

# **Prosecutorial powers of the Attorney-General under the Constitution**

*By Osita Mba*

IN a landmark judgment delivered on February 25, 1983, a full Bench of the Supreme Court (Fatayi-Williams CJN, Irikefe, Idigbe, Eso, Aniagolu, Nnamani and Uwais JJSC) held that the discretionary powers of the Attorney-General of the Federation and the state Attorneys-General to start or start criminal prosecutions in their respective jurisdictions cannot be challenged in court in the case of *The State v Ilori* (1983) 1 SCNLR 94.

Justice Kayode Eso, who delivered the lead judgment, set out the following statement, which remains the law till date (at page 106):

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

This paper, which is an abridged version of an article published recently in the Oxford University Comparative Law Forum, argues that the decision of the Supreme Court in *Ilori* is erroneous in law and should be overruled by that court in the interests of the rule of law at the earliest opportunity.

## **Why the judgment in Ilori is bad for Nigeria**

The expectation in conferring wide prosecutorial powers on the Attorney-General, according to Lord Justice Smith in the English case of *R v. Comptroller-General of Patents* (1899) 1 Q.B. 909, is that "a man in his position will never prostitute those functions which he has to perform".

Consequently, Chief Justice Fatayi-Williams counselled in *Ilori* (at page 112) that: "It is of paramount importance that when an Attorney-General is being appointed, the appointor should, at all times, bear in mind the integrity, ability, experience, and maturity required of the person holding this high and important office. He should be a person who, in the discharge of his duties, will always "have regard

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

No doubt late Justices Smith and Fatayi-Williams would be grateful they did not live to witness the calamitous phenomenon that is Michael Aondoakaa. There is considerable evidence to show that the judgment in Ilori has over the years been used by errant Attorneys-General at both the federal and states levels to undermine the criminal justice system and the rule in their respective jurisdictions.

However, Mr Aondoakaa was unique for highlighting how the judgment can equally be exploited to undermine national development by sabotaging efforts to crack down on the perennial and debilitating problem of high-level corruption. It is regrettable, but not surprising, that Mr. Aondoakaa's discontinuation of the criminal proceedings against Orji Uzor Kalu and Jimoh Lawal and his refusal to prosecute the suspects in the Siemens, Willbros and Halliburton corruption scandals, to give a few examples, were not only defended on the basis of the decision in Ilori but equally escaped legal challenge because of that decision.

After all, as he and his apologists never ceased to remind us, the Supreme Court confirmed his status as "a master unto himself" and "a law unto himself" in Ilori.

### **How the Supreme Court fell into a grave error**

Fortunately, the judgment in Ilori does not withstand rigorous legal scrutiny. Although the office of Attorney-General is a common feature of the constitutions of all the Commonwealth countries, in jurisdictions like Nigeria it is a statute (the Constitution) that confers the officer with similar powers to the common law royal prerogative of his English opposite number to exercise ultimate control over prosecutions. The failure to grapple with the different legal bases of the English and Nigerian Attorney-General's prosecutorial powers is at the heart of the Supreme Court's error in Ilori.

The court simply abdicated its judicial powers under section 6(6) of the 1979 Constitution to review the exercise of the statutory prosecutorial powers of the Nigerian Attorney-General under the Constitution and slavishly adopted the presumptive immunity from judicial review of the prerogative prosecutorial powers of the English Attorney-General under the common law.

### **The prerogative prosecutorial powers of the Attorney-General in English Law**

The origin of the office of Attorney-General can be traced to the thirteenth century when, as King's Attorney or King's Serjeant, he was responsible for maintaining the interests of the King in the royal courts. Consequently, the

prerogative power of the King to control prosecutions was vested in his Attorney-General.

As Lord Chief Justice Wilmot put it in *R v Wilkes* (1768) Wilm 322, 326: "By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society ... As indictments and information, granted by the King's Bench, are the King's suits, and under his control; information, filed by his Attorney General, are most emphatically his suits, because they are immediate emanations of his will and pleasure."

