

DISCRETIONARY POWERS OF THE ATTORNEY GENERAL: WHETHER OR NOT A CLOG IN THE WHEEL OF JUSTICE DELIVERY IN NIGERIA*

Abstract

The powers of the Attorney General to prosecution of criminal offences are constitutionally guaranteed under the Constitution of Federal Republic of Nigeria, 1999 (as amended). Both Attorney General of the Federation and that of various state governments can exercise the powers to commence, take over and terminate criminal proceedings in respect of federal offences and state offences respectively. While exercising such power, the respective Attorney's General are also empowered to use their discretions in the interest of justice to achieve the delivery of justice. This article shall examine whether or not the powers of public prosecution as contained under the Nigerian Constitution, especially the word 'discretion' created in the Constitution is not capable of allowing the Attorney General to prevent the realization of justice and consider the controversy generated by the inclusion of the word discretion in the Constitution. The article concludes by making recommendations on the best way out of the legal quagmire.

Keywords; Attorney General, Discretionary powers, Proceeding, Absolute powers

1. Introduction

The Attorney General (AG) whether of the federation or State is a Minister in the executive council of the Federal Government and Commissioner in the State Governments respectively. He is the only appointed member of the Council specifically mentioned and assigned functions in the Constitution. He is a custodian of the law as such regarded as the Chief Law Officer of the Federation or state as the case may be. The constitution therefore guarantees him absolute power and discretion. The AG is empowered to choose who to prosecute.¹ Apart from that, he is a law unto himself and his discretion to enter *nolle* in criminal proceedings cannot be questioned or reviewed by any judge or authority in Nigeria.² Whatever reason given by the AG in exercising his discretion, the action is valid³. In the *Nigeria Engineering Works v. Denap Ltd*⁴ the supreme court of Nigeria, referring to the state Attorney General held that the Attorney General of the state is not only the head of the Ministry of Justice but also the chief legal adviser of the government. He is basically responsible in law for government's action and inaction. He is the mouth piece of the government as far as the law is concerned. He is government's chief spokesman on law. The office is therefore sacrosanct under the Nigerian Constitution, and for this reason, even the judiciary is not empowered to subject the decision of the AG to judicial review, which therefore makes their power to be susceptible to abuse. The only rider provided by the constitution is that the power should be exercised with regards to public interest, interest of justice and prevention of abuse of court process⁵. Public interest is the general welfare of the public that warrants recognition and protection by the regulation of government, interest of justice refers to a fair and equitable treatment of issues in accordance with the twin pillar of justice i.e. *audi ultram patem* Rule and *Nemo Judex in Causa Sua*⁶ while abuse of court process is an improper use of judicial process for whimsical purpose and for the purpose of preventing efficient and effective administration of justice to the annoyance, irritation and detriment of an opponent.⁷

However, the rider has not saved the powers from abuse in the sense that the definition and perimeters of what will amount to public interest, interest of justice and abuse of court process in the course of exercising the powers was not contemplated by the constitution. Certainly, the exercise of these powers was left at their mercy or discretion to determine what constitute public interest, interest of justice and abuse of court process and can therefore be tantamount to executive lawlessness. Although, there are acceptable methods of checking the powers of the AG and

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¹ J.A. Agaba, *Practical Approach to criminal Litigation in Nigeria* (Revised 3rd edn Renaissance 2017) P. 349

² *State v Ilori* (1983) SCNLR 94

³ *ibid*

⁴ (2002) F.W.L.R. (Part 89) p. 1062.

⁵ *Blacks law Dictionary*, Ninth Edition p. 1350

⁶ *Comptroller General of Prison v. Adekanky* (1999) 5 FWLR. Pt 602 p. 167.

