Nolle Prosequi and the Attorney-general: a Clear Demand for Regulations

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ABSTRACT

The purpose for which any law may be enacted cannot be located at the outside the desire to ensure peace, order, and the protection of the rights of every citizen. Our laws are creations of reasoning and principles which should at all times be vigorous even at the test of reasonableness. The powers allotted to the Attorney-General in the Nigerian Constitution is in the humble opinion of this researcher, an imperfect fortune because it is not subject to any restraints whatsoever. This paper examines the power of the Attorney-General as contained in section 174 of the Constitution of the Federal Republic of Nigeria 1999 i.e. the power to institute criminal proceedings, to take over criminal proceedings instituted by any other person under his fiat, and to discontinue criminal proceedings at any stage before judgment is delivered. Mention shall also be made of the scope of exercise of these salient powers. Furthermore, this paper shall also consider the historical development of this office and how it emerged with such powers which is considered enormous in this study. The focus of this study shall be centered on the power to discontinue criminal proceedings which is otherwise known as nolle prosequi, the tendency of abuse of this ostensibly unfettered discretion, and the need to ensure that substantive justice at all times preponderates and substantially dominates the desire of a single person to exercise a constitutional power irrespective of the professional nomenclature. At the end of this study, the researcher shall humbly and respectfully make recommendations which are not geared towards a condemnation of the antique nolle prosequi, but focused on the need to prevent abuse and miscarriage of justice which has recently become unavoidable and often frequents the exercise of this power.

***Keywords**: Nolle Prosequi, Attorney-General, Discontinue, Power, Justice*.

Introduction

The Attorney-General is the chief law officer of the Federation or the State as the case may be. He represents the State in all legal proceedings and ensures that the State is well advised in all legal matters. All the states of the federation has their respective Attorneys-General and the same applies to the federation. The Attorney-General is the head of the ministry of justice or the minister of justice or the commissioner of justice as the case may be.[1] Thus, as the chief law officer and the minister or commissioner of justice as the case may be, the office of the Attorney-General can be said to be accorded with double royalty. This receives legal stamp in the statement of NIKI TOBI (as he then was) in *Esokoro v. Govt of Cross River State**[2]*** where he rightly commented thus:

> â€œThe Attorney-General is not only the head of the head of the ministry of justice but also the chief legal adviser of the government. He is basically responsible for their actions and inactions.â€

Likewise in the case of *State v. Ilori**[3]***, the Supreme Court expressed the view that the powers of the Attorney-General is a great ministerial prerogative coupled with ministerial responsibilities.[4]

Under subsections (2) of sections 150 and 195 of the Constitution of the Federal Republic of Nigeria (hereinafter referred to as the CFRN) 1999 provision is made for the necessary requisites that must be met before being qualified for appointment as an Attorney-General of either the Federation or the State. The subsections provides thus:

> â€œa person shall not be qualified to hold or perform the functions of the office of the Attorney-General unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than ten yearsâ€

It is interesting to pinpoint the fact that these provisions were couched in the negative form in consideration of the fundamentality of the office to the administration of criminal justice in Nigeria and in avoidance of admitting unqualified persons to wield such enormous powers given to the Attorney-General in our law.[5]

The office of the Attorney-General predates its mention in the constitution. This office is rooted in antiquity and has its origin at the English common law. The role of the Attorney-General in the administration of criminal justice cannot be undermined; and in the exercise of these powers, the Attorney-General is a law unto himself and subject to no control. [6]

The scope of exercise of the powers of the Attorney-General, despite the availability of express constitutional provisions, has been vulnerable to frequent disputes as we shall soon observe. Albeit the powers and duties of the Attorney General is constitutionally recognized; unfortunately, the extent of such power has been a subject of much polemics, resulting in an avalanche of judicial authorities.[7] Notwithstanding the multifarious court decisions, it remains conspicuous that disputes still arise at the exercise of the Attorney-General`s power out of miscarriage of justice or the fear of it. This and many other issues shall be evaluated in the course of this discourse.

A Historical Perspective of the Office of the Attorney-General

It may be sensed that since the powers of the Attorney-General are substantially highlighted in the constitution, the office may be a probable creation of it. However, facts reveal that the establishment of the office of the Attorney-General predates constitutional development. The position as to when exactly the office started is open to a lot of

