecution according to him, is to weigh up the facts known to him or of which he can obtain information sometimes secret, sometimes confidential, sometimes open and known to all and using his judgement and experience as best as he can to decide where the balance of Public interest lies. He thus cannot see reason why a court must be involved in all that.

The above writer however, ignores the underlining reason why the call for the judicial review of the powers of Attorney General in Nigeria was being made in the first place; and the basic tendency of Man to the abuse of power whenever he is bestowed with absolute prerogatives. He seems to also ignores the fact that Nigeria's system of government is based on democracy which requires transparency and accountability in the conduct of public affairs. That under that system, the court is the watch dog of the Constitutional order and the guardian of the fundamental liberty of the public who shall have unfettered access to it

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<sup>17</sup> Onyuike, G.C.M., Responsibility of An Attorney General in : Yemi Osibanjo (ed.), *Towards a better Administration of Justice*, Federal Ministry of Justice Law Review Series, VOL. 4, p.1.

whenever their right is being, has been or is likely to be infringed by any person or authority.

In the area of civil justice, the Court of Appeal in the case of *Cristopher Onjewu v. Kogi State Ministry of Commerce*,<sup>18</sup> relied on the provisions of section 84(1) & (3) of the Sheriffs and Civil Process Act<sup>19</sup> and held that in the execution of judgement affecting government, consent of the Attorney General must necessarily be sought for before any application for Garnishee order absolute against government's money in the custody of a public officer or other persons and corporations could be granted. According to the Court, where the consent was not obtained by the applicant, his application is incompetent and the court would not have jurisdiction to entertain the same.

Does the decision in this case derogate from the principle of equality before the law enshrined in section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999? Idakwoji J. A., learned counsel to the applicant in the above case seems to be of such opinion and hence his argument to that effect which was overruled. In the view of the learned counsel, section 84(1) of the sheriff and civil process Act relied upon by the court, is inconsistent with the provisions of section 36(1) and section 287(3) of the Constitution of the Federal Republic of Nigeria, 1999.

Efevwerhan D. I.<sup>20</sup> shares the same view as the appellant's counsel in the Onjewu's case under review. He criticized a similar provision to section 84(1)(3) of the sheriffs and civil process Act contained in the petition of Rights Act,<sup>21</sup> which exempted the state from the operation of court orders without prior consent

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<sup>18</sup> (2003) F.W.L.R.( Part 181) p.1590 at 1596 Ratio 4.

<sup>19</sup> Cap. 407 *Laws of the Federation of Nigeria*, 1990.

<sup>20</sup> Efevwerhan, D. I. (2003), *Principle of Civil Procedure In Nigeria* (2<sup>nd</sup> ed.), Snaap Press Limited, Enugu, p. 398.

<sup>21</sup> Cap. 149 *Laws of the Federation of Nigeria*, 1958.

of an Attorney General. He opined that the requirement is a nullity and inconsistent with the provisions of section 36(1) and 6(6)(b) of the Constitution of Nigeria, 1999. The Court of Appeal in *Onjewu's* case on the other hand, holds a contrary opinion. It held that mere requirement of the consent of Attorney General before application for the enforcement of garnishee order absolute against the state could be entertained, is not contrary to the provisions of section 36(1) and section 287(3) of the Constitution. The Court further said that when such application has been made, the Attorney General has a duty to ensure compliance with the courts' order under section 287(3) of the Constitution.

The position of the Court of Appeal however, seems to the writer as erroneous having regard to the doctrine and principle of separation of powers enshrined in section 4, 5, and 6 of the Constitution of the Federal Republic of Nigeria, 1999. Does the integrity of Attorney General got greatness more than the integrity and wisdom of a court of law? If actually an Attorney General has a duty under section 287(3) of the Constitution to ensure compliance with courts' order, why must his consent be necessary in the first place. before application for the enforcement? The Court of Appeal seems also to ignored the principle of equality of parties before the court in the above judgement..

A development in the area of law under consideration has taken place in other jurisdictions such as England and Kenya in Africa which abolish the requirement for the consent of Attorney General before execution of judgement affecting government in those countries. The dissertation compares the law in those jurisdictions with the position in Nigeria and provides suggestions for reforms.

#### **1.8. Organizational layout:**

In an attempt to achieve the purpose of this dissertation, and for the purpose of proper understanding of the discussions herein, the dissertation is divided into five chapters as follows: -

**Chapter one:** deals with the introductory matters as the background of the studies, statement of the research problems, aims and objectives of the research, justification of the research, scope and limitations of the research and the literature review.

**Chapter two:** which is entitled the 'Historical Development of the Powers of Attorney General' discusses who Attorney General is, the nature of the powers of Attorney General in Nigeria, the historical development of the office of Attorney General and the conceptual clarification of key terms used in the discussions of this dissertation such as – the meaning of administration/dispensation of justice, meaning of the phrase 'public interest', 'interest of justice' and the need to prevent 'abuse of court process'.

**Chapter three:** deals with the detailed appraisal of the powers of Attorney General in the administration of justice. It deals with the appraisal of the powers of Attorney General in the administration of criminal justice - which include the power of the Attorney General to institute and undertake criminal proceedings, to take over and continue any such proceedings instituted by any other person or authority and to discontinue such proceedings either instituted by him or any other person or authority in Nigeria. The exposition of the powers of Attorney General in the civil administration of justice was also carried out in this chapter. In the course of the discussion of that power of Attorney General in civil cases, the dissertation took special interest in the powers of Attorney General in the execution of garnishee orders affecting monies belonging to the government and its agencies

under section 84(1) & (3) of the Sheriffs and Civil Process Act, Cap. S. 6 *Laws of the Federation of Nigeria*, 2004. The dissertation holds the view that the said power is unconstitutional.

**Chapter four:** This chapter deals with the judicial review of the exercise of the powers of public prosecution by Attorney General in Nigeria. In this chapter, arguments for and against the judicial review of the powers of Attorney General in the administration of criminal justice was reproduced and reviewed. The judicial attitude of the Nigerian courts to applications seeking for the judicial review of the powers of Attorney General in public prosecution and matters arising thereto was also discussed. The chapter concludes with the submissions of the dissertation on the subject so discussed.

**Chapter five:** in conclusion contains the findings of the dissertation and its recommendations towards improving the identified problems with the powers of Attorney General in the administration of criminal justice in Nigeria.

## CHAPTER TWO:

### HISTORICAL DEVELOPMENT OF THE OFFICE AND POWERS OF ATTORNEY GENERAL IN NIGERIA:

**2.1. Introduction:** The office of Attorney General in Nigeria is the most senior office of a Minister/Commissioner in the executive council of either the states or the Federation as the case may be. This is so because of all the offices of Minister of government of the Federation or that of the Commissioners of governments of the states, the office of Attorney General is the only one specially provided by the Constitution with a defined powers and duties. In this chapter therefore, we shall try to explain who Attorney General is, the historical development of his office at both Common Law and the Constitution and the General character of his powers under the same. For ease of understanding of the discussion in this dissertation, the chapter also made attempt to provide Conceptual Clarification of Key Terms such as the meaning of dispensation/administration of justice in the context of the dissertation; and the meaning of the phrase ‘public interest’, ‘the interest of justice’ and ‘abuse of court process’,

#### **2.2. Who is an Attorney General?**

Generally, Attorney General is a professional legal consultant who is the Chief Law Officer and prosecutor of a particular jurisdiction. His or her general duties includes enforcing the law, representing the government, maintaining proper standard of conduct while acting as an Attorney for the state in court, developing programmes and legislations for law and criminal justice reform and been a public spokesman for the field of law. Of these functions, representing the government in presenting the state’s cases is the Attorney General’s most frequent task.<sup>22</sup>

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<sup>22</sup> Wikipedia, Retrieved 15/09/2013 6:25

In the United States of America for example, The U.S. Attorney – as the Attorney General of the United State of America is called - is the head of the Department of Justice and Chief Law Officer of the Federal Government representing the United States in the legal matters generally and gives advice and opinions to the president and the heads of executive departments of government when so required<sup>23</sup>The Attorney General appears in person to represent the government in the United State Supreme Court in cases of exceptional gravity or importance. In each state of the United States, there is also an Attorney General who is the chief law officer of the state. He gives advice and opinion to the government, to the executives and administrative departments<sup>24</sup>

In England, the Nigeria’s colonial master, Attorney General is the principal law officer of the crown, and head of the British Bar. He represents the crown in all matters affecting public interest. His representation is in any matter civil or criminal. In this sense therefore, Attorney General is an officer of the public<sup>25</sup>. In the Attorney General’s absence or incapacity, his duties devolve upon the solicitor General. Where the office of the Attorney General is vacant or Attorney General is unable to discharge the functions of his office through absence or illness, he authorizes the solicitor General to act on his behalf. Any function authorized or required by an enactment to be discharged by an Attorney General may in general be discharged by solicitor General<sup>26</sup>. The offices of the Attorney General and that of the Solicitor General are conferred by patent and are held during pleasure.

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<sup>23</sup> Larry, J. S., & Joseph, J. S. (2004), *Essentials of Criminal Justice* (4<sup>th</sup> ed.), Thomson Learning Inc., Canada, p. 232.

<sup>24</sup> Ibid.

<sup>25</sup> *Hulsbury’s Laws of England*, Vol.8, Butterworth London, 1994 p.789..

<sup>26</sup> Ibid.

Neither the Attorney General nor the Solicitor General may engage in private practice.<sup>27</sup>

In the courts of England, the Attorney General is the head of the Bar and has precedence over all Queens' Counsels. However, generally speaking, he has no greater rights than other members of the Bar; in so far that he or any person appointed to act for him must conform to the rules of the court in which the proceedings in which he is engaged takes place. The courts exercise over him the same authority that they exercise over every other solicitor or his advocate. For example, he would not be permitted to prosecute any proceeding which was merely vexatious or which had no legal object.<sup>28</sup> In the eyes of the law, the Attorney General's opinion is entitled to no more authority than that of any other member of the Bar. No general right of reply is recognized by the courts on the part of the Attorney General.<sup>29</sup> Admissions by the Attorney General, binds the crown as to the matters of facts only. The admission would however not be binding on the crown on matters of law<sup>30</sup>.

The Attorney General represents the Crown in the courts in all matters affecting public interest. For example, Attorney General must be the plaintiff in any civil proceedings by the crown unless an authorized government department sues in its own name. He may also be a defendant in every civil proceeding against the crown unless an authorized government department is clearly the appropriate defendant. He is a necessary party to the assertion of public right even where the moving party is a private individual.<sup>31</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid. p. 790.

<sup>29</sup> *Halsbury's Laws of England*, Vol.8, Butterworth London, 1994 p. 790.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid. p. 790 – 791.

11 Ibid..p. 791

Likewise, where a private suit may affect the prerogative of the crown, or raises any question of public policy - including the relationship with foreign states on which the executive may have a view which it may desire to bring to the notice of the court - Attorney General has a right of intervention at the invitation or with the permission of the court..<sup>32</sup>.

Generally in England<sup>33</sup> much as is the case in the United States of America<sup>34</sup> the office of the Attorney General is a public trust which involves the exercise of an utmost boundless of discretion by an officer who ought to stand as impartial as a judge. In criminal cases for example, when an arrest and investigation has been made by the police, the Attorney General been the chief prosecutor for the state, has a wide discretion to either prosecute or order for the release of the suspect on behalf of the state. The essence been to allow him decide on the propriety or otherwise of prosecution and the strength of evidence against an accused before going to court. Even in minor offences, normally prosecuted by the police, the Attorney General may decide to intervene after a complaint has been filed in court. He may subsequently decide to proceed with the matter or terminate it.

Finally, it should be noted that in England, the prerogative of the Attorney General in the exercise of his powers at Common Law is absolute. That is to say, Attorney General is not subject to any form of control in the exercise of his prosecutorial powers. The Attorney General is not answerable to the public through the courts, but to the parliament and his appointer only. Thus, in the case of *R. v. Comptroller General of Customs*<sup>35</sup> it was held that in England, when the Attorney General is exercising his functions as an officer of the crown, such

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<sup>33</sup> Ibid. p. 792.

<sup>34</sup> *Bourvier's Law Dictionary*, Vol. One (3<sup>rd</sup> ed.), p. 286

<sup>35</sup> (1899) 1 Q.B. p. 909 C.A. at 1914.

functions were not subject to the review by the courts of the Queen's Bench Division or any other court. However, this power has been whittled down at present. The Attorney General may now be instructed to prosecute in important cases by the court.<sup>36</sup>

This dissertation made the above discussions for the purpose of showing the similarities of the office of Attorney General in England and America with that of the office of Attorney General in Nigeria. The dissertation has done that because, in the case of England, it was the colonial master of Nigeria before independence in the year 1960. And due to that historical tie between the two countries, the legal system of Nigeria largely draws its origin from that of the country.<sup>37</sup> Our reference to the office of the Attorney General of the United States of America was however, made because of the similarities of the Constitution of that country with that of the Federal Republic of Nigeria, 1999. In fact, the Constitution of Nigeria, 1999 been a Republican constitution, is fashioned after the Constitution of the United States of America<sup>38</sup> Any discussion of the position of the office of Attorney General in the two jurisdictions is therefore, useful to the understanding of the office of Attorney General in Nigeria.

### **2.3. Nature of the Powers of Attorney General In Nigeria:**

The Attorney General in the Federal Republic of Nigeria is the Chief Law Officer and Minister/Commissioner of Justice of the Federation or of the State as the case may be. In that capacity, he is therefore, a member of the Executive Council of the Federation and states and performs executive functions. As the

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15. *Halsbury's Laws of England*, Vol.8, Butterworth London, 1994 P. 790. *Laws of England*, Vol.8, Butterworth London, 1994 p. 792.; *the Orown Office* (Commissioners of the Peace) Rules 1973, S.1. 1973 no. 2099 r,2, Schedule, Form 1.

<sup>37</sup> S. 32(1) *Interpretation Act*, Cap. 123 *Laws of the Federation of Nigeria*, 2004.

<sup>38</sup> *Lakanmi v. A.G. Western State of Nigeria*(1971) U.I.L.R., p. 201.

Chief Law Officer of the federation, Attorney General renders legal advice to the president and other governmental agencies. In fact, he acts as the government's chief spokesman on matters of law.<sup>39</sup> Similarly, he performs the same functions for the states where he is a state Attorney General.<sup>40</sup>

On all matters of law affecting government, a State or Federal Attorney General as the case may be, is the mouth piece of the government under which he serves subject to public interest, the interest of justice and the need to prevent abuse of legal process.<sup>41</sup>In the *Nigeria Engineering Works v. Denap Ltd*<sup>42</sup> the supreme court of Nigeria, referring to the state Attorney General held as follows:

The Attorney General of the state is not only the head of the Ministry of Justice but also the chief legal adviser of the government. He is basically responsible in law for government's action and in action. He is the mouth piece of the government as par as the law is concerned. He is government's chief spokesman on law.

In civil cases affecting government, Attorney General in Nigeria is the proper party. He can sue and be sued alone in any civil suit where government interest is involved without necessarily joining any particular government ministry, agency, or any public functionary acting in his official capacity. This is so because, the Attorney General as the chief law officer of government, is responsible for government's actions or inactions. And because of this exalted position of the Attorney General he exercises a controlling authority in all civil actions affecting government in Nigeria.<sup>43</sup> For example, where in any civil suit, judgement was delivered against government or any of its agencies; the condition precedent is that monies belonging to the state in the control of any public servant shall not be

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<sup>39</sup> . S. 150 *Constitution of the Federal Republic of Nigeria*, 1999..

<sup>40</sup> Ibid. S. 195(1)

<sup>41</sup> Ibid. SS. 174(3), 211(3)

<sup>42</sup> (2002) F.W.L.R. (Part 89) p. 1062.

<sup>43</sup> *Governor of Gongola State v. Tukur (No.2)* (1982) 2 N.W.L.R. (Part 56) p. 308.

attached in satisfaction of the judgement debt without necessarily obtaining the consent of the Attorney General<sup>44</sup>. Commenting on this law in *Onjewu v. Kwara State Ministry of Commerce and Industries*<sup>45</sup>, Oduyemi JCA.said:

The rationale for the provisions of section 84(1) of the sheriff and civil process Act on the power of the court to order garnishee nisi against funds in the hands of public officers is to ensure that money that has been voted by the House of Assembly of a state for a specific purpose in appropriation Bill presented to that house and approved in the budget for the year of appropriation does not end up being the subject of execution for other unapproved purposes... Under the sheriff and civil process Law, those monies though in a Bank account can only be assuredly withdrawn, on the authority of a public officer for the purpose for which the House of Assembly authorized the money. It is a provision to ensure sound public administration. It is a matter of good public policy aimed at protecting the public fund. It makes for good sense too.

Another example is that in the enforcement of foreign judgement in Nigeria, Attorney General, been the minister of justice, has power to extend recognition to the judgement of foreign courts for the purpose of enforcement in Nigeria based on the principle of sufficient reciprocity under section 3(1)(a&b)<sup>46</sup> which provides as follows:

The minister of justice if he is satisfied that in the event of the benefit conferred by this part of the Act being extended to the judgement given in the superior courts of any foreign country, substantial reciprocity of treatment will be issued as respect the enforcement in that foreign country of judgement given in the superior Courts in Nigeria may by order direct:

{a} that this part of this Act shall extend to that foreign country.

{b} that such courts of the foreign country as are specified in the order shall be deemed superior courts of that country for the purpose of this part of this Act.

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<sup>44</sup> S. 84(1)(3) *Sheriffs and Civil Process Act*, Cap. S. 6 Laws of the Federation of Nigeria, 2004.

<sup>45</sup> (2003) F.W.L.R. Part 181 p.. 1590 at 1596 Ratio 5.

<sup>46</sup> *Foreign Judgement (Reciprocal Enforcement Act)* Cap. F. 351, Laws of the Federation of Nigeria, 2004.

In criminal cases, Attorney General (Federal or State), is the chief law prosecutor. In the discharge of his duty here, Attorney general exercises a *quasi* judicial function and enjoys enormous discretion. Depending on the subject matter and limit of his territorial jurisdiction, he has liberty under the law to decide who to charge, for what offence and before any court of law in Nigeria, He can also discontinue any criminal prosecution as he deems fit whether or not the same was initially instituted by him or her. The only exception or limitation to his power seems to be in relation to criminal cases before a court martial.<sup>47</sup>

In all cases instituted for the state by any person other than the Attorney General, the Attorney General exercises supervisory authority over the prosecutorial process. He can take over and continue the prosecution, amend or change the charges or even discontinue the case as he deems fit. Where he so decides to discontinue, his decision cannot be challenged in court or reviewed by any court of law. His Authority in this regard, is final and any person aggrieved by the same, can only petition his appointer or the court of public opinion for redress. Even the appointer of the Attorney General, cannot reverse or review the exercise of Attorney General's power. His appointer can only remove or reassigns him to another ministry if he is not satisfied by his conducts. This in a nutshell, is the decision of the Nigerian Supreme Court in the case of *The State v. Ilori*.<sup>48</sup>

Attorney General in Nigeria is appointed by the president for the federation or a state governor for a state and is subject to removal from office at the sole discretion of his appointer.<sup>49</sup> This is the point of departure from the position of the law in America. In America, an Attorney General is answerable to both the president and the parliament and is subject to trial for misconduct by the parliament. While the American president has power to appoint the Attorney General, he cannot remove him without recourse to the Congress.<sup>50</sup>

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<sup>47</sup> S. 174(1) & 211(1) Constitution of the Federal Republic of Nigeria, 1999.

<sup>48</sup> (1983) 2 S.C, p. 155.

<sup>49</sup> S. 150 Constitution of the Federal Republic, of Nigeria, 1999.

<sup>50</sup> <http://wikipedia.org/wiki/file:Government> of United States.org.; <http://en.Wikipedia.org/wiki/impeachment> in the United States.org.; Larry J. Siegel, *Essentials of Criminal Justice* (4<sup>th</sup> ed.) Wadth Worth & Thompson learning. Belmont CA94002 – 3098, U.S.A. p. 236 – 237.

The essence has been to ensure that the office of the Attorney General is not exploited by the President for political or personal reason whatsoever. The Americans knew that too much concentration of powers in the hand of a single authority of the President may result to a disastrous consequence and may lead to impunity.

#### **2.4. Historical Development of the Powers of Attorney General in Nigeria:**

The history of the office and powers of Attorney General in Nigeria cannot be completely discussed and understood without making reference to the history of the office and the powers of Attorney General at England. This is so because, by colonial heritage, the bulk of the Nigeria's legal System was derived from the English legal system. For that reason therefore, our consideration of the history here, will start with consideration of the history at Common Law before proceeding to consider the history in Nigeria accordingly.