⁷ *Attorney General of Anambra State v. Uba* (2005) ALL. FWLR. Pt 277 p. 909 at 913 ratio 7.

this entails, by an aggrieved complainant forwarding a petition to the appointing authority which is the President in case of AGF or the Governor of the State in the case of AGS; or through the public or media criticizing the AG and subject his action to public debate or comments; or the aggrieved party can also maintain a civil action in court against the said AG; or the AG may be summoned by the National or State House of Assembly to explain his excesses. However, these checks are insufficient since they do not have control over the actions of the AG in view of the fact that the discretionary powers are so enormous under the Constitution of the Federal Republic of Nigeria. But a lot of questions have been asked about these discretionary powers, if the sanction against a mischievous AG is by a petition for his removal by his appointer, what happens where the appointer is the mastermind of the mischief? ⁸ Certainly we know that the appointer cannot do otherwise. Also, where public opinion, debate and media criticisms is an option, one may be tempted to ask where the public opinion may be expressed, in the newspaper or television? ⁹ Must the AG read newspapers or watch television or people's opinion? And what if the said adverse comment fails to move the Attorney-General into action or inaction as the case may be? For how long would such unscrupulous-Attorney-General remain loose on the populace before his appointer act or before such Attorney-General chooses to resign? ¹⁰

2. Evolution of the Attorney General's Office

The origins behind the creation of the office are largely unknown but the earliest record of an 'attorney of the crown' is from 1243, when a professional attorney named Laurence Del Brok was paid to prosecute cases for the King, who could not appear in courts where he had an interest ¹¹. During the early days of the office the holder was largely concerned with representing the Crown in litigation, and held no political role or duties ¹². The office first took on a political element in 1461, when the holder was summoned by writ to the House of Lords to advise the government on legal matters. This was also the first time that the office was referred to as the office of the 'Attorney General'. The custom of summoning the Attorney General to the Lords by writ when appointed continues unbroken to this day, although until the appointment of Lord Williams of Mostyn in 1999, no Attorney General had sat in the Lords since 1700 and no Attorney General had obeyed the writ since 1742 ¹³. During the sixteenth century the Attorney General was used to pass messages between the House of Lords and House of Commons, although he was viewed suspiciously by the House of Commons and seen as a tool of the Lords and the King. In 1673 the Attorney General began to take up a seat in the House of Commons, and since then it has been convention to ensure that all Attorneys General are members of the House of Commons or House of Lords, although there is no requirement that they be so. During the constitutional struggle centered on the Royal Declaration of Indulgence in 1672 and 1673 the Attorney General officially became the Crown's representative in legal matters. ¹⁴

Prior to 1890, the AG can engage in private practice but in that year the ability of an AG to continue practicing privately was formally taken away, turning the office-holder into a dedicated representative of the government. ¹⁵ Since the beginning of the twentieth century the role of the Attorney General has moved away from representing the Crown and government directly in court, and it has become more of a political and ministerial post, with the Attorney General serving as a legal adviser to both the government as a whole and individual government departments. ¹⁶ He or she is also the chief legal adviser of the Crown and its government, and has the primary role of advising the government and its agencies on any legal repercussions of their actions, either orally at meetings or in writing. Although the primary role is no longer one of litigation, the Attorney General still represents the Crown and government in court to handle most government legal cases. By convention, he represents the government in every

⁸ J.A. Agaba P. 357 *Supra*

⁹ *ibid*

¹⁰ *ibid*

¹¹ S. E. Jones, 'The Office of Attorney-General' *The Cambridge Law Journal* (1969) (27) 43