arguments. What is clear is that it sprung out from the Common Law in England. At the earliest time, the king was seen as the fountain of justice as he entertained petitions in his courts in matters affecting the rights of the people. Petitions were rolling in and it was becoming onerous for the king alone to attend to them all. Also, since the king was the first common law judge and was also looked upon for justice, the maxim â€œrex non potest peccareâ€ which means â€œthe king can do no wrong*â€* soon simmered down and ceased to be a defense for wrongs committed by the king or his servants in the course of effecting the king`s order. It alternatively became â€œthe king must not, was not allowed, was not entitled to do wrong.â€[8] Consequently, the King began to entertain petitions against himself and without bias he would comment â€œ fiat justitiaâ€ Â which means â€œ let justice be doneâ€ on the petitions bordering on his own wrongs or those of his servants. Owing to the fact that it was impossible for the king to represent himself in his own court, the need of an attorney for the king arose and became clearer. From this, it can be argued further that the Attorney-General at this time performed not more than the function of representing the king in suits against the Crown.Ã A learned scholar, Fitz James[9] expressed the view that apart from the king, other persons had Attorney General at this time and the expression meant no more than a general agent or representative.

According to Professor Sayles[10], since it was inconceivable for the king to appear in his suits, they could only sue or be sued by their Attorneys that is the Attorney-General who was then addressed as the King`s Attorney. In this regard, one Lawrence Del Brok, a professional attorney was already prosecuting pleas of particular concern to the sovereign.[11] From 1254 and 1268, there was a cumulative of at least thirty cases in which the crown had engaged this particular attorney.[12] From this juncture, it can be argued further that Lawrence Del Brok was the king`s first Attorney and the progenitor of the modern day Attorney-General. Conversely in 1966, a learned author[13] published a book titled *A Chronicle of Attorney-Generals in England* where he named William De Gisilham as the earliest Attorney-General in 1279. This publication created ruckus in the stream of judicial authorities as no mention at all was made to Lawrence Del Brok. However, with the availability of much more judicial authorities naming Lawrence Del Brok as the first king`s Attorney, this argument simmered down and was laid to rest[14]. To the extent of inconsistency with streams of judicial authorities, William Dugdale`s publication can be contested to be unreliable.

There was a discontinuance in the use of the expression â€œking`s attorneyâ€ in 1461 and it was in the same year that the term â€œAttorney-Generalâ€ was used for the first time. In 1461, John Herbert was appointed as the first Attorney-General in England. It was also recorded in the same year that the king`s solicitor, who may be likened to the present day Solicitor-General, was appointed for the first time and Richard Fowler was named the king`s solicitor. Although this discourse is not centered on the powers or functions of the office of the Solicitor-General, mention must be made of John Fort who was appointed as the first Solicitor-General of England in 1515.

The functions of the king`s Attorney at this period differs substantially from the ones performed by the present day Attorney-General. However, it must be pointed out that the functions performed by the modern day Attorney-General is an output of historical development in this regard and was not come about overnight. At the end of the 19th century, it had become crystal in England that the Attorney-General was solely responsible for the commencement of criminal cases. Ditto in civil suits, all proceedings by or against the Crown were (and still are) undertaken by the Attorney-General. Also, the approval of the Attorney-General was required before certain proceedings may be commenced[15] and his consent required before penalties could be recovered in certain cases.[16]

The emancipation of the office of the Attorney-General in Nigeria is a legacy of our colonial past. The incorporation of the office into our legal system was a deed done by the British colonialist. The office first appeared in the 1914 Amalgamation Constitution. The functions of the Attorney-General in the pre-independence constitutions do not differ much from the ones enunciated above, that is the Attorney-General of England. The office of the Attorney-General was instilled in the Nigerian legal system with the reception of English law. This Attorney-General was strictly a civil servant and manned the legal department which was established by the British colonialist. The Attorney-Generals of the various Nigerian colonies at this time were drawn from the English Bar.[17] They were appointed by the UK Government as ex officio members of the government and played substantial roles in colonial politics.[18] Subsequent Nigerian constitutions have given reverence to the office of the Attorney-General as the powers of the Attorney-General are clearly explicated in them. The 1963 republican constitution made the office of the Attorney- General political both at the central and regional level. A notable feature of the 1960 constitution was the recognition of a Director of Public Prosecutions who was not under the Minister of Justice. This pattern was abolished by the subsequent 1963 constitution to the effect that the Director of Public Prosecutions shall be placed under the direct surveillance of the Ministry of Justice. The 1979 constitution also followed this trend and created an office of the Attorney-General who was also the Minister of Justice with such officers as the Solicitor-General, the Director of Public prosecutions under his direct control.[19] The Attorney-General thus superintends the affairs of this Ministry of Justice. These sections were directly reproduced in the CFRN 1999 and thus a replica of it.[20] Also the provisions of the CFRN 1999 bordering on the powers of the Attorney-General is on all fours with the provisions in the 1979 constitution.[21] It must be noted that the qualifications for appointment of the Attorney-General remains unchanged since its mention in the 1960 Independence constitution.

