

## POWERS OF THE NIGERIAN ATTORNEY-GENERAL IN PERSPECTIVE

**INTRODUCTION:** The office of the Attorney-General in Nigeria is constitutionally provided for. He is the chief law officer of the Federation or of a State as the case may be. He also performs some political roles. Albeit the Constitution of the FRN 1999 makes copious provisions regarding the powers of the Attorney-General, unfortunately, as we shall soon see, the extent of such powers has been a subject of much polemics, resulting in an avalanche of judicial authorities. However, the decisions do not appear to have finally laid the matter to rest. In the text of this paper, I shall be examining the constitutional provisions regarding the office of the Attorney-General, the extent of such powers as well as some of the judicial decisions on the point. I shall also examine the historical development of the office of the Attorney-General as well as some English decisions on the subject, with a view to ascertaining the nature of the arguments proffered and providing solutions to the multifarious issues raised.

### **Office of the Attorney-General: A historical perspective**

Although the office of the Attorney-General in Nigeria is provided for in the Constitution, it is certainly not a creation of the Constitution. Indeed, the office predates Constitutional development in Nigeria and is a creation of the Common Law in England.

The exact origin of the office appears unknown. A learned author, Fitz James 2 expressed the view that apart from the king, other persons had Attorney-General in early times and that the expression simply meant no more than a general agent or representative. At the earliest, the second statute of Wes Minister 1283(13 Edw.1,C.10) provided that certain persons may make a general Attorney to sue for them in all pleas in the circuit of Justice and that such Attorneys shall have full powers in all pleas moved during the circuit until the plea be determined or that the master removeth.

Interestingly, it appears Shakespeare had this same meaning in mind when he put in the mouth of York who, who was endeavouring to dissuade the king from confiscating the Laucastrian estates, the following words

“If you do wrongfully seize Herdford’s rights, call in the letters patent that he hath by his Attorneys-General to sue, His Livery, and deny his offer’d homage. You pluck a thousand dangers on your head 3

According to H.H.L. Bellot 4, the episode referred to above actually took place at about the same time with the banishment of the Duke of Norfolk in 1398.

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- (1) FitzJames Stephen: History of the Criminal Law of England Vol.I Pg 499
  - (2) Ibid.
  - (3) Richard II Act 2 Scene 1
  - (4) Essay entitled “The origin of the Attorney-General” 1909 25 LDR 400 @ 403
  - (5) In RV Wilkes 1768 97 E.R 23.

According to him, this was the earliest recorded use of the term Attorney-General.

In 1739, Chief Justice Wilmot delivering a House of Lords' decision 5 concurred to by all his colleagues said

“..... the King is entrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community for the resenting and punishing of all offences which affect the community; and for that reason, proceedings and ad vindicatam et poenam are called in the law, the pleas or suits of the crown..... As indictments and, informations granted by the King's bench are the king's suits and under his control; (sic), informations filed by his AG are most emphatically his suits because they are the immediate emanations of his will and pleasure”

Earlier in the same case, Mansfield C. Y. had pointed out in the court of King's Bench that as a subject sues by his attorney, so does the king”.

In the above judgments, their Lordships attempted to highlight the very vital nature of the office of the Attorney-General as the King's Attorney. However the duties/power of the office has not always been as clear-cut as enumerated above. In deed to evolution of the office from that of the King's Attorney to the modern day Attorney-General has had a chequered history.

Tracing the historical evolution of the office of the Attorney-General, Professor Sayles opined that although the sovereign is in theory, the fountain of Justice and supreme, there are so many cases reported in the year books in which the king was a litigant in his own courts and presumably abided by their decisions. According to him, since it was inconceivable for the king to appear in person to the suits, they could only sue or be sued by their Attorneys – The Attorney-General. In this connection, it is interesting to note that as early as 1243, a professional Attorney – One Lawrence Del Brok was already prosecuting pleas of particular concern to the sovereign (6).

Between 1254 and 1268, there is a record of at least thirty cases in which this Attorney was engaged by the Crown (7). Professor Sayles refers to Lawrence Del Brok being paid a regular fee of twenty pounds a year “for suing the king's affairs of his pleas before him 8. It can therefore be contended that LAWRENCE Del Brok was the king's first Attorney and the progenitor of the modern day AG. However, surprisingly in 1966 an author produced in his book 10, a chronicle of Attorneys-General in England and named William De Gisilham as the Earliest King's Attorney in 1279. No mention at all was made of Del Brok, thus fuelling the confusion regarding the origin of this office.

