

**PARDON OR PERVERSE OF JUSTICE? A CRITICAL APPRAISAL/IN-DEPTH
INTERROGATION OF SECTIONS 36(10), 174 AND 211 OF THE CONSTITUTION
OF FEDERAL REPUBLIC OF NIGERIA, 1999.**

BY

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FACULTY OF LAW

UNIVERSITY OF BENIN

BENIN CITY

OCTOBER, 2025

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**A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF LAW,
UNIVERSITY OF BENIN, IN PARTIAL FULFILMENT OF THE REQUIREMENT
FOR THE AWARD OF BACHELOR OF LAW (L.L. B) DEGREE OF THE
UNIVERSITY OF BENIN, BENIN CITY.**

OCTOBER, 2025

CERTIFICATION

I, **Dennis Omachonu AKPOR**, with Matriculation Number, **LAW2103464**, hereby certify that, with the exception of references to the works and opinions of other writers duly acknowledged herein, this entire project is a product of my personal research and findings. It has, neither in whole or in part, been presented for another degree elsewhere.

Dennis Omachonu AKPOR

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APPROVAL

We certify that this project work was researched, written, and completed by **Dennis Omachonu AKPOR** with Matriculation Number, **LAW2103464** in partial fulfilment of the requirements for the award of degree of Masters of Laws (LL.M) of the University of Benin.

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DEDICATION

This research is dedicated to God Almighty, who instilled in me from birth the spirit and vision of becoming a lawyer. I am immensely grateful for His support, protection, and guidance in helping me complete the first step toward becoming the next generation of outstanding lawyers, and for directing me toward my aspirational dream of being a distinctive and transformational lawyer.

I also dedicate this work to my late daughter, Miss Benicia Ojoyemi Omachonu, whose life was tragically cut short, preventing her from celebrating this great milestone with me as a family. If her death was occasioned by anyone, Romans 12:19 shall prevail: "Vengeance is mine; I will repay, says the Lord."

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TABLE OF ABBREVIATIONS

CFRN – Constitution of the Federal Republic of Nigeria

EFCC – Economic and Financial Crimes Commission

ACJA – Administration of Criminal Justice Act

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ABSTRACT

*This research conducts a critical examination of Sections 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999, which confer discretionary prosecutorial powers upon the Attorney-General of the Federation and the States. Additionally, it evaluates the broader constitutional protection afforded under Section 36(10), which safeguards individuals against double jeopardy. These provisions raise pressing inquiries regarding the equilibrium between executive discretion and the principles of justice, accountability, and fair hearings within Nigeria's criminal justice system. The study investigates whether the extensive authority vested in the Attorney-General to initiate, pursue, or terminate criminal proceedings, particularly through nolle prosequi, has been exercised in accordance with the rule of law or has instead devolved into a mechanism for political interference and elite protection. This inquiry is contextualized within a conceptual and theoretical framework that examines justice (retributive, restorative, and distributive), prosecutorial discretion, and the principles of separation of powers and the rule of law. Employing doctrinal and analytical legal research methodologies, the study delineates the historical evolution of the Attorney-General's office and the development of prosecutorial discretion in Nigerian constitutional law. Furthermore, it discusses judicial interpretations of these provisions in landmark cases such as *State v. Ilori*, *Abacha v. State*, *Usman v. FRN*, *Mohammed v. State*, and *FRN v. Osahon & Ors*, revealing a concerning tendency of judicial deference that could potentially facilitate the abuse of prosecutorial authority. Section 36(10) is scrutinized as a constitutional guarantee of finality in criminal trials, which precludes multiple prosecutions for the same offense, thereby preserving the integrity of criminal adjudication. Nonetheless, this safeguard is frequently undermined when prosecutorial discretion is misused to arbitrarily terminate trials, denying victims' closure and eroding public trust in the justice system. The study concludes that, although Sections 174, 211, and 36(10) each fulfill significant constitutional functions, their interactions must be meticulously overseen to prevent distortions of justice. Recommendations encompass the establishment of clearer statutory guidelines, judicial oversight of prosecutorial decisions, and institutional checks to avert the risk of discretion devolving into impunity. This work contributes to ongoing deliberations concerning democratic accountability, prosecutorial ethics, and the reformation of Nigeria's criminal justice framework.*

CHAPTER ONE

GENERAL INTRODUCTION

1.1. Introduction

Each jurisdiction has a nomenclature ascribed to an individual who plays a front role in the preservation of the law of such State, that is, the Chief Law Officer. In Nigeria, the Attorney General is the person saddled with the responsibility of the preservation of laws and prosecution of offenders, be it at the Federal or State level. Among the key powers conferred on the Attorney General by the 1999 Constitution are: the power to institute and undertake criminal proceedings against any person before any court of law in Nigeria; to take over and continue any such criminal proceedings that may have been instituted by any other authority or person, and discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by him or any other authority or person. The exercise of this power has been criticised by many, and it remains doubtful whether exercising such has in any way helped achieve criminal justice or tackle the ever-increasing crime rate in the Nigerian society.¹

