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APPRAISING THE OVER SIGHT POWERS OF THE NATIONAL ASSEMBLY IN RELATION TO THE POWERS OF THE ATTORNEY GENERAL OF THE FEDERATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA

By

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Abstract

In June, 2016, the decision of the Attorney General of the Federation of Nigeria to prosecute the Senate president of the Federal Republic of Nigeria, his deputy and others for the alleged offence of forgery of the Senate Standing Rules had generated controversy between the executive and the National Assembly. At the heat of the controversy, the Senate threatened to issue an arrest warrant against the Attorney General if he failed to appear before them for the purpose of explaining whether he considered public interest when he resolved to prosecute the presiding officers of the Senate for the alleged offence. Whether the National Assembly has the power to demand such explanation from the Attorney General in the exercise of his prosecutorial powers is the question which this paper critically examined in the light of the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).. The paper made a detailed appraisal of the powers of the Attorney General in the conduct of public prosecution and examined the question whether the same could be questioned by the National Assembly in the exercise of their oversight functions. In the final analysis, the paper arrived at the conclusion that in the exercise of his powers, the Attorney General of the Federation or that of any other State in Nigeria, owes no obligation to explain to the National Assembly or any other person or authority why he resolved to prosecute a particular person for a particular criminal offence what so ever.

Keywords: Oversight, Power, Administration, Criminal Justice and Attorney General

1.1 Introduction

For the purpose of avoiding over concentration of powers and ensuring proper administration of the country, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has enshrined the doctrine of separation of powers wherein the governmental powers of the Federation is divided between the three independent but coordinates organs of the government - the executive, the legislatures and the judiciary. The administrative powers of the Federation are vested in the executive, the judicial powers in the judiciary; while the powers of law making and oversight function was vested in the legislature.[1]

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Subject to the provisions of the Constitution, the oversight powers of the National Assembly, include the power to issue or cause to be issued a directive for an investigation into any matter or thing with respect to which it has powers to make the law, the conduct of affairs of any person, authority, Ministry or Government Department charged or intended to be charged with the duty or responsibility for:

(a) Executing or administering laws enacted by the National Assembly, and
(b) Disbursing or administering moneys appropriated by the National Assembly.[2]

In the discharge of the aforementioned functions, the National Assembly is empowered to invite a Minister of the Government of the Federation (who shall appear before them) for the purpose of questioning and clarification by him when the affairs of his Ministry is under consideration[3] These powers are exercisable through a resolution published in the journal of the National Assembly or an official gazette of the Federation, for the purpose of enabling the National Assembly to make laws with respect to any matter over which it has powers to make law; correcting any defect in existing laws or for the purpose of exposing corruption, inefficiency or waste in the execution or administration of laws within its legislative competence only.[4]

In the exercise of the aforementioned powers, the Senate of the National Assembly invited the Attorney General of the Federation to appear before it on the 21st June, 2016 for the purpose only of explaining to it whether he considered public interest when he resolved to prosecute the Senate President and his deputy for the alleged offence of forgery of the Senate Standing Rules at the eve of its inauguration in the year 2015. While addressing the Attorney General on the said date, the Chairman Senate Committee on the judiciary, human rights and legal matters – David Umoru- insisted that the purpose of their inquiry was not to inquire into the forgery case but, the use of the Attorney General's power under section 174 of the Constitution in the Prosecution of the Senate President. In his words, "the Senates feels that the Attorney General owes the duty to the Senate and the citizens of Nigeria to know if the power of the Attorney General in the prosecution of the Senate President was exercised in public interest without any abuse. The Attorney General of the Federation has the power to institute or discontinue any criminal proceedings. We want to know if the Attorney General considered public interest."[5]

This paper therefore, examined the powers of the Attorney General of Federation in the administration of criminal justice and the oversight powers of the National

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[1] SS. 4, 5, & 6 Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[2] S. 88 (1), Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[3] S. 67(2) Ibid.
[4] S. 88(2) Ibid.
[5] http://guardian.ngnews, July 14, 2016: 4:58 a.m.

Assembly in the light of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) for the purpose of understanding whether the Senate are entitled to demand above explanation from the Attorney General in the discharge of his prosecutorial functions under the Constitution. In so doing, the paper explores the details of the powers of the Attorney General in the administration of criminal justice and considered whether the exercise of the same in the course of public prosecution, could be questioned by the National Assembly in the exercise of its powers of oversight on the affairs of the executives. In the final analysis, the paper concludes that the National Assembly lacks the authority to query the Attorney General of the Federation or any State of Nigeria in the discharge of his duty of public prosecution.