The origin of the office of Attorney General in England is traceable to the thirteen century when King Henry III accepted that he himself could be bound by the decision of his court. But because it would be awkward for the king to appear personally in his court as plaintiff or defendant, he appointed Lawrence Delbruck to act as crown counsel in the Royal courts. He was engaged in such actions as Rent recoveries, investigating homicide, and on some occasions, engaging in special missions to discover marriages, Wards reliefs and other Royal Rights. For all his troubles, he was paid a salary of twenty pounds per annum only.<sup>51</sup> However, it was in 1461 during accession of King Edward that the title ATTORNEY GENERAL was first used to describe the King's Attorney. In that year, John Herbart was

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<sup>51</sup> Ajibola, B. (1989), *The Federal Attorney General: Powers, duties and the Administration of Law* In: Ayo Ajomo (ed.) *Fundamentals of Nigerian Law*, Nigerian Institute of Advance Legal Studies, Lagos, p. 24.

described in the Patent of his Appointment as “ATTORNEY GENERAL in Anglia cum Posta state deportation”. Meaning, Attorney General of England.<sup>48</sup>

The exact historical detail of the development of the office of Attorney General in Nigeria is however, unclear. It is certain that before 1900 the office did not exist under the name. But there were in existence in 1863 – 1901, the offices of Queen’s Advocates<sup>52</sup>; and Queen’s Proctor.<sup>53</sup> A good authority exists on the other hand, for the belief that the office of Attorney General under that name was first established in Nigeria between January 1900 to 1912; when Lord Lugard assumed responsibility for amalgamation of the Northern and the *Southern Protectorates of Nigeria*. Each Protectorate had one Attorney General but, with the amalgamation, in 1914 there emerged one Attorney General designated as the Attorney General for the colony and Protectorate of Nigeria. Sir Donald Kingdom (who later became the Chief Justice of Nigeria) was the first to hold the newly created office.<sup>54</sup> ‘

The first Nigerian appointed to the office of the Attorney General of the Federal Republic of Nigeria was the legendary Honourable justice T.O. Elias, during whose tenure the present structure of the Attorney General’s powers were properly instituted and defined.<sup>55</sup>

In 1936 the Law Officers Act<sup>56</sup> was passed. The Act made provisions *inter alia* for the office of Attorney General. Section 3 of the Act is to the effect that the incumbent of the office will be deemed to be an ex-officio barrister, advocate and Solicitor of the Federal Supreme Court, and further that he shall be deemed to have been entitled to appear as counsel in all courts in Nigeria in which counsel may appear. The Act also recognized the pre-eminence of the incumbent of the office of

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<sup>52</sup> A person who assist, defends, pleads or prosecute for the queen.

<sup>53</sup> A solicitor who represents the crown in domestic relations, probate and admiralty Cases.

<sup>54</sup> Ajibola, B., Op. Cit. notes 30 p. 24.

<sup>56</sup> *Laws of the Federation of Nigeria & Lagos* 1958 (V.iv.) Cap. 100.

Attorney General, and that of the Solicitor General in relation to other legal practitioners in the Country.

Noteworthy is section 4 of the Ordinance which gives the Solicitor General Powers in the absence of the Attorney General to perform any of the duties of the latter and have his Powers during such absence. The 1963 Constitution however, modified that position by providing that where the Attorney General is unable to perform his functions, any person whether or not a Minister, designated by the President in accordance with the advice of the Prime Minister may perform his functions.<sup>57</sup>

With the promulgation of the 1979 Constitution and the present 1999 Constitution (the provisions of which as regards the powers of Attorney General are similar), the earlier arrangement was altered. The powers of the Attorney General must now be understood in the context of section 174(1-3) and Section 211(1-3) of the Constitution of the Federal Republic of Nigeria, 1999 which is similar to section 160 (1-3) and section 191(1-3) of the 1979 Constitution. Under the present arrangement, the Powers of the Attorney General is exercisable by him in person or through officer of his department. The officers in the department of the Attorney General cannot exercise his powers without authorization from him whatsoever.

It is important to note that before the 1963 Constitution, the Attorney General (like other officers) was a civil Servant. However, Section 88(1) of the 1963 Constitution politicized the office and provided for the position of Attorney General who shall also be a Minister of the Government of the Federation. Since

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<sup>57</sup> S. 88(3) *Constituion of the Federal Republic of Nigeria*, 1963.

1963, the incumbent of the office has had to serve in the joint capacity of civil Servant and Political appointee.<sup>58</sup>

Under the Constitution of the Federal Republic of Nigeria, 1999 as earlier explained in this chapter, the office of Attorney General, (Federal and State) is established under section 150 and 195 of the Constitution. Section 150 establishes the Office of the Federal Attorney General and provided that he shall be the chief law officer of the Federation as well as a Minister of Justice. Section 195 on the other hand establishes the office of State Attorney General and makes him to be the chief law officer of State and a Commissioner of Justice. As Minister/Commissioner for Justice,, Attorney General is a member of the executives and performs executive functions as administrative head of Ministry of Justice. He as Minister/Commissioner for Justice, attends meetings of the executive, presents programmes and the needs of his Ministry and is answerable to every decisions and deeds of the Ministry in the performance of its duties. That is why he is described as Attorney General and Minister for Justice of the Federation or an Attorney General and commissioner for Justice of a state. In this capacity, he is clothed with official Legal assignments and bureaucratic functions. Commenting on these bewildering amalgam of legal duties and bureaucratic functions of Attorney General, Meador D., wrote that:

Although the head of every executive department is heavily burdened, the Attorney-General is unique. In addition to carrying a vast array of administrative responsibilities, he must also perform as a lawyer. No other cabinet officer fills such a dual role, with the special professional obligation which is attached to the lawyer, as an officer of courts, as a member of the Bar and a representative of a client.<sup>59</sup>

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<sup>58</sup> S. 138(1) & 176(1) of the *Constitution of the Federal Republic of Nigeria*, 1979.

<sup>59</sup> Keeton, *British Common wealth: The development of its laws and Constitution*, Vol. 6 Stevens, London, p. 369.

Although the above arrangement is not peculiar to Nigeria, it does not obtain throughout the Commonwealth. For example, in India, the Attorney-General is not the Minister of Justice. Thus he is neither a member of the Council of Ministers nor of the Parliament.<sup>60</sup> A more interesting variation is that of Burma, where the Attorney-General is neither a Minister for Justice nor a full time Law Officer of the government and is free to practice Law privately in civil matters, although he cannot appear against the Government in such matters.<sup>61</sup>

In Australia, the Attorney-General interestingly need not be a lawyer to be appointed to that office. For example, in 1968 the Attorney-General of Queensland was a pharmacologist by training. However, as a sort of buffer in instances like this, the solicitor General is invariably an experienced lawyer.<sup>62</sup>

## **2.5. The Conceptual Clarification of Key Terms:**

### **2.5.1 The Concept of Administration/Dispensation of Justice Defined.**

According to the Oxford advanced learner's Dictionary, the word 'administration' literally means *inter alia* the process or act of organizing the process of doing something. It is used to refer to activities that are done in order to plan, organize and run a business, school or other institution.<sup>63</sup> In that sense therefore, 'administration of justice' means the process through which justice is delivered to the people or the actual act of organizing the process. However, in its legal connotation as defined by the Black's Law Dictionary, administration of justice refers to the maintenance of right within a political community by means of

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Edward, J.U.J. (1964), *The Attorney General Politics and Public Interest*, Sweet and Maxwell, London. 369.

<sup>63</sup> *Advanced Learner's Dictionary* (international Student's), 7th Edition), p. 19.

the physical force of the state. It is a state's application of the sanction of force to the rule of right.<sup>64</sup>

It should be noted that administration of justice and organization of the process of justice delivery in Nigeria, is primarily the principal function of the judiciary which consists essentially in adjudication - that is the resolution of conflicts of rights and interest.<sup>65</sup> Admittedly however, the courts alone, cannot administer justice without involvement and co-operation of other stake holders such as the police, the Bar (public & private), the press and the general members of the police or else, the end of justice will be greatly impaired.<sup>66</sup> In the discharge of its functions therefore, a balanced judiciary should not be seen to set itself in the head on collision with the executive or the legislature. It is of importance and very beneficial to all that there must be harmony between these arms of government for the benefit of the entire public who is the object of service of the judiciary and other stake holders mentioned above.

The business of administration of justice is a very serious business which admits of the involvement of only persons of impeccable character, integrity, learning and experience. Aderemi Jsc. (as he then was) wrote that:

The art of adjudication which is a pre occupation of the judiciary is a divine contrivance. An aspirant to the office of a judge or the judge himself must possess a higher sense of probity. He must be someone who is versatile in law and has practice it extensively. He must be a man of free thought, ideas and good reasoning. The position of a judge is undoubtedly an all powerful one. And to whom much is given, much is also desired from

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<sup>64</sup> *Blacks Law Dictionary*, Ninth edition, p. 50.

<sup>65</sup> SS. 6(6)(b), 236, 248,259,264,269,274 & 279 *Constitution of the Federal Republic of Nigeria*, 1999.

<sup>66</sup> Fred, O. O. (2010) Administration of Justice: Role of the Public and Private Bar, In: D.C. Maidu et. al. (eds.), *Judicial Administration and other Legal issues in Nigeria*, Malthouse Press Limited Lagos, p. 29.

him.... A judge must represent justice and integrity in all his undertaking. Every judge must not only in theory but more importantly, in practice adhere to clause 40 of the MAGNA CARTA 1215 which enjoins all judges to put themselves in positions where they will be able to say with all good conscience and without any fear of equivocation that “to no one shall we sell justice, to no one will we deny or delay right or justice. Judges must realize that they hold justice in trust for God who is the supreme justice of all. A judge in the discharge of his duties, must not travel in a wonderland in search of nothing that is lost, he must display learning, integrity and courage in the discharge of his duties...”<sup>67</sup>

No matter how good, how knowledgeable, how experienced and pious a judge is, he will not be able to discharge his duties effectively and ensure attainment of justice in a case before him, without co-operation and assistance of other stakeholders in the business of administration of justice as mentioned above.

### **2.5.2. The Public Interest defined.**

Public interest in the context of this dissertation refers to the general welfare of the public that warrants recognition and protection by the regulation of government. It includes any object of human desire in which members of the public are concerned and which deserves protection by public functionaries.<sup>68</sup>

### **2.5.3. The interest of Justice defined.**

Interest of Justice in the context of this dissertation means fair and proper administration of law. It refers to a fair and equitable treatment of issues in accordance with the twin pillar of justice i.e. *audi ultrem patem Rule and Nemo Judex in Causa Sua*. This interest, requires that in the discharge of his duties,

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<sup>67</sup> Aderemi, J.s.c.(2000), The Role of a Judge in the Administration of Justice In Nigeria, In: J.A. Yakubu (ed.), *Administration of Justice in Nigeria*, Malthouse Press Limited Lagos, P. 6.

<sup>68</sup> *Blacks law Dictionar*, Ninth Edition p. 1350

Attorney General shall not do anything based on his whimsical desire but the interest of the public.<sup>69</sup>

#### **2.5.4. Abuse of Court Process defined:**

The concept of abuse of court process involves circumstances and situations of infinite variety. However, in the context of this dissertation, the term is used to refer to the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is an improper use of judicial process for whimsical purpose and for the purpose of preventing efficient and effective administration of justice to the annoyance; irritation and detriment of an opponent. This may arise for example, where an Attorney General files a frivolous charge against a particular person or where he files multiple actions based on the same subject matter against the same accused person.<sup>70</sup>

#### **2.6. Conclusion:**

Apart from exploring the meaning, nature and historical development of the powers of Attorney General in Nigeria; this chapter explained that the duty or function of administration of justice {i.e. maintenance of legal rights and enforcement of legal obligations by the use of the political force of a state}, is the primary function of the courts in conjunction or collaboration with other stake holders such as the police, the Bar {public and private}, the prison and the press etc.

Amongst the stake holders who administer justice in conjunction with the court, the chapter noted that the Attorney General occupies a very prominent position. As chief law officer and prosecutor to the state, Attorney General in Nigeria is the public trustee for justice. He has responsibility not only to defend the interest of the executive president or governor who appointed him, but also the interest of the public at large. This is so because; the public, including the government which appointed him to the office, are both his clients

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<sup>69</sup> *Comptroller General of Prison v. Adekanky*(1999) 5 F.W.L.R. Part 602 p. 167.

<sup>70</sup> *Attorney General of Anambra State v. Uba* (2005) ALL. F.W.L.R. Part 277 p. 909at 913 ratio 7.

as law officer. Hence, section 174(3) and 211(3) of the Nigerian Constitution, 1999 provides that in the discharge of his duties, Attorney General shall have regard to public interest, the interest of justice and the need to prevent abuse of legal process. These expressions were also explained by this chapter.

## **CHAPTER THREE:**

### **APPRAISAL OF THE POWERS OF ATTORNEY GENERAL UNDER THE NIGERIAN CONSTITUTION:**

#### **3.1. Introduction:**

As explained in chapter two to this dissertation, the office of the Attorney General as public trusty for justice occupies a very prominent position in the administration of justice not only in Nigeria but, also in other Common Law Jurisdictions. This chapter therefore, provides detailed appraisal of the powers of Attorney General in criminal cases, as well as in civil cases affecting public interest. In the course of discussing the powers of Attorney General in civil cases, a special consideration was given to the powers of Attorney General in the execution of garnishee orders in the enforcement of judgement against government or any of its agencies. The chapter holds the view that the requirement for the consent of Attorney General before enforcement of garnishee orders against government and its agencies in civil cases is unconstitutional. Finally, the chapter concludes with the summary of its discussions herein.

#### **3.2. Powers of Attorney General in Civil Cases:**

The Office of Attorney General is not an office dedicated to the service of Government only; it is an office occupied by a Professional Legal Consultant, whose clients include the government as well as the general public. As a professional Lawyer, Attorney General is a solicitor to both Government and the Public and therefore, holds public trust for justice. Whenever Public right is being, has been or is likely to be infringed, it is the responsibility of the Attorney General to ensure that the same is redressed or protected against a threatened infringement.<sup>71</sup>

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<sup>71</sup> *Ndoma Egba v. Government of Cross River State* (1991) 4 N.W.L.R. (Part 188) P. 773 at 788.

In *Independent Electoral Commission & 2 Ors. v. Chief Onwuka Kalu*<sup>72</sup> the Court of Appeal held:

... Attorney General represents the government in matters between the government and individual or legal persons in the state on the one hand and he equally represents the government and people of the state against outsiders. ... An Attorney General is seen primarily as an officer of the state and that is in that sense an officer of the public. He performs judicial functions both at Common Law and by statute. He has wide powers covered by the Constitution, Common Law and inherent powers. These powers enable him to play a prominent role in the maintenance of public order and the protection of the lives and properties of the citizenry. By virtue of his position under the constitution he becomes an agent of the State Government...<sup>73</sup>

In the area of Civil Justice under consideration, when Public right has been affected by a wrongful act of any person, corporation or authority, it is the responsibility of Attorney General to ensure that he sue in redress of the same. For example, when a Public nuisance is committed, it is the responsibility of the Attorney General to sue on behalf of the Public to ensure the protection of Public right and attainment of proper remedy. Besides the Attorney General, no private individual is empowered by law to sue for such wrong without the consent of the Attorney General. But where a person's personal interest is specially and particularly affected by a Public nuisance, he may be allowed to sue in protection of his personal interest. That is to say, unless a private individual can show that he has sufficient interest or has suffered a greater or particular damage for Public nuisance, he will not be allowed to sue for the same.<sup>74</sup> This orthodox position of the Common

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<sup>72</sup> (2004) All F.W.L.R. Part 199 p. 1383.

<sup>73</sup> *Nigeria Engineering work Limited v. Deenap Limited* (2002) F.W.L.R. Part 89 p. 1062.

<sup>74</sup> Kodilinye, G. (1998), *Nigerian Law of Tort*, Spectrum Books Limited, Ibadan , p. 104

Law, which is received as part of the Nigerian Law,<sup>75</sup> was echoed by Buckley J. in the old case of *Boyce v. Paddington Borough Council*<sup>76</sup> as follows:

A plaintiff can sue without joining the Attorney General in two cases first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g where an obstruction is so placed in a High Way that the owner of premises abutting upon the High Way is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the High Way); and secondly where no private right is interfered with, but the plaintiff in respect of his public right suffers special damage peculiar to himself from the interference with the public right.<sup>77</sup>

The rationale for the above legal position appears to be the desire of the law to control and close the flood gate of litigation by busy bodies, professional litigants and meddlesome interlopers so that the Attorney General could be allowed to effectively perform his duties as officer of the public and a public trusty for justice. In the performance of his duties, the law enables the Attorney General to conveniently exercise his discretion in deciding the interest of the public without any interference what so ever. The rule also ensures that the courts are not turned into a theatre for the ventilation of spurious and vexatious claims by unmeritorious litigants under the guise of standing to sue or any guise whatsoever. In the recent case of *Ayida & Ors. v. Town Planning Authority & Another*<sup>78</sup> the 2<sup>nd</sup> Respondent , Mega Investment Limited, acquired two one story building Numbers 14A and 14B Idowu Martins Street Victoria Island, Lagos which were being used for residential purposes and converted the same for commercial purpose as Mega Plaza, without prior approval of the Planning authority of Lagos State. The Appellants who felt aggrieved, by a letter addressed to the Governor of Lagos State

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<sup>75</sup> *Attorney General of Anambra State v. Uba* (2005) ALL F.W.L.R. Part 277 p. 909 at 912 Ratio 4.;  
*Governor of Gongola State v. Tukur (No.2)* (1987) 2 N.W.L.R.(Part 56) p. 308.

<sup>76</sup> (1903) 1 Ch. p. 109.

<sup>77</sup> *Gouriet v. Union of Post Office Workers* (1977) 3 ALL ER. p. 70.

<sup>78</sup> (2013) 5 S.C.M. p. 46.

complained that the two one story residential houses in question were demolished by Mega Plaza Limited and in their places now stands what the Complainants described as imposing and intimidating four story structure on the site of one of the demolished building. The other premises according to the complainants, contains structures fitted with stalls for open shopping, while the main building stood in the area like an intimidating colossus in the midst of a conglomerate of peace loving dwarfish residential houses. The complainants therefore, pleaded with the governor of Lagos State to use his good office as the chief executive of the State to compel the Mega Plaza Limited to convert its building structures at 12/14 Idowu Martins Street, Victoria Island, Lagos, to luxurious apartments as initially authorised; or in the alternative, effect the demolishing of the structures on the ground of the alleged violation of the Planning and Environmental Authorities Bye-laws and regulations of Lagos State. When there was no positive response, the Appellants went to court to actualise their demands.

The Appellants therefore, took out an action for mandamus and an order of injunction against the 2<sup>nd</sup> Respondents as defendants at the trial High Court Lagos, which dismissed their claims. They appealed to the Court of Appeal which affirmed the decision of the trial High Court. Still dissatisfied, the Appellants appealed to the Supreme Court. The Supreme Court affirmed the decision of the two lower courts and held as follows:

From the evidence on record, the complaint of the Appellants in this case relate to a number of alleged contraventions of the provisions of the Lagos State Town and Country Planning Law, 1994 and regulations made under that Law in the construction, use and occupation of the land and premises at nos. 14A and 14B of Idowu Martins Street, Victoria Island Lagos. The appellant had clearly failed to show how the alleged contraventions of the law and regulation affected their personal rights or interest not been the owners or users of the properties the

subject of their complaint. Nor did the appellants show that they have suffered or likely to suffer any injury greater than that of any other member of the public or residents of Idowu Martins street Victoria Island Lagos where the building or structures of the 2<sup>nd</sup> Respondent, the subject of the Appellants complaint, are located and which building or structures were put in place with the approval of the 1<sup>st</sup> Respondent. This being the position of the situation on the ground, it is not difficult to see that the Appellants have no recognizable right under the law with respect to the properties and premises the subject of their complaint that required protection by a declaratory or injunctive order. The court below was on very strong ground in dismissing the Appellant's appeal in their alternative claim.

In the civil administration of justice process in Nigeria, one power of the Attorney General which appears to the writer to be a clog to Justice is the power of Attorney General to give or withhold consent in the execution of a money judgement against government or any of its agencies under section 84(1-3) of the Sheriff and Civil Process Act.<sup>79</sup> By the provisions of that law, where in execution of judgement monies liable to be attached by garnishee proceedings are in the custody or control of a Public Officer, in his official capacity or in *custodia legis*, garnishee order *nisi* in attachment of the money, shall not be made by any court, unless after obtaining prior consent to such attachment from the Attorney General.<sup>80</sup> The reason is simply put as one of Public Policy to prevent funds which might have been earmarked for some developmental programmes from being diverted to the satisfaction of judgement debts. In *Onjewu v. K.S.M.C.I.*<sup>81</sup> the Court of Appeal explained the rationale of the Law as follows:

... the rationale for the provision in section 84(1) of the Sheriff and Civil Process Act for the previous consent of the Attorney General before a court could validly issue even an order garnishee *nisi* against funds in the hands of

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<sup>79</sup> Cap. S. 6 *Laws of the Federation of Nigeria*, 2004

<sup>80</sup> S. 84(1) *Ibid.*

<sup>81</sup> (2003) F.W.L.R Part 189 p. 1590.

a Public Officer is to ensure that moneys that have been voted by the House of Assembly of a state for a specific purpose in the appropriation Bill presented to the House and approved in the budget for the year of appropriation does not end up being the subject of execution for other unapproved purposes under the Sheriff and Civil Process Law.

Does the above provisions derogate from the provisions and spirit of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999? The Court of Appeal in the above case seems to have answered that question in the negative. However, learned Counsel to the appellant in the above case and Mr. Efevwerhan hold a contrary opinion. Both are of the opinion that the provision indeed contravened section 36(1) and 287 (3) of the said Constitution.<sup>82</sup> This view is also shared by Buba Tijjani Musa<sup>83</sup> and the same is hereby adopted by the writer.

It seems to us however, that the law under section 84(1) of the Sheriff and Civil Process Act, did not only contravene the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, but is also contrary to Section 6(6) (b) of the same Constitution. That section vested judicial powers in the courts and confers them with authority to undertake judicial review in settlement of disputes not only between persons but also between persons and government and between the governments or authorities *inter se*. By the provisions of that section, the judicial powers of the courts shall extend, notwithstanding anything to the contrary in the Constitution, to all inherent powers and sanctions of a court of law and to all matters between persons, or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

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<sup>82</sup> Efevwerhan, D. I. (2003), *Principle of Civil Procedure in Nigeria (2<sup>nd</sup> ed.)*, Snaap Press Limited Enugu, p. 398.