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- (6) Kings Bench Vol.I P. exIV
  - (7) Dr. Bellot's work at P. 406
  - (8) Kings Bench Vol. V PxxxIII No.2
  - (9) William Dugdale.
  - (10) “In Cronica series”.

The confusion created by the afore-mentioned publication appears to have simmered down with the availability of a number of authorities naming Lawrence Del Brok as the first King's Attorney 11. To that extent, Dugdale's book afore-referred is unreliable. This unreliability notwithstanding, it appears fairly clear from the chronicle that the king appointed more than one Attorney at that time to represent him in matters affecting the Crown. For instance, mention is made of a certain John De Lythegrenes who also acted for the king in Northunber land at about that time. However, by 1279, during the reign of Edward I the practice of appointing a single person to act as the King's Attorney had become quite established 12.

In 1311, the practice of appointing the King's Attorney by letters patent was established 13. The first appointee to the office of the King's Attorney was Robert Poun but it was only in 1315 that the first formal appointment is recorded of a specially designated King's Attorney – William of Langley.

Mention must however be made of the fact that before this time, a peculiar situation arose after the demise of Del Brok in 1274, during the tenure of his successor – Walter of Wimborne who was appointed justice of the kings bench only two years after his appointment as King's Attorney. As a result, some of the kings pleas were assigned to professional Attorney or to the care of clerks of court to sue on the king's behalf but the ones affecting the sovereign were delivered by Walter of Wimborne in person to the King's Sergeants. However, in quite a number of these pleas, the new King's Attorney cum royal justice appeared in court himself to plead the King's cause thus creating a conflict of interest and roles where in some cases the new King's Attorney adjudged the very case in which he had earlier personally participated as King's legal representative 14. However, this practice was abolished in 1290 with the appointment of Richard de Brettiville as King's Attorney. It is important to observe that during this period, the King's Attorney did not have any political functions to perform as the Attorney-General performs today. His responsibility was simply to maintain the crown's interest before the courts. Also, during this time, the practice was that the King's Attorney was appointed and assigned to a particular court. For instance, John de Norton was appointed in 1312 as King's Attorney in the King's Bench and shortly thereafter in 1315, William of Langley was appointed as King's Attorney to cover the court of Common Bench. This practice continued unabated throughout the reign of Edward III.

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(11) See for instance, the book *Tabular Curiales* published in 1865 where Lawrence Del Brook was named first King's Attorney in England.

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(13) See *Kings Bench Vol. XXXVII*

(14) *Kings Bench Vol I P. CXII* where mention is made of this practice being criticized.

However, with the coronation of Henry IV in 1399, the foundation for the modern structure of a single King's Attorney with the right of audience in all the royal courts was instituted.

Again, the King's Attorney began to have terms of appointment from the appointment of William de Lodington in 1399. Before then, the King's Attorney had general supervision over the King's affairs in the royal courts. Subsequent appointments of the King's Attorneys followed the same or similar terms of appointments.

In 1461, with the patent appointing John Herbert the authority of the King's Attorney to appoint one or more deputies was introduced for the first time. However, the tenure of office was irregular, with the result that some of the King's Attorney, by custom, held appointment as the King's Legal representative during the pleasure of the sovereign, some others were appointed *quamdiu se bene gesserit* 16 and this applied more frequently in later years. Significantly during the reigns of King Henry V and Henry VI, the appointment of the King's Attorney was done *ad vitam* 17. However, there has been a complete reversal as patents of modern Attorneys-General now make provisions for appointment "during our pleasure".

In 1461, the expression "Attorney- General of England was used for the first time in the patent of appointment of John Herbert. This is the earliest instance of the adoption and use of the term ' Attorney-General. It was also in this year that the 1<sup>st</sup> King's Solicitor – Richard Fowler was appointed and this was the original precursor of the modern day office of the Solicitor-General. Albeit, the historical evolution of the office of the Solicitor-General is not the concern of this paper, the point must be made that in 1515, the office of the King's Solicitor became the office of the Solicitor-General of the King and the first Solicitor-General was John Fort.

There appears to be some confusion as to whether there was any distinction between the services performed by the King's Attorney and those of the King's Sergeants or whether the offices were one and the same. The general opinion among legal scholars 18 with some dissenting voices 19 is that the ranks of King's Attorney and Sergeant were distinguishable 20.