Lastly, a historical observation of the office of the Attorney-General cannot be said to be complete without reference made to the provisions of section 104(6) of the 1960 Independence constitution which provides thus:

â€œIn the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the Direction or Control of any other person or authorityâ€

Albeit this provision is directed towards ensuring the autonomy of the Attorney-General in the exercise of his powers, its vulnerability to abuse is blatant. Notwithstanding the fact that this provision is absent in letters in the CFRN 1979 and CFRN 1999, its effects appears unconcealed and direct our proceedings from its grave.[22]

Powers of the Attorney-General: Nigeria as a Case Study

An observation of the historical perspective of the office of the Attorney-General will not suffice to whittle down the

powers of the Attorney-General in our law. Nevertheless, it will reveal to us what has remained the oversight functions of the Attorney-General which is the representation of the government in all suits, whether civil or criminal, instituted by or against the government. Put in other words, the Attorney-General has the sole responsibility of undertaking legal proceedings in the name of the crown, i.e. the government in this case. He is the mouthpiece of the government in respect of all legal matters. He is responsible for the actions and inactions of the government.[23] Although it is not constitutionally provided for that the Attorney-General shall represent the government in all proceedings, it is not in that circumstance therefore rendered unconstitutional. It rather complements the already constitutionally prescribed power. It is rooted in antiquity the for king`s Attorney who were predecessors to the modern day Attorney-General to represent the Crown in all proceedings. Thus, this trend has been repeated in various legal systems including Nigeria. It must however be borne in mind that it is not the focus of this study.

The CFRN 1999 makes provisions for the office of the Attorney-General of the Federation[24] and the Attorney-General of the State[25] respectively. In the same vein, CFRN 1999 makes provisions for qualifications of the holders of the office, the qualifications which includes that such person is a qualified legal practitioner in Nigeria and has so practised for a period not less than ten years.[26] Notably, the oversight functions of the Attorney-General includes superintending the affairs of the Ministry of Justice. As the head of the Ministry of Justice, the Attorney-General has the responsibility of presenting the Ministry`s annual budget. The powers of the Attorney-General of the Federation, ditto for the States, are spelt out succinctly in sections 174 (1) and 211(1) of the CFRN 1999 respectively. These sections accord to the Attorney-General a wide latitude of power with respect to criminal prosecutions. These sections, which are similar in effect, provide thus:

> â€œThe Attorney-General of the Federation shall have the power â€“
>
> (a)Â 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;
>
> (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
>
> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.â€

As it was clearly highlighted above, the Attorney-General has its primary responsibility with respect to prosecution of criminal cases. The importance of the Attorney-General in the administration of criminal justice cannot be undermined. He plays a fundamental role in the prosecution of offenders thereby contributing largely to the maintenance of law and order in the society. Most criminal prosecutions, if not all, are commenced on the information of the Attorney-General. He enjoys unrestricted discretion in the choice of whom to prosecute and decides what charge or charges to press.[27] A question has often been raised in relation to the scope of exercise of this power which is whether the Attorney-General of the Federation can prosecute on matters bordering on State offences. The law is limpid in this regard. The Attorney-General of the Federation has a wide range of powers to institute criminal proceedings in respect of federal offences. Likewise, the Attorney-General of the State can only institute proceedings in respect of state offences. Where the Attorney-General of the federation is to institute criminal proceedings in respect of state offences, it must be done with the approval of the Attorney-General of the state. This is also the law where the Attorney-General of a state is to institute proceedings in respect of federal offences. A defiance of this rule will not go unanswered as it will surely form a ground for quashing whatever decision arrived at by the court on appeal. Thus, in *Anyebe v. State**[28]*, the accused person was standing trial for illegal possession of firearms which is contrary to section 4 of the Firearms Act, thus making it a federal offence. The proceeding was initiated by the Attorney General of Benue State. On appeal it was argued on behalf of the accused that since the offence he was being prosecuted for relates to a federal offence, the information of the Attorney- General of Benue state which caused the proceeding was incompetent. The Supreme Court toed this line of argument and held accordingly.[29] The question of distinguishing a federal offence from a state offence may permeate the mind of an average reader. A federal offence is an offence created by an Act of the National Assembly and designated to that effect.[30] On the other hand, a state offence is one created by a law of the state. This distinction is only a rationalization and should not be taken as being rigid. However, there are available instances where an offence will be a creation of an Act of the National Assembly but is also to take effect as State laws.[31]