The position of the Attorney General is well secured and entrenched in the Nigerian law. This position has been recognised under the Nigerian Constitution since Independence in 1960.² The office of the Attorney General is one ministerial position that enjoys Constitutional recognition, reflecting its importance and relevance in the legal and political setup in Nigeria. The role of the Attorney General in Nigeria are similar to the role the Attorney General performs in England, and this is traceable to her colonial history. Therefore, given the Federal system of Government in Nigeria, there is the position of the Federal Attorney General³ and

¹ B. M. Tijjani, 'The Power of the Attorney General to Enter Nolle Prosequi in Criminal Proceedings: Lessons for Nigeria', Bayero University Journal of Public Law (BUJPL) Vol. 6, No.1, June, 2023.

² The Office of the Attorney General was first recognised in Section 81 (11) the 1960 Independence Constitution, Section 104(2) of the 1963 Republican Constitution and subsequently in Section 150 & 190 of the 1979 Constitution and Section 174 & 211 of the 1999 Constitution.

³ CFRN 1999, Section 150 (1).

the Attorney General of the State.⁴ The Constitution prescribes the capacity in which the Attorney General is to function, that is, as the Chief Law Officer of the Federation or State and the Minister for Justice or Commissioner for Justice, as the case may be.⁵

While commenting on the importance of the office of the Attorney General, Justice Ekundayo observed that;

The Constitution of the country requires that the post of Attorney-General be filled from the rank of lawyers with 10 years (and above) post-call experience. This requirement is not without good reason. One of the reasons is to ensure that a person to be appointed Attorney-General has acquired sufficient experience to defend the rule of law, to guide his government away from offending it and I dare add sufficient courage and commitment to tender his resignation as soon as he discovers that he cannot or will not be allowed to protect the rule of law. If he tries and fails, he is still on the part of honour. If he fails to try, he brings a disgrace to the entire profession...the 'Master Brake' in the Governmental vehicle is the Attorney-General and his Ministry of Justice, as guided by law and judicial decisions. If he fails in this duty, there is nearly always a crash in which the government, the citizen, or the legal profession falls victim and sometimes a casualty. The Attorney-General must possess the knowledge and the courage to guide the government aright and to keep the government train on a lawful track.⁶

The Attorney General, from the above extract, occupies a very sensitive position in the Government.⁷ The occupier of the office, in essence, is called to serve three masters, first is the interest of his Appointer or President or Governor in whose pleasure he is serving (political), second is his professional responsibility (the leader of the Bar), and thirdly as officer or minister of the Court.⁸

Aside from being appointed by a politician, the Attorney General is a lawyer and minister in the temple of justice; he must not fall into the trap of seeing himself as a politician but as one

⁴ CFRN 1999. Section 195 (1).

⁵ There shall be an Attorney-General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation.(s.150 (1)); There shall be an Attorney-General for each State who shall be the Chief Law Officer of the State and Commissioner for Justice of the Government of that State.- s.195(1).

⁶ A. A. M. Ekundayo 'The Legal Profession and The Nigerian Nation in the 21st Century' published in The Legal Profession and the Nigerian Nation – edited by Yemi Akinseye-George (1988).

⁷ See Ikenga K. E. Oraegbunam, Boniface E. Ewulum, & Ifeanyi Agwuncha, 'Review of the Decision in Attorney-General of Kaduna State v Mallam Umaru Hassan on the Powers of the Attorney-General in the Light of Corporation Sole Concept', Unimaid Journal of Private and Property Law, Vol. No.1, 2016, pp. 63-80.

⁸ Paula. K. Maguire; 'Attorney General: Political Loyalty v. Professional Responsibility - The Ethical Challenge in Serving Three Masters' The John Marshal Law Review, Vol.23 (1990) P.229.

who has a higher cause, which is justice. Lord Denning MR, while speaking on the role of a lawyer in the case of *Rondel v Worsley*,⁹ observed thus:

‘As an advocate, he is a minister of justice equally with the judge...he must do all he honourably can on behalf of his client. I say ‘all he honourably can’ because his duty is not only to his client. He has a duty to the court, which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.... He must disregard the most specific instruction of his client if it conflicts with his duty to the court.’¹⁰

Lord Denning’s position further confirms that an Attorney General serves three masters: his master, the President, in whose pleasure he serves, his professional duty, and the duty to assist the Court as a minister in search of the truth and justice. He must have the public interest as client, and he is admonished to ‘put loyalty to the highest moral principles and country above loyalty to persons, party or government department’.¹¹ The powers of the Attorney General of the Federation¹² and the State¹³ are spelt out in Sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999, respectively. Section 174 (1) Provides that:

(1) The Attorney-General of the Federation 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 of the National Assembly; (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and (2) The Constitution of the Federal Republic of Nigeria Updated with the First, Second, Third, Fourth and Fifth Alterations (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 of the Federation 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 of the Federation shall have regard to the public interest, the interest of justice, and the need to prevent abuse of legal process.