### **The nature of the royal prerogative**

The principal function of the King was to govern England and the overseas territories under his sovereignty. He did so entirely by personal prerogative before Parliament and evolving principles of English constitutional law progressively limited his powers. Consequently, the royal prerogative is usually defined in terms of its residuary character. For example, Dicey (*Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959) 425) defined it as "the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or his Ministers." In other words, as he put it, "every act which the executive government can lawfully do without the authority of an Act of Parliament is done by virtue of this prerogative."

It was a fundamental doctrine of English constitutional law (Blackstone, *Commentaries on the Laws of England* (16th edn Butterworths, London 1825) vol 1, 250) that: "in the exertion ... of those prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the Constitution." Consequently, the Attorney-General enjoyed a position of omnipotence in the exercise of the King's prerogative prosecutorial powers.

Accordingly, successive Attorneys-General won some epic legal battles in leading cases that firmly established the principle according to which these powers were not subject to judicial review. Notable amongst these cases are *R v Allen* (1862) 1 B & S 850; *R v Comptroller-General of Patents* 1899 1 QB 909 and *Gouriet v Union of Post Office Workers* 1978 AC 435.

### **Gouriet v Union of Post Office Workers**

The decision of the House of Lords in this case is the high-water mark of this principle. In his speech, Viscount Dilhorne restated the principle in this oft-quoted dictum (at p 487): "The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these

powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts."

However, the judgments in the *Gouriet* and similar cases are a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or the prerogative.

### **Council of Civil Service Unions v Minister for the Civil Service**

This change in judicial attitude reached its climax in *Council of Civil Service Unions v Minister for the Civil Service* 1985 AC 374 (also known as the *GCHQ* case), in which the House of Lords laid to rest the view that all prerogative powers are beyond judicial review. Lord Diplock could see (at page 410) "no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review."

Rather, according to Lord Scarman (at page 407): "The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. ... Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

Although the prerogative prosecutorial powers of the Attorney-General were not expressly considered in this case, the necessary implication of the judgment is that these powers are now subject to judicial review in the same way as the prosecutorial powers of other prosecutors like the Director of Public Prosecutions and the statutory prosecutorial powers of the Attorney-General both of which have long been subject to judicial review.

### **Mohit v DPP of Mauritius**

This contention enjoys considerable support from the decision of a strong bench of the Law Lords (Lords Bingham, Hoffmann, Hope, Carswell and Brown) sitting as the Privy Council in *Mohit v DPP of Mauritius* 2006 UKPC 20.

In that case the Mauritian Director of Public Prosecutions, who enjoys similar prosecutorial powers to both the English and Nigerian Attorneys-General under the Mauritian Constitution, filed a *nolle prosequi* and terminated the proceedings each time the appellant tried to bring a private prosecution against a senior politician. The appellant requested leave to apply for judicial review from the Supreme Court of Mauritius but the court upheld the DPP's decision that the

effect of the decision in *Gouriet* was that the exercise of the DPP's powers was not amenable to judicial review.

However, on appeal to the Privy Council the DPP, in an apparent attempt to avoid the adverse implication of the *GCHQ* case for the *Gouriet* precedent, supported the decision of the Supreme Court by relying less on the source of the power to enter a *nolle prosequi* than on the nature of the decision to enter one. Relying on the Supreme Court's decision in *The State v Ilori*, the DPP contended that a prosecutorial decision involves the assessment of factors, which the courts cannot and should not seek to review.

The Privy Council emphatically rejected this contention, and refused to disturb what it described as "the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review."

Lord Bingham, who delivered the judgment, indicated (at paragraph 14) that Viscount Dilhorne's dictum in *Gouriet* could now be "reviewed or modified in the light of the later decision of the House of Lords in the *GCHQ* case." Also, in a subsequent passage (paragraph 21) he referred to "the immunity enjoyed, at any rate in the past, by the English Attorney General when exercising the prerogative power to enter a *nolle prosequi*."