¹² *ibid*

¹³ *Ibid* P.44

¹⁴ *Ibid* P.45

¹⁵ *ibid*

¹⁶ *Ibid* P.46

case in front of the International Court of Justice.¹⁷ He also superintends the Crown Prosecution Service and appoints its head, the Director of Public Prosecutions. Decisions to prosecute are taken by the Crown Prosecution Service other than in exceptional cases i.e. where the Attorney General's consent is required by statute or in cases of relating to national security.¹⁸ The AG also superintends the Government Legal Department and the Serious Fraud Office.¹⁹ In the same way the A.G also has powers to bring 'unduly lenient' sentences and points of law to the Court of Appeal. Issue Writs of *nolle prosequi* to terminate criminal prosecutions, supervise other prosecuting bodies and advise individual ministers facing legal action as a result of their official actions. He is responsible for making applications to the court restraining vexatious litigants, and may intervene in litigation to represent the interests of charity, or the public interest in certain family law cases.²⁰ He or she is also officially the leader of the Bar of England and Wales, although this is merely custom and has no duties or rights attached to it.²¹ In England and Wales, when he AG is exercising his functions as an officer of the crown such functions were not subjected to review by the court of Queen's Bench division or any other court.²² To underline the sublime nature of the power, Lord Justice Smith of the House of Lords said that the AG has a supreme command in exercising his powers and no court in England could review such powers because the powers can be likened to a judicial power.²³

In the United State of America, the AG is equally granted similar power of public prosecution which is also not subject to judicial review²⁴. Indeed, given the fact that the AGs of the several states of America attain office by election. An AG who fails to exercise due diligence and interest of justice for the overall interest of the public does so at the expense of his political career.²⁵ However, an Attorney General is answerable to both the president and the parliament and is subject to trial for misconduct by the parliament. While the American president has power to appoint the Attorney General, he cannot remove him without recourse to the Congress.²⁶ The essence has been to ensure that the office of the Attorney General is not exploited by the President for political or personal reason whatsoever. The Americans knew that too much concentration of powers in the hand of a single authority of the President may result to a disastrous consequence and may lead to impunity.²⁷ This is not the case in Nigeria since the office is occupied by a political appointee.

In Nigeria, the office of AG dates back to pre- independence era or the colonial era. It was the period the received English law which contains the common law of England was introduced into Nigeria as primary source of law. The exact origin of the Office of the AG in Nigeria before 1900 is not clear. There was the office of a Queen's Advocate as well as a Queen's proctor and that was occupied by one person who also double as Registrar and Taxing Master of the then Supreme Court between 1863 and 1901 but in the Supreme Court ordinance of 1876 the office was not mentioned, the office may have been instituted under the Queen's advocate, if not then at the proclamation of amalgamation of the Northern and southern protectorate on January 1, 1900, at any rate within twelve years after the amalgamation of the two protectorate, when Lord Lugard assumed responsibility to administer the protectorate, there was the merger of the two offices of AG into one as AG for the colony and protectorate of Nigeria on January

¹⁷ Ibid P.48

¹⁸ Ibid

¹⁹ ibid

²⁰ Constitutional Affairs Committee. *'The Constitutional Role of the Attorney General'*. (United Kingdom Press 2007) P.23

²¹ Ibid P.24

²² *R. v Comptroller General of Patents* (1899) 1 Q.B (Pt 909) 914

²³ Ibid. Pp 913 – 914.

²⁴ *United State v. Thompson* 251 US 457,

Orobona v. Linscott 49 RI 443, 144 A, 52 53

²⁵ ibid

²⁶ <http://wikipedia.org/wiki/file:Government_of_United_States.org; http://en.Wikipedia.org/wiki/impeachment_in_the_United_States.org> accessed on 15/02/19; Larry J. Siegel, *Essentials of Criminal Justice* (4th ed.) Wadth Worth & Thompson learning. Belmont CA94002 – 3098, U.S.A. p. 236 – 237.

²⁷ A. Gambo, *A Critique Of The Power OF Attorney General in the Administration of Criminal Justice in Nigeria*. (Being an LL.M. Dissertation of the Faculty of Law, Ahmadu Bello University Zaria 2015).