1.2 Who is the Attorney General?

Attorney General is a professional legal consultant who is the Chief Law Officer and prosecutor of a particular jurisdiction.[6] His/ her general duties includes enforcing the law, representing the government, maintaining proper standard of conduct while acting as an Attorney for the State, developing programs and legislations for law and criminal justice reform and been a government's spokesman for the field of law. Of these functions, prosecution of criminal offenders in court either in person or through law officers in his department is the Attorney General's most frequent duty.[7]

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[8]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[9]

In England, the 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[10]. 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 the 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

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[6] S. 150 & 195. *Constitution of the Federal Republic of Nigeria*, 1999 (as amended).
[7] Wikipedia. Retrieved 15/09/2013 6:25
[8] Larry, J. S. & Joseph, J. S. (2004), *Essentials of Criminal Justice* (4th ed.), Thomson Learning Inc., Canada, p. 232.
[9] Ibid.
[10] *Hulsbury's Laws of England*, Vol.8, Butterworth London, 1994 p.789..

general be discharged by the solicitor General[11]. The offices of the Attorney General and that of the Solicitor General are conferred by patent and are held during pleasure. Neither the Attorney General nor the Solicitor General may engage in private practice.[12]

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; this is so because, 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 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.[13]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.[14]

Generally in England[15] much as is the case in Nigeria and the United States of America[16] 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. 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.

The prerogative powers of the Attorney General in the prosecution of criminal offences in England are absolute. That is to say, Attorney General is not subject to any form of control in the exercise of his prosecutorial powers. Thus, in the case of R. *v Comptroller General of Customs*[17]it was held that in England, when the Attorney General is exercising his functions as an officer of the crown, such functions were not subject to 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.[18]

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[11]Ibid.
[12] Ibid.
[13]Ibid. p. 790.
[14]*Hulsbury's Laws of England,* Vol.8, Butterworth London, 1994 p. 790..
[15]Ibid. p. 792.
[16]*Bourvier's Law Dictionary,* Vol. One (3rd ed.), p. 286
[17](1899) 1 Q.B. p. 909 C.A. at 1914.
18 *Hulsbury'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.I. 1973 no. 2099, 2, Schedule, Form 1.

This paper embarked on the above discussions for the purpose of showing the similarities of the office of Attorney General of the Federation of Nigeria with that of England and America. The paper has done so because, in the case of England, it was the colonial master of Nigeria before independence in the year 1960; and due to that historical link between the two countries, the legal system of Nigeria largely owes its origin from that of England.[19] On the other hand, our reference to the office of the Attorney General of the United States of America was 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 modelled on the Constitution of the United States of America[20]

1.3 Appraising the Powers of the Attorney General of the Federation in Public Prosecution

The powers of the Attorney General of the Federation of Nigeria are similar to the powers of the States Attorneys General. 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.[21]

The Attorney General, whether of the State or that of the Federation, has power under the Constitution of the Federal Republic of Nigeria,1999, to institute, undertake, take over or continue any criminal proceedings against any person in any court of law save a court martial. This power 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.[22]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 authorization by the state Attorney General.[23]

Therefore, before an Attorney General can Institute, take over or discontinue any criminal proceeding 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

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[19]S. 32(1) *Interpretation Act*, Cap. 123 Laws of the Federation of Nigeria, 2004.
[20]*Lakanmi v A.G. Western State of Nigeria* (1971) U.I.L.R., p. 201.

[21] S. 174(1-3) & 211 (1-3) of the *Constitution of Federal Republic of Nigeria*, 1999.
[22] Supra note 54.
[23]*Anyebe v State* (1986) 1 S.C. p. 87; *Emelogu v 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.

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.[24]

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.[25] 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[26]. 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.[27] 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.

In Nigeria, the powers of the Attorney general (Federal and State) in criminal cases are classified into three - Power to institute and undertake criminal proceedings, Power to take over and continue any criminal prosecution instituted by any authority or person, and Power to discontinue any Criminal Prosecution.

1.4 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 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.

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[24] *Emelogu v The State* (1988) 2 NWLR. (Pt. 78) .

[25] Ibid.

[26] Example of such offence can be seen in the offence of Armed Robbery created under the provision of section 1(1) &(2) of the Robbery and Fire Arms (Special Provisions), Act, Cap. R. 11, Laws of the Federation of Nigeria, 2004.

[27] *Nyame v The State* (2010) 4 S.C.M.p. 6.