During the early stages of development of these offices, the work performed by the King's Attorney resembled those now performed by the modern day Solicitor while resort was had to the King's Sergeant in difficult cases involving the exercise of high intellectual ability and forensic skill 21. Again, whereas the Sergeants were paid 20 pounds a year for their services the

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(15) J. Edwards: The Law Officers of the Crown P.26

(16) "During good behaviour"

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(18) e.g. Cohen: History of the Bar

(19) e.g. Professor Sayles Kings Bench Vol.V. P. IV at Seg; Dr. Bellots opp. at P. 409

Attorneys were paid 10 pounds a year. Finally, whereas the Sergeants could take private cases, the King's Attorneys could not.

It is noteworthy that the King's Sergeants were superior to the King's Attorney and in fact took precedence over the Attorney at this stage in the history of the legal profession. 22 But this pre-eminence of the King's Sergeants began to decline during the 16<sup>th</sup> Century. By 1545, it had become clear that the rule requiring a new Judge to hold the position of King's Sergeant had become a mere procedural formality 22a. Thus, from about the time of preferment of Sir Edward Coke to the Office of Chief Justice of England, the Court of King's Bench, the pre-eminent position of the King's Sergeant had been supplanted by the Attorney-General and even the Solicitor-General whose duties and responsibilities were looked upon as providing the right caliber of persons to fill the positions the Chief Justice-ship of the Common Law Courts 23. Indeed, it must be said that the specialized nature of the Sergeant's qualifications and invariably, the restriction of his sphere of operation to, principally, the court of Common Pleas, enabled, as it were, the Attorneys-General to establish their positions as Chief Law Officers of the Crown.

It is also important to observe that the now very wide and expansive powers of the Attorney-General in England did not come about in one fell swoop. They developed with the development historical evolution of the office. By the turn of the 19<sup>th</sup> Century, it had become clear that the Attorney-General had control over all criminal prosecutions in England. Even in civil matters, all suits for or against Government or any department of Government were (are still are) instituted by or against the Attorney-General.

Still on criminal prosecutions, so wide were the powers of the Attorney-General that by the Public Bodies Corrupt Practices Act 1889 and the Prevention of Crimes Act 1906, the fiat or consent of the Attorney-General was required before certain proceedings could be commenced and in some cases as in the Lunacy Act 1890, the consent of the A.G. was declared necessary before certain penalties could be recovered. Again, it was necessary to obtain the AG's fiat for certain appeals to the House of Lords (Appellate Jurisdiction Act 1876 – S.10) Ditto for the Printers and Publishers Act 1839, confirmed by the Newspapers and Reading Rooms Repeal Act 1869 and Explosives Act 1853.

It has also been the duty of the Attorney-General in England to attend at the Bar in a judicial capacity and report on the claim whenever the House of Lords sat in a committee of privileges and he is almost invariably a member of the House of Commons where he answers questions on legal matters of public interest and this brings to bear the political nature of his office.

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(20) J. Edwards Opp. Cit. P at pg. 21

(21) King's Bench Vol.V. pp IIII-IIIV

(22) Theobald Mathew: For Lawyers and Others (1937) pp 177-197

(22a) The Judicature Act 1873 finally abolished this rule.

(23) J. Edwards opp cit at p.30.

I have taken the trouble to cite legislations (Pre-1900 legislations) bordering on the powers of the Attorney-General in England because of their bearing on the constitutional nature of the powers of the A.G. in Nigeria. The pre 1900 legislations cited above are statutes of general application. Little doubt therefore that the Attorney-General in pre-independence Nigeria continued to perform the same roles, mutatis mutandis as those enunciated above with respect to Nigeria. Constitution development in Nigeria with regards to the office of the Attorney-General took cognizance of these legislations as well as the nature and ambit of the Powers of Attorney-General in England, thus, the current SS.150, 174, 195 and 221 of the 1999 Constitution are substantially a replication of the position in England.

