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**POWER OF THE ATTORNEY GENERAL OVER PUBLIC PROSECUTION UNDER
THE NIGERIAN CONSTITUTION NEED FOR JUDICIAL RESTATEMENT**

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POWER OF THE ATTORNEY GENERAL OVER PUBLIC PROSECUTION UNDER THE NIGERIAN CONSTITUTION: NEED FOR JUDICIAL RESTATEMENT*

INTRODUCTION

The position of the Nigerian Constitutional Law on the Power of the Attorney General over Public prosecution seem to have been settled long ago following the decision of the Supreme Court in the landmark case of *STATE V. ILORI & ORS*¹. However, the recent decision of the same apex court in the controversial case of *ABACHA V. STATE*² appears to seriously question the law espoused in the ILORI case.

This essay attempts to review these two leading but apparently conflicting cases. It would be shown that the ILORI case is an unsatisfactory statement of the law as it is founded on the wrong premise that the Attorney General has been conferred wide and unbridled discretionary power over public prosecution by the Nigerian Constitution³. On the other hand, the decision in the ABACHA case would be shown to be un-preferable either as it fails to set a discernable standard. Finally, we shall formulate a whole new view on the proper interpretation to be placed on the power over public prosecution conferred on the Attorney General under the Nigerian constitution.

CONSTITUTIONAL POWER OF THE ATTORNEY GENERAL OVER PUBLIC PROSECUTION IN NIGERIA

Sections 174 and 211 of the extant Constitution of the Federal Republic of Nigeria, 1999 respectively make separate but identical provisions conferring on the Attorneys General of the Federation and of each of the states power over public prosecution. These include power to commence, continue and discontinue any criminal proceedings. In exercising the power, the Attorney General (hereinafter referred to as the "A.G.") is empowered to act by himself or through officers of his department or Ministry⁴.

However, it seems that an officer in the A.G.'s department can only exercise this constitutional power upon actual delegation by the A.G. himself⁵. In *ATTORNEY GENERAL, KADUNA STATE V. HASSAN*⁶, without an incumbent A.G., the Solicitor-General of the state exercised the state A.G.'s powers under section 191 (1) (c)⁷ of the 1979 Constitution and discontinued a trial in the High Court. The Supreme Court held that the Solicitor General acted without competence since at the material time when he assumed the power and acted, there was no incumbent A.G. in the state who could have delegated the power to him.

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¹ (1983) 14 N.S.C.C. 69. See generally F. Nwadialo *The Criminal Procedure of the Southern States of Nigeria* 2nd ed. (Lagos: MilJ Publishers, 1987) pp. 368 –70.

² (2002) II NWLR PT.779, p. 437

³ The operative constitution at the time was the Constitution of the Federal Republic of Nigeria, 1979. Sections 160 and 191 of the Constitution respectively provided for the powers of the Attorneys General of the Federation and of the states over public prosecution. These provisions are similar in all material respect to sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999.

⁴ See Sections 174 (2) and 211 (2), 1999 Constitution.

⁵ Nwadialo, (Supra) note 1 at p. 365.

⁶ (1985) 2 NWLR PT. 8 p. 483

⁷ Similar to section 211(1) (c) of the 1999 Constitution

The A.G.'s power to institute and undertake public prosecution against

The A.G.'s power to institute and undertake public prosecution against any person in Nigeria is only tenable in the regular court of law⁸. The power cannot be exercised in a court-martial, which is a court that adjudicates upon military offences under the Armed forces Decrees (No. 105) of 1993 (as amended). The A.G's. can take over any criminal proceedings that may have been instituted by any other authority or person such as the commissioner of police⁹. The A.G. can only exercise the power to discontinue criminal prosecution before judgment¹⁰. However, since the judicial process can proceed as far as the Appeal Court and even up to the Supreme Court, it is arguable if the A.G. can still exercise such power at the appellate level.

⁸ See Sections 174 (1) (a) and 211 (1) (a) of the 1999

⁹ See *Emeakayi V. C.O.P.* (2004) 4 N.W.L.R. PT. 862 p. 158

¹⁰ See Sections 174 (1) (c) and 211 (1) (c) of the 1999 Constitution.