Literal interpretation of section 174(1)(a) and 211(1) (a) of the Constitution ,may 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 a serving President, Vice President, State Governor or his Deputy, and indeed every other person. That literal interpretation does not however, represent the position of the law. This is so because; Constitutional provisions are not interpreted in isolation from other provisions of the same. The Constitution is usually interpreted as integral 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 consolidating the unity of people.[28] An Attorney General therefore has no power to proceed against any person who does not commit an offence or who is not reasonably suspected to have committed a criminal offence. In the case of *Mohammed Abacha v The State,*[29] the right of the Appellant to personal liberty and to freedom from arbitrary prosecution was up held against Attorney General Lagos State. In that case, the Attorney General of Lagos State 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 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, cannot lead to criminal prosecution against him or any other person whatsoever. In other word, where no reasonable ground exist for believing that a person has committed a criminal offence, such a person cannot be prosecuted in a criminal trial since doing so will constitute 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.[30]Where therefore, a criminal prosecution is instituted against those persons, the charge or charges will be set aside as incompetent.[31] 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 cover members of their families.[32]The immunity does not also cover the president of the Senate/Speakers and other members of the National or State Assemblies.[33]

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[28]*Supra* note 61.
[29](2002) F.W.L.R. (Part 108) p. 1355.
[30] S. 308 *Constitution of the Federal Republic of Nigeria,* 1999; *Fawehinmi v I.G.P.* (2002) F.W.L.R. Part 108 p. 1355.
[31]*Fawehinmi v I.G.P.* (2002) F.W.L.R. Part 108 p. 1355.
[32]*Abacha v The Federal Republic of Nigeria* (2014) 2 S.C.M. p.1 at p.9 ratio 9.
[33] See S. 308 of the *Constitution of the Federal Republic of Nigeria,* 1999 (as amended).

A President, Vice President, Governor or Deputy Governor, who commits a Criminal Offence during the tenure of his office, is however, 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.[34]

There are no hard and fast rules as to what legal considerations should guide the Attorney General In the exercise of his powers of the institution and undertaking of criminal proceedings. He is only expected to exercise his discretion in public interest, the interest of justice and the need to prevent abuse of legal process.[35] What Constitute public interest, the interest of justice and the need to prevent abuse of legal process, has not however been defined by the Constitution. The Constitution left them to be determined by the Attorney General based on his conscience and the information available to him in the circumstance of a particular case. Fola Arthur Worry however, observed that:

> 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 judgment as to his probable guilt even before all the facts are in.[36]

In the consideration of whether to prosecute a suspect or not, the Attorney General may consider some of the following guidelines:

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[34] *Fawehinmi v. I.G.P.*(2002) F.W.L.R. Part 108 p. 1355.; Abacha vs. F.R.N. (2014) 6 N.W.L.R.(Part 1402) p.43

[35] SS. 174(3) & 211(3), Constitution of the Federal Republic of Nigeria, 1999 (as amened).

[36] Worry F.A., (2000),*The Prosecutor in Public Prosecution*, Josadeen Nigerian Limited, Lagos, p. 41.

(I) 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.

(II) 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 Public fund and energy of Prosecutors to institute Criminal Prosecution in such circumstance.[37]

In the end, Attorney General must satisfy the dictate of his training as a lawyer as well as his conscience in making a decision. As mentioned earlier, 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 organ or body.[38] 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 over and continue the case or discontinue the same based on his own subjective judgment.

1.5 Power of the Attorney General to Discontinue Criminal Proceedings *(Nolle Prosequi)*

The power of the Attorney General to discontinue Criminal Prosecution otherwise known as *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.[39] This power of the Attorney General is a power of great antiquity. It is one of the pre-eminent prerogatives of the

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[37] 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.

[38] Ibid.

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

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, who initiates and at whose instance Public prosecutions are initiated. In the lignt 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.[40]

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 judgment 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 judgment.[41]

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 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

[40] 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.
[41] *Audu v A.G.F.* (2012) 12 (Pt 2) SCM p. 23

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 would not be in public interest or the interest of justice to prosecute the particular accused person concerned.[42] 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.[43]

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.[44] 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 v Hassan,* [45] it was held that "a solicitor general has no power to enter *nolleprosequi* and 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 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).[46]

In the exercise of his Powers, 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 powers. His authority cannot be questioned by anybody, including the legislature, the 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 unbearable. This orthodox position, was affirmed by Supreme Court in the case of *State v Ilori;*[47]and was recently restated by the

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[42]*Ilori v The State* (1983) 2 SC p. 155
[43]*Jimoh Atanda v Attorney General Western Nigeria* (1965) NWLR p. 225
[44]*Attorney General Kaduna State v Hassan* (1985) 2 N.W.L.R. (Part 8) p. 483.
[45] Ibid.
[46] Ibid.
[47] (1983) 2 SC p. 155;

same Court in the case of *Prince Abubakar Audu v Attorney General of the Federation & Another*[48] In that 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 10December, 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 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 the Court of Appeal of the question: whether an Attorney General of a State could legally and validly *enter nolle proseque* 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 judgment, 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

[48](2012) 12 (Part 2) S.C.M. p. 23.