### **POWERS OF THE ATTORNEY-GENERAL IN NIGERIA**

The Constitution of the Federal Republic of Nigeria 1999 (hereinafter called the 1999 Constitution) makes provisions for the office of the Attorney-General of the Federation 24 and of the States.<sup>25</sup> Provision is also made in the same constitution for qualification of holders of that office or those who perform its duty. <sup>26</sup>

The 1999 Constitution in S174 [1] spells out the powers of the Attorney-General of the Federation. Ditto for the States. <sup>27</sup> From these provisions, the Attorney-General is given a wide range of powers with regards to public prosecutions. The Federal AG can institute and undertake criminal proceedings or take over and continue or discontinue same before any court in Nigeria (other than a court Martial) in respect of any federal offence. Similar provisions are made regarding powers of the State Attorney-General with respect to state offences.<sup>28</sup> .By subsection 2; the Attorney-General may exercise these powers either personally or through any officer of his department.

The issue has arisen from the above provisions whether the Attorney-General of a State can exercise the powers of instituting, undertaking taking over and continuing or discontinuing with respect to federal offences? The position of the law is that the State Attorney-General cannot prosecute anybody for a federal offence without the express permission of the Attorney General of the federation. <sup>29</sup>

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(24) S. 150(1) CFRN 1999

(25) S. 195(1) CFRN

(26) S. 150(2) and 195(2) – qualification to practice in Nigeria as legal practitioner and ten years post call.

(27) S. 211

(28) S. 211(1)

(29) Anyebe V. State (1986) 1 SC 8

(29b) Nwabueze opp. at @ p.88

(29c) Chap 12 at page 126

However, there are cases where Acts of the National Assembly are to take effect as laws of the State, then, the State A.G. can properly prosecute them. Examples are the Criminal and Penal Codes<sup>29B</sup> The recently enacted Childs Rights Act is also a case in point.

As earlier observed, the effect/extent of these powers has been well recognized over the years. Speaking generally of the AG's powers under Common Law, and in particular his power at common law to grant what is generally known as AG's fiat, the learned author of "the Law Officers of the Crown" Dr. J. Edwards opined "these powers..... are of great antiquity the Attorney-General being well nigh a master unto himself as to whether or not, and in what precise circumstances he will issue his certificate.<sup>29c</sup>

Speaking of similar provisions in the 1979 Constitution <sup>30</sup>, spelling out the powers of the Federal and State Attorneys-General, a learned author <sup>31</sup> said "The Attorney-General of the Federation has complete control of all prosecutions in respect of offences created by or under a law made by the National Assembly or deemed to be so made.... control of prosecutions in respect of offences under State Laws is similarly vested in the State Attorney-General". <sup>32</sup>

In respect of prosecutions not initiated by him, for instance, prosecutions done by the police, it is pertinent to note that such prosecutions are done subject to his powers. E.g. S. 19 of the Police Act. The Police Act allows the Police to prosecute matters in all courts in Nigeria, subject to the Attorney General's Powers. This provision was recently affirmed by the Supreme Court in a recent case <sup>33</sup> in which the Supreme Court delivered judgment early this year and affirmed the right of Police Lawyers to prosecute matters up to the highest court of the land but with the proviso that such prosecution is subject to the powers of the State and Federal Attorneys-General as provided for in the Constitution.

Interestingly, the said case has thrown up a variety of issues which are likely to affect criminal justice dispensation in Nigeria. First, the judgment has the implication that the Police may no longer send files to the D.P.P. for legal advice. This is in view of the fact that if they can prosecute in the High Court, they can also render the necessary information. The issue that necessarily arises is this: Do the Police have the necessary experienced manpower in this regard? From experience, a capital No is the answer to this question.

Again, it appears to be against the interest of fairness or justice for the Police to investigate a matter, advice themselves on the said case and thereafter charge same to court. Albeit, the police already do this in lower courts in respect of offences other than capital offences, the same cannot be said of

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(30) S. 160 & 190 1979 Constitution

(31) Professor Ben Nwabueze: Federalism in Nigeria under the Presidential Constitution 1983.

(32) Ibid @ p. 100

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serious offences in which suspects are likely to suffer the death penalty on conviction or get imprisoned for life or for long terms.

Clearly, the possibility exists of biases in favour of the investigation that has been done even though law and fact may not be supportive of the results of such investigations. Apart from possessing the requisite manpower, the office of the D.P.P. is enabled, by its internal working arrangement to look at issues arising from police investigations without bias, fear or favour. Also the possibility of the finished product of the overview of case files – i.e. the advice being grounded in law and fact is very much enabled by the experience of some law officers of the D.P.P's office who have been in the courtroom for many years. From my experience, opinion of young law officers are vetted by their superiors before such opinions ever get to the D.P.P's table who, by all standards, is also very much experienced. In the short run, such experience may not be available in the Police Force.