The decision in *Mohit* is also significant in the sense that the Board confirmed that the statutory prosecutorial powers of the Attorney-General in English law are definitely subject to judicial review. According to Lord Bingham (at paragraph 14): "Where the Attorney General's power derives from a statutory source, as in giving his consent to prosecutions requiring such consent, since the source of the discretionary power rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked."

Even more significantly for present purposes, the Board also gave short shrift to the decision of the Supreme Court in *Ilori*, which the DPP had relied on as authority for the contention that his power to enter a *nolle prosequi* could not be subject to judicial review.

### **The office Attorney-General under the Nigerian Constitutions**

There was an officer that acted as Attorney-General in every British Colony. He was generally appointed by an instrument under the Public Seal of the Colony in Her Majesty's name and performed similar functions to those of the Attorney-General in England. It is arguable that prior to the attainment of republican status in 1963 the basis of certain executive powers, including the prosecutorial powers, could be traced to the royal prerogative.

However, from October 1, 1963 when the republican Constitution took effect, the Queen formally lost her sovereignty over Nigeria and her functions devolved upon the President and the Governors of the Regions. Consequently, any

prerogative power not previously abrogated by the 1960 Constitution or any other statute was extinguished by the 1963 Constitution. Moreover, the 1963 Constitution transferred the prosecutorial powers from the federal and regional Directors of Public Prosecutions to the federal and regional Attorneys-General.

The 1979 Constitution continued this tradition by providing for an Attorney-General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation and vesting on him the power to start or stop prosecutions in the public interest.

### **Judicial powers under Section 6 of the Constitution**

The 1979 Constitution that introduced the presidential system of government to Nigeria clearly separated the powers of the three arms of government. Section 6 vested judicial powers in the courts. Section 6(6)(a) and (b) provided in the clearest of terms that these powers extended, notwithstanding anything to the contrary in that Constitution, to all inherent powers and sanctions of a court of law and to all matters between persons, or between government or authority and to any persons in Nigeria respectively.

However, section 6(c) and (d) specifically excluded from the jurisdiction of the courts any question as to whether any act or omission is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of that Constitution and any action relating to any existing law made on or after 15th January 1966 for determining any issue as to the competence of any authority or person to make any such law.

It is, therefore, clear that, apart from the two matters specifically excepted by section 6(c) and (d), all other matters, including the exercise of the prosecutorial powers of the Attorney-General, were subject to judicial review under the 1979 Constitution.

### **Prosecutorial powers of the Attorney-General under the Constitution**

In view of the abuse of the prosecutorial powers by the Regional and Federal Attorneys-General under the 1963 Constitution, the 1979 Constitution Drafting Committee had recommended (in section 159(2) of the Draft Constitution) that the Attorney-General's power to institute or take over or discontinue criminal prosecutions instituted by some other person should only be exercised with the permission of the court which, in deciding whether or not to grant permission, shall have regard to the public interest, the interests of justice and the need to prevent abuse of legal process.

This recommendation was rejected by the government. Instead, sections 160(3) and 191(3) of the 1979 Constitution, which conferred prosecutorial powers on the Federal and States' Attorneys-General respectively, provided that in exercising

the prosecutorial power, the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

As a result of this formulation, sections 160(3) and 191(3), rather than section 6(3), were frequently but erroneously invoked whenever the issue of whether the prosecutorial powers under the 1979 Constitution were amenable to judicial review arose. This misconception, on the part of both the parties and the courts, vitiated the decision in *The State v Ilori*. 1983 1 SCNLR 94.