⁹ (1966) 3 All E. R. 657 at 665.

¹⁰ Cited by B. F. Jemilohun; ‘The Attorney General and Nolle Prosequi: Powers without Limitations’ Available at <www.academica.edu> Accessed 3rd June, 2025.

¹¹ Elisa E. Ugarte, ‘The Government Lawyer and the Common Good’; South Texas Law Review, (1999) Volume 40 P. 269, 279.

¹² Section 174(1)-(3) 1999 Constitution.

¹³ Section 211(1)-(3) 1999 Constitution.

While Section 211 provides that:

- (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; (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 of a State under subsection 1 of this section may be exercised by him in person or through officers of his department. The Constitution of the Federal Republic of Nigeria Updated with the First, Second, Third, Fourth and Fifth Alterations 141 (3) In exercising his powers under this section, the Attorney-General of a State shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

The focus of this work is to critically analyse Sections 36(10), 174 and 211 of the 1999 Constitution, in respect to case laws and actual practice, to see whether the exercise of the powers conferred on the Attorney General by this Sections has led to the attainment of justice or it serves as a sword in the hands of the Attorney General which he uses to pervert justice.

1.2.Statement of the Research Problem

While the 1999 Constitution provides a framework for justice and democratic accountability, it paradoxically permits significant executive and prosecutorial discretion in criminal matters. The major problem that this project seeks to address is whether these provisions, particularly Sections 36(10), 174, and 211 enhance justice or have been repeatedly misused to obstruct it.¹⁴

In recent years, the Nigerian political landscape has witnessed instances where prominent political actors, after conviction for corruption or financial crimes, have either been pardoned by executive powers or had their cases discontinued by the Attorney-General. These actions, though Constitutional, raise the concern whether the law is being used not as an instrument of

¹⁴ Ibid.

justice, but as a shield for the powerful. This apparent manipulation of legal provisions fuels public perception that there exists one law for the poor and another for the politically connected.¹⁵

Moreover, there is lack of transparency, checks, and accountability mechanisms around the use of these powers. The Constitution provides minimal procedural safeguards against abuse, and judicial review of such decisions is limited. In practice, this grants a dangerously high level of discretion to individuals who may act based on political expediency rather than objective legal standards.¹⁶

1.3. Research Questions

Stemming from the identified research problem, a series of questions has been curated to anchor this project and steer this research in the right direction. The following questions have been raised:

- a. Does Sections 36(10), 174, and 211 facilitate justice, or do they open doors to abuse and selective application of the law?
- b. Were the drafters of the Constitution fully conscious of the wide discretion they were placing in the hands of the Attorney General's officeholders?
- c. Can a balance be struck between the necessity, for the exercise of executive mercy or prosecutorial discretion and the imperative of justice, equality, and accountability?

1.4. Aim and Objectives of the Project

The aim of the project is to critically appraise the Constitutional provisions relating to pardon and prosecutorial discretion under Sections 36(10), 174, and 211 of the 1999 Constitution as to evaluate whether their application advances or subverts justice in Nigeria.

While the objectives are to:

¹⁵ Ibid.

¹⁶ Ibid.

1. provide a detailed interpretation and legal analysis of Sections 36(10), 174, and 211 of the 1999 Constitution;
2. Analyse the exercise of these powers in cases;
3. Analyse the abuse or controversial use of pardon and prosecutorial discretion in Nigeria; and,
4. Analyse in a comparative basis the exercise of prosecutorial powers in other jurisdictions.

1.5. Scope and Limitations of the Project

This project is primarily focused on the Nigerian legal system, with specific attention to Sections 36(10), 174, and 211 of the 1999 Constitution. The research will critically assess the Constitutional and judicial framework surrounding pardon and prosecutorial discretion in Nigeria. The project is doctrinal and analytical. It will not involve empirical fieldwork or interviews. While it relies on available primary and secondary sources, limitations may arise due to incomplete records of pardon grants or prosecutorial decisions, especially those that are politically sensitive or classified. Additionally, the scope is limited to criminal cases, as Sections 36(10), 174, and 211 of the 1999 Constitution specifically deal with Criminal proceedings.

1.6. Significance of the Project

This research contributes to the ongoing project on Constitutionalism, the rule of law, and judicial integrity in Nigeria. By interrogating Sections 36(10), 174, and 211, it challenges lawyers, judges, law students, policymakers, and any other interested reader to rethink the limits of executive and prosecutorial discretion.

At a time when public trust in the justice system is eroding, this project highlights how legal mechanisms may inadvertently sustain inequality. It speaks directly to the concerns of ordinary citizens who perceive justice as a privilege for the rich and punishment for the poor. The findings and recommendations of this project may guide Constitutional amendments, judicial guidelines, or administrative reforms aimed at making the justice system more transparent and accountable.