<sup>83</sup> Musa, B.T. (2012), Enforcement of Awards/Judgement in Nigeria, *University of Ibadan law Journal* Vol. 2 No. 1, p. 43 at PP. 50-51.

The provisions of section 6(6) (b) of the Constitution, are plain, straight forward and unambiguous. In the context of the section, the inherent powers of court mean the necessary power of court for the proper and complete Administration of Justice. It includes the intrinsic authority of court to decide and pronounce a judgement and carry it into effect between persons and parties who bring a case before it for decision. It is not also necessarily drivable from the Constitution.<sup>84</sup> The expression “sanction of court of Law” in the section includes penalties, or other mechanism of enforcement inherent in the exercise of judicial power like sentencing for contempt etc.<sup>85</sup> Government in the context of the said section of the Constitution include the Government of the Federation or of any State or of a Local Government Council or any person who exercises power or authority on its behalf.<sup>86</sup> And decision of court means any determination of the court including judgement, decree, order, conviction, sentence or recommendation as defined in section 318(1) of the same Constitution.<sup>87</sup> It follows therefore; that the authority of courts extends to every person, natural and artificial, including the Government without any exception whatsoever. Both government and the subjects are answerable in equal terms, to the powers and authority of court as established by the above section. Perhaps, it is for the above reason that Section 287(1-3) of the same Constitution places a mandatory duty on all authorities and persons to enforce judgement of courts established under the Constitution in any part of Nigeria without any reservation. It is submitted, that if section 84(1) of the Sheriff and civil process Act subjugates the authority of court and places consent of Attorney General, as a condition precedent to the exercise of the same in the enforcement of any judgement affecting government, the section

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14, *Blacks law Dictionary* 6<sup>th</sup> edition p. 782; *Giwa vs. I.G.P.* (1985)6 N.C.L.R. p. 369 at 185, *Ikechikwu v. Nwoye* 7 anor. (2012) 12 S.C.M. (pt. 2) p. 293 at 300.

<sup>85</sup> *Blacks Law Dictionary*, 6<sup>TH</sup> ED., p. 1341.

<sup>86</sup> S. 318, *Constitution of the Federal Republic of Nigeria*, 1999.

<sup>87</sup> *Ibid.*

must be in complete contravention of the provision of the Constitution. It negates the authority of court and is therefore, null and void to the extent of its inconsistency with the Constitution. The provision of the section also does violence to the doctrine of equality of all persons and authorities before the courts and the principle of separation of powers enshrined in section 4, 5, and 6 of the Constitution of Nigeria, 1999.

As observed by Babalola A.,<sup>88</sup> the requirement of consent of the Attorney General before an order of attachment of monies in the hand or control of a Public Officer can be made, is similar to the requirements under the Petition of Rights Act passed in England in 1915 by which the consent of the Attorney General was required before an action could be instituted against government. The law which was passed in England under the concept that the Crown could do no wrong was incorporated in to Nigeria by virtue of the Interpretation Act.<sup>89</sup> However, the consequent Republican status of Nigeria rendered the continued application of the law a legal absurdity as was decided in the case of *Nigerian Oil Seeds v. A.G. Imo State*<sup>90</sup> In that case, the court held as follows:

The whole concept of Petitions of Right is inconsistent with the Presidential system of government which is Republican in nature as opposed to Monarchical system. The Petitions of Right Law no doubt found its way into our law when Nigeria had the queen of England as the Head of State. Even in England it was abolished by the Crown proceedings Act of 1947 which came into force on the 1<sup>st</sup> of January, 1948. Before the abolishing, it had become unpopular both with the legal Profession and the Courts. Lord Atkinson in *Hollingshead v. Hazleton* 1916

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<sup>88</sup> Babalola, A. (2013) , A call for the Review of abolishing of Archaic, anachronistic & unconstitutional laws – Section 84 of the Sheriffs and Civil Process Act protecting Government from payment of Judgement Debt, *Afe Babalola University Ado Ekiti Law Journal*, Vol. 1No.1.p.1.

<sup>89</sup> Cap. 123 *Laws of the Federation of Nigeria*, 2004.

<sup>90</sup> (1984) 5 M.C.L.R. p. 487 at 492.

1 A.C. 428 H.L. described it with utter disdain as “merely an amicable litigation taken by consent of the Crown against the Crown itself”. Section 5 of the Petition of Right Law does not make the grant of a fiat by the governor a matter of Right nor does it stipulate how long it will take to decide whether to grant or refuse a fiat. Indeed, the Statement of Claim will not be forwarded to the governor himself but to his secretary who will place it before the governor. The section does not state within what neither time the secretary should place the statement of claim before the governor, nor does it state what happens if the secretary fails to place it before the governor. This was a Law purposely designed by Government to frustrate certain claims against it. There was no provision in the Pre independence Constitution or the Constitution of the 1<sup>st</sup> Republic that stood against it and so the law survived. I hold the firm view that the Petition of Rights Law seized to be valid on coming into force of the Constitution of the Federal Republic of Nigeria, 1979. The summons in the case before me was issued on 3<sup>rd</sup> October, 1979. Even if it had been a claim for recovery of Land, the claim would still be in order. I reject the objection of the learned deputy solicitor general which I hereby over ruled.

In another case of *Alhaji Widi Usman Jallo v. Military Governor Kano State & 1 other*<sup>91</sup> the Court of Appeal considered and set aside the provisions of section 92A of the Sheriffs and Civil Process (Amendment) Edict, 1987 of Kano State, which is a similar provision to section 84(1) of the Sheriffs and Civil Process Act, as inconsistent with the provisions of section 6(6), 236 and 251 of the 1979, Constitution of the Federal Republic of Nigeria. In a categorical and clearer term, the Kano State Edict sought to exempt the Kano State Government, its agencies and any other enterprise in which the State holds controlling shares or interest from the operation of the Sheriff and civil Process Law. In that case, the Appellant obtained Judgement against the Military Governor of Kano State, the Attorney General and

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<sup>91</sup> (1991)5 NNLR Part 194 p. 754

Broadcasting Corporation of the State but could not levy execution of the same because of the provisions of the Sheriffs and Civil Process (Amendment) Edict of 1987 which provides *inter alia*, that the provisions of the Sheriffs and Civil Process Law shall not apply to the Government of the State, its agencies and any enterprise in which it holds controlling shares or interest. The Judgement sum was N20, 000.00 (twenty thousand Naira) and N1, 000.00 (one thousand Naira) costs only. The appellant/applicant then brought an originating summons before the High Court of Kano State to declare the said Law as void being contrary to section 6(6), 236 and 251 of the 1979 Constitution. These sections of the 1979 Constitution are the same as sections 6(6) and 287 of the present 1999 Constitution of the Federal Republic of Nigeria (as amended). The learned trial judge, Justice Rowland of the Kano State High Court (as he then was) dismissed the application. The appellant/applicant then appealed to the Court of appeal which upheld the appeal and held as follows:

The learned D.P.P had submitted that no country in the common wealth of Nations allows execution of judgement against the state. That was so in Nigeria before the 1979 constitution since the State could not be sued in tort. Nor could the State be sued in contract except by way of petition of Rights. Then the principle of the king (State) could no wrong prevailed. The 1979 Constitution changed all that. Section 6 thereof gave the Superior Courts of record a compendium of judicial powers, and sections 236 gave a High Court of a State unlimited Jurisdiction. Under the new dispensation, which has also been enshrined in the 1989 Constitution, it ought to be the duty of the Attorney General, Federal or State to consult quickly with the Minister/Commissioner of Finance or Budget to provide Funds to satisfy Judgement debt lawfully obtained against the State. No Attorney General worth his salt should fold his arms and do nothing when the State is a Judgement debtor. Under section 251 of the Constitution, decisions of the Supreme Court, Court of Appeal and High Court shall be enforced in any part of the Federation by all persons and authorities and by courts of subordinate jurisdiction to the three courts aforesaid. ... If any decision of the Supreme

Court, the Court of Appeal or any other High Court is sought to be executed in Kano State in a judgement obtained against the government of Kano State or any of its agencies and enterprises in which it holds controlling shares or interests the said Edict of 1987 would halt such exercise of Constitutional powers under section 251, and will be in conflict with that section. Also execution of judgement is part of the compendium of judicial powers of the court under section 6, for which it has unlimited jurisdiction under section 236 of the said Constitution: That Edict by ousting the jurisdiction of the court in its powers to enforce Judgement against all parties in the case, as regards judgement obtained against the Kano State and its Agencies or Enterprises is as bad an ouster of the court's jurisdiction as the ouster in chieftaincy matters in the Ondo State Chief's Edict declared in Adewunmi's case by the High Court, Court of Appeal and the Supreme Court as inconsistent with sections 6 and 236 of the Constitution and therefore void. I too hereby declared the said edict of 1987 enacted by the governor of Kano State as void being inconsistent with sections 6, 236, and 251 of the 1979 constitution.

Careful perusal of the reasons for setting aside the petition of Rights Act and the relevant provision of the sheriffs and Civil Process (Amendment) edict, 1987 of Kano State in the two cases above shows that the same reasons are also applicable to the provision of section 84 (1) of the Sheriffs and Civil Process Act under consideration. By necessary implications, the section is a clog and in practice, does actually constitute a bar to the execution of judgement against government or any of its agencies. As in the petition of Rights Act, the section did not say whether it is mandatory for the Attorney General to give his consent to the attachment of monies in control of government, its agencies or any Public servant vide garnishee order. The time within which he shall give such consent has not also been provided by the said law. Although section 84 of the Sheriffs and Civil Process Act did not expressly oust the jurisdiction of the court to enforce judgement against government, as does the Sheriffs and civil Process (Amendment) Edict of Kano State; the implications of the two sections, for all

intent and purposes, are practically the same. This is so because, Section 84 of the Sheriff and civil Process Act, did not make it mandatory on the Attorney General to give his consent to the execution of judgement against government when applied for. If the Attorney General refuses to issue such consent, the section did not stipulate what the court shall do to enforce or execute its judgement. In other words in such circumstances, the section did not give straight forward authority to the court to execute its judgement without the Attorney General's consent. The result is that applications for such kind of consent could be and are often treated with levity by Attorneys General in Nigeria for the purpose of pleasing their political mentors and for the purpose also of protecting political administrations to which they belong. This is detrimental to judgement creditors and the overall interest of justice. When viewed another way, the provisions of section 84(1) of the Sheriffs and Civil Process Act, also falls short of international standard as enshrined in various International Legal Instruments such as the African Charter on Human and peoples' Rights, which forms part of the Nigerian law by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,<sup>92</sup> the charter imposes a duty on State Parties to guarantee independence of judiciary, who shall under article 3 of the same charter, give equal treatment to all persons including government in the course of Administration of Justice. It is for this reason that the courts in some African countries which operate similar judicial systems to Nigeria, had courage to decide the Constitutionality of legal provisions similar to section 84 (1) of the Sheriffs and Civil Process Act as follows:

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<sup>92</sup> Cap. A9 *Laws of the Federation of Nigeria*, 2004.

1. Ghana : recently in this country, the Court of Appeal dismissed an Application for stay of proceedings brought by the Attorney General of that country to halt the execution of a garnishee order absolute made by a High Court which had given the judgement of \$1.3 million dollars against the Federal Ministry of Agriculture in that country. The fact of the matter was that in 2005 the MFA entered to an agreement with Isofoton S.A. for the Company to provide a Solar P.V. powered water pumping and irrigation system in remote rural areas of Ghana under the 2<sup>nd</sup> Ghana-Spanish financial protocol. However, for unspecified reasons, the Ministry cancelled the contract and awarded it to another firm. Isofoton S.A. brought an action against the State in 2008 for wrongful termination of a contract. It secured a default judgement but the State went to court in 2009 and filed processes in an attempt to set aside that judgement. This brought the two parties to the table to discuss an amicable settlement consequent upon which the government offered to pay \$1.3 Million. On the 28 September, 2010, the settlement agreement was filed and adopted by the court on 29 September, 2010. The State paid \$400,000 of the agreed sum and failed to pay the remainder. On these ground, Isofoton SA proceeded to garnishee the Agriculture Ministry's account. The order was granted on 21<sup>st</sup> November, 2011. It was as a result of this that the Federal Attorney of that country applied unsuccessfully for an order staying the execution of the garnishee order.<sup>93</sup>

1. In Uganda: the High Court of Uganda, made an order garnishee absolute in *Mildred Lwango v. Administrator General and Anor.*<sup>94</sup> in respect of funds held by the Administrator General, a Public Officer. The court held that since the

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<sup>93</sup> Babalola A., Op. Cit. p. 61; Ghana News Spy Ghana.com. "ISOFOFON CASE. Appeal's Court throws out A.G.'s application" available online at <http://www.spyghana.com/isofoton-case-appeal-court-throw-out-ags-application> (accessed on 05 March, 2013).

<sup>94</sup> Suit No. 0086 at 2002.;

Administrator General could not deny that he was a judgement debtor, he had no option but to pay the judgement debt.

2. Malawi: Here, the High Court of Malawi in the case of *Car Sales v. Attorney General* held that:

As we understand it, there is no law in Malawi that would stop government to obtain a garnishee order if it wanted to enforce a judgement obtained against any other person. Yet in the National Bank of Malawi's case this court conferred government immunity from garnishee orders in respect of funds due or accruing to it. The immunity that was conferred on government is not clearly spelt out in the said civil procedure (suits by or against government or Public officers) Act. Indeed, it is against the Rule of Law if we were to allow that government should be able to obtain a garnishee order in respect of funds due or accruing to a person when it is impossible to do so against government funds. This is more so where our legislature did not enact a Law to shield government from the effects of a garnishee order. In the absence of law conferring immunity to government, the court cannot justify its decision that has the effect of shielding government by not subjecting it to the same mode of enforcing judgment that it might employ against private persons.<sup>95</sup>

The above exemplary decisions indicate that provisions of law, such as section 84(1) of the Sheriffs and Civil Process Act is no longer popular with courts in the current civilized world and in societies that desire to live by the Rule of Law rather than the whimsical Rule of Man. It is submitted that if Superior courts in African countries, such as Ghana, Malawi and Uganda could guard their judicial independence and set aside similar provisions in their laws as section 84(1) of the Sheriffs and Civil Process Act, there is no reason why the same should not be the case in Nigeria. The decision of the Court of Appeal in the *Onjewu's* case in our view therefore is most regrettable. The said decision was reached *per in curium* and ought to be revisited because; it is in conflict with the basic Constitutional principles of Separation of Powers, enshrined in the Nigerian Constitution. The

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<sup>95</sup> Civil Cause No. 364500 2001.

court of Appeal in that case only succeeded in confusing the legal position concerning enforcement of judgement against government, to the detriment of Judgement Creditors and effective administration of justice. In this country, executive aversion to court orders is not new and same is not unconnected to the existence of legal provisions such as section 84 of the Sheriffs and civil process Act in the body of our laws. The executive control of the law enforcement agencies such as the police, on which the courts relies in the enforcement of their judgement, is also a factor. This problem could however, be settled if the court realizes the fact that it is the last hope of the common man and protect its judicial independence. If the executive also realizes the fact that the safest way to peace, progress, political and economic advancement in any society, lies in obedience to court orders by the government and citizens alike. In fact, a government that abdicate its responsibility to obey court orders in a democratic society has no business demanding for obedience to its lawful orders. Anything contrary to this is an aberration, an invitation to anarchy, and will do no good to anybody government and the governed - and is capable of consuming the citizens and the government itself.

### **3.3. Powers of the Attorney General in Criminal cases.**

In criminal cases, the powers of Attorney General, whether State or Federal, are similar. The only difference being that the power of the Federal Attorney General is exercisable solely in relation to the Federal offences i.e. offences created by or under an Act of the National Assembly, while that of the State Attorney General are exercisable in relation only to those offences created by or under the law of the State House of Assembly.<sup>96</sup>

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<sup>96</sup> S. 174(1-3) & 211 (1-3) of the *Constitution of Federal Republic of Nigeria*, 1999.

Under the Nigerian Constitution, 1999, the Attorney General, whether State or Federal, can institute, undertake, take over or continue any criminal proceedings against any person in any court of law save a court martial. This power however, is rigidly demarcated. While a state Attorney General has power to institute and undertake, take over and continue or discontinue any criminal proceedings against any person for any offence created by or under the law of the state House of Assembly; the Federal Attorney General, has power to institute, undertake, take over and continue any criminal proceeding against any person and for any offence created by or under an Act of the National Assembly.<sup>97</sup> Thus, the State Attorney General cannot prosecute for an offence created by or under an Act of the National Assembly (i.e. a Federal offence) without the express delegation of the Federal Attorney General. Conversely, the Federal Attorney General cannot prosecute for a clearly state offence without authorisation by the state Attorney General.<sup>98</sup>

Therefore, before an Attorney General can Institute, take over or discontinue any criminal proceedings against any person, he or she must determine whether the offence is a State or a Federal offence. It is only when the offence is within his jurisdiction that he can institute, undertake, take over or discontinue a criminal prosecution in relation thereto. When an offence is a State offence, it is within the automatic competence of a State Attorney General. If it is a Federal offence, it is within the competence of the Federal Attorney General. Express delegation is therefore, required from the competent Attorney General before the other Attorney General can validly deal with offences within the other's competence.<sup>99</sup>

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<sup>97</sup> Supra note 54..

<sup>98</sup> *Anyebe v. State* (1986) 1 S.C. p. 87; *Emelogu vs. The State*(1988)2 N.W.L.R. (PART 78) Or 5 S.C.N.J. P. 79.; *Nyame v. State* (2010) 4 S.C.M. p. P.61.

<sup>99</sup> *Emelogu v. The State* (1988) 2 NWLR. (Pt. 78) .

In determining whether an offence is a Federal or State offence, reference shall always be made to the statute creating the offence. If an offence was created by the law of a State House of Assembly, it is a State offence. Where however, the offence was created by an Act of the National Assembly, the offence is a Federal offence within the competence of the Federal Attorney General. A State Attorney General therefore, has no prosecutorial power over the same without express delegation from the Federal Attorney General.<sup>100</sup> However, there are circumstances where an Act of the National Assembly is passed to take effect as a State law. In such circumstance, offences created under that Act are both State and Federal offences. Both State and Federal Attorney General are therefore, competent to prosecute any person who commits or is alleged to have committed an offence in contravention of the Act.<sup>101</sup> This is so because; the Federal Law was created to operate as a State Law and consequently falls within the prosecutorial competence of the State Attorney General at the same time.

Under the Constitution of the Federal Republic of Nigeria, 1999, the powers of the Attorney general (Federal and State) are classified into:

- (i) Power to institute and undertake criminal proceedings.
- (ii) Power to take over and continue any criminal prosecution instituted by any other person or authority; and
- (iii) Power to discontinue any Criminal Prosecution.

### **3.3.1. Powers of the Attorney General to Institute and Undertake Criminal Proceedings.**

The power of the Attorney General to institute and undertake Criminal Proceedings are provided under sections 174(1) and 211(1)(a) of the Constitution of

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<sup>100</sup> Ibid.

<sup>101</sup> *Nyame v. The State* (2010) 4 S.C.M. p. 6.

Nigeria, 1999. For the Federation, Sections 174(1)(a) of the Constitution, provides 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”. While section 211(1)(a) contains identical provisions for the State Attorney General.

Strict interpretation of section 174(1)(a) and 211(1) (a) of the Constitution ,suggests that the Attorney General has unqualified discretion to institute, undertake, take over 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.<sup>102</sup> This is more so, when Literal interpretation of a statute, do not always lead to a correct interpretation and correct intention of the law makers. Where literal interpretation of a Statute would produce 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 arrive at the correct intention of the law makers.<sup>103</sup> 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 Constitution for the purpose of good governance and welfare of the State on the principle of freedom, equality, and justice and for the purpose of

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<sup>102</sup> *Supra* note 59.

<sup>103</sup> *Adesanya v. President of the Federal Republic of Nigeria* (1981) 5 SC p. 112 at 134.  
*Uzoukwu v. Ezeonu* 11(1991) 6 NWLR (Pt. 200) p. 708

consolidating the unity of people.<sup>104</sup> Therefore, based on this important Rule or principle of interpretation, the interpretation above can not in any way 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 of 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 shall not be deprived of such liberty unless he commits an offence or reasonably suspected of having committed a criminal offence.<sup>105</sup>

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 *Mohammed Abacha V. The State*,<sup>106</sup> the right of the Appellant to personal liberty and to freedom from arbitrary prosecution was upheld against Attorney General Lagos State. In that case, the Attorney General of Lagos State frivolously accused the Appellant of Conspiracy to Murder and the Murder of one Kudirat Abiola, the late wife of a renowned business man and one time presidential candidate in Nigeria, Late Moshood Abiola. The Supreme Court however, prevented his prosecution by holding that the Appellant, who was not in any way linked to the offence charged by proof of evidence, cannot lawfully be prosecuted for the same offence. The court further held that a mere suspicion of the commission of an offence against a suspect, no matter how grave, can not lead to criminal prosecution of the Appellant or any other person whatsoever. In other

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<sup>104</sup> *Supra* note 61..

<sup>105</sup> Section 36 (8); Section 36 (6) (c) of *the Constitution of Nigeria, 1999* (as amended). *Abacha V. The State* (2002) II S.C.Q.R part 345 at p. 353

<sup>106</sup> (2002) F.W.L.R. (Part 108) p. 1355.

word, where no reasonable ground exist for believing that a person has committed a criminal offence, such a person can not be prosecuted in a criminal trial since doing so will be an infringement of his right to personal liberty.