### **The State v Ilori**

In this case, Mr. Fred Egbe was charged with obtaining money by false pretences and stealing by the first respondent, the Lagos State DPP. Following the dismissal of the charges, Mr Egbe requested the Lagos State Attorney-General to prosecute the DPP and the two police officers that investigated the case for conspiracy to bring false accusations against him and for conspiracy to injure him in his profession. The Attorney-General declined the request. Mr. Egbe then instituted a private prosecution but the Attorney-General filed a *nolle prosequi* in exercise of his powers under section 191 of the 1979 Constitution. The trial judge heard arguments on the propriety of the *nolle prosequi* and upheld the Attorney-General's decision.

Mr. Egbe appealed the decision contending that the trial judge should have taken evidence and examined his allegations of malice and extraneous considerations against the Attorney-General pursuant to section 191(3). The Court of Appeal dismissed the appeal on the ground that Mr Egbe started the private prosecution without obtaining the consent of a judge as required by law but nevertheless held that the Attorney-General's decision was justiciable.

In a further appeal, a full bench of the Supreme Court unanimously allowed the respondent's appeal. Relying on English authorities like *R v Allen*, *R v Comptroller-General of Patents and the Nigerian case of Layiwola v The Queen* (1959) 4 F.S.C. 119, Justice Eso, held (at page 109) that: "All these cases have shown that both in England and in this country before the 1979 Constitution, what guided the Attorney-General in the exercise of his discretion, whether in the institution or in the discontinuance of a case were public interest, interests of justice and the need to prevent abuse of legal process. When sub-section (3) of section 191 prescribes what the Attorney-General "shall have regard to" ... the sub-section is merely declaring, in the 1979 Constitution, what had obtained at common law and under the Constitutions which preceded the 1979 Constitutions"

However, the Supreme Court did not identify any provision of the Constitution that excepted the prosecutorial powers of the Attorney-General from the wide judicial powers conferred on it by section 6(6). There was none. Nor did the court identify any provision of the Constitution that allowed it to transplant the common law presumptive immunity from judicial review to Nigerian law. Again, there was none.

## Adegbenro v Akintola

The Privy Council had earlier expressed a strong disapproval of slavish interpretation of the constitutional provisions of independent countries in *Adegbenro v Akintola* 1963 AC 614.

The case arose over the political crisis in Western Nigeria that led to the removal of Chief Akintola by the Governor in 1961 purportedly under the constitutional power to do so if it appears to him that the premier no longer commands the support of a majority of the members of the House of Assembly. Acting on the basis of a letter signed by 66 of the 124 Assembly members, the governor removed Akintola and replaced him with Chief Adegbenro.

The Federal Supreme Court held that the removal was unconstitutional since it was not carried out after a vote on the floor of the House as required by a convention of the British constitution.

However, the Privy Council disagreed and held that it could not find any indications either in the general scheme or in other specific provisions of the Constitution of Western Nigeria which would enable them to say that the Governor was legally precluded from forming his opinion upon the basis of anything but votes formally given on the floor of the House.

Delivering the judgement of the Board, Viscount Radcliff made the following important statement: (at pages (631- 632):

"It is true that the Western Nigerian Constitution ... does embody much of the constitutional practice and principle of the United Kingdom. But ... the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

Applying this principle of interpretation to the 1979 Constitution, it is evident that, regardless of what obtains under the common law or any previous Constitution, section 6(6) of that Constitution subjected the prosecutorial powers of the Attorney-General to judicial review.

## Prosecutorial Powers of the Attorney-General under the 1999 Constitution

The wordings of Sections 174 and 211 of the 1999 Constitution that confer prosecutorial powers on the Federal and States Attorneys-General respectively

are identical to sections 160 and 191 of the 1979 Constitution. Similarly, section 6 of the 1999 Constitution is identical to section 6 of the 1979 Constitution. Therefore the prosecutorial powers currently exercised by the respective Attorneys-General should be subject to judicial review for the reasons discussed above.