1.7. Research Methodology

This research adopts a doctrinal legal research methodology, relying on both primary and secondary sources. The primary sources include the Constitution of the Federal Republic of Nigeria, 1999 ., judicial decisions interpreting Sections 36(10), 174, and 211, Statutes such as the Criminal Code Act, Administration of Criminal Justice Act, and other enabling legislation, academic journal articles, textbooks, government reports, newspaper reports and verified media sources highlighting relevant political and legal controversies.

1.8.Chapters Overview

This research explores the tension between executive discretion and the imperatives of justice, focusing specifically on Sections 174 and 211 of the 1999 Constitution of the Federal Republic of Nigeria ., which grant broad prosecutorial powers to the Attorney-General of the Federation and of the States, and Section 36(10), which protects individuals from double jeopardy. The central question driving this inquiry is whether these provisions, while constitutionally valid, have been used in ways that promote justice or whether they have, in practice, enabled political interference and undermined public confidence in the criminal justice system. The project begins with a background on the problem, highlighting how the Attorney-General's powers have been controversial. While the Constitution permits the Attorney-General to take over or discontinue any criminal proceedings before judgment is

delivered, there are growing concerns that these powers have been abused to shield the politically connected or frustrate due process. The statement of the research problem draws attention to this abuse, questioning whether the legal framework surrounding these powers has allowed discretion to become impunity. The aim of the project is to interrogate whether the discretionary prosecutorial powers vested in the Attorney-General align with Nigeria's commitment to the attainment of justice and the rule of law. Among the objectives are to examine the legal and historical development of these powers, analyse these sections, and evaluate their real-world application through case law. The research adopts a doctrinal and analytical methodology, relying on Constitutional texts, case law, and academic literature.

Chapter Two provides the conceptual and theoretical foundation of the work. It begins by distinguishing related concepts such as pardon, amnesty, and prosecutorial discretion. While pardon and amnesty are post-conviction mechanisms of mercy or political resolution, *nolle prosequi* is exercised by the Attorney-General during prosecution.¹⁷ The chapter then discusses the concept of justice through the lenses of retributive, restorative, and distributive justice. Retributive justice supports proportionate punishment, restorative justice aims at repairing harm and reconciliation, while distributive justice focuses on fairness in how justice is administered. These justice models serve as evaluative tools for assessing the Attorney-General's powers. The theoretical framework is further enriched by the principles of the rule of law and the doctrine of separation of powers. The rule of law insists on legal accountability and the prevention of arbitrary government action, while the separation of powers limits the concentration of authority in one arm of government. From this perspective, unchecked prosecutorial discretion represents a Constitutional and institutional threat. The literature review reveals that while some scholars view discretion as vital to prosecutorial

¹⁷ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

efficiency, others warn that it is frequently misused in Nigeria, often to the detriment of justice and public accountability.

Chapter Three turns to a legal and historical analysis of the Attorney-General's discretionary powers. The office, inherited from colonial governance, has retained immense prosecutorial authority through successive Constitutional iterations. Sections 174 and 211 affirm that the Attorney-General may institute, take over, or discontinue any criminal proceedings in the public interest. However, the project finds that this discretion lacks statutory checks and has often been exercised with little or no justification. The chapter also examines how *nolle prosequi* operates procedurally and conceptually—originally intended to avoid wasteful litigation or unjust prosecutions; it now frequently functions as a political tool. The chapter discusses the potential conflict between the Attorney-General's political appointment and the independence required to fairly exercise prosecutorial power.¹⁸ It argues that when the office is subject to partisan interests, justice is compromised. Moreover, the arbitrary use of *nolle prosequi* is linked to Nigeria's rising crime rate, as it sends a message that accountability can be evaded through connections rather than due process. The absence of institutional or judicial oversight over these powers leaves room for executive overreach and erosion of the public's trust in the judiciary.

Chapter Four undertakes a direct analysis of Sections 36(10), 174, and 211, exploring how they operate and interact. Section 36(10) enshrines the principle of double jeopardy, protecting individuals from being prosecuted more than once for the same offense after acquittal or conviction. However, the misuse of *nolle prosequi* can undermine this safeguard by interrupting trials arbitrarily and leaving the accused in prolonged legal limbo without finality.¹⁹ The judicial posture in interpreting these provisions has often been deferential, granting the Attorney-General wide latitude. A detailed review of major cases like *State v*

¹⁸ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

¹⁹ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623

*Ilori*²⁰, *Abacha v State*²¹, *Usman v FRN*²², *Mohammed v State*²³, and *FRN v Osahon & Ors*²⁴ reveals a consistent pattern. The courts have generally affirmed that the Attorney-General's discretion is constitutionally protected and beyond judicial review. In *Ilori*²⁵, the Supreme Court ruled that the power to discontinue criminal proceedings is not subject to court interference, even where such decisions appear politically motivated. This trend suggests a judicial unwillingness to question executive authority, despite the risk of misuse. The chapter argues that although the Constitution grants these powers, their exercise must be subject to higher accountability standards. The failure of the judiciary to develop a robust review mechanism effectively allows the Attorney-General to truncate prosecutions unilaterally, regardless of the public interest. As a result, the prosecutorial process may be used not to uphold the law, but to protect powerful individuals or settle political scores.