Subsection (2) of the section allotting to the Attorney-General his powers provides that these powers may be exercised by the Attorney-General in person or through officers in his department. It must be pointed out that apart from officers in his department, the Attorney-General can delegate the power to prosecute other individuals or authority. When this power has been validly delegated by an instrument, the recipient of the power is qualified to appear for the Attorney-General and proceed to sign charge sheets and court processes.[32] This provision more often than not has generated heated controversies leaving behind footmarks on judicial authorities. The question here has always been that in the event of vacancy of the office of the Attorney-General, can the officers in his office put these powers into effect? Put alternatively, can the Solicitor-General or any other officer in the office of the Attorney-General initiate criminal proceedings where the power has not been by any instrument donated to him? It raises the eyebrow to also consider the question of whether crime may be allowed to thrive inexorably as a reason of the absence of an Attorney-General. In the past times, the law has been that the Solicitor- General who is an officer in the department of the Attorney-General cannot validly exercise his powers (Attorney-General`s) in the event of vacancy of the office. This principle was laid down in the case of *Attorney-General of Kaduna State v. Mallam Usman.**[33]* The facts of this case which is that there was a breakout of violence in a village in Kaduna state; this affray led to the death of one Abdul Rashid; certain villagers were arrested in connection with the breakout of the violence which led to the death of the deceased and they were accordingly charged with culpable homicide. They were already arraigned before the Kaduna State High Court when the father of the deceased gave evidence at the preliminary inquiry. The Solicitor-General purported to discontinue the proceeding and thus entered a nolle prosequi pursuant to section 191(1)(c) & (2) of the 1979 constitution which allot the power to discontinue criminal proceedings at any stage before judgment and that the powers of the Attorney-General may be exercised by him in person or through such other officers of his department. The judge gave effect to the *nolle* entered by the Solicitor-General and consequently terminated the proceeding. The suit was accordingly struck

out and the accused persons were so discharged. At the time this power was exercised, there was no substantive holder of the office of the Attorney-General, thus, there was clearly no instrument delegating this power. Subsequently, the respondent initiated a civil proceeding against the Attorney-General where he challenged the competence of this discontinuance. The objection of non-availability of *locus standi* was quickly raised by the appellants, and it was shown to have no reasonable connection with this suit. Also, it was contended that the court hearing this matter would imply that the judge was sitting on appeal of the case at the trial court. The court overruled the objections and entered that the discontinuance by the Solicitor-General was unconstitutional. The appellants failed at the court of appeal and further appealed to the Supreme Court. It was argued on behalf of the plaintiff that the doctrine of necessity should be made to apply in this case since crimes may not be allowed to thrive because of the absence of an Attorney-General. The court seemed not to toe this line of argument and held otherwise. It was affirmed that before the powers of the Attorney-General can be exercised by any person, it must have been expressly donated to him to the effect that such person should exercise the power as he has already obtained the fiat of the Attorney-General. It must be mentioned that as noted by Muhammadu Lawal Uwais JSC, what contributed to the failure of the argument of the appellants was that they, the appellants, failed to show that there was any law which conferred on the Solicitor-General the authority to exercise the powers of the office of the Attorney-General in his absence.

However, the foregoing line of reasoning has become obsolete and no longer indicates the position of the law as there are multifarious and available judicial authorities to the effect that the Solicitor-General can validly exercise the powers of the Attorney-General in the event of vacancy of the office. The Court of Appeal was approached with a scenario similar to the facts of the case of *Attorney-General of Kaduna State v. Mallam Hassan Usman*[34] shortly after the decision of the Supreme Court, in the case of *State v. Obasi****[35]*** and the court decided otherwise.Â The fact of the case was that while the defense counsel was giving its submission at the trial court, it *inter alia* raised an objection as to the competence of the information which caused the criminal proceeding on the ground that when the information was filed there was no substantive holder of the office of the Attorney-General and the suit should be struck out. The court by distinguishing this present case from the former one gave a radical interpretation of section 191(2) of the 1979 constitution and held that the powers allotted to the Attorney-General may be exercised by him in person or through such other officers in his department. Thus, it is a tenuous argument to allege that the information was incompetent because it was filed in the absence of an Attorney-General. The court also noted that if the drafters of the constitution had intended such interpretation, there would not have been the need to create the Ministry of Justice and placing under the Attorney-General, such armful of officers form the Solicitor-General to the State counsel. This position has received statutory support as the provision of section 4 of the Law Officers Act[36] is to the effect that the Solicitor-General has a right to exercise the functions of the office of the Attorney-General where there is no incumbent holder of the office. This provision has found fertile soil in the recent case of *Saraki v. Federal Republic of Nigeria****[37]*** where the Supreme Court held among other things that the charge filed in the absence of the Attorney-General of the Federation was competent to commence the proceeding.