JUDICIAL ATTITUDE TO THE ATTORNEY GENERAL POWER OVER PUBLIC PROSECUTION

Judicial attitude seemed for a long time to be decidedly supportive of the notion that the power exercisable by the A.G. over public prosecution in Nigeria is one of absolute discretion. Indeed, the power was held to be beyond judicial control. This view thrived regardless of the seeming strictures in the Constitutional provision requiring that the A.G. “shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process”¹¹ before he exercises his power over public prosecution. The locus classicus, which illustrates this judicial attitude, is the case of *STATE V. ILORI & ORS*¹².

In that case, the Plaintiff instituted an action in the High Court seeking to show that the A.G. Lagos State was biased in a criminal proceeding against the plaintiff and that the A.G. was by virtue of the provision of Section 191 (3) of the 1979 Constitution not competent to discontinue the proceedings. The High Court held that the Attorney General had the right to discontinue any criminal proceedings instituted by him or any other person at any stage before judgment. The Appellant appealed to the Court of Appeal, which held that the trial court should have taken evidence and examined allegations against the A.G. of malice.

On appeal to the Supreme Court, the Court held that the words “shall have regard to public interest” (in section 191 (3), 1979 Constitution) are not a curtailment of the Attorney General’s absolute discretion, but merely declaratory of those powers. Furthermore, the court held that the A.G. is still not subject to any control in so far as the exercise of his powers under the Constitution is concerned; and except for public opinion and the reaction of his appointer, he is still, in so far as the exercise of those powers are concerned, a law unto himself. The Court then held that the remedy for abuse of power by the A.G. lies in separate proceedings against him by the person adversely affected and not in judicial review of the same. Finally, the Court held that Section 191(3) of the 1979 Constitution has in no way altered the pre- 1979 Constitutional power of the A.G. to enter a *nolle prosequi*¹³

Recently, in *ABACHA V. STATE* (Supra) the Supreme Court appeared to have towed a completely different path from that which it treaded in the *ILORI* case. Regrettably, however, the Court, with respect, inexplicably stopped short of categorically overruling its decision in the *ILORI* case. Yet, in the *ABACHA* case, the court fundamentally distorted the foundations upon which the *ILORI* case was laid over two decades earlier. The *ABACHA* case is hereunder summarized.

On 4th June 1996, Alhaja Kudirat Abiola, wife of Chief M.K.O. Abiola, was gruesomely murdered. She was shot dead in her car in Ikeja, Lagos. Three years later in 1999, after the cessation of military rule, the appellant, son of the much-despised military dictator, General Sani Abacha, and three others were arrested for the murder. The A.G. Lagos State, through the State Director of Public Prosecution (D.P.P.) by a letter to the Chief Registrar of the High Court of Lagos State filed information against the appellant and the other three suspects. Essentially, the charges contained in the information were

¹¹ See sections 174 (3) and 211 (3) , 1999 Constitution

¹² Supra note 1

¹³ This expression is of Latin origin meaning ‘do not want to pursue’. It is the term used at common law to depict the power of the Attorney General to discontinue criminal prosecution before judgment and without question by the court or any other authority. The term is still extant under the criminal procedure laws of the various states in Nigeria (See sections 73 and 74 of the Criminal Procedure law Cap 49, Laws of Bendel State of Nigeria still applicable in Edo and Delta States). Thus, in *A.G. KADUNA STATE V. HASSAN* (Supra) the Court reasoned, obiter, that the Solicitor General or any other officer in the department could have validly acted in the absence of a substantive Attorney General if in doing so resort was had to the criminal procedure law instead of the Constitution.

for murder, conspiracy to commit murder and accessory after the fact to murder contrary to sections 324, 319 (1) and 322 respectively of the criminal code Cap 32, Laws of Lagos State, 1994.

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

Section 211(1): The Attorney-General of a State shall have power:-

- (a) to Institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court martial in respect of any offence created by or under any law of the House of Assembly.

When the information came up for trial at the Lagos High Court, the appellant moved that the indictment against him be quashed on the ground, *inter alia*, that the proof of evidence does not disclose a prima-facie case against the appellant requiring him to stand trial before the High Court or any other Court; that the ingredients of all the alleged offences and the list of witnesses disclose that the information is an abuse of process; that the statement of the offences disclosed in the information are prejudicial to the appellant's right to fair hearing.