The final chapter summarises the research, offering conclusions and practical recommendations. The project finds that the powers of the Attorney-General, as currently framed and applied, are too expansive and insufficiently checked. This has led to a systemic imbalance where justice is often sacrificed on the altar of political expediency. The misuse of the Attorney General's powers, without public explanation or independent scrutiny, undermines public confidence in the judiciary and raises serious questions about prosecutorial ethics. To address this, the project recommends statutory reforms that define the scope and limits of prosecutorial discretion. It calls for the creation of judicial review mechanisms to assess the legality and propriety of discontinuing prosecutions. Additionally, the appointment process for the Attorney-General should be depoliticised to preserve prosecutorial independence. Victims' rights and interests should also be integrated into the

²⁰ (1982) 2 SC 155.

²¹ (2002) II NWLR PT.779, (P .437).

²² (2015) LPELR-40584(CA).

²³ (2015) LPELR-24397(SC).

²⁴ (2006) LPELR-3174(SC).

²⁵ Ibid.

prosecutorial process, especially in cases where discontinuance affects the outcome of justice. In conclusion, this research argues that discretion, while necessary in any justice system, must not be absolute. Sections 174 and 211, in their current form and judicial interpretation, have enabled a perversion of justice rather than its administration. If Nigeria is to uphold the rule of law and Constitutionalism, there must be a recalibration of prosecutorial authority, striking a balance between discretion and transparency, accountability, and the genuine pursuit of justice.

CHAPTER TWO

CONCEPTUAL, THEORETICAL FRAMEWORK AND LITERATURE REVIEW

2.1. Introduction

This chapter provides the intellectual scaffolding on which the research is anchored. It seeks to clarify the essential concepts which are central to this project. It offers theoretical lenses through which the powers of pardon and prosecutorial discretion may be understood, and critically reviews existing literature to identify gaps and scholarly trends on the subject matter. This is particularly important given that legal powers, are not exercised in a vacuum but in a social context where power, politics, and inequality intersect with justice, thus creating room for discretion. The concern that forms the backdrop of this project is the increasing tendency in Nigeria for the Constitutional powers of the Attorney-General (hereinafter referred to as the AG), and the Executive arm of government to be wielded in a manner that serves private or political interests, rather than the collective good. In this regard, a thorough conceptual understanding of ‘pardon’, ‘justice’, and ‘prosecutorial discretion’ is sacrosanct to lay a foundation for critical evaluation. Likewise, the theoretical frameworks discussed in this chapter help expose the structural biases, contradictions, and tensions inherent in the relevant Constitutional provisions.

2.2. Conceptual Framework

Conceptual clarity is imperative for meaningful academic project. All good research proceeds from a thorough exposition and elucidation of the conceptual terminologies associated with the research topic.²⁶ This project is no exception, as it comprises several concepts that must be holistic, albeit succinctly clarified. Thus, this section is devoted to intricately analysing the concepts embedded in this research by clarifying their meaning and purpose. To begin, we

²⁶Bhat Ishwara, Idea and Methods of Legal Research (Oxford Academic 2020). <<https://doi.org/10.1093/oso/9780199493098.001.0001>> accessed 9th June 2025.

will extricate the terms in this research that are recurrently used within the breadth of this work. Thereafter, we will define these terms lexically and within the context in which they are used in this research. It is intended that this definitional framework will provide a compass for navigating the subsequent expositions in this project. Each concept here is examined not merely for its dictionary or legal meaning, but for its implication in this work.

2.2.1. Pardon

Hornby describes pardon as ‘to forgive’ or ‘excuse’.²⁷ The Black’s Law Dictionary²⁸ defines ‘Pardon’ as ‘*the act or an instance of officially nullifying punishment or other legal consequences.*’ While Mudsapher, J.C.A. (as he then was), succinctly adumbrated in *Ojukwu v Obasanjo*²⁹ that:

‘A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and the privileges forfeited on account of the offence...the effect of a pardon is to make the offender pardoned. A critical view of the definitions denotes that a pardon is an official act, and it is given after an offence has been committed...’

The Nigerian Court of Appeal in the case of *Falae v Obasanjo (No. 2)*,³⁰ opined that:

‘A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and privileges forfeited on account of the offence. The effect of pardon is to make the offender a new man (*novus homo*), to acquit him of all or corporal penalties and forfeitures annexed to the offence pardoned.’