Again, the possibility exists that the delay which, many perceive, currently exists in rendering opinions and prosecuting suspected offenders which, in my opinion apparently swayed the mind of the Supreme Court in coming to the conclusion which it did may just well turn out to be worse because most of the delays are occasioned by the Police themselves. Usually, when a criminal charge is instituted in the Magistrates court as a holding charge, the police are expected to send duplicate case files to the D.P.P's office. Usually, they never do this, until the parents or relatives of the Accused pay through their nose to duplicate such files. I.P.Os are known to collect between #5,000-#7000 from such relatives to duplicate case files that will not cost them more than #500 to do. What usually delays such cases is the demand for this money. Files are known to spend months with IPOs when their demands are not met. I do not see the situation ameliorating if the police begin to prosecute in the high courts. It can even get worse because there is the possibility of the Police lawyer conniving (at the risk of immodesty) with their IPO colleagues and as agreeing to having received files when they have not.

Further, getting witnesses to prosecute matters in the high courts has always been a major source of delay in the prosecution of offenders. As long as Police Lawyers will have to continue to rely on IPOs to get their witnesses as Law Officers currently do, the situation will remain the same.

Sadly, without meaning to demean the Police Lawyer, the mentality of a policeman, notwithstanding the professional nomenclature attached to him, is the same. This explains the situation where a police lawyer investigating an allegation of crime demands for money for bail from a suspect or detains a suspect beyond the constitutionally prescribed period. Interestingly, this is common place in the police force. The truth of the matter is that most legal personnel in the police read law while they were already serving policemen and so, at the risk of immodesty, I opine that appreciating legal issues is always a problem. I have personally done a case of a breach of fundamental human



rights at the Federal High Court where a police D.P.O. (of over 15 years post call) arrested and detained a colleague who had gone to the station to solicit the bail of his clients who were arrested in connection with the offence of armed robbery.

The sad truth is that by the nature of their training, Policemen are out to hunt offenders and many are known to be overzealous in the performance of this duty. It is my view that except Lawyers are going to be appointed directly into the police force without taking them through the requisite police training, we are going to continue to have lawyers in the Police Force who are more Policemen than Lawyers.

Finally, in their over zealousness, the Police may bite “more than they can actually chew” in a bid to enjoy the fruits of the judgment afore-referred. They may decide to immediately start doing all the matters hitherto sent to the D.P.P’s office themselves. If this happens, the mess created will be much worse than that sought to be dealt with in the first place. This is in view of the immediate shortage of manpower in the police and to do away with this shortage, the police will need to employ a lot of lawyers. One wonders what purpose this will serve since it will have the effect of creating another “Ministry of Justice” in the Police Force.

Finally on this point, in reality, I do not see the possibility of the police taking on the prosecution of offences in the high courts for now. It might be that a few of these matters might be taken on but I don’t expect anything more in the short run. Again, we must remind ourselves of the fact which the Supreme Court stressed in the judgment under examination that all prosecutions done by the Police are subject to the powers of the AG who may take them over, if, as in a myriad of circumstances, they are not being done well.

The A.G. is not the only authority who can institute criminal proceedings. Some other authorities can, but subject to the Powers of the Attorney-General. However, in some offences, only the A.G. can institute proceedings e.g. in the offence of sedition, the law is that only the A.G. can initiate proceedings.

It used to be the Law that officers of the Attorney-General’s office, including the Solicitor-General cannot prosecute a state offence or perform any of the functions of the Attorney-General unless such powers are expressly delegated to such officers. However, this is no longer good law in view of the provisions of S. 174(2) and 211(2) of the CFRN 1999 which provide that the Attorney-General may exercise his powers directly or through officers of his department. Thus, cases like State V. Malam Umaru Hassan 34 no longer represent the law.

In Sections 174(3) and 211(3), the Constitution provides that in exercising his power, the Attorney-General shall have regard to the public interest the interest of justice and the need to prevent an abuse of the legal process. This provision has been, perhaps, the most problematic of all the provisions relating

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(34) (1985)2 NWLR Pt. 8 P. 483.

the Attorney-General. The issues brought up by an application of this provision and their resolution by the courts of our land, have indeed underscored the vastness and elastic nature of the powers of the Attorney-General. We shall now proceed to examine some of these issues

First, what is the precise meaning of the expression “abuse of the legal process”?