In refusing the appellant's application at the High court, the trial judge held that among other things, information without procedural defect couldn't be quashed.

Dissatisfied, the appellant appealed to the Court of Appeal, which Court, while dismissing the appeal, held that the appellant had taken a premature step of challenging the indictment when he could await the time for no case submission to move that he had no case to answer. Still dissatisfied, the appellant appealed to the Supreme Court.

In a startling and highly controversial judgement,¹⁴ the Supreme Court held, *inter alia*, that the charge against the appellant was based on suspicion, as no linkage was shown that the appellant knew what was being planned by what he did or said at the relevant occasion. The Court further held that an accused person, despite the power of the Attorney General of a state to file indictment on information, should not be indicted to face trial, which from the outset he should not face. The Supreme Court held even further that the Court of Appeal was wrong when it opined, *obiter*, that a challenge to quash information should not be encouraged. In his leading judgment Belgore J.S.C. said:¹⁵

All power to settle issue between parties is vested in Courts and court must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through act of prosecution; if not, we shall have persecution in place of prosecution. It is for this reason that an accused person, despite the power to file indictment on an information, should not be indicted to face trial that from the outset it was clear he should not face.

¹⁴ There was general public out cry against the judgment all across the country; with many people believing that the fact that four out of the five justices who decided the case are of Northern extraction like the appellant tilted the scale of justice in favour of the appellant. This charge is made more pungent by the realization that the only justice of the court who dissented, the Honourable Justice A. O. Ejiwunmi is Yoruba, like the victim of the murder the late Mrs. Kudirat Abiola. The unsettling supposition therefore is that the Lord Justices of the Supreme Court, with respect may have been swayed more by their ethnic origin than by the dictates of the law in coming to their respective judgements.

¹⁵ (Supra) note 2, particularly at pp 484 – 486.

CRITIQUE OF JUDICIAL ATTITUDE TO THE ATTORNEY GENERAL'S CONSTITUTIONAL POWER OVER PUBLIC PROSECUTION

i. STATE V. ILORI CRITICIZED

It is noteworthy that this case dealt not only with the Constitutional power of the A.G. to discontinue criminal prosecution, but also with the A.G.'s power to commence criminal prosecution (or to continue same). Thus, in his leading judgment, ESO, J.S.C. said¹⁶:

It is one thing to point out the dangers of an Attorney General in arriving at a decision without taking into consideration what he is expected to have regard to. However, to my mind, it would be completely wrong to regard this as a pre-condition to the exercise of his powers under Section 191 of the 1979 Constitution. The exercise of these powers by the Attorney General, that is, the institution and discontinuance of criminal proceedings cannot be questioned (underlining supplied)

The Supreme Court while interpreting subsection (3) of section 191 of the 1979 held the view that the expression "shall have regard to" only enables something to be done (whatever that means) and that the expression is what is known in the interpretation statutes as a "permissive language". A language, which imports discretion but certainly does not create a condition. It is submitted with respect that such discretion is much too wide to be consistent with the intendment of the framers of the constitution or to be consistent with the tenet of constitutional democracy, which is founded on the need to forestall the exercise or blossoming of arbitrariness in government.

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

...the Attorney-General is in supreme command as regard the withholding or granting of that fiat, and no court in this kingdom has any jurisdiction over the Attorney General of England in the matter. Why is that? It is because the Attorney General is given high judicial functions, and it is known that a man in his position never will prostitute those functions, which he has to perform.¹⁷

In view of the several centuries of experience in civil governance the confidence, which the British People have in their Attorney General to exercise his discretion within the bounds of civilized behaviour, could be well founded. This much can also be said of the position in the United States of America, where similar power exercised by the A.G. over public prosecution is not subject to judicial scrutiny¹⁸. Indeed, given the fact that the A.G. of the several states of America attain office by election, an A.G. who fails to exercise the discretion of his office in the overall interest of the public does so at the expense of his political career.

¹⁶ (Supra) note 1, particularly at pp 77 - 79

¹⁷ See R.V. COMPTROLLER-GENERAL OF PATENTS DESIGNS AND TRADE MARKS (EX PARTE TOMPLINSON) (1899) 1 Q.B. 909 at pp 913 - 914.