1, 1914.²⁸ Then came the Law officers ordinance²⁹ which created the Offices of AG and Solicitor-General. A 1951 amendment in 1954 provided that ‘the AGF shall be entitled in the courts in Nigeria to the same rights and privileges as are enjoyed by the AG of England in the courts of England. The offices of Regional AGs were created by a further amendment in 1955, to replace the Legal Secretaries, Today the AGF still exercises similar powers to the English AG including the constitutional powers to commence or terminate prosecutions and powers under various statutes to consent to prosecutions. Under the country’s federal Constitution, the AGF/Minister of justice and AGS/Commissioners of justice in each of the thirty six states (that replaced regions) exercises identical powers in relation to criminal proceedings under their respective state laws.³⁰

The criminal procedure ordinance, which came into force in 1945, codified the prosecutorial powers of the Law Officers. Amendments to the Ordinance in 1954 and 1955 conferred on the Federal and Regional Attorneys-General respectively the powers to ‘exhibit to the High Court information for all purposes for which Her Majesty’s Attorney-General for England may exhibit information in the High Court of Justice in England’ and to ‘enter a *nolle prosequi*.’ In 1958, an amendment to the law³¹ transferred the powers of the Attorneys-General of the Western and Eastern Regions to initiate, conduct, and discontinue criminal proceedings to the newly created office of the Director of Public Prosecutions of both Regions.³² This does not preclude a person from filing a criminal complaint directly but subject to the overriding powers of the AG.

3. Constitutional Development on the Powers of the Attorney General

In 1960, the then Nigerian constitution introduced the organizational structure of the office of the Federal Attorney General. It provided that the AG of federation (AGF) shall be a minister of the Government of federation.³³ The constitution equally vested the on the Directors of Public Prosecution (DPP) of the federation and each region respectively to exercise such powers, they include;

- 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 Act of Parliament;
- b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
- c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.³⁴

Further to this the Constitution further re-affirmed the absoluteness of this power by providing that in exercising his power, the AG is not subject to the direction or control of any other person or authority.³⁵ The 1960 constitution is Nigeria’s first independence constitution as a sovereign state. Under it, Nigeria was not a Republic as such retained Queen Elizabeth II as titular head of state, until 1st of October 1963 when a Republican Constitution took effect in Nigeria. 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 Constitution³⁶. With regard to the prosecutorial powers, a 1962 amendment to the 1960 Constitution required the DPP to exercise them in accordance with any general or special directions given by the Attorney-General. The 1963 Constitution completed the restoration of the powers to the Attorney-General and subordinated the erstwhile independent office of the DPP to the Attorney-

²⁸ T. Elias ‘The Office and Duties of the Federal Attorney General in Nigeria’ *The Nigerian Law review journal* (1972) (149) 149.

²⁹ Officers Ordinance, Section 2. 1936

³⁰ O. Mba, ‘Judicial Review of the Prosecutorial Powers of the Attorney General in England and Wales and Nigeria: an imperative of the Rule of Law’ *Oxford University Comparative Law Forum* (2010) 2.

³¹ Law Officers Ordinance OP cit.

³² O. Mba *Supra*.

³³ Section 81(11) Constitution of the Federation of Nigeria 1960, Section 34(11) Constitution of Northern Nigeria, Section 33(1) Constitutions of Western and Eastern Nigeria, for the regional Attorneys-General.

³⁴ *ibid*

³⁵ Section 104(6) Constitution of the Federal Republic of Nigeria 1963.

³⁶ Osita Mba, *Supra*.

General³⁷ which provided for the establishment of office of the Director Public prosecution who shall be an officer in the public service of the federation and the office shall be a department of government for which responsibility is assigned to the AGF³⁸

However, 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 recommended³⁹ that the Attorney-General's power to take over or discontinue criminal prosecutions instituted by some other person or authority 'shall 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 the Constitution, which conferred prosecutorial powers on the Federal and States' AGs respectively, provided as follows:⁴⁰

1. The Attorney-General 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 Act.
 - b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
 - c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
2. The powers conferred upon the Attorney-General under subsection (1) of this section may be exercised by him in person or through officers of his department.
3. In exercising his powers under this section, the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.⁴¹

It is equally worthy of note that before the 1963 Constitution, the Attorney General (like other officers) was a civil Servant. However, the 1963 Constitution⁴² politicized the office and provided for the position of Attorney General who shall also be a Minister of the Government of the Federation. The 1999 constitution with regards to the provision on powers and office of the Attorney general did not change the position of the 1979 constitution except for the arrangement of sections.