Similarly, an 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; they enjoy immunity from criminal prosecution within the period they continue to hold office.<sup>107</sup> Where therefore, a criminal prosecution is instituted against those persons, the charge or charges will be set aside as incompetent.<sup>108</sup> This immunity is however, not absolute. It is limited only to the period within which they continue to hold their respective offices and does not extend to the members of their families.<sup>109</sup>

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 office, be 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 of the 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 another person is appointed to serve in his place. From then on, he could be prosecuted for the offence committed while in office.<sup>110</sup>

### **3.3.1.1 Delegation of the Prosecutorial Powers of Attorney General.**

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<sup>107</sup> S. 308 *Constitution of the Federal Republic of Nigeria*, 1999; *Fawehinmi v. I.G.P.* (2002) F.W.L.R.

Part 108 p. 1355.

<sup>108</sup> *Fawehinmi v. I.G.P.* (2002) F.W.L.R. Part 108 p. 1355.

<sup>109</sup> *Abacha v. The Federal Republic of Nigeria* (2014) 2 S.C.M. p.1 at p.9 ratio 9.

<sup>110</sup> *Ibid.*

The powers of the Attorney General under section 174(1) (a) and 211(1) (a) of the constitution are exercisable by him in person or through officers in his department.. That is to say, through Law Officers ranging from the solicitor General, the Director of Public Prosecution, other Directors, Law Officers of various grade and Pupil State Counsels in the National youth service posted to the state or the Federal Ministry of Justice in their service year. These law officers according to Osamor B.,<sup>111</sup> do not by any stretch of imagination or application of the rule of interpretation, include private legal practitioners. Arguing against the involvement of private legal practitioners in Public prosecution for the State, Osamor said:

The power of the Attorney General may be exercised in person or through officers in his department. Officers in the department of Attorney General will clearly include state counsels of all grades, which are from pupil state counsel (lawyers on National youth service) to the D.P.P. and may also include a minister of state for justice ( the office of the minister of state for ministry of justice is not a creation of the Constitution). The power conferred on the Attorney General in section 174 and 211 of the Nigerian Constitution, 1999, can only be exercised by the Attorney General himself or through officers of his department by the literal interpretation of the section. This by no stretch of imagination or application of the rule of interpretation include private legal practitioner.... All the powers vested in the Attorney General by sub-section (1) of section 174 and 211 of the Constitution subject to the same section allows the Attorney General liberty to delegate these powers subject only to the limitation that the delegate must be a law officer in his department. No private legal practitioner comes under this definition. The current practice where private legal practitioners appear in court to represent the state is therefore, unconstitutional

When viewed in the light of the fact only that the conduct of public affairs in Nigeria is presently identified with chronic corruption, the above view may be

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<sup>111</sup> *Fundamentals of Criminal Procedure Law in Nigeria*, Dee Sage Nigeria Limited, Abuja, (2004) first edition, pp. 123-125.

justified. It is no longer news in Nigeria that corruption in many forms – tribalism, sycophancy, nepotism and the likes - decides ones luck in securing employment, contracts or patronage for any service or services he specializes in. In fact, according to one writer, corruption in public affairs in Nigeria has now becomes a cankerworm which defies medication.<sup>112</sup> As Dankofa wrote,<sup>113</sup> when the ruling class have become parasitic on the economy, their main source of material wealth and social standing has become the state, it is very easy to see why Mr. Osamor could hold an opinion such as the one above. It is possible for an unscrupulous Attorney General in Nigeria to use Private Legal Practitioners in Public Prosecution for self enrichment, the enrichment of his friends, crannies and political associates to the detriment of the state. In some offences involving political class or big men in the society, it is possible also that an unscrupulous private practitioner engaged by the State, may compromise standard for some material or other benefits, particularly in cases with political flavour. Therefore, to those extents only, Mr. Osmor’s view may be justified.

However, history has told us that the office of Attorney General both in England and in Nigeria, is a repository of public trust. In the discharge of his duties Attorney General has absolute discretion to decide what is in the best interest of the society<sup>114</sup>. As the law stands now, whether that discretion was exercised positively is not for anybody to query; his decision in that regard is final.<sup>115</sup> Where the discretion was exercised arbitrarily, he could be punished only by removal or

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<sup>112</sup> Akujobi, A.T. (2010), Perspective on corruption and its control in Nigeria, in: Maidoh D.C. et. al. (eds.), *Judicial Administration & other Legal Issues in Nigeria*, Malthouse Press Limited, Lagos, p. 157.

<sup>113</sup> Dankofa, Y. (2008), The Fallacy of Democracy in the absence of Development and the Role of Law: the Need For Enthronement of Constitutional Democracy in Nigeria, *Ahmadu Bello University Zaria Journal of Public and International Law*, Volume I, No. 2 pp. 155-166.

<sup>114</sup> *Ilori V. The State* (1983) 2 SC. p. 155.

<sup>115</sup> *Audu v. Attorney General of the Federation* (2012) 12 (Pt. 2) S.C.M. p. 23.

assignment to another ministry by his appointer. Another sanction which may lie against him may be a public condemnation of his action or in action in the court of public opinion.<sup>116</sup> He therefore, has the power to assign any case to any private legal practitioner when he considers the appointment to be in the best interest of the society and the interest of justice.

Secondly, considering the fact that most State and Federal Ministries of Justice in Nigeria, are bedevilled with the problems of understaffing, lack of adequate facilities for effective discharge of their duties, inadequate staff training, coupled with the large volume of cases calling for their attention; one cannot complain but only see reason why it is imperative for Attorney Generals in deserving cases, to invoke and continue invoking the services of private practitioners to ensure effective and efficient prosecution of Criminal and civil state cases. That could at least, help control congestion which has now become a problem in the Nigeria's Criminal Justice system.<sup>117</sup> The recruitment process of law officers nowadays, is also a factor worth consideration. Recruitment in to Public service, that of law officers is no exception, has now become a matter of who favouritism. Officers are employed not strictly on merit, but based on social connection and inter personal relations. The appointment Sometimes, is based on tribal and religious sentiment with the attendant negative consequences to the smooth and effective administration of justice.<sup>118</sup>In this kind of situation therefore, it would be quite absurd and against collective interest of society, if Attorney General is deprived of discretion to use the services of private practitioners who may be more experienced, better skilled and trained in ensuring proper and effective

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<sup>116</sup> *Ilori v. The State* (1983) 2 S.C. p. 155.

<sup>117</sup> Fred, O. O. (2010), Administration of Justice: Role and Constraint of the Public & Private Bar in: Maidoh D.C Et-al. (eds.), *Judicial Administration and other legal issues in Nigeria*, Malthouse press limited, Lagos, p. 9

<sup>118</sup> *Ibid.*

Administration of justice to the advantage of the Public, who is strictly his client. It is in this wise, with greatest respect, that we consider Bob Osamor's view as erroneous.

Regard been had to the history of the powers of Attorney General, the problems we highlighted above and the need for effective justice delivery, particularly in criminal cases, Literal rule of interpretation is not suitable to the interpretation of section 174(2) and 211(2) of the Nigerian Constitution as suggested by Osamor Bob above. Interpretation with that Rule will be counterproductive and detrimental to public interest, the interest of justice and the need to prevent abuse of legal process. The reason being, that resorting to that interpretation will defeat the intention and the very essence of the discretion granted the Attorney General under the law. In any case, courts have settled this controversy and have held in plethora of cases, that Attorney General has unfettered discretion to use the services of private legal practitioners in the prosecution of State cases. In the case of the *State v. Aibangbee*,<sup>119</sup> a case where the appearance of Chief G.O.K. Ajayi S.A.N. for Lagos State, was challenged before the Supreme Court of Nigeria, the court held that when it is said that the Attorney General and his officers can institute and undertake criminal prosecution under section 191 of the Constitution of the Federal Republic of Nigeria, 1979 now section 174 of the Constitution, it does not mean that the Attorney General cannot brief a private legal practitioner to appear on his behalf either alone or together with a State Counsel. It means only, that the Attorney General and his officers have discretion to institute criminal prosecution and undertake the prosecution by themselves. The objection was therefore, overruled.

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<sup>119</sup> (1988) 7 S.C. Part 1 p. 196.

Similarly, in a more recent case of *Comptroller Nigerian Prison & 2 ors. v. DR.Femi Adekanye & 25 ors.*,<sup>120</sup> the position of the law in *Aibangbee's* case was emphasized by the Supreme Court. In that case, the respondents who were standing trial for offences under the failed Bank Decree instituted Habeas Corpus proceedings praying the High Court of Lagos State for their bail due to their inability to satisfy the draconian conditions of Bail under the Decree. The appellant, who happened to be the state, filed preliminary objection challenging the jurisdiction of the Lagos state High Court to entertain the action which was overruled. This led to Appeal to Court of Appeal by the Appellant. In the course of the appeal, the Appellant was represented by Chief Fidelis Nwadialo S.A.N. together with Emeka Ngige both of them private legal practitioners. The respondent objected to the appearance of Nwadialo on behalf of the Attorney General of the Federation. The Supreme Court described this objection as bizarre and held that by presumption of regularity, whenever a private legal practitioner appears for a client, it is presumed that he has his authority to do so. And who so ever asserts that no such authority exists, has the burden of proving the same. This decision in effect, approves the authority of Attorney General to appoint private legal practitioners in prosecution or defence of state cases.

In the exercise of his powers of the institution and undertaking of 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 based on his subjective conscience. Fola Arthur worry however observed that:

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<sup>120</sup> (2002) F.W.L.R. Part 120 p. 1650; *Nnakwe vs. The State* (2014) All F.W.L.R. Part 716, p. 414. or (2013) 12 (Part 2) S.C.M., p. 406.; *Egbe vs. C.O.P.* (2008) ALL F.W.L.R. (Part 406) p. 1849.

The decision to prosecute ought to be primarily geared towards the public benefit in terms of protecting public norms and social cohesion by underlining the principle of accountability as a deterrent to others who might be inclined to break the law. In concrete terms, there is in the decision to prosecute serious implications 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 counsel, the real possibility of loss of his liberty. Or more fundamentally the real possibility of loss of life and the opprobrium of society which tends to immediately pass judgement as to his probable guilt even before all the facts are in.<sup>121</sup>

Some of the following guidelines offered by jurists may be useful. Examples are:

- a. Are there any technical obstacles that could constitute fatal flaw to the prosecution of the case? An instance of a fatal flaw is the institution of proceedings in a court whose jurisdiction does not extend to where the accused committed the offence in question. If the answer to the above question is in the negative then the proceedings can be instituted, if not, it is pointless to do so.
- b. Is the evidence available sufficient to justify the institution of criminal proceedings against the accused? In other words, is there a better than fifty per cent chance that the judge will find the accused guilty on the evidence that the prosecution is in the position to present? This is called the fifty-one percent Rule as enunciated by a Director of Public Prosecutions of England, Sir Thomas Hartington. If this second question is answered in the affirmative, then the Attorney General has a green light to institute proceedings. Otherwise, it will be a waste of

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<sup>121</sup> Worry F.A., (2000), *The Prosecutor in Public Prosecution*, Josadeen Nigerian Limited, Lagos, p. 41.

Public fund and energy of Prosecutors to institute Criminal Prosecution in such circumstance.<sup>122</sup>

In the end, Attorney General must satisfy the dictate of his training as a lawyer as well as his conscience in making a decision. The decision he makes is his alone, and no rules or guidelines can reduce the burden. It is in recognition of the very sensitive and demanding nature of the decision he has to make that the Constitution confers on the Attorney General the right to blow hot and cold, to begin criminal trials and to discontinue them without been questioned by the court or any other judicial organ or body.<sup>123</sup> Attorney General expectedly, must be bold and assertive in the exercise of his powers because, criminal trial may be used as a weapon for the harassment of innocent citizens by unscrupulous elements. At this instance, it is the duty of the Attorney General where he perceived that his right is being used for dubious purposes to take either of two available options to him. They are:

- a. Taking over the prosecution of the case from the prosecutor whether private prosecutor, police or any other prosecuting authority.
- b. Entering *nolle prosequi*.

### **3.3.2. Power of the Attorney General to Take over and Continue Criminal Proceeding.**

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 law and ensuring the sustenance of peace in Nigeria, is not the exclusive preserve of the Attorney

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<sup>122</sup> Ajibola, B. (1989), The Federal Attorney General: Powers, Duties and the Administration of Law in: Ajomo M.A., *Fundamentals of Nigerian Law*, Nigerian Institute of Advanced Legal Studies Law series, No. 2 p.1.

<sup>123</sup> Ibid.

General. Indeed Criminal Law by its very nature, is addressed 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 coexistence of the society. This is so because, the peace of the society is the responsibility of everyone, and as far as the protection against crime is concerned, everyone is the others keeper.<sup>124</sup> 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 authorities such as the Police under section 23 of the Police Act<sup>125</sup>, the Economic and Financial Crimes Commission (EFCC) under section 12(2)(a) of the Economic and Financial Crime Commission(Establishment) Act,<sup>126</sup> the Independent Corrupt Practices and other Related Offences Commission (ICPC)<sup>127</sup> the National Drug Law Enforcement Agency under section 7(1) & 8(2)(a) of the National Drug Law Enforcement Agency Act,<sup>128</sup> to mention but a few. Subject to the consent and reluctance of the Attorney General to prosecute, a Private Person can also prosecute under sections 77-78 and section 340-343 of the Criminal Procedure Act,<sup>129</sup> Section 143 & 185 of the Criminal Procedure Code<sup>130</sup> applicable to the Southern and the Northern States of Nigeria respectively. The rules are promulgated by the legislatures who are representatives of the society and have so made the same for the benefit of the society.

The power of the police to prosecute for criminal offences is provided under section 23 of the police Act.<sup>131</sup> The section provides that:

Subject to the provisions of section 174 and 211 of the  
Constitution, of the Federal Republic of Nigeria, 1999

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<sup>124</sup> *Fawehinmi V. Akilu* (1987) 11-12 SCNJ p. 151

<sup>125</sup> Cap. p. 19, *Laws of the Federation of Nigeria*, 2004.

<sup>126</sup> Cap E.1 *Laws of the Federation of Nigeria*, Vol. 5 (2004)

<sup>127</sup> *Independent Corrupt Practices and other Related Offences Commission Act No. 5*, 2000.

<sup>128</sup> Cap. N. 30 *Laws of the Federation of Nigeria*, 2004.

<sup>129</sup> Cap C. 41, *Laws of the Federation of Nigeria*, 2004.

<sup>130</sup> Cap. C. 42, *Ibid.*

<sup>131</sup> Cap. P. 19, *Ibid.*

(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 the Attorney General. He has authority to take over and continue or discontinue any criminal prosecution instituted by the police. This 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 of 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.

The power of the Attorney General to take over and continue Criminal Prosecution instituted by any other authority or person is categorically stated under section 174(1)(b) and 211(1)(b) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that “The Attorney General shall have power to take over and continue any such criminal proceedings that may have been instituted by any other authority or person.”

In practice, this power of the Attorney General is not usually exercised. But Attorney General has unfettered discretion to so exercise the same when a situation calls for it. Attorney General may and often does, exercise the power in the following situations:

(i) 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 arise where a

complainant or victim of a crime alleges that the prosecuting police officer is bribed to compromise the criminal prosecution against a particular accused person. If on 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.

(ii) Where it occurs to the Attorney General that a Public Prosecutor in a particular case has his or 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 the charge or charges against the accused.<sup>132</sup> In practice, this situation may arise for instance, where an accused person complained 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; or 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. 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.

(iii) Where the Attorney General considers it desirable in the exercise of his powers as Chief Law Officer and Chief Law Prosecutor of a State or

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<sup>132</sup> S. 253 Criminal Procedure Code, Cap. C. 42 *Laws of the Federation of Nigeria*, 2004.

the Federation in the interest of justice and the need to prevent abuse of Legal Process.<sup>133</sup>

In any of the above situations, the Attorney General can appear personally before a trial court and take over the conduct of Criminal proceedings or assign any legal practitioner to do so, from the relevant authority or person. Neither the court nor the prosecutor concerned has authority to question the exercise of his power.

### **3.3.2 Power of the Attorney General to Discontinue Criminal Proceedings (*Nolle Prosequi*):**

The power of the Attorney General to discontinue Criminal Prosecution otherwise known as the Power of *Nolle Prosequi*, is the discretionary power of the Attorney General to refuse to proceed with a criminal prosecution instituted by him, law officer in his department or any other prosecuting authority whatsoever. *Nolle prosequi* is a Latin term which in ordinary parlance means unwilling to prosecute.<sup>134</sup> This power of the Attorney General is a power of great antiquity. It is one of the pre-eminent prerogatives of the Attorney General under English Common Law which was inherited by Nigeria into body of its judicial process as a colonial heritage from England.

There are divergent opinions as to how exactly the plea of *nolle prosequi* originated. Apparently however, this power stem from the principle that parties who instituted proceedings, have the right to terminate the same. The power is given to Attorney General by virtue of his position as guardian of Public interest,

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<sup>133</sup> Hambali, Y.D.U. (2012), *Criminal Litigation in Nigeria*, Feat Print and Publishing Limited, Lagos, p. 194.; Worry, F.A. (2000), *The Prosecutor in Public Prosecutions*, Josadeen Nigeria, Limited, Lagos, p. 14.

<sup>134</sup> *Black Law Dictionary*, 11<sup>th</sup> edition, p. 1147; *Audu v. Attorney General of the Federation & 1 other* (2012) 12 SCM Pt 2. p. 23 ratio 6.

who initiates and at whose instance Public prosecutions are initiated. In the light of what he considers as being in public interest and the interest of justice, Attorney General has unfettered discretion to terminate criminal proceedings so instituted by him or on his behalf.

Professor Ajomo M.A. said:

Opinions diverge as to how exactly the plea of *nolle prosequi* originated. It would appear that the power of *nolle prosequi* is based on the first principle of prosecution at Common Law that all proceedings are at the suit of the Crown, since all offences are either against the King's peace or his Crown and dignity. Pre-eminent of prerogative powers exercisable by Attorney General as Chief Legal representative of the Crown in the criminal prosecutions is the power of *nolle prosequi* – the basis seems that it is natural for the Crown in whose name indictment embodying criminal charges are brought, to reserve the right to terminate the proceedings at will. The first recorded instance of recourse to the arbitrary procedure dates back to 1555.<sup>135</sup>

In Nigeria, the power of *nolle prosequi* was conferred on the Attorney General under section 174(1){c} and 211(1){c} of the 1999 Constitution. For the Federal Attorney general, section 174(1){c} Provides that: “The Attorney General of the Federation shall have power to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.” Proceedings in the context of this section, means the regular and orderly progression of a criminal law suit, including all acts and events between the time of arraignment and the entry of judgement.<sup>136</sup>

The power of *nolle prosequi* is distinguishable from the Power of Attorney General to terminate a criminal case after close of investigation by the police and before commencement of trial under section 253(3) of the Criminal Procedure

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<sup>135</sup> Ajomo, M.A. (1990), *Nolle Prosequi*; an unquestionable tool in the hand of Attorney General in: Yemi Osibanjo (ed), *Towards better Administration of justice in Nigeria*, Federal Ministry of Justice law review series, Vol 4 p. 17.

<sup>136</sup> *Audu v. A.G.F.* (2012) 12 (Pt 2) SCM p. 23

Code. As opposed to *nolle prosequi*, the power of the Attorney General to discontinue or terminate a criminal case before trial, is usually exercised by the Attorney General when the police forwarded a case diary to his office for legal advice. At that stage, if in the opinion of the Attorney General, their investigation did not disclose a prima facie case, he can refuse criminal prosecution and order for the discharge of the suspect. This he can do even when a case is established but in his opinion, it will not be in public interest or the interest of justice to prosecute the particular accused person concerned.<sup>137</sup> An accused person could therefore, be validly granted Amnesty from criminal prosecution under this section. Although a discharge doesn't constitute a bar to subsequent criminal proceedings, under section 253(1) of the Criminal procedure Code, when a person so discharged has given evidence for the prosecution against an accomplice, he should not be (though technically he can be) prosecuted for that offence.<sup>138</sup>

The power of Attorney General to enter *nolle prosequi* is exercisable by him in person by informing the court of his intention to discontinue criminal prosecution or in writing through Law Officers in his department.<sup>139</sup> Where however, there is no incumbent Attorney General, none of the officers of his department including the Solicitor General can validly exercise the power. This is so because, in *Attorney General of Kaduna State vs. Hassan*,<sup>140</sup> it was held that “a solicitor general has no power to discontinue criminal proceedings on behalf of the State. Any such discontinuance by the Solicitor General is unconstitutional, *ultra vires*, null and void.” When however, this power is exercised by the Attorney General, a person discharged there upon, can subsequently be prosecuted for the same offence and

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<sup>137</sup> *Ilori vs. The State* (1983) 2 SC p. 155

<sup>138</sup> *Jimoh Atanda vs. Attorney General Western Nigeria* (1965) NWLR p. 225

<sup>139</sup> *Attorney General Kaduna State vs. Hassan* (1985) 2 N.W.L.R. (Part 8) p. 483.