¹⁸ See UNITED STATE V. THOMPSON 251 US 457, OROBONA V. LINSKOTT 49 RI 443, 144 A, 52 53 and US V. BROKAN 60f Suppl. 100 all cited in D. OLOWU *NOLLE PROSEQUI AND THE LAW IN NIGERIA* (Ibadan: Demyaxs Law Publishers, 2002) pp 7-8

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

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

Consequently, it is only proper for a developing country such as ours to take a cue from the experience and practice in other developing countries with similar political and economic background¹⁹. Only recently, the courts in Kenya have departed from the established English common law position on the power of the A.G. to enter a *nolle prosequi*. Thus, in *CRISPUS KARANJA V. ATTORNEY GENERAL*²⁰, the court declared: On the present practise in our Criminal Justice system that a *nolle prosequi* cannot be challenged in Court, we find such a proposition to be untenable under the Kenyan Constitution.

We subscribe to this view in relation to the extant Constitution of Nigeria, 1999. We submit that the provisions of sections 174(3) and 211(3) of the Constitution place clear strictures on the discretion exercisable by Attorneys General of the Federation and of the States over public prosecution. Indeed we further submit that by virtue of those constitutional provisions the power is subject to judicial determination as to whether the A.G. has acted with regard to parameters of “public interest”, “interest of justice” and the need to “prevent abuse of legal process” set by those provisions of the Constitution.

ii. **ABACHA V. STATE CRITICIZED**

In the ABACHA case, the Supreme Court held that “An accused person despite the power of the Attorney General of State to file Indictment on an information should not be indicted to face trial which from the outset he should not face”²¹. It is worthy of note that in filing the indictment, the Lagos State Attorney General expressly stated that he was doing so pursuant to the power conferred on him by Section 211 of the 1999 Constitution. Even in his leading judgment, Belgore J.S.C. acknowledged this and went on to declare as follows:

Section 211(1)(a) of the 1999 Constitution empowers the Attorney General of a State to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a Court martial in respect of any offence created by or under any law of the House of Assembly...²²

His Lordship further went on to say:

¹⁹ Olowu (Ibid) p. 9.

²⁰ (200) Crim App No. 39, p. 1 cited in Olowu, Ibid.

²¹ (Supra) note 2, at p 452.

²² Ibid, at p. 448.

It is the duty of the State Attorney General to prosecute any offence as provided in laws made by the state legislature as provided in section 211 of the 1999 Constitution. It is equally at his discretion to charge some offenders and decline to charge others. This power is to be exercised having regard 'to public interest, interest of justice and the need to prevent abuse of legal process'. The power is exercisable only by the Attorney General and he holds ministerial responsibility for it, not collective executive responsibility.²³

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

By this decision, it would appear that the ILORI case no longer represents the law as far as the A.G.'s power over public prosecution is concerned. However, the difficulty inherent in such a conclusion is quite obvious upon a cursory review of the ABACHA case. Significantly, the Supreme Court did not expressly overrule²⁴ ILORI, much less mention or consider it. Rather, the Court acknowledged the discretionary power of the A.G. over public prosecution under the constitution, but questioned the exercise of that discretion where no "Prima facie" case has been made against an accused person to warrant the filing of information against him.

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

The Supreme Court, again with respect, ignored the fact that the A.G. expressly stated that he filed the indictment pursuant to his power under Section 211 of the 1999 Constitution (and not under the Criminal procedure law of Lagos State). Surely, the Supreme Court does not seek to be understood as holding that the statutory provision of the Criminal Procedure Law of Lagos State requiring a prima facie case stands superior over the express provisions of Section 211 of the Constitution, which by the same Courts decision in the ILORI case is not subject or amenable to any review?^{24a}

²³ Ibid.

²⁴ Indeed, the Supreme Court has inherent powers to overrule its previous decision. See JOHNSON & SONS V. LAWANSON & ANO. (1971) 1 NWLR 380, NGWU & ORS V. MONYE & ORS (1970) 1 ANLR 91. et al. The Supreme Court would only upturn its previous decision where such previous decision was patently wrong or decided per incuriam: See A.M.O. AKINSANYA (ALIAS M.O. AKINS) V. UNITED BANK FOR AFRICA LIMITED (1986) 4 NWLT PT. 35, p. 273, per UWAIS, J.S.C. (as he then was), See, generally for a scholarly expose of this important Jurisdiction of the Supreme Court: I.A. Okafor "The Appellate system of Justice in Nigeria" in T.O. Elias and M. I. Jegede (ed) *NIGERIAN ESSAYS IN JURISPRUDENCE* (Lagos: M. J. Publishers, 1993) p. 312, particularly at pp 317 – 330.