4. Application of the Powers of Public Prosecution by the Attorney General in Nigeria

It is true that in Nigeria today, the office of the AG is constitutional⁴³ as well as political⁴⁴. Its political coloration has no doubt created an opportunity for the players to abuse the power. Those in political position use such power against their political opponents and sometimes against their people. It's not uncommon for political appointees to subject the values of their offices to the whims and caprices of their appointers for cheap political gains. The A.G. being a political appointee is therefore not exempted from such unwholesome political arrangement. We have seen a situation where the AG of Abia State appeared for the Governor in an election petition case in his personal capacity.⁴⁵ History also has it during the Second Republic, the then Governor of Kwara State removed his AG from office and appointed himself as the AG, because he was also a lawyer. He then entered a *nolle prosequi* in respect of a case pending before a Chief Magistrate Court against his political supporters.⁴⁶ Another incident happened in Imo State. It was a case of embezzlement of substantial amount of Public Funds. The Attorney General had appeared for the accused while still at the Private Bar before his appointment as Attorney General. When he was so appointed as Attorney General, he

³⁷ Ibid.

³⁸ Section 104(1) Constitution of the Federal Republic of Nigeria 1963.

³⁹ Section 159(2) of the 1979 Draft Constitution of the Federal Republic of Nigeria.

⁴⁰ Ibid, sections 160 and 191

⁴¹ ibid

⁴² Section 88(1) Constitution of the Federal Republic of Nigeria 1963.

⁴³ Section 150 constitution of the Federal Republic of Nigeria (as amended)

⁴⁴ The AG is an appointee of the President or Governor as the case may be.

⁴⁵ *INEC v Kalu* 1(2006)8 NWLR (Pt 981). where the Court frowned at of AG Imo state over his appearance for the Governor in his personal capacity.

⁴⁶ Gambo A. *Supra*.

used the opportunity to give his erstwhile client, a freedom. The weight of Public opinion which attended this flagrant abuse of power was such that the then Military Governor of the State had to remove the erring Law Officer. But then the damage has already been done. The accused had had opportunity to escape justice even if it was the desire of the succeeding Attorney General to prosecute him.⁴⁷

It is quite common in Nigeria to find the AG 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'⁴⁸. One may even find the AG entering a *nolle prosequi* over a case he was defending before his appointment as the AG or taken over a criminal matter because of personal or pecuniary interest while he jettisons the parameters set out by the constitution. The problem most often is attributed to judicial activism displayed by judges of the apex court. In discerning this, two cases will come to mind. The case of *State v Ilori & ors*⁴⁹ which is the most celebrated case on this issue and the case of *Abacha v the State*.⁵⁰ In the former, legal experts have argued that the judgment is bad for Nigeria and there is considerable evidence to show that the judgment in Ilori's case 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.⁵¹ The plaintiff in that case instituted a civil action before Lagos State High Court on the premise that the then AG of Lagos State was not impartial in a criminal action brought against the plaintiff. He claimed that by the provision of section 191(3) of the 1979 Constitution, the AG was not competent to discontinue the matter because the power was exercised in bad faith but the High Court however held that the AG is constitutionally empowered to exercise the power to discontinue any criminal proceeding at any stage before judgement in a criminal matter instituted by him or any other person as such the AG was not in breach of his constitutional powers. The plaintiff having being dissatisfied filed an appeal before the Court of Appeal. He asked the appellate court to set aside the judgement of the High Court. The Court of Appeal held that the trial court should have taken evidence and examined allegations against the AG of malice. On appeal to the Supreme Court, the Court set aside the judgement of the Court of Appeal and 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 further held that the remedy for abuse of power by the AG 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 discontinue a matter.