Thus, it must be noted that a pardon does not raise the inference that the person pardoned had not committed the crime for which the pardon was granted. A pardon stops with the punishment and the consequences attaching thereto, but does not wipe out conviction. This

²⁷ See generally, J.O. Olatoke; An Examination of the Constitutionality of the Amnesty Programme in the Niger Delta Region of the Federal Republic of Nigeria published in the Journal of Law, Policy and Globalization, available at: <www.iiste.org> Volume 5, 2012, p. 22.

²⁸ Garner B.A; 9th Ed. 2009 Thomson Reuters, Page 1137, 384.

²⁹(2004) FWLR, (Pt. 222) 1666. See also *F.R.N. v Ifekwu* (2003) 15 NWLR (Pt. 842) 113; *Jammal Steel Structure v A.C.B.* (1973) ALL NLR 823.

³⁰(1999) 4 NWLR (Pt. 599) 476 at p. 495 paras D-E.

position of law was reiterated by the court in *Okongwu v State*.³¹ However, it is regarded as defamatory to refer to a person granted a pardon as a convict in a derogatory tone.³²

Grant of Pardon may be absolute, full or partial.³³ However, under the Nigerian law, there is no distinction between absolute, full or partial pardon. The word used in the 1999 Constitution is 'Pardon', and in that context, pardon may be with or without any condition.³⁴

It must be noted that there are other species of pardon, although not relevant to this work, which usually flow from a victim of a crime. These types of pardons come in the form of condonation of offence³⁵ and compounding of offence.³⁶ Both are forms of forgiveness by a victim of a crime to an offender. The major difference is that in compounding of offence the offender is not treated as if the offence had not been committed, but by condoning the offence, the offender is treated as if the offence had not been committed in the first place, as seen in *Romrig (Nig.) Ltd v Federal Republic of Nigeria*,³⁷ *PML (Securities) Co. Ltd. v Federal Republic of Nigeria*,³⁸ *Gava Corp. Ltd v Federal Republic of Nigeria*.³⁹

In practice, the application of pardon in Nigeria has often drawn criticism. High-profile cases, such as the 2013 pardon of Diepreye Alamiyeseigha⁴⁰, a former governor convicted of corruption, have raised alarm over the potential abuse of pardon powers to favour political allies or serve as a reward for loyalty.⁴¹

³¹ 1986 5 NWLR (Pt. 44) 721, 736. Compare *Hay v Tower Division of London* (1890) 24 QBD 561.

³² *Okongwu v State*, 1986.

³³ *Ibid.*

³⁴ See Sections 175(1) (a) and 212(1) (a); *Falae v Obasanjo* (No. 2).

³⁵ Condonation is 'the voluntary overlooking or pardon of an offence', an 'implied pardon of an offence by treating the offence as if it had not been committed'.

³⁶ The difference between condoning and compounding of offence is that while the compounding of an offence does not mean that the offence had not been committed, by condoning the offence, the offender is treated as if the offence had not been committed in the first place.

³⁷ (2018) 15 NWLR (Pt. 1642) 284 (Pp. 306, paras. A-B; 316 para A).

³⁸ (2018) 13 NWLR (Pt. 1635) 157 (Pp. 184) Paras. F-G; 185, paras. F-G.

³⁹ (2019) 10 NWLR (Pt. 1679) 139 (Pp. 180, para. D; 180-181, paras. H-C).

⁴⁰ Olarewaju Saraju, 'Presidential Pardon for Diepreye Alamiyeseigha: Abuse of Power and Morality', Shara Reporters.com, available at: <<https://saharareporters.com/2013/03/18/presidential-pardon-diepreye-alamiyeseigha-abuse-power-and-morality-olanrewaju-suraju>> accessed 2nd June 2025.

⁴¹ *Ibid.*

We also have the recent presidential pardon of Chief Ibori⁴², also a former governor of Delta State, convicted for money laundering and financial misconduct. This decision made on the 12th of June 2025, has generated mixed reactions across Nigeria.⁴³ This undermines the rule of law and the credibility of anti-corruption efforts.

2.2.2. Amnesty

The Black's Law Dictionary⁴⁴ defines amnesty as:

'A pardon extended by the government to a group or class of persons, usually for a political offence; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted'.⁴⁵

It noted further that:

'[U]nlike an ordinary pardon, amnesty is usually addressed to crimes against state sovereignty—that is, to political offences concerning which forgiveness is deemed more expedient for the public welfare than prosecution and punishment. Amnesty is usually general, addressed to classes or even communities—also termed general pardon.'⁴⁶

Amnesty implies that it cancels the punishment provided by the law in respect of the offence committed, as seen in *Oloyede v State*,⁴⁷ *Isibor v State*.⁴⁸

2.2.3. Justice

Examining the issue of justice today appears to be a challenging task.⁴⁹ Enquiries as to the meaning of justice have aroused the interest of scholars since time immemorial,⁵⁰ but while its importance is apparent and unquestionable, its exact purport remains a fissiparous issue, as

⁴² Available at: < <https://www.bbc.com/pidgin/articles/cq69n046gvdo> > accessed 15th June 2025.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Garner B.A; 9th Ed. 2009 Thomson Reuters, Page 1137, 384.