<sup>140</sup> *Ibid.*

based on the same facts ,as the Attorney General or his successor may deem fit. The discharge in such circumstance therefore, does not amount to an acquittal and will not constitute a bar to the subsequent prosecution of the accused concerned. In other words, it will not allow an accused person to raise the plea of *autrafois acquit*( meaning that the accused cannot challenge his subsequent prosecution for the same offence based on the same facts since he has not been tried of the offence).<sup>141</sup>

In the exercise of the Power of *Nolle Prosequi*, the authority of the Attorney General is unquestionable. He has full and complete authority to decide when, how and in which circumstance to exercise the power. His authority cannot be questioned by any court or his appointer. The Constitution merely expects the Attorney General to consider public interest, the interest of justice and need to prevent abuse of legal process in the discharge of his duties. Where he is not so guided by those considerations, his action can be questioned only in the court of public opinion. His appointer can also remove him in such a circumstance particularly where the heat of public criticism generated by his action becomes too much. This orthodox position of the common law was affirmed by Supreme Court in the case of *State v. Ilori*;<sup>142</sup> and was recently restated by the same court in the case of *Prince Abubakar Audu v. Attorney General of the Federation & Another*<sup>143</sup> In this case, the Appellant was arraigned before the Kogi State High Court sitting at Lokoja on eighty count charge under the Advance Fee Fraud (and other related offences) Act as well as the Penal Code applicable in Kogi State. He was released on bail on the 10 December, 2006. The matter was adjourned for hearing to 29 January 2007. Three days to that date, on the 26 January, 2007 Mr Yunus Ustaz Othman S.A.N., learned senior counsel for the Appellant, by an ex-parte application

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<sup>141</sup> Ibid.

<sup>142</sup> (1983) 2 SC p. 155;

<sup>143</sup> (2012) 12 (Part 2) S.C.M. p. 23.

secured from the trial court an order referring the questions: (a) whether the Advance Fee Fraud (and other related offences) Act No. 13 of 1995 particularly Section 1(3) thereof under which the appellant was arraigned at the trial court, was constitutional; and (b) whether the Economic and Financial Crimes Commission and the Attorney General of the Federation have power to institute Criminal proceedings in respect of offences under the Penal Code to the Court of Appeal.

On the 8 February, 2007 both Attorney General of Kogi State and the Attorney General; of the Federation entered *nolle prosequi* at the trial High Court discontinuing the case against the Appellant. The Kogi State Attorney General was personally at the court and restated the fact of their withdrawing the case against the Appellant. In its ruling of 9 February, 2007, the court *suo motu* made further reference to Court of Appeal of the question: whether an Attorney General of a State could legally and validly *enter nolle prosequere* in respect of a criminal charge alleging violation of a Federal Statute when a reference in respect of the same is already pending at the Court of Appeal. However, by their motion filed on the 13 March, 2007 the respondents urged the Court of Appeal to strike out the questions referred to it by the trial court. The Court of Appeal considered the questions on reference before eventually granting the respondent's application. Aggrieved, the Appellant appealed to the Supreme Court claiming that the case ought not to have abated since the *nolle prosequi* was entered at the trial court when the case was already pending on reference, to the Court of Appeal. The Supreme Court dismissed the Appeal and held as follows:

At any stage of any criminal proceedings before judgement, the Attorney General of a State or the Attorney General of the Federation may enter a *nolle prosequi* either by stating in court or filing appropriate process informing the court that the State intends that the proceedings abate. Once this is brought to the notice of

the trial judge, the accused person shall be discharged immediately from the charge the *nolle prosequi* was filed or entered. The judge has no power to question the Attorney General as to why he filed the *nolle prosequi*.

With the filing of the *nolle prosequi* by the Chief Law Officers of Kogi State and Nigeria, the trial judge ought to have discharged the Appellant and struck out the case since the case was no longer in existence. The court of Appeal was wrong to have considered the questions referred to it for determination after being aware from the Records of Appeal that the *nolle prosequi* had been filed. This is so because, there is/was nothing again before the trial court, and so there would be nothing for the Court of Appeal to send back. It amounted to an academic exercise for the Court of Appeal to waste judicial time considering questions from a case that is no longer in existence. There was no longer a live issue to be considered by the Court of Appeal in view of the *nolle prosequi* filed in the trial court. In a long line of cases it has been said over and over again that courts are constituted to determine live issues and not to engage in academic exercise. In view of the *nolle prosequi* filed in the High Court, the consideration of the two issues by the Court of Appeal amounted to academic exercise.

The constitution did not stipulate the circumstances when the Attorney General may exercise the power of *nolle prosequi*. However, the power may be exercised by Attorney General in the following circumstances:

- (a) Where the Attorney General finds at any stage of the proceedings that he has no sufficient evidence to prove the guilt of the Accused but is satisfied that there are sufficient grounds for securing more evidence. In this situation, he may suspend the prosecution by entering *nolli prosequi* pending such time when he will have sufficient evidence to use for the prosecution of the Accused;
- (b) Where in a joint trial the Attorney General is of the view that one of the Accused persons standing a criminal charge would be a material witness in establishing the guilt of others, he may enter *nolle prosequi* in respect of that

one so that he may serve as a prosecution witness in the trial of his co-accused. This is more so, because, under the law, where a person is charged jointly with others for a criminal offence, he cannot be a competent witness for the prosecution.<sup>144</sup> Therefore, in for example, syndicate crimes where the only material witnesses are the accused themselves, the Attorney General may have to decide to prosecute some of the members of the syndicate and use others as prosecution witnesses to secure conviction in public interest.

(c) Where the Attorney General is of the view that to continue with the prosecution of the Accused will further worsen the fragile security situation of a place rather than enhancing it, he may suspend such prosecution by entering a *nolle prosequi* in respect of the accused person until the security improves. This may explain the reason why the Attorney General of the Federation withdrew a charge of treasonable felony against Mr Henry Orker, the leader of the Movement for the Emancipation of Niger Delta, on the 13 July, 2009 under the amnesty programme of the administration of president Yar'adua for various atrocities committed by him and members of his organisation in the course of fighting for the freedom of self determination for the Niger Delta people to give peace a chance.<sup>145</sup>

(d) Where the Attorney General is of the view that entering the *nolle prosequi* will serve public interest.<sup>146</sup> This may arise for example, in a situation where the accused, his relations and the family of the victim of a crime happen to arrive at an amicable settlement of a case amongst them. Depending on the

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<sup>144</sup> Section 180 evidence Act NO.18, 2011.

<sup>145</sup> The Deal with Henry Orker, In: *Newswatch*, Vol. 50 No.4 July 27, 2009, p. 18.

<sup>146</sup> Hambali, Y.D.U. (2012), *Criminal Litigation in Nigeria*, Feat Print and publishing Lagos, p. 199.

nature and circumstances of an offence, and particularly where the only material witnesses are the victim and his family alone; it may not be in public interest for the Attorney General to insist on criminal prosecution when they become unwilling to testify at the trial due to the settlement. Though a crime is a wrong against the state and the victim's compromise is not binding on the Attorney General; but in such a situation, the Attorney General may not be able to prove his case without the co-operation of the victim and that of his family. It may thus be a futile exercise, a waste of time and resources of the state, if the Attorney General should insist on proceeding with the prosecution. Worry F. A., reasoned in a similar direction when he wrote as follows:

In a situation where an Attorney General is in the process of filing a Murder charge in Court and the families of both the accused person and that of the victim make an official visit to his office to inform him that they have settled the matter in the traditional way and are therefore requesting him to give finality to the process of settlement by not filing the charges. In fact the families of the deceased stated unequivocally that they are not prepared to testify at the trial since that would be a breach of the settlement and the Attorney General knows that without their testimony he cannot prove the case; can we describe this situation as one contemplated by the constitution? Would the decision not to prosecute in this circumstance be a decision in public interest and the interest of justice? Knotty question indeed. Constitutional wisdom holds that criminal matters are state matters and that the state stands in the paternal relationship to all citizens and offenders alike. Thus technically, the decision by the victim's family does not legally affect the power of the Attorney General to continue with the filing of the charge and requesting the court to compel their attendance in court as witnesses even against their will. That is to say that in Nigeria, the victim of the crime has no say in whether charges will be entered or not. But what purpose would be served here? Can the state really justify crying more than the bereaved? And if the bereaved come to the court and become hostile witnesses, would the interest of justice have been served. In this instance, attempting to force through prosecution would amount to acting contrary

to the wisdom of the legislature who conferred the power to prosecute and discontinue criminal prosecution and the court that sanctify it. If the family of the accused have made some form of restitution to the family of the victim, any further punishment may be oppressive. The Attorney General is entitled to look at this kind of request against the backdrop of the cultural values of the citizens since the law does not operate in vacuum.<sup>147</sup>

In circumstance such as the above, the Attorney General is entitled to act according to his conscience in the light of what he considers to be the ultimate goal of the society regarding the exercise of prosecutorial function. But a practical *bonafide* approach to justice should be the guiding factor. In such a situation therefore, it may be wiser and may be in the best interest of the society if the Attorney General allows the settlement to subsist. After all, the purpose of criminal law does not only lie on retributive punishment but also restitution and fostering peaceful co-existence amongst members of the society.

#### **3.4. Conclusion:**

The powers of Attorney General explained in this chapter above were not granted him to be exercised for whimsical purpose but, in the best interest of the public only. Therefore, the discretion granted to Attorney General in the exercise of those powers was only granted to allow him Liberty to consider alternative decisions in the enforcement of the Law and to humanize the system. If Attorney General and other prosecutors have little or no discretion in the discharge of their duties, they would be forced to prosecute all cases brought to them by the police and other Law enforcement Agencies. And ultimately, the enforcement process would be chaotic. Thus in the exercise of his powers – whether in the institution and undertaking of criminal proceedings, or taking over and continuing criminal proceedings instituted by any other authority or person; or discontinuing any such

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101. Worry, F. A. (2000), *The Prosecutor in Public Prosecutions*, Josadeen Nigeria, Limited, Lagos, p. 52

criminal proceedings - the Attorney General Is expected by the constitution to have regard to public interest, the interest of justice and the need to prevent abuse of legal process.<sup>148</sup> What is public interest has not been explained by the Constitution. The term is so wide, all encompassing and appears to be almost vague. In determining what Public interest is, the Attorney General must bear in mind not only Legal considerations, but also socio-political and often economic considerations. As the Attorney General is not merely a lawyer but also a Minister, he must bear the political implication of his decisions, weighing them against the needs of the maintenance of public order, public peace and the interest of justice.

Over the years however, and especially in recent times, there have been increased criticism of the Attorney General's powers in Criminal Cases. We have in chapter one to this dissertation highlighted some of those criticisms. According to Bukar Bwala<sup>149</sup> these criticisms started during the turbulent days of the civilian administration of the 2<sup>nd</sup> Republic where several disgraceful uses of the power were recorded. He cited example with Kwara State where during the 2<sup>nd</sup> Republic, the then Governor of Kwara State removed his Attorney General and did not appoint another. The Governor himself, a lawyer, then appointed himself Attorney General and entered a *nolle prosequi* in respect of a case pending before a Chief Magistrate C. O. P. V. Isiaka Sanni & 2 Ors.<sup>150</sup>

Now the question which remains and consistently being asked is, whether the 1999, Constitution of the Federal Republic of Nigeria, conferred Attorney General with unquestionable discretion in the discharge of his duties. We do not intend to go into detail of that controversy in this chapter. That will however, form the fulcrum of our discussion in Chapter four herein. Suffice it to say that a

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<sup>148</sup> SS. 174(3) and 211(3), *Constitution of the Federal Republic of Nigeria*, 1999(as amended)

<sup>149</sup> Bwala, B. (2009), *Legal Topics*, Midland Press Limited, Jos-Nigeria 2<sup>nd</sup> ed. p. 1

<sup>150</sup> Ibid.

situation where single individual is possessed with absolute discretion in the conduct of Public affairs is dangerous and calls for the concern of everyone who desires transparency in management of public affairs. It also calls for careful appraisal having regards to human frailties. The legal position for now, at least, might have ignored the general nature of the Nigerian Constitution; and the nature of Man in his bullish and selfish characteristic which tempts him to commit injustice against others irrespective of race, culture, religious or ideological affiliation. And it is in that light we shall approach our discussions in the next chapter.

## **CHAPTER FOUR:**

### **JUDICIAL REVIEW OF THE POWERS OF ATTORNEY GENERAL IN NIGERIA**

#### **4.1. Introduction:**

In the exercise of his powers, Attorney General (Federal and State) is required by the Constitution of the Federal Republic of Nigeria, 1999; to have regard to Public interest, the interest of Justice and the need to prevent abuse of Legal process. This rider to the powers of Attorney General contained in section 174(3) and 211(3) of the Constitution, has triggered debate as to whether the powers of Attorney General under the Constitution, are subject to judicial review. Those who argue that the powers of the Attorney General are subject to judicial review based their argument on the susceptibility of absolute powers to abuse by its holders. They posited that in Administrative Law, the discretionary power of every holder of power is subject to some form of review which requires that the power be exercised judicially and judiciously. Those who posited that the powers of Attorney General in Nigeria are absolute on the other hand, hinges their argument on the historical antecedence of the powers under the Common Law and the need for strict respect to doctrine of separation of powers entrenched in the Constitution, which requires strict maintenance of independence of the various arms of government from interference by others in the discharge of their respective duties under the Constitution. This chapter examines the debate.

#### **4.2 Arguments for the Judicial Review of the Powers of Attorney General:**

The advocates of judicial review of the powers of Attorney General argue that circumstances in Nigeria absolutely, do not justify the conferment of unquestionable discretion to Attorney General in the discharge of his duties. Edoba

B. Omoregie who echoed the sentiment of the followers of this view wrote as follows:

Nigeria is a developing country steeped in the throes of the vices attendant to our state of under development. One notorious prediction of such a state is the high incidence of weak political ethos. Thus, those who found 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 is not uncommon for political appointees to subject the values of their offices to the whims 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 an Attorney General refusing to exercise his powers against heavily suspected persons of having committed a criminal offence or having complicity in the commission of an offence; while readily discontinuing criminal prosecution against accused persons whose convictions 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 public interest, the interest of justice and the need to prevent abuse of legal process.<sup>151</sup>

In buttressing the sentiment expressed by Mr. Edoba above, reference can be made to so many arbitrary and disgraceful uses of powers of Attorney General witnessed in the history of Nigeria's Democratic Development. Bukar Bwala wrote that during the turbulent days of the civilian Administration of the 2nd Republic in Nigeria, several disgraceful uses of the powers of Attorney General were recorded. He cited example with a case in Kwara State where the Governor of the State removed his Attorney General and did not appoint another. The Governor himself, a lawyer, then appointed himself Attorney General and entered a *nolle prosequi* in respect of a case pending before a Chief Magistrate Court against his political supporters.<sup>152</sup>

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<sup>151</sup> Omoregie, E.B. (2010), Power of Attorney General Over Public Prosecution under the Nigerian Constitution: need for judicial restatement, *The Appellate Review*, Vol.1 No.1, pp. 135-148.

<sup>152</sup> The Legal Topic, Midland Press Limited, Jos, 2<sup>nd</sup> ed. p.1.

Another incident happened in Imo State. It was a case of embezzlement of substantial amount of Public Funds. The Attorney General had appeared for the accused while still at the Private Bar before his appointment as Attorney General. When he was so appointed as Attorney General, he used the opportunity to give his erstwhile client, a freedom. The weight of Public opinion which attended this flagrant abuse of power was such that the then Military Governor of the State had to remove the erring Law Officer. But then the damage has already been done. The accused had had opportunity to escape justice even if it was the desire of the succeeding Attorney General to prosecute him.<sup>153</sup>

The story of disgraceful abuse of powers of Attorney General in Nigeria is not restricted to the misuse of the powers recorded in the 2<sup>nd</sup> Republic. In the current 4<sup>th</sup> Republic, one case which demonstrated the extent to which the powers of Attorney General may be employed for the satisfaction of whimsical purpose is the case of *Major Hamza Al-Mustapha v. The State*.<sup>154</sup> The case demonstrated how the prosecutorial powers of Attorney General may be used for political purpose rather than the public interest and the interest of justice. In that case, the Appellant, Major Hamza Al-Mustapha, was accused of Conspiracy to Murder and the murder of Late Alhaja Kudirat Abiola, wife of the acclaimed winner of the June 12, 1993, Nigerian election, Chief Moshood Abiola. The murder was committed on the 04 June, 1996 along Lagos-Ibadan express way opposite Cargo Vision Ikeja, Lagos State of Nigeria. As found by the Court of Appeal, this was a case where a murderer who voluntarily confessed to the murder of the deceased was spared

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<sup>153</sup> Ajomo M.A. (1990), Nolle Prosequi, An unquestionable Tool in the hand of Attorney General in: YemiOsibanjo (ed.), *Towards better Administration of Justice in Nigeria*, Federal Ministry of Justice Law Review Series Vol.4, p.16.

<sup>154</sup> Unreported, *Suit No. C.A./1/469A/2012*, Court of Appeal, Lagos Division.

charges for the offence and was instead, used as a prosecution witness in return for his agreement to give damaging evidence against the Appellant, who knows nothing about the offence whatsoever. The Appellant was so indicted because of the wrong perception of him as a political enemy and a security threat by his tormentors.

As disclosed by evidence In this case, both the Federal Attorney General and the Attorney General of Lagos State scarified the ethics of criminal prosecution for the purpose of securing conviction of the Appellant at all cost even when no evidence was available to achieve that target. To achieve that purpose at all cost, both Attorneys General visited witnesses in detention and bribed them with money and promised houses and scholarship for their children, in return for their agreement to implicate the Appellant in the Murder of the deceased. They have done this despite their knowledge of who the murderer is, at least from his confession. The result was that no body was found guilty of the murder in issue. And the deceased and her family were consequently abandoned to their fate when the whole drama failed in favour of the Appellant.

Delivering the lead judgement in the case, Rita Nosakhare Pemu JCA., observed as follows:

...PW.2 who initially confessed to the shooting of the deceased was fielded as a prosecution witness instead of being charged with murder....The totality of the witnesses story (at least PW2 and PW3 and indeed the appellant) is that this case is being fuelled by factions sympathetic to the cause of Abdulsalam Abubakar. The Appellant became a security threat because of what he knows to be going on in the country which is inimical to it. It is unimaginable that the lower court did not expunge the evidence of PW.2 and PW3. in the face of the contradiction in their testimony. Yes, the lower court reasoned that the contradictions were immaterial. But they were material.

There is allegation that the Appellant provided the logistics for the movement of people from Abuja to Lagos by flight, their accommodation at his Lagos official residence at

Dodan Barracks, and linked them up with one Lateef Shofolahan for the purpose of the murder. But where is the proof.

No matter the suspicion and its degree, no matter the grievance or grouse, no matter the height of the conjecture, no matter the depth of hatred, even the strongest SUSPICION can never found a conviction in law. There is the duty, on the prosecution, not discretion to prove its case beyond reasonable doubt...

This court is not interested in politics of a given situation and its attendant semantics. Yes, someone very dear to the nation has been cut off and in such a gruesome manner. She has paid a price; but the question is who pulled the trigger? Is it the Appellant? If not, is the person dead or alive? Could the person be present here, even in this Court lurking around? There is only one person who knows and sees the culprit. That person who looks down from heaven, and sees the whole earth at a glance,! He alone is the just God. And He will judge. It is He that anoints judges.

But from the facts and circumstances of the present case, subject of this appeal, it is certainly not the Appellant. Even as God is no respecter of persons, the law is no respecter of persons;. The Court is not interested in sentiments.

I am certainly not pontificating, but it is necessary in a situation such as this to bring to bear that whatever the situation, whatever the obstacles in the wheel of justice, the truth is fixed, and must be expressed.

The political immaturity of Nigeria was also cited as a factor in support of the argument for judicial review of the exercise of powers by Attorney General. The argument here is that as the Attorney General is appointed by the President or a State governor as the case may be; his powers is often exploited in satisfaction of the whimsical purpose of his appointer against political opponents and in favour of political supporters of his appointer. Failure of an Attorney General to do the bidding of his appointer, may lead to the loss of his office as his appointer enjoy the prerogative of firing him at his own discretion. Osita Mba observed that:

The Nigerian Constitution provides for an Attorney General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of Government of the Federation and confers on him the powers to start or stop prosecutions in the Public interest. The officer usually styled "Attorney General and Minister of Justice" and invariably appointed on the basis of political considerations; has typically proved to be more of a political Minister than an

officer of the Law committed to upholding the demands of criminal Justice; thereby making prosecution of political opponents upon trumped up Charges and the discontinuance of prosecutions instituted by the police against government party activists a common phenomenon.<sup>155</sup>

What happened during the 2<sup>nd</sup> Republic can again be used to buttress the above sentiment. In the said Republic, a case of Murder came up before the Akure Judicial Division of the High Court of Ondo State where the power of *nolle prosequi* was misused to terminate the same. Because the accused persons at the time belonged to the ruling party in the State, pressure was brought to bear on the Attorney General who succumbed to the pressure and exercised the power of *nolle prosequi* resulting in the discharge of the accused in a situation in which they would have been tried and convicted according to the law. Here, the Attorney General allowed political motivation to becloud his judgement.<sup>156</sup>

In the recent history of Nigeria, one episode which demonstrated Nigeria's political immaturity, lack of freedom of the office of Attorney General from political interference and the extent to which public opinion can be manipulated to disparage the person or office of even the most honest Attorney General; was the controversy which surrounded the office of the former Attorney General of the Federation, Mr. Michael Kaase Aondokaa during the regime of late president Umaru Musa Tar'adua whose tenure lasted to the early days of the Administration of Mr. Good-luck Ebele Jonathan. That controversy surrounded the manner in which the Attorney General handled the fight against corruption and his role in the removal from office of Nuhu Ribadu, the erstwhile chairman of the Economic and

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<sup>155</sup> <http://Oucle.JusComp.Org/articles/mba.shtml>., 25/02/2013, 14:49.

<sup>156</sup> Ajomo M.A., Op. Cit. note 3.

Financial Crimes Commission. In his place, the Attorney General was accused of influencing the appointment of Mrs. Farida Waziri, who was his acclaimed protégé. The validity of the reason for the removal notwithstanding, the general sentiment was that Aondoakaa instigated the removal of Ribadu because he moved against James Ibori, the former Governor of Delta State, who was a friend to the Attorney General and a substantial contributor to the campaign expenses of President Yar'adua in the run up to the 2007 presidential election.<sup>157</sup> When James Ibori was eventually convicted and sentenced to imprisonment for Money Laundering in London, the Public criticism and pressure that was brought to bear on the activities of the said Attorney General, lead to his removal from office after the death of his original appointer and a close confidant.