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.

in the case of his power of the institution of criminal proceedings, the ı did not stipulate the circumstances when the Attorney General may exercise of *nolle prosequi.* The power may however, be exercised in the following :es:

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;

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.[49] 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.

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vidence Act NO.18, 2011.

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 Late 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.[50]

Where the Attorney General is of the view that entering the *nolle prosequi* will serve public interest.[51]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. Defending on the 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 insists on proceeding with the prosecution.

menting on the fourth situation above mentioned, Worry F. A., reasoned as

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

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ı Henry Orker, In: *Newswatch*, Vol. 5C No.4 July 27, 2009, p. 18.

.U. (2012), *Criminal Litigation in Nigeria*, Feat Print and publishing Lagos, p. 199.

> 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 affects 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 has 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.[52]

Therefore, in the discharge of his duties, the Attorney General is entitled to act 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. Therefore, in the circumstances such as the above, 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 lie on retribution only but, restitution and fostering peaceful co-existence amongst members of the society.

We have gone this per in the consideration of the powers of the Attorney General in the administration of criminal justice for the purpose of preparing the mind of the readers towards understanding the argument of this paper on the subject under consideration. We shall hereunder consider the oversight powers of the National Assembly in relation to the powers of the Attorney General for the purpose of

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

determining whether same could be extended to question the powers of the Attorney General explained above.

(d) The Concept of Legislative Oversight

As mentioned in the introduction to this paper, the oversight powers of the National Assembly are constitutionally provided.[53] The oversight powers of the legislature include the wilful supervision into the conduct of any person or authority charged with the conduct of public affairs or the execution and implementation of the laws so made by the legislature. The power is exercised to conduct investigation, control and surveillance on the government's general business for the purpose of ensuring accountability and prudence in the discharge of governmental affairs by the executive.[54]

By the United State Military Dictionary, executive oversight is "the supervision by the congress (legislature) of governmental agencies and other bodies such as the Military through standing committees of the House and Senate and also by panel convened for special purpose.[55] In such committees, members of the congress gather information and dictate the preferred cause of action.[56]The executive oversight entails reviewing, monitoring and supervision of operations and activities of the executives. It takes a variety of forms and utilizes various techniques. These techniques, ranges from specialized investigation by the select committees, panel of inquiries to annual appropriation hearing.[57] The main purpose of legislative oversight is to ensure that there is transparency in the activities of the executive by providing financial accountability. Chief Justice Earl Warren, an American Jurist and politician observed:

> The power of the congress to conduct investigation is inherent in the legislative process. The power is broad. It encompasses inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes. It includes survey of defects in our social, economic or political system for the purpose of enabling congress to remedy them. It comprehends probe into the department of Federal Government to expose corruption. Inefficiency and waste.[58]

As mentioned in the introduction to this paper, the oversight powers of the National Assembly are provided by the provisions of S. 88 (1) & (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended. The section provides that:

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[53]SS. 88 & 89 Constitution of the Federal Republic of Nigeria, 1999 (as ameded).
[54] See Attorney General Abia State vs. The Attorney General of the Federation (2006) ALL FWLR. (PT. 338) P. 604 at 674.
[55] Okoro Oscar, www.aronewsonline.com : 23/04/2018: 12:55.
[56] Ibid.
[57] Ibid.
[58] Ibid.

(1) Subject to the provisions of this Constitution, each House of the National Assembly shall have power by resolution published in its journal or in the official gazette of the Government of the Federation to direct or cause to be directed an investigation into:-
   (a) any matter or thing with respect to which it has powers to make laws; and
   (b) the disbursement or administering money appropriated or to be appropriated by the National Assembly.
(2) The powers conferred on the National Assembly under the provisions of this section are exercisable only for the purpose of enabling it to :-
   (a) Make laws with respect to any matter within its legislative competence and correct any defect in existing laws; and
   (b) Expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.[59]

From the foregoing provision of the Constitution, the purpose for which the oversight powers of the National Assembly are granted by the Constitution is very much clear. By the wordings of section 88(2) above quoted, which is in *pari materia* with section 128 of the same Constitution, the oversight powers of the National Assembly shall be exercised only for the purpose of making law with respect to any matter over which it has power to make law or for the purpose of exposing corruption, inefficiency, or waste in the administration of the funds appropriated by it.[60] The powers shall not be exercised without any form of justification whatsoever. From the provisions of the above section, the power shall not be used to interfere with the activities of the executive for a purpose which does not relates to the purpose for which the power was granted by the Constitution,[61] The legislature under the above section, are not empowered to use their oversight power for personal reasons or for the purpose of disgracing those under investigation. Whatever action taken by the legislature in the exercise of their powers under the above section, must relate to and must be in furtherance of the legislative task