However, the judgement in Ilori remains the law because a judgment of court, no matter the fundamental vice that afflicts it, remains legally binding and valid until set aside by due process of law: A-G of Anambra State v A-G of the Federation & Ors 2005 9 NWLR (Pt 931) 574, 606 (Supreme Court) Katsina-Alu JSC; A-G of Ondo State v A-G of the Federation (2002) NWLR (Pt.111) 2167.

Fortunately, the Supreme Court has the power to depart from and overrule its previous decisions where, inter alia, it is shown that the decision is erroneous in law; or was given per incuriam; or it is shown that the previous decision is contrary to public policy or is occasioning miscarriage of justice or perpetuating injustice: A-G of the Federation v Guardian Newspapers Ltd 1999 9 NWLR (Pt 618) 187, 266 (Iguh JSC).

In the circumstances, there is no reason why the Supreme Court should not abandon its pretension to infallibility to end more than a quarter of a century of judicial abdication and slavishness by overruling Ilori at the earliest possible opportunity. It is a great irony that the principle in Ilori remains a binding precedent in Nigerian law when the common law the Supreme Court relied on establishes it is no longer good law in England and Wales.

## **Conclusion**

It is pertinent to note that the use of the criminal process by the government of the day to attack its political opponents and to protect its political friends is not restricted to Nigeria.

In his recent evidence before the House of Commons Constitutional Affairs Committee recently (EV 107 in Report from the Select Committee on Constitutional Affairs HC Fifth Report (2006-07)) Professor John Spencer QC observed that the powers were originally meant to be abused in this manner. According to him: "The power of the A-G to start or stop prosecutions dates from the days when it was thought ... to be quite right for the King to react to his political critics by prosecuting them for "political offences" such as seditious or blasphemous libel, and in such matters the A-G was the right arm of the government."

However, there is no room for such abuse of powers in a modern democracy and suspicion that this has been done has led to some dramatic political consequences.

For example, in 1924 the suspicion that the Attorney-General, Sir Patrick Hastings, was pressured to withdraw the sedition prosecution of the editor of a left-wing newspaper resulted in a vote of no confidence in, and the downfall of, the government of the first ever British Labour Prime Minister, Sir Ramsay MacDonald. It later emerged that Sir Hastings was instructed unlawfully (via Cabinet Instruction of 6 August 1924) that "no prosecution of a political character should be undertaken without prior sanction of the Cabinet being obtained."

In Australia, Mr Robert Ellicott resigned his office as Attorney-General in 1977 in protest against pressure from the Prime Minister and the Cabinet to take over and terminate criminal proceedings against some Ministers of the previous government (including the Prime Minister) for conspiracy in connection with loans to be raised by that government.

More recently, similar allegations of succumbing to political pressure against the former English Attorney-General, Lord Goldsmith, in relation to the cash for honours and BAE controversies in 2006 probably hastened the resignation of Tony Blair as Prime Minister in July 2007.

The case of Mr Aondoakaa, who, but for the incapacitation of Yar'Adua would probably remain in office till today despite relentless calls for his removal, shows that the Nigerian political system is largely immune to public opinion and that the remote possibility of removal does not provide an adequate safeguard against abuse of the Attorney-General's prosecutorial powers in Nigeria.

In view of the gross inadequacy of the present reliance on the executive (the President or Governor) or the legislature (National or State Assembly) or indeed public opinion to check the excesses of an errant Attorney-General, it is imperative that the Nigerian judiciary should take immediate steps to exercise its judicial review functions in this regard.

In the final analysis, the political solution to the politicisation of the criminal justice system is a constitutional amendment to separate the legal functions of the Attorney-General as the chief public prosecutor and guardian of the public interest from the political functions of the Minister of Justice as the chief legal adviser to the government of the day with responsibility for criminal justice policy.

- Osita Mba belongs to the Anti-Corruption Committee and the Public and Professional Interest Division of the International Bar Association. The full version of this article - 'Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: an Imperative of the Rule of Law' - can be read and discussed in the Oxford University Comparative Law Forum.