At the height of that controversy, the Committee for the Defence of Human Right (CDHR), a non governmental organization, petitioned and urged the Legal Practitioners Privileges Committee to withdraw the Rank of SAN from Mr. Machael Kaase Aodoaka on the contention that during his tenure as Attorney General of the Federation, the anti corruption battle in Nigeria suffered serious set back. The cause of which was traceable to the deliberate acts of the Attorney General. They further alleged that:

Mr. Michael Kaase Aondoaka S.A.N. as the Attorney General of the Federation then proceeded to use his position as Attorney General, to emasculate the anti-corruption institutions and pursue the same goals he could not pursue at the Supreme Court in the course of doing which he engaged in acts that abused the powers of the office of Attorney General and dragged the nobility of, not only the office of the Attorney General of the Federation and the Rank of Senior Advocate of Nigeria, but also the Legal Profession in the mud of infamy

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<sup>157</sup> Adeniyi, O. (2011), *Power, Politics & Death*, Kachifo Limited, Yaba, Lagos, p. 16.

thereby violating the Code of Ethics of the Legal Profession.<sup>158</sup>

And based on the above petition, the Legal practitioner's Privileges Committee went ahead to suspend the said Mr. Kaase Aondoaka as Senior Advocate of Nigeria pending an investigation of the petition. The action of the Committee was however, met with mixed reaction and was opposed by the Nigerian Bar Association<sup>159</sup>.

Though the above experience of Aondoakaa shows that public opinion may at times, deal successfully with the excesses of an Attorney General, but it has shown also that the same can be manipulated for political purpose against Attorney General. This is so because, in the performance of his duties, the basis upon which he may exercise his discretion in a particular case may not be known to the public and is often technical in nature. Thus the public may not always be in a position to appreciate the wisdom of his decision and be able to make a fair comment thereon. This is more so, when the majority of Nigeria's public do not even understand the philosophy behind the criminal justice system now in force in Nigeria.<sup>160</sup> They may thus be amenable to deception by a vocal few who may be aggrieved by the decisions of an Attorney General to attract sympathy and criticism for the purpose of forcing him out of office in satisfaction of their whimsical purpose. That possibility alone underscores the need for the professionalization of the office and has lends credence to the call for the control of the exercise of powers of Attorney General through the judiciary.

Regard been had to the meaning of Public Interest- which is an interest in which the public as a whole has a stake and which warrants recognition and

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<sup>158</sup> <http://saharareporters.com/news-page/michael-aondoaka-%E2%80%9Cunfit%E2%80%9D-ramin-san-says-edhr-high-powered-petition>, visited 02/02/2012.

<sup>159</sup> Adebayo, A.M. (2012), *Administration of Criminal Justices System in Nigeria*, Princeton Publishing Co., Ikeja Lagos, p. 124.

<sup>160</sup> Mahmoud A.B. (1998), Institutional Framework and the Constraint in Criminal Justice Administration, In: Tabi'u M. (ed.), *Administration of Criminal Justice and Human Rights in Nigeria*, National Human Rights Commission, Abuja, p. 1.

protection especially, by government<sup>161</sup> - the most pertinent question which requires answer in the above crises is whether Aondoakaa was entirely wrong in his handling of the war against corruption to merit such a huge criticism? Was Ribadu himself a Saint in the manner he fought corruption? Answer to this question can be distilled by making reference to the past. Before the ascension to office of Aondoakaa, it was on record that during his tenure as E.F.C.C. chairman, Ribadu was accused of flagrant disobedience of court orders, abuse of powers, bias and breach of procedures in the performance of his duties. The general sentiment among the public was that the fight against corruption was being fought through the use of rapid result approach and was used by Ribadu, as a tool for political vendetta against perceive enemies of his appointer and their political party. There was therefore, general apathy to his method and call for fairness and respect for the Rules and Procedures in the conduct of the fight against corruption in Nigeria.<sup>162</sup>

To buttress their point against Ribadu, critics points to how he used to arrest and detain suspects without prior investigation; and how he also portrayed Nigerians to the international community as corrupt to their detriment and to such an extent that no Nigerian goes abroad without suffering indignity. They sited example with how he went to the National assembly during the build up to the 2007 election and in the presence of the international press disparaged 31 out of 36 governors of Nigeria - who were mostly enemies of his appointer - as corrupt and incompetent to stand for election without recourse to or pronouncement by a court of law.<sup>163</sup> The overzealousness of Ribadu in the persecution of perceived enemies of his government was also exemplified by the way he blackmailed and stampeded members of the Bayelsa, Plateau and Ekiti State House of Assembly to impeach

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<sup>161</sup> *Blacks Law Dictionary*, Ninth Edition p. 1350.

<sup>162</sup> *Ribadu Saint or Sinner*, Newswatch, Vol. 47 No. 2, January 14, 2008, p. 10.

<sup>163</sup> *Ibid.*

their governors who he accused of corruption without following legal process. In Plateau for instance, the legislature had insisted on properly probing Dariye. They set up a panel and invited Ibrahim Lamorde, the then director of operations of the economic and financial crimes commission. He testified on oath and tendered more than twenty documents to the panel. But he refused to turn up for cross examination. Instead, Lamorde wrote the legislators and warned that eight principal officers of the House should report to Ikoyi Lagos office of the body. Exasperated, the legislators threatened to issue warrant of arrest on Lamorde. Gambo Nbilamut, chairman House committee on information said that although the House showed enough good will and credibility in the execution of the statutory provision, the E.F.C.C. was adamant. “By the activities of the E.F.C.C., the House feels slighted and demeaned which is unacceptable.” He said. But in its Gestapo style, the E.F.C.C. got four Plateau legislators who would not want to be tried over monies they allegedly collected in the course of their job to impeach Dariye. The same procedure was used by Ribadu in Zamfara and Benue without success.<sup>164</sup>

Was the above manner of fighting corruption in Public Interest? That in our view was clearly the decision for Aondoakaa to make when he assumed office at the material time. And as chief law officer of the state, he had the power to decide that based on his conscience. However, the Rule of Law policy of the administration which brought Aondoakaa to office requires that every affairs of government must be conducted in accordance with the law and could have been the policy which led to Ribadu’s sacking.<sup>165</sup> Yet, the American government in particular which seemed to approve of Ribadu’s method could see no wisdom in the decision to sack him and accused the regime of shielding corrupt officials from

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<sup>164</sup> Ibid. p. 20.

<sup>165</sup> Aondoakaa: A Child of Destiny, *NewsWatch*, Vol. 49 No. 14 April 6, 2009. p. 12.

criminal prosecution.<sup>166</sup> This in our view was the problem which swept Aondoakaa out of office. As a distinguished legal practitioner and custodian of public trust for justice, Aondoakaa would have wanted to fight corruption without succumbing to external control and would have perceived such external control as detrimental to national interest. His decision not to co-operate with the British Government in the fight against public officials such as Ibori for money laundering, might therefore be in good faith and in the protection of national interest contrary to the popular belief of it been otherwise.

In the enforcement of criminal law, respect for constitutionalism is more important than the end product itself. In that process, the danger of sentimentally abandoning the path of constitutionality in an attempt to stamp out perceived rampant anti social behaviour from the society is as dangerous as the antisocial behaviour it self. The Court of Appeal has painstakingly explained that danger in the case of *Sule vs. The State*.<sup>167</sup> In that case, the appellants who were students of Kwara State polytechnic were accused of Illegal possession of fire arms and belonging to a proscribed secret cult. They applied for bail and deposed in their affidavit in support that prior to their arraignment before the trial Court, they had been on bail granted them by a Magistrate Court and had never failed to appear before the said court for one year, nor did they breach any of the bail conditions before their eventual arraignment at the High Court for trial. These facts were never contradicted by the prosecution. However, the prosecution opposed the bail application on the ground that the offences with which they were charged were so rampant amongst the youth of tertiary institutions in Nigeria and needs to be curbed out. And that if released on bail, the accused will be a bad influence on other

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<sup>166</sup> Adeniyi O., Op Cit., note 7.

<sup>167</sup> (2007) ALL. F.W.L.R. (PART 340 p. 512 at 516 ratio 4.

students of their institution. The trial court denied Appellants bail on the prosecution's grounds of objection and on the ground that the life of the accused would be in danger if they were released on bail. No evidence was available to the judge to support those reasons. On appeal to Court of Appeal, the Court set aside the judgement of the lower court and per Ikongbeh J.C.A., held as follows:

...I must admit that I share the sentiment of the learned judge and the learned Attorney General that the menace of illegal possession of fire arms in our country and the menace of cultism by our youth need to be addressed. No true and patriotic Nigerian would not. The phenomenon is one that is worrisome and needs to be tackled by all of us if we are to survive as a free and progressive nation.

This however, is no reason why any state functionary should work in opposition to the letter and spirit of the constitution. Abandoning the path of constitutionality in the desire to stamp out a perceived evil is as dangerous, if not more dangerous, than the evil been targeted. In such case, we risk the danger of enthroning the Rule of Man, or, rather, the Rule by sentiment, rather than the Rule of Law. Each arm of Government has assigned to it a specified role to play in moving society forward. In the performance of its role, each is to act as a check on the excesses of the others. The judiciary is to see to it that the other two arms, especially the executive, which is possessed of coercive powers, do not unduly interfere with the liberty of the citizens. If for any reason it abandons this checking role and, so to speak, joins others in clear conspiracy against the constitution, in oppressing the citizen, merely because they think he might have broken the law, then the real danger to society is caused.

While the judges been members of and have a stake in the well being of society, must be concerned about the rampancy of some of the antisocial behaviours of our youth, they must never the less not lose sight of their constitutionally assigned role. Protecting the right of the citizens and all times and in all circumstances, except, of course when and where the superior demands of state security or other over riding public interest demands otherwise, is one of the most important aspect of the role of the court. It must always be vigilant to see that in the zeal to correct any behavioural aberrations detected in the society, the fundamental right guaranteed to every body by the constitution are not unduly interfered with. It is in times of such popular outcry as has been generated by the rampancy of the offences with which the appellants have been charged that the court is expected to be most vigilant. The tendency in such times and under such circumstances is for every body to want to crucify any and every body who has the misfortune of been of been linked to any such offences, no matter how remotely and even before the hapless individual is

heard. It is in such times and under such circumstances that extra burden is cast on the court. The constitution in such times and under such circumstances casts the burden on it to see to it that while the well being of the state is not jeopardised by the ills complained of by the executive; the liberty of the citizen is not unduly curtailed. The laws and the rules will not be bent just because a particular offence is sought by the generality to have become rampant and needs curbing.

The above voice of wisdom in the final analysis explains not only the danger of abandoning constitutionalism in the fight against a perceived antisocial behaviour but also serves to explain why review of the powers of Attorney General through the use of public sentiment is dangerous and counter productive. It has thus underscores the importance for the review of the powers of Attorney General through the judiciary which is stocked with professional training to understand and fairly decide the merit or otherwise of Attorney General's decisions in the discharge of his duties.

#### **4.3. Arguments against the Judicial Review of the Exercise of Powers by Attorney General in Nigeria:**

The argument against judicial review of the powers of Attorney General was championed by those who believe that the responsibility of the maintenance of public peace and social order under the Constitution of Nigeria, lies with the executive arms of Government and that since Attorney General is part of the executive and is a repository of Public's trust for justice, his discretion to determine what is Public interest and the interest of justice in the performance of his duties, should remain unquestionable by any court of law.

One of those who belong to this school of thought is Onyuike G.C.M.- who in reaction to the call for amendment of the Nigerian Constitution to reflect at least, that the power of Attorney General to enter *nolle prosequi* shall be exercised only

subject to the consent of the court- said that a move in that direction would be draconian, ill advised, capable of creating more problems than it seeks to solve and unnecessary. He argued that:

In the first place, the responsibility for the detection, investigation and prosecution of criminal offences belong to the executive arm of the government. In the second place, a situation where an Attorney General will be compelled to continue with the prosecution of a criminal case against his better judgement should be avoided as much as possible. In the third place, it transfers the responsibility for the prosecution of a criminal case to the court; because this is what in the final analysis it translates to... The Primary function of an Attorney General is to weigh up the facts known to him or of which he can obtain information sometimes secret, sometimes confidential, sometimes open and known to all and using his judgement and experience as best as he can to decide where the balance of Public interest lies. Must a court of law be involved in all this? Will it not work to the prejudice of an accused person and possibly affect the attitude of the judge to an accused where the judge overrule the Attorney General and insist on the continuation of the criminal proceedings? The fact that one or two Attorney Generals had debased their office cannot justify a constitutional amendment of such magnitude..... Lastly, the fact that an Attorney General enters *nolle prosequi*, is not the end of the matter. The entering of *nolle prosequi* does not amount to *autrafois acquit*. A succeeding Attorney General, can decide to reopen the criminal case. <sup>168</sup>

There is no doubt that when power is conferred on an administrative authority, it inevitably includes discretion – a freedom to choose between two alternatives or among many causes of action. If no such freedom is expressly or implied tagged to the power conferred, then the authority has not discretion but a duty. When a Statute has empowered a Minister, Commissioner or other authority to do certain things as he may think fit, the doing of such thing must be by his authority not the power of the court. The court has no business interfering thereby.

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<sup>168</sup> Onyuike, G. C.M.(1990), Responsibility of An Attorney General in : Yemi Osibanjo (ed.), *Towards a better Administration of Justice*, Federal Ministry of Justice Law Review Series, VOL. 4, p.1.

This is what is implied in the decision of the case of *Fawehinmi v. Inspector General of Police*.<sup>169</sup> However, the Powers of Attorney General to institute undertake or discontinue criminal proceedings- like every discretionary power- is granted him to be exercised in public interest and the interest of Justice only. The law recognised beyond question that an Attorney General and every person charged with authority, is in fiduciary relationship to the Public and so must exercise his powers according to the rule of reason and justice, not private opinion, according to law not humour. Where power is exercised for a purpose other than Public interest, the Court may therefore, intervene to ensure that the power is not misused to the detriment of the Public provided that the facts and circumstances of a particular case allowed it to do so.<sup>170</sup>

Onyuike's view seems to us to be based on the principle that where a person is vested with authority to take an executive action and decides to so take the action, the question as to whether such action was justified shall not be questioned in a court of law as expounded in the old English case of *Liversidge v. Anderson*.<sup>171</sup> That line of reasoning however, is untenable and can not hold water in Nigeria at least, when illegality is committed or private right of an individual is affected by the exercise of executive discretion in bad faith. The case of *Shugaba Darman v. Federal Ministry of Internal affairs & Ors*.<sup>172</sup> is illustrative of this point. In that case, the Plaintiff, a Nigerian citizen was hurriedly and illegally deported from Nigeria in breach of his entire fundamental rights appurtenant to his citizenship. In a marathon judgement, the court declared the action of the Government as unconstitutional, null and void and awarded aggravated damages. The Court

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<sup>169</sup> (2002) F.W.L.R. Part 108. p. 1355.

<sup>170</sup> *Agbaje v. Commissioner of Police* (1971) U.I.L.R. P. 201; *Lakanmi v. A.G. Western State* (1971) 1 U.I.L.R. p. 201.

<sup>171</sup> (1942) A.C. p. 206.

<sup>172</sup> (1980) 2 NCLR. p. 459.

actually recognised that the deportation was motivated by bad faith or ill motive because the plaintiff was an indefatigable political opponent of the political party controlling the Federal Government then in Lagos. While setting aside the deportation of the Applicant, learned judge in that case observed:

Personal animosity, I don't think, can be ruled out amongst Political rivals - that may be argued possibly - but there is no doubt from the evidence before me, that there is political rivalry between the two parties in this State, GNPP and NPN. The applicant belongs to the GNPP according to his evidence and is the leader of the House. The NPN is there rival ... in this State and ... I shall take judicial notice that the first Respondent, the Minister of Internal affairs and the third Respondent his Excellency the President of the Federal Republic, also belong to the NPN the ruling party at the Federal Level at Lagos. I can not in this case before me rule out political victimization from the evidence before me as I have reviewed that it was this political victimization that led to the deportation of the Applicant.

The above case therefore, establishes the principle in Nigeria that when an executive discretion affecting the fundamental liberty of an individual is exercised in bad faith, the court reserves the power to intervene and review the administrative action provided that the facts and surrounding circumstances permit such intervention. This view is reinforced by the more recent decision of the Supreme Court In *Abacha vs. The State*.<sup>173</sup> In this case, Mohammed Abacha - the son of General Sani Abacha - was accused of the offence of Conspiracy to murder, Murder of one Kudirat Abiola and of been an accessory after the fact of the Murder of the same woman. He challenged the information on the ground that he was innocent and could not thus be prosecuted when the proof of evidence filed by the Attorney General of Lagos State did not in any way link him with the alleged offences. He urged the Court to quash the information and uphold his Right to personal liberty and freedom from arbitrary prosecution. In opposition to the application, the Attorney General argued that the proof of evidence filed had

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<sup>173</sup> (2002)11 N.W.L.R. (Pt. 779) p. 437.

sufficiently linked the Appellant with the offence in issue. He claimed that the proof of evidence shows that by his own admission, Abacha was in the office of Major Hamza El-Mustapha' – who actually ordered the killing of the deceased - when a bag containing guns were handed over to Barnabas Jabilla (Sergeant Rogers) for the purpose of killing the deceased. He also claimed that Mohammed Abacha's car and driver were used by Sergeant Rogers for the purpose of the same operation; and that on the eve of the Murder, Mohammed Abacha was present when Major Al-Mustapha arranged a chartered flight which conveyed some undisclosed people from Abuja to Lagos for the purpose of the Murder in issue.

The Supreme Court however, found that it was not written anywhere in the printed record of the case that Mohammed (the appellant) admitted his presence and that with his consent, Major Hamza Al-Mustapha gave the orders for the killing of the deceased or gave guns to Sergeant Rogers for that purpose. From the proof of evidence, the court did not also find where the appellant admitted that either his car or driver was used for the Murder of the deceased. None of the statements of the co-accused in that case implicated the appellant in the Murder of the deceased whatsoever. The court therefore held that such accusation by the Attorney General was unfair on the appellant and Appellant ought not to be allowed to face prosecution for the same. The Court further held that even if the guns were shared in the presence of the appellant, it is common practice of the Military to share guns for the purpose of an operation. And that even where the Appellant was at the scene of sharing the guns, he can not be prosecuted for the crime in the absence of anything which shows that he knew of the Conspiracy to kill the deceased and agrees to participate in the same. Nor can he be prosecuted for being an accessory after the fact of Murder because, it was not shown by the proof of evidence that

when he gave out money to his father's bodyguards allegedly involved in the Murder, the money were given for the purpose of aiding their escape from justice or for their involvement in the Murder whatsoever. The court therefore, concluded that the Court of Appeal as well as the trial court erred in finding a prima facie case against the Appellant to answer. According to the Court, what is in the proof of evidence amounts at best, to a serious suspicion that the Appellant knows more than he avers. And suspicion however well placed, can not amount to a prima facie case. More facts than are in the printed record will be needed to nail the Appellant to his been required to explain. The Court in explaining the role of the Judiciary in preventing Abuse of Legal Process in a democracy and in recognition of the right of a citizen to challenge arbitrary exercise of executive powers against him held generally as follows:

That in a democratic setting, as we now are, with no legislative ouster of courts jurisdiction, all perceived abuses should be tested if confidence is to be preserved for courts as final arbiter in people's rights. The courts have inherent power, to prevent abuse of their process by any of the parties, whether plaintiff or defendant, prosecution or defence, so that as long as democratic process exist nobody will have his right curtailed. All power to settle issues between parties is vested in courts and 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. It is for this reason that an accused person, despite the power to file indictment on information, should not be indicted to face trial from the outset it was clear he should not face.

The above decision by implication signifies at least, that the power of Attorney General to Institute criminal prosecution against an individual is reviewable by a court of law where he arbitrarily exercises or threatens to exercise power in breach of the fundamental liberty of a person under the constitution.

Onyuike's view that it will work to the prejudice of an accuse person and possibly affect the attitude of a judge to him if exercise of the power of *nolle prosequi* by Attorney General is subjected to the authority of the court, can as well be countered. Nothing will work to the prejudice of an accuse person if the court is allowed to decide the propriety or other wise of entry of *nolle prosequi* by Attorney General in a particular case. In the criminal justice process in Northern Nigeria for example, procedure exists where a magistrate is allowed to draft a charge or charges for the trial of a criminal offender before him without wrecking any havoc to the presumption of innocence of an accused person<sup>174</sup> The constitutionality of this procedure was challenged without success, in the case of *Ibeziako v. Commissioner of Police*<sup>175</sup> In that case, the accused persons were brought to the Magistrate of the Jos Magisterial District on Police First Information Report under Section 118 of the Criminal Procedure Code and accused of bribing a Public Official. As required by section 156 of the same Code, the particulars of the offence as contained in the First Information Report was stated to the accused and were asked to show cause why they shall not be convicted for the offence. They denied the Information thereby forcing the Magistrate to here preliminary evidence from the prosecution. He heard most of the prosecution's witnesses who where also cross examined by the defence. Having being convinced that there was a prima facie case against the accused, the Magistrate then drafted the charge of offering or giving

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<sup>174</sup> Section 155-161 of the Criminal Procedure Code Act, Cap. C42, *Laws of the Federation Of Nigeria, 2004.*

<sup>175</sup> (2009) 4 N.C.C. p. 264.

gratification to a Public servant contrary to Section 118 of the Penal Code against the Appellant; to which the Appellant pleaded not guilty. Prosecution then called the remainder of its witnesses and closed its case. The Accused were thereafter, asked to enter defence but failed to adduce any evidence in their defence. The accused were eventually convicted. They appealed to the High Court of Northern region and failed. And on further appeal to the Supreme Court, the Appellant claimed that they were denied fair trial and Challenged the procedure adopted by the Magistrate in the case as unconstitutional and contrary to the provisions of section 21(4) of the Constitution of Nigeria, 1963 now section 36(5) the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The Section Provides that:

Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty;

Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

After careful consideration of the Appellants' argument, the Court

pronounced as follows:

We have given anxious consideration to the objection to the Magistrate being required to frame the charge in the Northern Region; we feel that this means no more than that the Magistrate is formulating what seems to him to be the appropriate charge for the offence which prima facie appears to have been committed, and it does not mean that the Magistrate has made up his mind that the accused person is guilty. During our research, we have had occasions to refer to the Power provided in the Criminal Procedure Ordinance for the trial court to alter or amend the charge or information. The idea in the Northern Region is that the charge should be framed by the Magistrate instead of being left in the hands of lay prosecutors to frame.