The expression “abuse of the legal process” has not been amenable to precise legal definition. Consequently, there is some confusion as to what constitutes an abuse of legal process 35 by an Attorney-General. In one case, 36 the Supreme Court held that the Attorney-General did not abuse the legal process where he filed an information against the Accused for an offence in respect of which proceedings were pending in the Magistrates’ Court on the same facts. The Supreme Court held that as long as the Attorney-General did not act maliciously or did not take extraneous considerations, he did not abuse the legal process.

However, in another case 37 the same Supreme Court held that the fact that a charge of manslaughter was pending in the Magistrates’ Court while a fresh charge of murder was filed against the Accused on the same facts amounted to an abuse of the process of court.

However, it does appear that a lot depends on the facts and circumstances of a particular case for the court to strike down the exercise of the powers of the Attorney-General on the ground that he has abused the legal practice. But generally, an abuse of the legal process connotes an improper use of a procedure laid down by law for bringing an Accused person to court.<sup>38</sup>

The second issue raised by this provision is whether the court can question the exercise of the Powers of the A.G. or put more appropriately, assuming that the A.G. does not take into consideration the interest of justice, public interest and the need to prevent an abuse of process in the exercise of his powers, to say, terminate proceedings by entering a nolle prosequi, can the court interfere and strike down the exercise of such powers? Put alternatively can the Attorney-General who says he does not want to go on with a criminal case be compelled to go on by court?

It has been long recognised that the courts do not question the exercise of the powers of the Attorney-General. In the old English case of *EXPARTE NEWTON* 39 Campbell C. J. said of the A.G. in England

“If he (the Attorney-General) refuses to hear and consider an application for a fiat, we would compel him by mandamus to consider; but when he has heard

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(35) Oluwatoyin Doherty: pp. at @ Pg. 58

(36) Amaefule V. State (1988) 2 NWLR pt 75 p. 156

(37) Edet V. State (1988) 12 SCNJ

(38) Oluwatoyin Dherty: Opposite citation at Page 58

(39) (1855) 119 ER 323

and considered and refused, we cannot interfere....”<sup>40</sup>

In the House of Commons on February 16, 1959, the Prime Minister of England, Mr. Harold Macmillan stated. <sup>41</sup>

“It is an established principle of Government in this country..... that the decision as to whether any citizen should be prosecuted or whether any prosecution be discontinued should be a matter, where a public as opposed to a private prosecution is concerned for the prosecuting authorities to decide on the merits of the case.....

The case of *Exparte Newton* and the statement of Prime Minister Harold Macmillan exemplify the attitude of the courts and Government to the exercise of the Attorney-Generals powers.

In Nigeria, the position is much the same. According to a learned author who is now the Inspector-General of Police in Nigeria, <sup>42</sup> the Attorney-General has absolute discretion in exercising his powers over criminal prosecutions.<sup>43</sup> Indeed, the Attorney-General has a choice as to whom to prosecute or whether to prosecute or not. The courts have long held this to be the position of the law.<sup>44</sup>

In the *State V. Ilori* <sup>45</sup>, the Lagos State Attorney-General entered a nolle to discontinue the prosecution of the Accused persons and on the strength of this, the trial court terminated proceedings. There was an appeal to the court of Appeal and subsequently to the Supreme Court on the ground, principally, that in entering a nolle, the Attorney-General did not consider or have regard to the public interest, interest of justice and the need to prevent an abuse of process. The Supreme Court held that these considerations were subjective and that they were to be taken into account by the Attorney-General in accordance with his own judgment and that a court of law could not reject a plea of nolle on the ground that these interests were not taken into account. The court further held that the requirements were non-justice able and that the powers vested in the Attorney-General in this regard are absolute and unfettered and so, cannot be challenged in court.

In the fairly recent case of *Col. Haliru Akilu & Anor. V. Chief Gani Fawehimi* <sup>46</sup>, the court of Appeal per Ogundere JCA held.

“..... as the abuse of Power by the Minister of State, if any, is the responsibility of the political power that appointed him, it is to that extent, not justiceable as the court does not question the exercise of the power of the

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(40) See also *R V. Allen* (1862) 1 B & S 850 @ 852 *R V Comptroller of Patents* (1889) 1 Q.B 909

(41) H.E Debates Vol. 600 Col. 31

(42) SG Ehindero: *Police and the Law in Nigeria* 1986

(43) *Ibid* \t Page 114

(44) *RV Olayiwola* (1959) 4 RSC 119

- (45) (1983) 1 SCNLR 94  
(46) 1989 3 NWLR (Pt 112) 685  
Attorney-General.....”