Furthermore, the Attorney-General reserves the power to take over criminal proceeding that may have been instituted by any other person or authority.[38] The reason for the exercise of this power has often been indolent or an undiligent prosecution. Where the Attorney-General has given his fiat to any person for such purpose of private prosecution or where such prosecution has been instituted by the police[39], the Attorney-General may decide to take over and continue such proceedings if it appears to him that the charges are not diligently prosecuted or for such other reasons he may have borne in mind. He also possesses wide discretion in the exercise of this power.[40]

In the exercise of his powers, the constitution provides that the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.[41] The question of what will amount to an abuse of legal process has generated continuing debate. The term â€œabuse of legal processâ€ has no precise definition; thus, what will be regarded as an abuse of legal process is based on the available circumstance in each case. In line with the authority of *Amaefule v. State****[42]***, an abuse of legal process implies an abuse of legal procedure or improper use of legal process. In this case, the Attorney-General initiated a criminal action against the accused in the High Court while there was another action on the same facts pending at the Magistrate`s court. The accused person filed an action at the High court to strike out the suit because it amounted to an abuse of legal process. The Supreme Court toeing the line of argument of the High Court held that this was never an abuse of legal process. However, in the case of *Edet v. State****[43]***, the accused was facing a charge of manslaughter at the Magistrate`s Court while another charge of murder was instituted against him at the High Court; the Supreme Court held that this amounted to an abuse of legal process. The court further noted that since the powers of the Attorney-General in instituting or discontinuing criminal proceedings cannot be questioned, the remedy for abuse of this power does not lie in judicial review. It can thus be argued further that this proviso is merely complementary to the exercise of the powers of the Attorney-General and is not a shackle to the exercise of the powers. Furthermore, the fact that the test of ascertainment of this provision is a subjective one manifests that the Attorney-General is subject to no restraints when exercising his powers.

It is fundamental to this discourse to note that the powers of the Attorney-General are not subject to any control even in the light of the exercise of nolle prosequi. In deciding whether or not to allow private prosecution of a case, the Attorney-General has wide discretion in this regard. He may be compelled to enter application for fiats but no court has the power to compel him to give a nod. This was observed in the judicially notorious case of *State v. Ilori*[44] where Idigbe JSC rightly commented thus:

â€œAt common law, the decision of the Attorney-General in granting or refusing his fiat is final and conclusive. While the court can compel him in appropriate cases(by mandamus) to hear and entertain application for his fiat, no court can compel him to grant his fiat nor question the property of his refusal of same who can enter a nolle prosequi exempting the fiat of the Attorney-General.â€[45]

In the same vein, the Attorney-General has, in the exercise of his powers, been described as a law unto himself.Â Smith L.J. also had this to say:

> â€œâ€¦the Attorney-General alone has the power to enter a nolle prosequi; and that power is not subject to

any control.â€[46]

Mention must also be made of the provisions of section 97(6) of the 1960 constitution which expressly stated that the Attorney-General is not subject to the control of any person or authority in the exercise of his powers. Albeit this provision is absent in our recent constitutions, their fragrance lingers in our legal system. From this juncture, it can be argued further that the Attorney-General is only answerable to his appointer, public opinion and the legislative house. Even when sanctions are meted out against him for actions done in his official capacity, this will never operate to roll back his actions. It must be brought to limelight that the powers of the Attorney-General are salient enough for our law to enable him liberty and autonomy in its exercise. He plays an unparalleled role in the administration of criminal justice. However, what is important is that this liberty should not be exercised at the extent of injustice. Put alternatively, the freedom innate in the powers of the Attorney-General should not be used to occasion miscarriage of justice, thus making the demand for restraints, even if not much, more lucid and evident.

An Appraisal of Nolle Prosequi

The reason for the discussion and analysis of the salient doctrine of *nolle prosequi* in a separate sub-topic is nothing but a consideration of how fundamental the analysis of this doctrine is to this discourse. This power is ingrained in the CFRN 1999, though not created by it; giving to the Attorney-General the power to discontinue criminal proceedings at any stage before judgment before any court of law in Nigeria other than a court martial.[47] Nolle prosequi is a formal entry on the record by the prosecuting officer to cause a cessation of the proceeding and with the effect that the case shall not be prosecuted further. It is a discretionary power vested in the Attorney-General to make any criminal proceeding instituted by the Attorney-General or any other person or authority cease to proceed. The practice of entering a nolle is old and rooted in antiquity. The power of the Attorney-General in the administration of criminal justice cannot be overemphasized. The application of this power operates to discharge the accused person or acquits depending on the time the power was entered. If the nolle prosequi is entered before the accused person enters his defence, it will be a discharge and acquittal. However, if it is entered when the accused person has entered his defence, it will operate to discharge the accused person thus with the effect that the accused person can be charged again with the same offence.[48] In the exercise of this power, the Attorney-General need not put forward any reason.[49]