⁴⁶ Ibid.

⁴⁷ 8 NWLR (Pt. 1621) 311 (P. 326) para. E.

⁴⁸ (2002) 4 NWLR (Pt.758) 741.

⁴⁹ S. Banakas, 'A Global Concept of Justice-Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World', Louisiana Law Review, Volume 67, No. 4, 1021.

⁵⁰ E.E. Edor, 'John Rawls's Concept of Justice as Fairness', Pinisi Discretion Review, Volume 4, Issue 1, September, 2020, 180.

there is no unanimous definition of the same.⁵¹ Justice has been defined as ‘the fair treatment of people’⁵² as well as ‘the fair and proper administration of laws’.⁵³ Furthermore, it has been said to be ‘the principle that people get what they deserve.’⁵⁴ Justice has also been stated to be the ‘constant and perpetual disposition to render to every man his due.’⁵⁵ In the view of Aristotle, one of the greatest philosophers in antiquity, *‘It is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal.’*⁵⁶

Justice is a complex and multifaceted concept with philosophical, moral, and legal dimensions. In the context of this project, justice implies fairness in legal proceedings, equity in the application of law, and impartiality in outcomes. Justice demands that the guilty be punished proportionately and the innocent protected. Justice also includes the notion of accountability — a system where power is exercised transparently and responsibly.

2.2.4. Prosecutorial Discretion

Prosecutorial discretion is the authority of a prosecutor to decide whether to initiate, pursue or withdraw criminal charges against a person, the nature of charges to be brought, and the overall handling of a case, including a plea agreement.⁵⁷ The exercise of such broad powers is essential in maintaining public confidence in the rule of law and a fair and efficient criminal justice system, but it requires accountability in any democratic setting. In Nigeria, considering the myriad of corrupt practices that have caused the near collapse of governance

⁵¹N.T. Nwikipasi and NA Dusan, ‘The Concept of Justice and its Application in a Developing Country Such as Nigeria’, *International Journal of Innovative Legal & Political Studies*, 9(1), Jan-March, 2021, 53.

⁵²A.S. Hornby, *Oxford Advanced Learner’s Dictionary of Current English* (9th ed, Oxford: Oxford University Press, 2015), 851.

⁵³B.A. Garner, *Black’s Law Dictionary* (10th ed, St. Paul: Thomson Reuters, 2014), 995.

⁵⁴N.N. Pandey and M Jaiswal, ‘A Comparative Project of Theory of Justice: in Reference to Rawls and Nozick’, *Journal of Positive School Psychology*, 2022, Vol. 6, No.8, 2363.

⁵⁵Justinian, *Institutes* 5 (3rd ed, Cooper Translation, 1852), quoted in R Waelder, 2.

⁵⁶Aristotle, *Politics* (Rackman Translation, 1959), quoted in R Waelder, 2.

⁵⁷Cowdery N. (2013) ‘Challenges to Prosecutorial Discretion’ 39(1) *Commonwealth Law Bulletin* 17 – 20.

and the economy, the prosecution of high-profile corruption cases involving political functionaries takes on a heightened significance.⁵⁸

Plea-bargaining was introduced into the criminal justice process as a special device in the prosecution of top-ranking public officials,⁵⁹ but the lack of independence and political interference has marred the decisions of the prosecuting institutions.⁶⁰ Consequently, public perception is palpable concerning the gross abuse of prosecutorial discretion in favour of party loyalists, the president and the political class,⁶¹ particularly in corruption and money laundering cases, with few exceptions.⁶² This has caused marked disparities between offences and sentences, proceeds of crime and recoveries, and high public officials and other

⁵⁸Abe B. (2023) 'Present State of Some High Profile EFCC Corruption Cases' International Centre for Investigative Reporting, available at <<https://www.icirnigeria.org/present-state-of-some-high-profile-efcc-corruption-cases/>> last accessed 6th June 2025; Folorunso OOF (2023) 'Plea Bargain and the Fight Against Corruption in Nigeria' 7(1) Wukari International Studies Journal 502 – 520 at 513.

⁵⁹Osipitan T & Odusote A (2014) 'Challenges of Defence Counsel in Corruption Prosecution' 10(3) Acta Universitatis Danubius Juridica 71 – 94.

⁶⁰Aliyu MM (2022) 'Challenges to Investigation and Prosecution of Corruption Cases in Nigeria' 7 African Journal of Criminal Law and Jurisprudence 24 – 32 at 28.