In the light of the above judgement, it is submitted that the fact that a judge is allowed to overrule entry of *nolle prosequi* by Attorney General, will not in itself, prejudice the mind of the judge against an accused person. Such liberty to the court may at times, work in favour of an accused person. There may be cases where *nolle prosequi* may be entered by Attorney General for no meritorious reasons whatsoever. In certain cases also, the *nolle prosequi* may be entered on mere technical ground to deny acquittal to an accused for the purpose of harassing him with future prosecution, on the same facts. In such cases, it would be advantageous to an accused if the court is allowed to force prosecution to continue, failing which the court may acquit the accused of charges against him thereby securing his freedom and preventing abuse of legal process. The nolle entered in the case of Prince Abubakar Audu v. Federal Republic of Nigeria & 1 Other<sup>176</sup> may fall into this category.

In any case, criminal or civil, the sole duty of a judge is to ensure the highest attainment of Justice. As an unbiased umpire, a Judge has no business whether or not an accused is convicted for a criminal offence. His business is to ensure fair hearing to either side and finally deliver his judgement based on the facts available to him and applicable legal principles relevant to a case. In any case, prosecution must prove its case beyond reasonable doubt before it could secure conviction. Either side has right of Appeal where they are not satisfied with a Judgement. Also, it is because of the neutrality of judges in adjudicatory process, that the law provides that

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<sup>176</sup> (2012) 12 Pt.2) S.C.M. p. 23.

charges for use in criminal trial at State High Courts should be filed with the leave of court only.<sup>177</sup> In such instance, a Judge before whom an application to prefer a charge is filed, may refused the application if he is of the opinion that the case should not proceed to trial. Where however, the judge is of the opinion that there is prima facie case from proof of evidence available to him, he can order for the prosecution of the accused. Where this happened, it will be reasonable to say that a judge has participated in the formalization of a charge against an accused person but without any negative implication to the right of an accused person to fair trial whatsoever. The procedure is meant to ensure protection for the fundamental liberty of accused persons by ensuring that they are protected from arbitrary prosecution for an act or omission which does not constitute an offence. This procedure has for long being followed in the Criminal Justice process in Nigeria without wrecking any havoc on the relationship of court with Public prosecution. And allowing a judge to inquire into reasons for entry of *nolle prosequi* therefore, will not set the judiciary in the path of conflict with public prosecutors whatsoever. The court and Attorney General's office are partners in administration of criminal justice and if there relationship is viewed in that direction, there should be no quarrel with a judge who tries to know why an Attorney General should enter a *nolle prosequi* in a particular case.

Another scholar who holds the same view as Onyuike's above is Ajomo M.A. The learned writer in his argument saw no better wisdom with

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<sup>177</sup> Section 185(b) Criminal Procedure Code Cap. 30 *Laws of Northern Nieria*, 1963.; Cap. 37 *Laws of Kano State of Nigeria*, 1991.

judges than Attorney General in the protection of Public interest and the interest of Justice. He stretches Onyuike's argument by adding that as judges themselves are not immune to abuse of powers in the discharge of their duties, they should not exercise supervisory authority over the powers of Attorney General. He buttress his argument by saying that there are myriads examples of judges who because of overzealousness or obsession with power had at one time or the other abused their discretionary powers in for example, punishing for contempt, grant of injunctions, making order of service of process and order of *fife* est. contrary to the tradition of impartiality and Independence for which judges are noted based on their personal prejudices or predilections.<sup>178</sup>

As forceful as Ajomo's criticism of judiciary is, we are of the view that his sentiment against judges should not be the reason why the powers of Attorney General should not be reviewable. Although judges are not infallible to corruption and abuse of powers; but in recognition of that practical reality, the system of administration of justice in Nigeria has provided for an appellate system where litigants who are not satisfied with a judgement could appeal to a higher court for review of the same. Through that system, the judgement of every judge can be reviewed or set aside by a higher court in the judicial hierarchy. As the law stands however, the same can not be the case with exercise of powers by Attorney General. The decision of Attorney General to institute or terminate a criminal case is final

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<sup>178</sup> Ajomo M.A., Op. Cit. note 3.

and cannot be reversed even by his appointer. The law does not therefore; create a monster in any judge but the Attorney General.

It should be noted that as the Constitution of the Federal Republic of Nigeria, 1999 requires that the Country shall be a State based on the principle of Democracy and social justice, that objective can not be achieved without transparency in the affairs of the government.<sup>179</sup> There can be no Democracy, i.e. government of the people by the people for the people, if people are detached from the decision making process on issues that affects their Rights and become ignorant of argument for and against solutions to their problems.<sup>180</sup>

#### **4.4. Judicial Attitude to Applications for the Review of the Exercise of Powers by Attorney General in Nigeria:**

Judicial review of administrative action is one of the inherent powers of courts enshrined under section 6(b) of the Constitution of the Federal Republic of Nigeria, 1999. It is a process through which the court enforces the Constitution of the Federal Republic of Nigeria; and ensures protection for the fundamental liberty of citizens and every other person in Nigeria. The concept of Judicial review is designed to ensure:

- a. That the executive acts within the powers conferred upon it by the Constitution and the law and those laws are not unconstitutional.
- b. That whenever the rights, interest or status of any person are infringed, or threatened by executive actions, such person have an inviolable access to the courts and unless such action was legal free from bias and not unreasonable be entitled to appropriate protection.

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<sup>179</sup> S. 14(1&2) *Constitution of the Federal Republic of Nigeria, 1999.*

<sup>180</sup> *R.v. Sheyler* (2002) ALL E.R. p. 477.

- c. That when executive action is taken under discretionary power, the courts shall be entitled to examine the basis on which the discretion has been exercised and if it has been exercised in a proper and reasonable way and in accordance with the principle granted the executive are not used for a collateral or improper purpose.<sup>181</sup>

The above laudable objectives of the concept of Judicial review notwithstanding; the attitude of court to application for judicial review of the powers of Attorney General in Nigeria has remained the same. Whether in the institution or termination of criminal proceedings, the courts maintained the view that the powers of Attorney General are unquestionable and are subject only to his conscience and good faith. This line of reasoning was first adopted by Supreme Court in the case of *Ilori v. The State*<sup>182</sup>; and is now religiously followed by Nigerian courts in compliance with the doctrine of *stare decisis* (i.e. Judicial precedent). In that case, the Attorney General of Lagos State on the 20 October, 1978 filed information to prosecute one Fred Egbe herein called the Appellant. The information was for the offence of inducing delivery of money by false pretences and for stealing. The Court of Appeal discharged and acquitted the Appellant after declaring the charges as frivolous on the application of the Appellant.

Subsequently, the Appellant wrote to the Attorney General of Lagos State requesting for the prosecution of the Respondents for the offence of conspiracy to bring false accusation against him contrary to the provisions of the Criminal Code<sup>183</sup> and conspiracy to injure the Appellant in his trade or

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<sup>181</sup> Eka B.U. (2001), *Judicial Control of Administrative Process in Nigeria*, Obafemi Awolowo University Press Limited Ile-ife, Nigeria, pp.39-46.

<sup>182</sup> (1981) 2 S.C., p. 155.

<sup>183</sup> Cap 31 Laws of Lagos State, 2004.

profession by maliciously procuring the seizure and detention of the properties of the Appellants client contrary to section 518 of the same code. The respondents in this case were the Director of Public Prosecution Lagos, State and the police officers involved in the arrest and failed prosecution of the Appellant.

The Attorney General by a letter dated the 9 January, 1980 declined to accept the request of the Appellant citing no reason for his decision. Apparently, the Attorney General did not consider the flight of the Appellant, the frivolity of the charges which were brought against him, the injurious effect they had on the reputation and professional interest of the Appellant and the fact of their dismissal by the court.. The Attorney General declined to prosecute the respondents to the grievance of the Appellant.

The Appellant thereafter initiated a private prosecution against the respondents at the Lagos State High Court which was terminated by the same Attorney General by entering *nolle prosequere* in the action. While striking out the case, learned trial judge in the case ruled that the “ the Attorney General has the right to terminate any criminal proceeding instituted byhim or any other person at any stage before judgement. There can not be any doubt about it.”

Dissatisfied with the ruling, the Appellant appealed to the Court of Appeal on the ground that the Attorney General had abused the powers of his office when he entered *nolle prosequi* which terminated his private information against the respondents. He relied on the provisions of section

191(3) of the 1979 Constitution, which is in *pari materia* with section 211 (3) of the 1999, and argued that in the exercise of his powers under the constitution, the Attorney General owes a mandatory duty to have regard to public interest, the interest of justice and the need to avoid abuse of court process. He further maintained that when an Attorney General failed to be so guided by those considerations, the court can exercise powers of judicial review on him under the Constitution. He concluded that the Attorney General did not have regard to those considerations when he exercised the power of *nolle prosequi* to terminate his private prosecution and urged the court to exercise power of judicial review and restore the case.

Section 191(3) of the 1979, Constitution provides to the effect that :

- (1) The Attorney General of a State shall have power:
  - (a) to institute and undertake criminal prosecution against any person before any court of Nigeria other than a Court Martial in respect of any offence created by Law of the House of Assembly.
  - (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or persons; and
  - (c) to discontinue at any stage before judgement is delivered, any such criminal proceedings instituted or undertaken by him or any other authority or persons.
- (2) The power conferred on the Attorney General under sub section (1) of this section may be exercised by him in person or through officers of his department.
- (3) In exercising his powers under this section, the Attorney General shall have regard to public interest, the interest of justice and the need to prevent abuse of court process.

The Court of Appeal alluded to the view of the Appellant but, dismissed the appeal for lack of evidence to substantiate non compliance by the Attorney General with the provisions of section 191(3) reproduced above.

Whilst dismissing the appeal, KAZEEM JCA. (as he then was) held as follows:

- (1) That at Common Law, and under the 1960 and 1963 Constitutions of Nigeria, the power of Attorney General as officer of the Crown is not subject to review by the Courts of Queen's Bench Division or another court. He cited the case of *Comptroller General of Customs (1819) 1 Q.B. p. 909*. He relied also on section 104(3) of the Constitution of Nigeria, 1963.
- (2) That now in Nigeria, S. 191(3) of the 1979 constitution provides for additional safeguards which the Attorney General should show regard for when exercising his powers under sub section 3 above mentioned. These are the public interest, the interest of justice and the need to prevent abuse of legal process. He further held that whenever an aggrieved person complains of an infraction of his fundamental rights and that the Attorney General has failed to have regard for those safeguards in exercising his powers and he can successfully prove it, the courts in this country in the exercise of their wide powers under section 6(6) of the 1979 constitution can inquire into such complaint and grant appropriate remedy.
- (3) That the Appellant did not prove his claims in this case. and until he does so, the Appellant cannot ask the court to go behind the certificate of discontinuance filed by the Attorney General under section 191 (1)(c) of the 1979, Constitution.

In the view of the Court of Appeal therefore, while the Attorney General is presumed to have regard to the public interest, the interest of justice and the need to prevent abuse of legal process in the discharge of his duties, a person aggrieved by the exercise of his powers, can challenge the same and adduce evidence to prove his claim under section 191(3) of the 1979, Constitution. The Court of Appeal had thus created a distinction on the position of the powers of the Attorney General between the pre 1979 and post 1979 Constitution in Nigeria.

Still dissatisfied, the Appellant, appealed to the Supreme Court. He substantially raised the same issues and repeated the same argument as at the Court of Appeal and submitted that the provision of section 191(3) of the

1979, Constitution are mandatory and urged the Court to allow his appeal. The respondents did not file any reply brief before the Supreme Court and the appeal was thus heard on the Appellant's brief only.

In the course of its judgement, the Supreme Court disagreed with the reasoning of the Appellant and that of the Court of Appeal and held:

1. That the position of the Court of Appeal on the provisions of section 191(3) was not in contemplation of the 1979, Constitution and if anything at all, it does not accord with the common sense. If the Court of Appeal was right, whenever the Attorney General fails to have regard to the content of sub section 3 of the 1979 Constitution, than the court must stop the prosecution of the person concerned and commence an inquiry into the complaint by the accused person. Surely, this is not in contemplation of the 1979 Constitution and does not accord with the common sense.
2. That the pre eminent and incontestable position of the Attorney General under the Common Law, as the Chief Law Officer of the State either generally as legal adviser or especially in a court proceedings to which the State is a party, has long been recognized by the courts. The Attorney General at Common Law, is a master onto himself, law onto himself and under no control whatsoever, judicial or otherwise, *vis a vis* his powers of instituting or discontinuing criminal proceedings. The Attorney General's power is subject only to the ultimate control of his appointer who could remove him and subject

only to the ultimate control of his appointer who could remove him and subject only to adverse public comment.

3. That in using the word “ the Attorney General shall have regard to”, section 191(3) of the 1979, Constitution did not intend to delimit and has not delimited the powers which the Attorney General had, either at Common Law or under the constitutions preceding the 1979, Constitution, in so far as institution or discontinuing criminal proceedings in Nigeria is concerned.
4. That the word “shall have regard to” in sub section 3 of section 191 of the 1979, Constitution, are words which are known in the interpretation of Statute as permissive language: a language which imports discretion, but certainly does not create a condition. The words which are merely declaratory of what Attorney General takes into consideration in the exercise of his powers.
5. That person who suffered the unjust exercise of power by an unscrupulous Attorney General is not without remedy, his remedy; he can invoke other proceeding against Attorney General. But certainly, his remedy is not to ask the court to question or review the exercise of the powers of Attorney General. Whatever this remedy may be. It is certainly not to form part of the proceeding where the grievances occur. It has o be the subject of other proceedings.
6. That the provision of sub-section (3) of section 191 of the 1979, Constitution applies to the whole section.

The decision of the Supreme Court in the above case, which is the *locus classic us* in matter of the judicial review of the powers of Attorney General in Nigeria, seems to be based on the history of the powers at Common Law as most of the cases cited in support of the same are evidently English. The decision was followed in the more recent case of *Audu vs. The Federal Republic of Nigeria* which was cited in the course of our discussions of Chapter Three to this dissertation. That case together with Ilori's case clearly explained the attitude of courts in Nigeria to applications for the review of the powers of *nolle prosequi*. As regards other segment of the powers of Attorney General – i.e. power to instituted and undertake criminal prosecution and the power to take over and continue prosecution instituted by any other person or authority in Nigeria - other cases are herein used to explain the judicial attitude.

In the recent case of *Attorney General of Ondo State vs. Attorney General of the Federation*<sup>184</sup> the Plaintiff, Attorney General of Ondo State, filed an action at the Supreme Court challenging the powers of the National Assembly to legislate offences for the States, the constitutionality of the Independent Corrupt Practices and Other Related Offences Commission Act No. 5 of the year, 2000 and the power of the Attorney General of the Federation to prosecute for offences created under the same Act at the Ondo State High Court. He prayed inter alia, for the following orders:

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<sup>184</sup> (2002) F.W.L.R. (PART 111) p.1972.

(1) a declaration that it is not lawful for the Attorney General of the Federation (1<sup>st</sup> defendant) or any other person authorised by him to institute legal proceedings in any court of law in Ondo State in respect of the Criminal Offences created by the provisions of the Corrupt Practices and other related Offences Act, No. 5 2000.

(2) An order of perpetual injunction restraining Attorney General of the Federation including his officers, servants, and agents whosoever, from exercising any of the powers vested in him by the Constitution of the Federal Republic of Nigeria or any other law in respect of any offence created by the provisions of the Corrupt practices and Other Related Offences Act, No.5 2000.

The Court upheld the authority of the National Assembly to legislate offences for the State and that of the Attorney General of the Federation to prosecute for those offences at the State High Court and dismissed the action.

In its judgement, the Court held as follows:

It must be recognised that our Constitution is an organic instrument which confers powers and also creates Rights and limitations. It is the Supreme Law in which certain first principles of fundamental nature are established. Once the powers, rights, and limitations under the Constitution are identified as having been created, their existence can not be disputed in a court of law. But their extent and implications may be sought to be interpreted and explained by the Court in cases properly brought before it. All agencies of government are organs of initiative whose powers are derived either directly from the Constitution or from laws enacted there under. They therefore, stand in relationship to the Constitution as it permits of their existence and functions. The Attorney General of the Federation derives his powers under section 174 of the Constitution as an agency of the Federal Government. *The*

*law is well settled that the court cannot control the manner he exercises his powers so conferred. Nor can he be prevented from exercising his functions on the ground that his jurisdiction does not extend to any particular State in Nigeria. Section 174 of the Constitution does not impose any such limitation.*

The position of the Court on reviewability of exercise of powers by Attorney General was also maintained in the case of *Alhaji Mohammed O. Atta v. Commissioner of Police Kogi State*.<sup>185</sup> In that case, the Appellant filed a complaint of forcible damage, breaking and entry into his apartment against one Alhaji Ado Ibrahim, the Ohinoyi of Ebira land and one other. After preliminary investigation, the Respondent on behalf of the Attorney General Kogi State, declined to investigate or prosecute the matter. Believing in the credibility of his complaint, the Appellant as plaintiff filed an action at the Kogi State High Court praying for an order of the court compelling the Respondent to prosecute the suspects. The application was opposed by a counsel from the office of the Attorney General of the State claiming that the State Attorney General has unfettered discretion to prosecute for criminal offences. And consequently, the application was dismissed. The Appellant's appeal to the Court of Appeal was also dismissed. While dismissing the appeal, the Court of Appeal held as follows:

It must be presumed that the Respondent is speaking through the mouth of the Attorney General of Kogi State and its authorized officials that its decision not to prosecute has the authority of the said Attorney General by the combined operation of section 23 of the Police Act

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<sup>185</sup> (2003) F.W.L.R. Part 185 p. 407.

and Section 211 of the Constitution of the Federal Republic of Nigeria, 1999 formerly section 191 of the 1979 Constitution. Cases are replete as authority for the proposition that in the performance of the duties conferred by this section of the Constitution on the Attorney General, the court shall not review the decision of the Attorney General in the matter in which the Attorney General has exercised his discretion. In the circumstance of this case, it is apparent that although the application is against the Respondent in point of facts, the decision not to prosecute can safely be said to be on the authority of the Attorney General of Kogi State. In the event, I am firmly of the view that in the circumstance of this case, the lower court was justified in its decision to refuse order of Mandamus.

Another interesting case where the power of Attorney General to prosecute for criminal offences was declared unquestionable is the case of *Attorney General of Anambra State vs. Chief Chris Uba & 3Ors.*<sup>186</sup> In that case, the Plaintiff/Respondent who was accused of complicity in the activities leading to the dramatic resignation of Chief Chris Ngige as Governor of Anambra State was sought to be arrested and prosecuted by the Attorney General of Anambra State. He sued the State Commissioner of Police and the Attorney General claiming for an order restraining the Police from arresting him and the State Attorney General from prosecuting him on the ground that he has committed no offence whatsoever. The Attorney General opposed the Application for lack of reasonable cause of action. He argued *inter alia*, that the order sought for, was aimed at stopping him from exercising his right to criminal prosecution enshrined in the Constitution. After analysing argument of the parties, the trial court granted the reliefs as

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<sup>186</sup> (2005) F.W.L.R. Part 277 p. 909.

prayed. The Attorney General appeal to the Court of Appeal was upheld.

The Court held *inter alia*, as follows:

... The plaintiff has no legally recognizable right to which the court can come to his aid. His claim is not one the court can take cognizance of for it has disclosed no cause of action. The plaintiff can not expect a judicial fiat preventing a law officer in the exercise of his Constitutional power....

#### **4.5. Matters Arising From the Judicial Attitude to Application for Judicial Review in Nigeria:**

Going through the decision in Ilori and other cases above, the natural question that flares in the mind of the writer is whether those decisions, correctly represent the intention of the framers of section 160(3) and 191(3) of the 1979 Constitution now section 174(3) and 211(3) of the Constitution of the Federal Republic of Nigeria, 1999. Could it be presumed rightly, that when the framers of the 1979 Constitution inserted those provisions in the Constitution they had no intention of controlling the powers of Attorney General? The courts have answered the above questions in the positive but, the writer thinks otherwise. In the view of the writer, the position of Supreme Court in Ilori's case, which represent the position of the law in Nigeria, does not present correct interpretation of the provisions of section 160(3) and 191(3) of the 1979 Constitution now section 174(3) and 211(3) of the 1999 Constitution of the Federal Republic of Nigeria. It is a decision passed in complete misapplication of the Rules of interpretation of the Constitution and in total disregard to the general character of the 1979 now the Constitution of the Federal Republic of Nigeria, 1999.