It is informative to note that this power and its exercise is indisputable and incontrovertible. When the Attorney-General enters a nolle prosequi, it cannot constitute a subject to judicial review. Even in the United Kingdom where the doctrine has its origin, this power is not subject to any constraints.Â Thus, the Attorney-General enjoys an unrestrained liberty in this regard. Smith L.J. had this to say in *R v. Comptroller of Patents, Designs and Trademarks, ex parte Tomlinson.* ***[50]****:*

> â€œEverybody knows that he (Attorney-General) is the head of the English Bar. We know he has had from earlier times power to perform high judicial functions, which are left to his discretionâ€¦the Attorney-General has the power to enter when a case is before a judgeâ€¦the Attorney-General alone has the power to enter a nolle prosequi and that power is not subject to any control.â€

This power may either be exercised by the Attorney-General himself or by a private prosecutor. This is done to preclude an accused person from criminal liability in respect of some or all of the charges preferred against him. In exercising this, the Attorney-General is entitled to do so orally or otherwise through a legal instrument. However, where the power to enter a nolle prosequi has been delegated to officers of his department or to a private prosecutor, such instrument delegating the power must be in writing. Thus, a State Counsel cannot enter a nolle prosequi or discontinue any criminal proceeding before any court in Nigeria until the instrument authenticating such delegation and effecting such discontinuance is tendered in court.[51]

The power of the Attorney-General to enter a nolle prosequi, just like any of his powers highlighted in the Nigerian Constitution, is not subject to control of the courts. This view was expressed in the case of Akilu & Anor v. Chief Gani Fawehinmi[52] per Ogundere JCA thus:

> â€œâ€¦the abuse of power by the Minister of State, if any, is the responsibility of the political power that appointed him. It is to that extent not justiciable as the court does not question the exercise of the power of the Attorney-Generalâ€¦If he refuses to hear and consider an application for a fiat, we would compel him by mandamus to hear and considerâ€¦the Attorney-General may be made responsible to Parliament. If he has made an improper decision, the Crown may and if properly advised, dismiss him but we cannot review his decisionâ€[53]

Albeit this case borders not on the power of the Attorney-General to enter a nolle, a view is that the expression covers all the powers of the Attorney-General and does not leave out his power to discontinue a criminal proceeding at any stage before judgment is delivered. The unrestricted exercise of this power and its openness to outright abuse makes this fortune an imperfect one.

As it was earlier observed, when a nolle prosequi is entered, it temporarily or permanently relieves a person of criminal liability depending on the time it was entered i.e. before or after the accused person enters a plea. Even though the enabling statutes giving the Attorney-General power to enter nolle prosequi is silent concerning the reason for the inclusion of the power. Also, a cursory look at the historical development of the power does not say much about its emancipation. But it is safe to speculate that the rationale for the inclusion of this power is to exonerate a person facing a criminal charge when facts later reveal that the individual has no reasonable connection with the offence he is alleged to have committed. It may also be due to unnecessary delay in prosecution i.e. where the accused person is not diligently prosecuted in cases of private prosecution, where stupendous time has been spent on the proceeding even in the face of apparent doubts as to the guilt of the suspected person. Any other reason for its exercise is arguably to occasion miscarriage of justice, political, and in fact making it an additional immunity clause. The office of the Attorney-General being a political one i.e. as a minister in the executive cabinet makes it possible for an unscrupulous Attorney-

General to exercise the powers to exonerate a party member who is facing a charge and its exercise will never be questioned. Even when it is claimed to be in light with the phrase â€œin the interest of justiceâ€ in section 174(3) of CFRN 1999, if it is not in line with the above speculated reasons, miscarriage of justice may become inevitable. It is not an unknown fact that a court system is established for the purpose of justice and nothing else thus making it wrong for the Attorney-General to claim to have avowed the interest of justice while impeding a court proceeding as it is an axiomatic truth that the Attorney-General cannot do justice better than the court. Notably, there is no limit as to the number of persons in respect of which a nolle prosequi can be entered and as it stands, its exercise cannot be questioned by any court of law.

A view has been expressed as a form of regulation to the powers of the Attorney-General. This has often been that an aggrieved person who has suffered perceived injustice from the exercise of the powers of the Attorney-General should have a separate action in civil proceedings against the Attorney-General. This has received judicial support in the case of *A.G. Kaduna State v. Mallam Usman.**[54]* It may however be asked that of what relevance is a declaration of right or even compensation in the face of substantive justice? How satisfying can compensation be to a man who wants the perpetrators of an evil be brought to book while they are left to roam freely?Â It is therefore submitted that for this and many other reasons that the need for regulations in relation to the office of the Attorney-General, especially with regards to the power to enter a nolle prosequi, appear clearer, closer and in fact exigent.