^{24a} By virtue of section 1 of the 1999 Constitution the constitution is supreme and any law inconsistent is with its provision is null and void and of no effect.

SUGGESTED APPROACH

(i) A CASE AGAINST ABSOLUTE DISCRETION

As previously indicated, we subscribe to the firm view that the Constitutional power of the Attorney General over public prosecution is not one of absolute discretion. If this view were otherwise, the framers of the constitution would not have taken the extra step of expressly inserting provision such as Sections 194(3) and 211(3) of the 1999 Constitution.

In contrast to these provisions the English common law on this subject does not contain a corresponding direction as to what the A.G. should consider while exercising his power over public prosecution including the power of *nolle prosequi*. Consequently, the view taken by the Supreme court in the ILORI case when it held that “the words” “shall have regard to” “public interest is not a curtailment of the Attorney General’s absolute discretion but merely declaratory of those powers”²⁵ cannot, with respect be well founded. This is so because the Court was of the belief that Section 191(3) of the 1979 Constitution did not alter the pre – 1979 power of the Attorney General to enter a *nolle prosequi*.²⁶ In any event, prior to the 1979 Constitution, the judicial view of the Power of the A.G. to issue *nolle prosequi* was fairly consistent in favour of the established English common law position of absolute discretion. It was therefore needless for the framers of the constitution to have been anxious to freshly declare that power in the Constitution so as to cure a mischief in the law where none existed.

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

(ii) A CASE FOR JUDICIAL REVIEW

In the ABACHA case, Belgore J.S.C. said:

All power to settle issues between parties is vested in Courts and the Court must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through act of prosecution; if not we shall have persecution in place of prosecution²⁷.

In the case of AFRICAN NEWSPAPERS V. NIGERIA²⁸, the Supreme Court held (inter alia):

When a Court is deciding whether it has jurisdiction or not over a matter before it, it should be guided by the following...

(ii) Nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which specially appears to be so, and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.²⁹

²⁵ (Supra) note 1, ratio 1

²⁶ Ibid, at ratio 3.

²⁷ (Supra) note 2 at p. 437

²⁸ (1985) 2 NWLR PT 6 p.137

²⁹ Ibid, at p. 141

The court further held:

The judges have a duty to expound the jurisdiction of the Court but it is not part of their duty to expand it.³⁰

And Section 6 (a) of the 1999 Constitution provides as follows:

6. The Judicial powers vested in accordance with the foregoing provision of this section-
 - (a) Shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law.

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

Under our system of separation of powers, the judiciary is not permitted to make laws but to interpret them. To pronounce, as did the Supreme Court in the ILORI case that the power of the A.G. over public prosecution is not subject to review when no such provision excluding judicial review exist under the constitution is tantamount to making a law. This, with respect is not a power, which the Supreme Court is permitted to exercise under the Constitution.

(iii) METHOD OF JUDICIAL REVIEW

In the ABACHA case, the Court of Appeal said, *obiter* that the appellant took a premature step of challenging the indictment when he could await the time for no case submission to move that he had no case to answer³¹. The Supreme Court, however, declared this view to be wrong and held that such an objection must be taken immediately after the charge has been read to the accused person and not later. The Court further held that inherent in its power to prevent abuse of their processes, is the Court's power to safeguard an accused person from oppression and prejudice such as would result if he is sent to trial pursuant to an information which discloses no offence with which he is any way linked.

With respect, the position taken by the Supreme Court is unsupportable. Under the adversary system practiced in Nigerian jurisprudence, the Courts are no more than umpire in the judicial arena. They can only act upon the cases put up by the adversaries. And in the particular case of criminal prosecution, it has become an established part of our law that the prosecution must first be allowed to prove a *Prima facie* case against the accused. This the prosecution would do by calling on witness (es) to testify in proof of the charge or information. Thereupon, the accused is allowed the opportunity of entering a no case submission, if he so desires. It is at this stage that the Court would determine if the prosecution has made out a *prima-facie* case against the accused to warrant the

³⁰ Ibid.