From the forgoing, it is clear that the Attorney-General cannot be compelled to go on with a criminal case which he does not intend to prosecute if he has entered a nolle as the courts cannot question the exercise of his powers once he has come to a decision.

However, it is suggested here that an aggrieved party should be able to get an order of mandamus against the Attorney-General to come to a decision on whether to enter a nolle or not, where the proceedings are unnecessarily delayed because of some inability, as it were, of the Attorney-General to immediately come to a decision on whether to continue with proceedings or terminate them. Though there is no Nigerian authority on this issue the suggestion finds support in the diction of Campbell C J in the *Exparte Newton* case *Supra*.

Again, as the court of Kings Bench did in 1862 in the case of *R V Allen* 47, if any question arises of an abuse of power or of an injustice occasioned by the entering of a nolle, the Attorney-General should be held accountable to the High Court of Parliament but unfortunately, even in England, the opportunities for the House of Commons to challenge the Attorney-General’s exercise of his powers are now few and far between and is dictated largely by the emphasis English Law now places on personal responsibility of the Attorney-General.<sup>48</sup>

Along the same lines, the Court of Appeal in Nigeria in the case of *Akilu V Fawehimi* in (*Supra*) observed per Ogundere JCA (as he then was)

“If he (the Attorney-General) refuses to hear and consider an application for a fiat, we would compel him by mandamus to hear and consider;  
..... The Attorney-General may be made responsible to Parliament. If he has made an improper decision, the Crown may and if properly advised, dismiss him but we cannot review his decision”

Again, the Supreme Court in the case of *State V. Ilori* [*supra*] expressed similar sentiments when it concluded per Kayode ESO JSC that the only sanction against an Attorney-General who misuses his powers is the reaction of his appointer who may remove him from office or reassign him.

Oluwatoyin Doherty in her book <sup>49</sup> expressed the view that a person aggrieved by the AG’s exercise of his powers of nolle *prosequi* can institute separate proceedings e.g. civil proceedings against the AG. This certainly finds support in the case of *Attorney-General Kaduna State V Hassan* <sup>50</sup> and in the dictum of Kayode ESO JSC in *State V. Ilori* [*supra*] but it is doubtful what measure of good this will do to an aggrieved person who desires only that justice be done in the matter by bringing the perpetrators of the crime against him to book. What meaning will a declaration *simpliciter* or even damages

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- (47) (1862) (Bands 850 @ 855  
(48) J Edwards opp. cit. @ Page 447

- (49) Opposite cit. at P. 63  
(50) (1985) 2 NWLR (Pt. 8) 483

make to such an aggrieved person?

However, another option is open to an aggrieved and it is a simple one. It is to wait for another Government and another Attorney-General to assume office if such new Attorney-General is favourably disposed to prosecuting the person in whose case a nolle had been entered. This is because; the entry of a nolle has the effect of only a discharge and not an acquittal. Consequently, such Accused person can be re-arraigned, on the same facts after entry of a nolle and consequent termination of proceedings. This proposition finds support in the case of State V. S. O. Ilori [supra] where Aniagolu JSC said “..... a nolle prosequi is only a temporary proceeding which has the effect only of a stay and not of the quashing of the indictment which technically may later be prosecuted without a fresh indictment. 51

**CONCLUSION:** A lot has been said and written about the Powers of the Attorney-General in Nigeria. From this text, I have shown that the powers of the Attorney-General are very wide and expansive. This is especially so in criminal matters. Obviously, the reason for such powers is to put him completely and effectively in control of criminal prosecutions in Nigeria and to accentuate this, the draftsmen of the Constitution carefully employed the use of such words as institute, undertake, takeover, continue, discontinue which show that all aspects of prosecutions are within his powers and this undoubtedly. It is hoped that in spite of the elasticity of these provisions, Attorneys-General will act fairly in all matters in which they exercise their powers. Indeed this is what the third subsection of S 174 and 211 is designed to achieve. In doing this, hopefully, they will become not only Attorneys-General of Government but also Attorneys-General of the people of Nigeria.

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