[59] See also the provisions of Section 128 of the Constitution for the over sight powers of the State House of Assembly.
[60] *Toney Momoh v The Senate* (1983)4NCLR P. 269 at 296; El-*Rufa'I v National Assembly* (2016)1 N.W.L.R. (Part 1494) P. 507

of the Assembly. In the case of *Tony Momoh v the Senate* of the National Assembly[62] the court held that "the legislature is not given powers to usurp the general investigating functions of the executive nor the adjudicative function of the judiciary. Any invitation of the legislature to any person outside the purpose defined in the relevant section is invalid."[63]

Also the prosecution of any person accused of corrupt practices or gross inadequacies or misconduct in the discharge of his public duties, is within the exclusive preserve of the executive. This view is reinforced by the provisions of section 174 and 211 of the Constitution and the opening paragraph of section 88 of the same Constitution which subject the powers of the National Assembly to the provisions of the other sections of the Constitution. Thus by the decision of the Supreme Court of Nigeria in plethora of cases, including the *locus classicus* case of *Ilori v The State*[64] the powers of the Attorney General in Public Prosecution is unquestionable and subject to no control whatsoever. The legislature owes no duty and therefore no power to conduct any investigation for the purpose of inviting the Attorney General to explain the reason why he proceeds against any person in the discharge of his duty. The legislature cannot inquire into the reason for the prosecution for the purpose of shielding any of its members or other persons or organization from public prosecution for an offence or for the purpose of ridiculing the Attorney General or any of his officers what so ever. This is so because those purposes are purposes outside the purpose for which the oversight powers of the National Assembly was granted under section 88 of the Constitution.

1.7 Summary/Conclusion

This paper examined the oversight powers of the National Assembly in relation to the powers of the Attorney General in the administration of criminal justice under the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The paper found that although the Constitution has granted the powers of oversight on the activities of the executives to the National Assembly, the same Constitution does not allow the power to be exercised for the purpose of interference with the prosecutorial functions of the Attorney General; or for any other purpose other than the purposes provided under section 88 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The paper also found that the powers of the Attorney General in Public Prosecution are unquestionable and therefore, superior to the oversight powers of the National Assembly in that regard. The Constitution confers the powers of public prosecution to the Attorney General to be exercised subject to his unquestionable discretion.[65] In the exercise of those powers, the Attorney General is not bound to follow any mandatory guideline provided by the Constitution. In fact, in the discharge of his duties, the Constitution merely requires the Attorney General to have regard to public interest, the interest of justice and

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[62] (1982) NCLR P. 105

[63] See El-*Rufa'I v The House of Representative* (2003) FWLR. (Part 173) p. 162.

[64] (1983) 2 S.C. P. 155

[65] *Ilori v The State* (1981) 2 S.C., p. 155; *Prince Abubakar Audu v F.R.N.*(2012) 12 (Pt.2) S.C.M. p.23

the need to prevent abuse of legal process.[66] What constitute public interest, the interest of justice and the need to prevent abuse of legal process is however, left to the discretion of the Attorney General to be exercised based on his conscience. Where he decides to take a particular course of action in a particular criminal matter, no person or authority, including the National Assembly has power to question his judgment what so ever.[67] Therefore, an attempt by the Senate of the National Assembly to question the Attorney General of the Federation on why he proceeded against its President, as explained in the introduction to this paper, is unconstitutional.

The paper considers the powers granted the National Assembly under section 88 of the Constitution as very wide and to some extent vague. It therefore recommends that the same should be amended to provide for the scope of the oversight powers of the National Assembly in a clearer term for the purpose of ensuring harmony in the conduct of governmental affairs between the executive and the legislature in the best interest of the society. The amendment becomes necessary in view of the frequent altercation of the legislatures with the executive on issues of National importance that are ordinarily within the exclusive spheres of the executive under the constitution.[68]

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[66] SS. 174(3) and 211(3), *Constitution of the Federal Republic of Nigeria*, 1999(as amended)

[67] *Emeakavi v C.O.P* (2004) 4 N.W.L.R. (Part 862) p. 158 at 165 Ratios 8 & 10.

[68] See the Nation News Paper of May 15, 2018 p. 27 for the current crises between the Inspector General of Police and the Senate on the Dino Melaye Saga.