³¹ (Supra) note 2 at p. 452

latter being called upon to enter a defense against the indictment. This procedure is time honoured and has aided the Court in terminating unfounded criminal proceedings.³²

Thus, the Supreme Court's decision in the ABACHA case would only invite the court to join the fray and embark on a voyage of discovery without a compass. It is trite law that mere statements made by witnesses to a crime at the police station are worthless if they are not supported by oral testimony of the persons who made them. What then is the value of the statements of prosecution witnesses in the ABACHA case when the witnesses were never given an opportunity in a trial to supply oral testimony in support thereof? Why then did the Supreme Court rely upon the bare statements of witnesses in holding that the appellant was right to have challenged his indictment even before trial began?

Our strong view is that such a challenge ought to have come after the prosecution had made out its case against the appellant and not before. This is at the stage of no case submission permitted under our criminal jurisprudence.

(iv) HOW IS THE "INTEREST OF JUSTICE", "PUBLIC INTEREST" "AND THE NEED TO PREVENT ABUSE OF LEGAL PROCESS" TO BE JUDICIALLY CONSTRUED?

We concede from the outset that the notions of "justice" "public interest" and "abuse of legal process" remain controversial to lawyers. Arguments on the true meaning of these concepts continue unabated. However, for Judges, disinterested as they often are with academic legal polemics, these ideas do not pose much daunting challenge. This is so because judges do not pretend to set standards that would cover a wide field. They focus more on the particular cases before them and the facts presented in those cases; but with a keen eye on the broad legal concepts relevant to those cases.

Thus, in a long line of cases what would constitute abuse of legal or court process seems to have been settled. In *ONYEABUCHI V. INEC*³³ the Supreme Court said:

It is an abuse of the process of Court for the Plaintiff to litigate again over an identical question which had already been decided against him, also, where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to fail, they may be dismissed as being abuse of process of the court.

On its part, the idea of "justice" is inexorably linked with the notion of fairness. That being so, it is submitted that our jurisprudence is reasonably familiar with what would conduce to fairness whenever the question arises. Given the established parameters of the idea of "justice", "fairness" or "fair hearing" known to our justice system, it should be expected that our Courts can always come to a firm and acceptable determination of whether or not the A.G. has acted in the interest of justice while exercising his power over public prosecution.

The notion of "public interest" on its part is also not a totally novel idea to lawyers and jurists. Our Justice system is quite familiar with the concept of Public Policy. It is submitted that the ideal of public interest is not different from the notion of public policy. Admittedly, no consensus has been achieved even judicially on the broad parameters of public policy. Yet, it seems commonsensical enough to suppose that an Attorney

³² See *EMEDO V. STATE* (2002) 15 NWLR PT. 789 p. 196.

³³ (2002) 8 NWLRPT. 769 p. 417

General who refuses to commence criminal proceedings against his brother or discontinues a criminal proceeding against him would surely not be acting in the public interest if the consideration for such action is the sanguineous connection between the duo.

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

CONCLUSION

In the foregoing analysis, we have argued that the decisions of the Supreme Court in the two cases of STATE V. ILORI and ABACHA V. STATE do not satisfactorily espouse the law on the power of the A.G. over public prosecution. We are of the firm view that the two cases are in conflict and therefore begging for a judicial restatement by the Supreme Court of Nigeria along the lines, which we have formulated.

Given the nascent nature of our democracy, with the attendant infirmity of our public institutions, it is dangerous for anyone holding public office to possess absolute powers. It is in this wise, therefore, that we have strenuously argued against the judicial view found in the ILORI case that the power of the Attorney General over public prosecution is one of absolute discretion. The magnitude of the danger posed by the possession of such unbridled power is similar to the scenario of creating a state police force in Nigeria and leaving their control in the overriding power of the State Governors.

To be sure, what we have advocated is that the Attorney General should continue to exercise discretion in public prosecution. Such discretion should however be subjected to judicial review along the lines, we strongly believe, prescribed by Sections 174 (3) and 211(3) of the 1999 Constitution.