Consequently, in the case of *Abacha v.State*, the wife of late Chief M.K.O Abiola, Alhaja Kudirat Abiola was assassinated in cold blood by shooting her inside her car at Ikeja, Lagos. In 1999, Mohammed Abacha, son of former head of state Gen. Sani Abacha was arraigned along with three before the High Court of Lagos State. The AG Lagos State, through the State Director of Public Prosecution (D.P.P.) filed information against the appellant and the other three suspects. Essentially, the charges contained in the information were for murder, conspiracy to commit murder and accessory after the fact to murder.⁵² While preferring the information the A.G. expressly stated in writing that he was acting pursuant to the power conferred on him⁵³ which provides⁵⁴ that the AG of a State shall have the powers to institute criminal proceedings any person before any court in Nigeria other than a court martial in respect of a state offence. When the matter 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 him requiring him to stand trial before the High Court

⁴⁷ *ibid*

⁴⁸ E.B Omoregie 'Power of the Attorney General over Prosecution Under the Nigerian Constitution: Need For Judicial Restatement' *The Appellate Review* (2004) Vol.1 No1. Pp 135-152.

⁴⁹ *State v Ilori, Supra.*

⁵⁰ *Abacha v State* (2002) II NWLR PT.779, (P .437)

⁵¹ *Mba Supra*

⁵² The offences are contrary to sections 324, 319 (1) and 322 respectively of the criminal code Cap 32, Laws of Lagos State, 1994.

⁵³ By virtue of Section 211(1) of the CFRN 1999,

⁵⁴ (1) (a) *ibid*

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 court 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 among other things that the 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 judgment, 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 face⁵⁵. The Supreme Court further held 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 the courts are empowered to determine cases among parties and it doing so the courts must be vigilant so that no party will be oppressed directly or indirectly through an act of prosecution. Therefore, an accused person should not be subjected to a trial which at the onset has no basis. 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 overrule 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.⁵⁶ The court agrees with the appellant that there was no prima facie evidence in the information filed against the appellant but it however sees no fault in the power of AG exercised in that regard.

The Supreme Court has over the years being criticized over these two judgements for failure to put a stop to the excess powers granted the AG which has been so exercised without regard to public interest. The power of judicial review is a constitutional power⁵⁷ to which the Court has failed to apply in this case.

5. Conclusion and Recommendations

From the aforementioned discussion, it is obvious that the power granted that AG is one of the colonial legacies inherited and transplanted into our grundnorm and granted a constitutional flavour. The powers have been abused by the political class even with the constitutional parameters of 'public interest', 'interest of justice', and the need to 'prevent abuse of legal process' has not in any way help the situation considering the enormous discretion the AG carries in that power. Some other means of checking the powers such as to petition his appointer, institute a civil action against him, media and public debate criticism or summon by the legislative house may have little impact one way or the other but have not significantly affected or prevented the abuse of such power. It therefore becomes necessary to make the following recommendations: The constitutional provisions of section 174 and 211 of the 1999 constitution should be subjected to judicial review. This is in line with section 6(a) of the 1999 constitution. Only recently, the courts in Kenya have departed from the established English common law position on the power of the AG. to enter a *nolle prosequi*. Thus, in *Crispus Karanja v Attorney General*⁵⁸, the court declared: 'On the present practice 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'. 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 experience and background. This is an unprecedented feat achieved in Kenya. There is also a need to separate the office of the AG from that of the Hon Minister of justice or Commissioner for justice. This is because the office of the Minister/Commissioner for justice is more political than professional. In appointing AG, priority should be given to the nominee's antecedents, probity and good sense of judgment, discipline and knowledge of the law not just political appointee of any sort.

⁵⁵ E.B Omoregie, *Supra*. P. 7

⁵⁶ *Ibid* P.8

⁵⁷ Section 6 (a) Constitution of Federal Republic of Nigeria 1999; see also *African Newspapers V. Nigeria* (1985) 2 NWLR (Pt.137)

⁵⁸ E.B Omoregie *Supra*