Commenting on the position taken by the Supreme Court in the Ilori's case, Hambali Y.D.U., said:

It seems to me with respect that the Attorney General possible abuse of his discretionary powers is not legally reviewable. The Public may not by its opinion be able to influence his appointer to remove him when the affected Attorney General is a member of the Ruling party and a favourite of the party or his appointer. It also seems to me that the constituent Assembly to the 1979 Constitution had in mind of the possibility of turning the discretionary powers of the Attorney General to a monstrous use when it recommended section 159(9)(b) of the draft to the 1979 Constitution which after several mutilation is left to read what is today section 160(3) and 191(3) of the 1979 Constitution now Section 174(3) and 211(3) of the 1999 Constitution. It is a trite rule of interpretation of Statute that when a Court is called upon to interpret the provisions of any law, the court is otherwise invited to have an imaginary picture of the minds of the legislature. It thus follows that although the Constituent Assembly was not the Legislature, which enacted the 1979 Constitution, their recommendation under section 159(2)(a)(b) of the 1979 Draft Constitution. However influenced the mind of the legislature to include for the first time, in the Nigerian Constitutional History sub section (3) of section 160 and 191 of the 1979 Constitution which has now been re-enacted in section 174(3) and 211(3) of the 1999 Constitution ( as amended).

... it is submitted with respect that section 160(3) and 191(3) of the 1979, Constitution now section 174(3) and 211(3) of the 1999 Constitution (as amended) must be for a purpose other than being merely declaratory of what the Attorney General takes into consideration in the exercise of his powers

This author is not unaware of the erudition of Eso Jsc. And scholastic interpretation he gave to the phrase “shall have regard to” in Ilori’s case that the expression only enable something to be done and that it is what is known in the interpretation of statute as a permissive language. It is submitted with respect that the literal interpretation given to the phrase only returned the pre-1979 Constitution state of affairs thereby leaving the Attorney General with absolute powers. To my mind, the sub section is not as clear and unambiguous as it has been made to appear by the apex Court. None of the Constitutions of the Federal Republic of Nigeria which preceded the 1979 Constitution contained similar provisions thereby raising the question of the possible defect the sub-section is meant to cure applying mischief rule of interpretation. More so, that the word “shall” used in the subsection has on a number of occasions been held to be imperative unless where such interpretation will bestow no right or benefit to any one...

He concluded his argument by submitting finally that:

“It is a universal belief that absolute power corrupts absolutely and unless the subsection is given its true construction or

interpretation, the power of the Attorney General to enter *nolle prosequi* will remain subject to abuse as it was before the 1979 Constitution and now. It must be born in mind that what obtains at common law as canvassed in Ilorin's case, must be flexible to meet our peculiar circumstances where the instrument of *nolle prosequi* may be used for political purposes rather than for the public interest."<sup>187</sup>

We absolutely, share Ham Bali's sentiment above quoted. However, we observed that Mr. Ham Bali seems to hold the view that the Literal Rule of interpretation applied by the Supreme Court in the interpretation of section 191(3) in this case, shouldn't have been chosen in the interpretation of the said Sub section. His view implies that the Sub section is ambiguous and hence, his suggestion that Mischief Rule of Interpretation should have been the relevant Rule of Interpretation of the same.

While we concede that Mischief Rule of Interpretation could as well, be used in the interpretation of the section under consideration; our view however, is that the problem of the Supreme Court's interpretation in that case, does not lay in the choice of the Literal Rule of Interpretation but in the manner the Rule was applied to the interpretation of the section in issue. The Sub section, which is now section 211(3) of 1999 Constitution, is devoid of any ambiguity. It is clear and unambiguous when viewed within the context of the Constitution and should have been interpreted in accordance with its grammatical construction. The case of *Dangana v. Usman & Ors*,<sup>188</sup> provides clearer guideline on when and how to apply the Literal Rule of Interpretation. In that case, the same Supreme Court of Nigeria held as follows:

That in the Literal Rule of interpretation, courts must interpret words of the Constitution in accordance with the intendment and

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<sup>187</sup> Hambali Y.D.U. (2012), *Practice and Procedure of Criminal Litigation*, Foot Print Publishing Limited Lagos, 1<sup>st</sup> ed., p. 195.

<sup>188</sup> (2012) 4 S.C.M. p.55.

not in a way oppose to the purpose intended for the enactment. Where the words of a statute are clear and unambiguous, effect must be given to them irrespective of whether that produces a harsh or inconvenient result. Judges should also rely on our historical development as a people and our history before the constitution was enacted in statutory interpretation.

It seems that in the interpretation of the said section 160(3) and 191(3) of the 1979 now section 174(3) and 211(3) of the Constitution of Nigeria, 1999. The Supreme Court was mainly swayed by the history of the powers of Attorney General under the Common Law rather than the historical development of the powers under the Nigerian Constitution before the enactment of the section under the 1979 Constitution. That history shouldn't have influenced the decision of Supreme Court if it had considered the relevant history under section 104(6) of the 1963 Constitution. The section provides to the effect that in the exercise of the powers conferred upon the Attorney General, (i.e. institute and undertake, to take over and continue or discontinue criminal proceedings), he shall not be subject to the direction or control of any other person or authority. This very crucial provision which serves to underscore a special and almost apolitical nature of the office of the Attorney General is significantly missing in both the 1979 and the 1999 Constitutions which in contrast, provides that "in exercising his powers, Attorney General shall have regard to public interest, the interest of justice and the need to prevent abuse of legal process". The court should have then asked itself why the change under section 191(3) of the 1979. If the Court had done that, it would have seen that when the section was inserted into the Constitution, its legislatures had intention of controlling the powers of Attorney General.

In the interpretation of statute including the Constitution, recent history and circumstances of the society where the statute applies are the most crucial factors of consideration other than colonial history. After all, Nigeria is now an independent

nation and is subject not to the colonial Laws which even in England are now obsolete. The application of Received English Law in Nigerian is not without any qualification either. It is applicable only subject to the Limit of the Local jurisdiction, the local circumstance and subject also to its compatibility with the Nigerian legislations. Section 32(1) & (2) of the Interpretation Act,<sup>189</sup> provides that:

Subject to the provision of this section and except in so far as other provision is made by any Federal law, the Common Law of England and the Doctrine of Equity, together with the Statute of General Application that were enforce in England on the 1<sup>st</sup> day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.

Such imperial Laws, shall be in force so far only as the limits of the local Jurisdiction and local circumstances shall permit and subject to any Federal law.

Circumstances in Nigeria, absolutely do not justify the judicial attitude to the issue under review. To borrow the argument of Edoba B. Omoregie, Nigeria is a developing country steeped in the throes of the vices attendant to our state of under development. One notorious prediction of such a state is the high incidence of weak political ethos. Thus, those who found 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 is not uncommon for political appointees to subject the values of their offices to the whims of their appointers. The Attorney General being a political appointee is therefore, not free from such unwholesome political intrigues.

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<sup>189</sup> Cap. 123 *Laws of the Federation of Nigeria*, 2004.

As examples cited in this chapter shows, it is quite common in Nigeria, to find an Attorney General refusing to exercise his powers against heavily suspected persons of having committed a criminal offence or having complicity in the commission of an offence; while readily discontinuing criminal prosecution against accused persons whose convictions for crimes alleged against them seem certain. It is often the case that in such circumstances, the Attorney General is motivated by political considerations over and above the public interest, the interest of justice and the need to prevent abuse of legal process.

Natural Characteristics of Man are such that when ever he is vested with absolute prerogative, he usually abused it. Such was the reason why proponents of the doctrine of separation of powers and the Rule of Law advocated for its constitutional recognition right from the early ages.

Deming M.R., explained the influence of power on Man when he said that:

All power corrupts. Total power absolutely corrupts. And the trouble about it is that an official who is the possessor of power often does not realize when he is abusing it. Its influence is so insidious that he may believe that he is acting for the Public good, when in truth; all he is doing is to assert his own brief authority. The Jack in office never realizes that he is being a little tyrant.<sup>190</sup>

Jegede J. K., the former Director General of the Nigerian Law School, said of the influence of power to Man that:

There is no doubt that there has always been some trait of unreasonableness or arbitrariness in the action of man or government. Even at home or in small communities, those who find themselves in the position of leadership or authority do exhibits traits of abuse of power and often take unkindly to any attempt to limit there authority or power especially, if they are

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<sup>190</sup> *Freedom Under the Law*, Hamlyn Lectures, First Series, p. 100.

invested with absolute authority like the Military in modern government.<sup>191</sup>

It should be noted that it was in order to tame the Natural tendency of Man to abuse powers and ensure the sustenance of the Rule of Law, that the Constitution of Nigeria, provides for the entrenchment of the doctrine of separation of powers and a system of check and balance where the powers of Government is shared between three independent but coordinate organs of Government: the executive, legislature and the judiciary. It is a concept in the relationship between the executive, the legislature and the judicial organs of Government whereby the organs with a view to balancing of power are able to check one another in the exercise of their respective functions.<sup>192</sup> The Administrative power is vested in the executive under section 4 of the Constitution, the power of law making and oversight functions is vested in the legislature under section 5, while the power of Interpretation of statute and settlement of dispute between persons or between authorities or between . authorities and persons are vested on the judiciary under section 6 of the same. The judicial authority of the court extends to all the inherent powers and sanction of a court of law and to all matters between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligation of that person.<sup>193</sup> The persons, matters and actions on which this power could be exercised were not specifically mentioned not to include Attorney General by the Constitution.

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<sup>191</sup> Jegede, J.K. (1990), The Rule of Law in Military Government – An Appraisal, *Nigerian Law and Practice Journal*, Volum 3 No.2, p.19.

<sup>192</sup> Ibid.

<sup>193</sup> Section 6(6)(b), *Constitution of the Federal Republic of Nigeria*, 1999.

Now if the general context of the Nigerian Constitution is as explained above, wherein lies Justification for the decision of the Supreme Court in the *Ilori's* case and other cases that follow suit above. Clearly in our view, no such justification exists. It does not exist because; the decision does not conform to the ideal of the Constitution under section 4, 5, and 6(6) of the Nigerian Constitution, 1999. The decision has subjugated the authority of Court in protecting the fundamental rights of people whose liberty may be infringed by an unscrupulous Attorney General. By judicial fiat, the court deprives itself of jurisdiction where the Constitution expressly conferred it with the same and enthrones a despot with unquestionable authority.

Although there is general reluctance by the judiciary in Nigeria to review the powers of Attorney General, the judiciary in other Common Law Jurisdictions have however seen the need to review all political powers given the new realities and the expanding frontiers of human rights. In England, which is the historical base of the powers of Attorney General for example, the powers of Attorney General are now divided into two - Statutory and Prerogative powers. The Prerogative powers of Attorney General which were derived from the Common Law and include everything that the executive government could do without the authority of a statute are non reviewable. While the Statutory powers of the Attorney General which were on the other hand derived from the authority of a Statute are generally subject to judicial review. However, recent development in that country indicates that even the prerogative powers of the Attorney General are now subject to judicial review.<sup>194</sup> In the case of *Civil Service Union v. Minister of*

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<sup>194</sup> Mba, O. (2010), Judicial Review of the Prosecutorial powers of the Attorney General in England and Wales and Nigeria: an imperative of the Rule of Law *Oxford University Comparative Law Forum* at <http://Oucf.Juscomp.org>.

*Civil Service*<sup>195</sup>, known shortly as the GCHQ case, the House of Lords have put to rest the view that all Prerogative powers are beyond judicial control. Lord Diplock in that case could see no reason why simply because a discretionary power was derived from Common Law and not a statutory source, it should for that reason only be immune from Judicial Review. Rather, he held the view that the law relating to Judicial Review has now reached the stage when it can be said that if the subject matter in respect of which the prerogative is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principle developed in respect of the review of the exercise of Statutory power. Today in England therefore, the controlling factor in determining whether the exercise of Prerogative powers is subject to Judicial Review is not its source but its subject matter.

The above decision of the House of Lords is fortified by the decision of a strong Bench of the Law Lords (Lord Bingham, Hoffmann, Hope, Carswell and Brown) sitting at Privy Council in *Mohit vs. DPP of Mauritius*.<sup>196</sup> In that case, the Mauritius Director of Public Prosecution, who enjoys similar prosecutorial powers to both the English and Nigerian Attorneys General under the Mauritian Constitution filed a *nolle prosequi* and terminated the proceeding each time Appellant requested leave to apply for Judicial Review from the Supreme Court of Mauritius but the court upheld the DPP's decision holding that the DPP's power was not amenable to Judicial Review. However, on Appeal to Privy Council, the DPP in an apparent attempt to avoid the adverse implication of the GCHQ case supported the decision of the Supreme Court by relying less on the source of the power to enter *nolle prosequi* than on the nature of the decision to enter one.

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<sup>195</sup> (1985) A.C. p. 374.

<sup>196</sup> (2006) UKPC, 20; (2006) 1 WLR 3343.

Relying on the decision of Supreme Court of Nigeria in *State v. Ilori*<sup>197</sup>, the DPP contended that a prosecutorial decision involves the assessment of factors which the courts cannot and should not seek to review. The Privy Council emphatically rejected this contention and refused to disturb what it described as ordinary assumption and held that a public officer exercising statutory function is amenable to Judicial Review. Lord Bingham, in the course of delivering the lead judgement referred to the prerogative powers of Attorney General and considered them reviewable under the current dispensation in England.

Not only in England, the judiciary in other Common Law countries such as Canada and Kenya in Africa, has also seen the need to control the powers of Attorney General. In Canada for example, the court now holds the view that although it is the fundamental principle of the law that Attorney General may act independently of partisan concern when exercising their delegated sovereign authority to institute, continue or discontinue criminal prosecution, his decision in that regard is reviewable if it is not exercised honestly and in good faith.<sup>198</sup>

In Kenya, the Judiciary has also moved away from the Common Law regime on the powers of Attorney General to legal accountability. In a land mark judgement, in the case of *Crispus Karanya vs. Attorney General*,<sup>199</sup> the Kenya High Court overruled itself when it declared that “on the present practice in our criminal justice system, that a *nolle prosequi* can not be challenged in court, we find such proposition as untenable under the Kenyan Constitution”. The relevant part of the Kenyan Constitution considered in the aforementioned case is section 26(3) which provides that:

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<sup>197</sup> (1983) 2 S.C. p. 155.

<sup>198</sup> Marc, R. (2009), the Attorney General and Prosecutorial Function on the 21<sup>st</sup> Century, *Queens University Law Journal*, Vol. 43(2), p.813.

<sup>199</sup> High Court Kenya, Criminal application No. 39 of 2000.

The Attorney General shall have power in any case in which he considers it desirable so to do:

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

Careful examination of the above section reveals that it is similar to section 172 and 211 of the Constitution of the Federal Republic of Nigeria, 1999 in all respect save for the provision of sub section 3 which requires the Attorney General of Nigeria 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.

#### 4.6. Conclusion:

In the final analysis, it is submitted that the method adopted by the Supreme Court in the interpretation of section 191(3) of the 1979, Constitution now section 211(3) of the Constitution, has gone counter to the spirit of the Constitution and canon of Interpretation upheld by the same court in the recent case of *Marwa & Anor. V. Nyako & Anor.*<sup>200</sup> where the Court per Musdapha CJN. (As he then was) held as follows:

That in interpreting a Constitution, a judge extracts the Legal meaning along the range of the text's various semantic meanings. One should not give the

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<sup>200</sup> (2012) S.C.M. p. 67.

Constitution meaning that its express or implied language can not sustain. The implied language is the language written in the invisible ink between the lines and derived from the structure of the Constitution... A Constitution is a unique legal; document, it enshrine the special kind of norms and stand at the top of the normative pyramid...the task of expounding Constitution is crucially different from that of construing a statute. A statute defines present rights and obligation, a Constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing frame work for the legitimate exercise of governmental power, it must therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers.

If the Supreme Court had applied the above principle of interpretation, its decision in the Ilorin's case would have been different. It would have interpreted the word "Shall" in the section in issue to mean "Mandatory" thereby placing Attorney General under a necessary duty to have regard to public interest and the interest of justice in the exercise of his powers. Ultimately, that interpretation would have lead to the conclusion that an exercise of powers by Attorney General is subject to judicial review at least, where his actions infringes on the fundamental liberty of others, is illegal or unconstitutional in line with the general context of the 1979 now the 1999 Constitution of the Federal Republic of Nigeria.

**CHAPTER FIVE:**  
**SUMMARY AND CONCLUSION:**

**5.1. Summary:**

From what was discussed in this dissertation, there is no doubt that Attorney General - whose main duty is advising government, enforcing the law, representing government in the prosecution of cases (civil and criminal) as Attorney for the state and acting generally as public spokes man for the field of law - occupies a very prominent position in the administration of justice process in Nigeria. In chapter three to this dissertation, we noticed that while Attorney General exercises controlling authority in any civil case affecting Public interest; his powers in criminal cases are much more overbearing. Attorney General has powers to institute and undertake, take over and continue or discontinue any criminal proceedings instituted by himself, any other person or authority in Nigeria whatsoever. His powers could be exercised personally, through officers of his department or any other person delegated by him. Though his powers in criminal cases were described by the Supreme Court as absolute and subject to no judicial review whatsoever, this dissertation found however, in chapter four that the said position was erroneous based on the general character of the Nigerian Constitution, the historical development of the powers under the Constitution and the fundamental objectives and directive principles of State policy under the same. The dissertation concludes that the powers of Attorney General are unfettered only when it is exercised legally, honestly and in good faith, without infringement on the fundamental liberty of any person whatsoever. Details of the findings are as follows:

## 5.2. Findings:

- i. That although the position of the judiciary in Nigeria remains that the powers of Attorney General is unquestionable by the courts, the Judiciary in other Common Law jurisdictions 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 powers by Attorney General.
- ii. That the position of the Nigerian Judiciary that the powers of Attorney General is unquestionable contravenes the provisions of section 6(6)(a & b) of the Constitution of the Federal Republic of Nigeria, 1999 which confers judicial authority on the court and extends the same to cover all the inherent powers and sanctions of a court of law and to all matters between government or authority and any person in Nigeria; and to all actions and proceedings relating to the determination of any question as to the civil rights and obligations of that person.
- iii. That although the position of the Nigerian Judiciary remains that the powers of Attorney General is unquestionable by the courts; the decision of the Supreme Court in *Abacha vs. The State* (2002) NWLR (Part 779) p. 437 impliedly establishes the principle that an exercise of powers by Attorney General will be subject to judicial review if done in bad faith, is illegal or done in the unlawful infringement of the fundamental liberty of a particular person.
- iv. That the mandatory requirement for the consent of Attorney General before a court could execute garnishee orders against government or any of its agencies as provided by section 84(1)(3) of the *Sheriffs and Civil Process Act*<sup>201</sup> is

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<sup>201</sup> Cap. S. 6 *Laws of the Federation of Nigeria*, 2004.

unconstitutional having regards to the provisions of section 36(1), 287(3) and 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

### **5.3. Recommendations:**

In view of the above findings, the dissertation makes the following recommendations:

- i. That whenever opportunity arises, the Supreme Court should reconsider its interpretation of section 174(3) and 211(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) in such a manner that would allow for the judicial review of the exercise of powers 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.
- ii. That the Constitution of the Federal Republic of Nigeria, 1999 should be amended in such a manner that will categorically make the powers of Attorney General subject to judicial review for the purpose of encouraging transparency and accountability in the discharge of his duties. The thesis makes this recommendation believing that separating the office of Attorney General from that of the Minister of Justice as presently recommended by the new section 150(1) and 195(1) the draft amended Constitution, 2004, alone would not provide the needed independence for the office Attorney General from executive interference. This is so because once Attorney General remains a civil servant as suggested, he would be amenable to political control by the executive in the same way as the Attorney General in his present position. If judicial review of

the powers of Attorney General is categorically recognised by the constitution,, it will uphold the Rule of Law by ensuring the independence and impartiality of Attorney General in the exercise of his discretionary powers in perception and reality. It will also reduce to a considerable degree, the chances of arbitrary or capricious decision and boosts public confidence in the justice system particularly in the institution and conduct of public prosecution, where the public rightly expects scrupulous fairness and complete absence of political interference.

- iii. To checkmate political control of the functions of Attorney General by Chief executives, the dissertation alternatively recommends for the removal of the over bearing discretionary powers of the president/governors in the appointment and removal of Attorney General from office. Amendment should be made to the constitution in such a manner that would allow for the removal of erring Attorney General by the Federal and State house of assembly when the need arises. The amendment if made would be similar to what obtains in America where the U.S. Attorney, as the Attorney General of the United State is called, though appointed by the president and serves at the pleasure of the president, could be impeached from office by the congress for misconduct. He or she could also be tried by the senate for treason bribery and other high crimes and misdemeanour.<sup>202</sup> If the National or State House of Assembly as the case may be, could impeach an Attorney General for misconduct, that will break the political control of the function of the Attorney General by chief executives and ensure independence of the office from their control.

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<sup>202</sup> Larry J. Siegel, *Essential of Criminal Justice (4<sup>th</sup> ed.)*, Width Worth & Thompson, Learning, Belmont CA94002-3098 U.S.A. pp. 236-237.; Ogidi, H. (2014), Rethinking the Powers of *Nolle Prosequi in Nigeria Global Journal of Policy and Law Research, Volume 12 No. 1 pp. 1-11.*

- iv. That the provisions of section 84(1-3) of the Sheriffs and Civil Process Act Cap. S. 6 Laws of the Federation of Nigeria, 2004 which stipulate for the mandatory consent of Attorney General before enforcement of garnishee orders against government or any of its agencies be repealed to ensure the independence of courts and up hold the principle of equality of all parties before the court under the Constitution.

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