Recommendations

It is the humble recommendation of this study and a respectful opinion of this researcher that the office of Attorney-General should be severed from that of the Head of the Ministry of Justice. The implication of this is that the occupation of the office not based on appointment by the Head of the executive cabinet will substantially make the office and its holder devoid of political influence whenever they are exercising their powers. Thus, it is suggested that the Attorney-General, just like the Solicitor-General, should bear the status of a civil servant as it was obtainable in the pre-independence constitutions. If this is ensured, an Attorney-General would be able to exercise his powers with utmost autonomy and diligence and devoid of political influence which is a major clog in the wheel of the exercise of the powers of the office, bearing in mind that his stay in office is hinged on his terms of employment.

Furthermore, it is proffered as a solution to the frequent injustice suffered at the entry of a *nolle* and the factor of bias which is often influential in its exercise that the power of the Attorney-General to discontinue a criminal proceeding should be made subject to the advice of an advisory council. The members of this council shall be the head of the executive cabinet, head(s) of the legislative house(s), the Attorney-General, a prominent judge and two proficient legal practitioners which shall be recommended by the Nigerian Bar Association. The primary duty of this council shall be to advise the Attorney-General whenever a discontinuance is to be effected. This will ensure the enablement of a curios and critical analyses of the consequences of entering a nolle prosequi and ensure that the Attorney-General is well advised in this regard before proceeding with a total discontinuance of a criminal proceeding or a withdrawal of charge(s) and it will also deter political influence in the exercise of his powers.

Finally, the Attorney-General should bear in mind his role in the sustenance of peace and order in the society and should be sworn to the upholding of justice and not posit himself to the legal system as a badly structured dam that impedes the free flow of justice.

Conclusion

The unparalleled role of the Attorney-General in our legal system especially in relation to criminal proceedings has been considered extensively in this study. Attempts have been made in this paper to expound the powers performed by the Attorney-General and a curios and detailed exposition of the office of the Attorney-General. An examination of historical facts has revealed that this office has its roots in English Common Law and was created as far back as the thirteenth century where the sole function they performed then was to undertake legal proceedings on behalf of the king and offer to him legal advice. The incorporation of the office into Nigerian legal system was a legacy of the colonial past effected the British colonialists. The oversight functions of the Attorney-General was also a subject of discussion in this paper and an analysis was made to the scope of exercise of the power of the Attorney-General and it was submitted that in the absence of an incumbent holder of the office , the powers may be validly effected by such other members of his department.[55] In the same vein, the power of the Attorney-General was considered from the viewpoint of the Nigerian Constitution.[56] The emancipation of the power of the Attorney-General to discontinue criminal proceedings was also considered in this discourse and speculations were made, safely, as to the probable rationale for giving the Attorney-General such enormous power where it was observed and submitted that its exercise may be due to a delayed trial or an erroneous prosecution. Mention was also made of the vulnerability of this power to outright abuse. Furthermore, the availability of multifarious pronouncements by courts in respect of the exercise of this power reveals that the Attorney-General is not subject to any control and is only answerable to his appointer and even when sanctions are meted out on him for being erring in his official dealings, it does not operate to roll back his actions.[57] This makes the demand for regulations to the exercise of this power exigent in a bid to ensure that the Attorney-General and his power to halt criminal proceedings is not presented as a badly structured dam which blocks the flow of justice and also to deter political influence and bias in the exercise of this power; all anchored on the need to avoid injustice.

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References

[1] Sections 150(1) and 195(1) makes creation for the office of the Attorney-General of the Federation and States respectively.

[2] (1991) 4 NWLR (Pt. 185) 336.

[3] (1985) 2 SC 155.

[4]Â The case of *FCSC v Laoye* (1989) 2 NWLR (pt.106) 652, is also illustrative in this regard.

[5]CFRN 1999 S.174&211.

[6] See the case of *State v. ilori (1985) 2* SC 155.

[7] Hon Charles Uwensuyi Edosomwan S.A.N., Powers of the Nigerian Attorney General in perspective, 2006.

[8]Eugene Erlich, Proceedings Against the Crown, pp.1216-137.

[9] Fitz James Stephen, History of the Criminal Law of England Vol.1 Pg. 499.

[10] The King`s Parliament of England, 1974.

[11] Kings Bench Vol I P. XIV.

[12]Â Dr Belliot`s work, p. 406.

[13] William Dugdale, *A Chronicle of Attorney Generals in Eng*land, 1966.

[14] See the publications Tabular Curiales, 1865 and Review of the Decision in Attorney-General of Kaduna State v. Mallam Umaru Hassan on.

the Powers of the Attorney-General in the Light of â€˜Corporation Sole Concept` by Ikenga K.E. ORAEGBUNAM, Boniface E. EWULUM, Ifeanyi AGWUNCHA. In these texts, Lawrence Del Brok was referenced as the king`s first Attorney.

[15] See Prevention of Crimes Act 1906 & Public Bodies Corrupt Practices Act 1889.

[16]Â See Lunacy Act 1890. These pre-1900 legislations have their influence on the powers of the Attorney-General in Nigeria as they apply as statutes of general application. However, some of them have been reproduced as local legislations.

[17] Edwards, *The Attorney General, Politics and the Public Interest*, (London: Sweet & Maxwell, 1984), 367.

[18]*Ibid.*

[19] CFRN 1979 S. 138&176.

[20] CFRN 1999(as amended) S. 150&195.

[21] Compare sections 174&211 CFRN 1999 and section 191 CFRN 1979

[22] *State v Ilori* (1985) 2 SC 155.

[23] *Esokoro v Government of Cross River State* (1991) 4 NWLR (Pt. 185) 336.

[24] Section 150(1) CFRN 1999.

[25] Section 195(1) CFRN 1999.

[26]CFRN 1999(as amended) S. 150(2) & 195.

[27] *Onwuzulika v State* (2017) LPELR 41899 CA. The Court of Appeal in this case affirmed the fact that the Attorney-General enjoys wide discretion in making the decision or choice of whom to prosecute and the exercise of this is not a subject of judicial review; the case of *R Â Olayiwola* (1959) 4 RSC 119 is informative in this regard.

[28] (1986) 1 SC 87.

[29] See also the case of *Emelogu v State* (1988) 2 NWLR (Pt 78) at 524.

[30] E.g. Part III of the Civil Aviation (Fire and Security Measures) Act.

[31] See the Criminal Code, the Penal Code Act, and the Child Rights Act.

[32] *Federal Republic of Nigeria v Adewunmi* (2007) 10 NWLR Pt 1042 at 399; *Ajakaye v Federal Republic of Nigeria* (2010) 1 NWLR (Pt 1206) 500.

[33] (1985) N.W.L.R (pt.8) 483.

[34] Supra.

[35] (1998) 9 NWLR (Pt 567) 686.

[36] Cap L8 LFN 2004.

[37]Â (2016) 3 NWLR (Pt. 1500) Pg 531.

[38] CFRN 1999 (as amended) ss. 174(1)(b) & 211(1)(b).

[39] Section 23 of the Police Act provides for prosecution of criminal offences by police officers in any court in Nigeria. Agencies like the EFCC, NDLEA, etc., are also allowed to prosecute criminal offences in all courts in Nigeria. Section 6 of the EFCC Act confirms this statement in respect of prosecutions by the Economic and Financial Crime Commission; Akingbola v Chairman Economic and Financial Crimes Commission (2012) 9 NWLR (Pt 1306) at 475: Ajakaiye v FRN (supra).

[40]Â *Barkono v COP* (1971) All NLR 505. Concluding, the court held that although it was desirable for the Director of Public Prosecutions to inform a private prosecutor that he was taking over a proceeding, failure to do so will in no way vitiate the step taken by the DPP or render it a nullity.

[41] Sections 174(3) & 211(3) CFRN 1999 for the Attorney-General of the Federation and the States respectively.

[42] (1988) 2 NWLR pt. 75, p. 156

[43] (1988) 4 NWLR pt. 91, p. 722

[44] Supra

[45] See also *Fawehinmi v Akilu* (1987) 12 SC 136, SCN

[46] *R v Comptroller of Patents, Designs and Trademarks, ex parte Tomlinson* (1899) 1 QB 909, 913-914.

[47] CFRN 1999 (as amended) S. 174(1)(c) & 211(1)(c).

[48] Section 108(1)(2) Administration of Criminal Justice Act, section 97(1) of the Administration of Criminal Justice Law, Ondo State.

[49] *State v Adakole Akor and Ors.* (1981) 2 NCLR 410; *State v Ilori* (supra).

[50] Supra.

[51] *State v Chukwurah* (1964) NWLR 64.

[52]Â (1989) 3 NWLR (Pt.112) 685.

[53] See also the case of *State v. Ilori* (Supra) where it was concluded per Kayode Eso JSC that the only sanction against an Attorney-General who misuses his power is the reaction of his appointer who may remove him from office or reassign him.

[54] Supra. See also the case of *State v Ilori* (supra).

[55] *State v Obasi* (supra); *Saraki v. FRN* (supra); section 4 of the Law Officers Act.

CFRN 1999 (as amended) [56]S. 174& 211.

[57] *Fawehinmi v Akilu* (supra); *State v Ilori* (supra); *Attorney-General of Ogun State v Eganti* (1986) 3 NWLR (Pt. 28) 256; *Amaefule v State* (1988) 2 NWLR (Pt. 75) 156.where the Attorney-General was described as a god by the Supreme Court; *Attorney-General of the Federation v Ajayi* (1996) 5 NWLR (Pt. 448) 283.