⁶¹Osamor R (2022) 'Plea Bargaining in an Administrative State' 4(1) International Journal of Comparative Law and Legal Philosophy 39 – 44 at 41 – 42; United Nations Office on Drugs and Crime (2019) Corruption in Nigeria, Patterns and Trends: Second Survey on Corruption as Experienced by the Population 29. Oguiche S (2016) 'Development of Plea Bargain in the Administration of Justice in Nigeria: A Revolution, Vaccination against Punishment or Mere Expediency' in Azinge E & Laura A (Eds) Plea Bargaining in Nigeria: Law and Practice Lagos, Nigeria: Nigerian Institute of Advanced Legal Studies 97 – 119. Referred to in Aborisade RA & Adeleke OA (2018) 'One Rule for the Goose, One for the Gander? The Use of Plea Bargaining for High Profile Corruption Cases in Nigeria' 12(2) African research Review 1 – 12 at 6.

⁶²See, A Compendium of 100 High Profile Corruption Cases in Nigeria 3 ed (2019), available at <<https://hedang.org/blog/a-compedium-of-100-high-profile-corruption-cases-in-nigeria/>> last accessed 6th June 2025; Adegbe FF & Fakile SA (2022) 'Economic and Financial Crime in Nigeria: Forensic Accounting as Antidote' 6(1) British Journal of Arts and Social Sciences 37–50, available at <https://d1wqtxts1xzle7.cloudfront.net/48258882/Economic_and_Financial_Crime_in_Nigeria_Forensic_Accounting_as_Antidot.pdf?1471969572=&response-content> last accessed 6th June 2025; A former Attorney General of the Federation, Mr. Aondoakaa, flagrantly exercised his prosecutorial discretion in favour of politically exposed persons when he discontinued the criminal proceedings against former Governor Orji Uzor Kalu and Jimoh Lawal and refused to prosecute the suspects in the Siemens, Willbros and Halliburton corruption scandals, even though the culprits in the corruption scandals had been convicted on the same offences in other jurisdictions, see Office of Public Affairs, US Department of Justice (2009) 'Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine', available at <<https://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million>> last accessed 6th June 2025.

defendants,⁶³ which gives the impression of a special ‘rule of law’ being created in their favour as against other citizens.⁶⁴

The determinative rules and practices vary across jurisdictions, with two commonalities. The first concerns the rules of evidence, that is, the availability, admissibility, and credibility of evidence towards the establishment of a reasonable prospect of conviction⁶⁵. The second relates to public interest considerations, namely, the nature and seriousness of the crime, type and prevalence of offence, victim interest and impact, and the like.⁶⁶ Considering the extensive ambit of the prosecutorial mandate, prosecutors exercise considerable powers in regard to citizens, the victims of crimes, and society.⁶⁷

Beyond the foregoing, the unethical inclinations coupled with the trend of prosecutorial misconduct in democratic countries raise serious questions about the role of prosecutorial discretion in the criminal justice system generally and especially in official corruption cases, considering the principle of independence. The prosecutorial decision-making is quasi-judicial because prosecutors aim at doing justice through truth-seeking to determine whether an accused has a case to answer by being implicated in the commission of a crime through a criminal investigation. This determination is sometimes referred to as a *prima facie* case or a reasonable and probable cause to believe in the accused’s guilt. Independence is key to such a process as a requirement of the public interest, whereby the prosecutor’s judgment must be free from partisan political or other corruptive influences on or from the prosecutor. Again, since prosecutorial decision-making can inherently cause the loss of liberty, property, or life of an accused, or have far-reaching effects on the rights and interests of the victim of crime

⁶³*F.R.N v Tafa Balogun* [2005] 4 NWLR (Pt. 324) 190; *F.R.N v Esai Dangbar* (2012) LPELR-19732 (CA); *F.R.N v Igbinedion* [2014] All FWLR (Pt. 734) 101; *F.R.N v Cecilia Ibru* unreported charge no FHC/L/297C/2009 (8 October 2010).

⁶⁴Aborisade & Adeleke (2018) at 6.

⁶⁵A *prima facie* case.

⁶⁶Varney H, De Silva S & Raleigh A (2019) Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute ICTJ 5 – 18.

⁶⁷Varney, De Silva & Raleigh (2019) at 1.

and society,⁶⁸ there cannot be independence without accountability. Accountability relates to the answerability of prosecutors for their decisions to the demands of public scrutiny since they serve the public interest.

Nonetheless, independence is required in terms of shaping outcomes in cases of utmost public interest, such as high-profile corruption cases. Public prosecutors occupy a vital but sensitive position since they are usually members of the executive arm of government to which they are accountable in most Commonwealth jurisdictions. This, in turn, makes them susceptible to political pressure. The implication then is that the need to uphold the principles of equality before the law, the right to equal treatment under the law, and the value of human dignity on a day-to-day basis goes beyond the traditional requirements of accountability based on the separation of powers. Consequently, the influence of Constitutionalism has brought a slight but significant shift in a few Commonwealth countries on the imposition of judicial scrutiny on the exercise of prosecutorial discretion by the Attorney General or the Director of Public Prosecutions. As against the hitherto established position, the emerging shift noticeable in Canada, Australia, and South Africa is of comparatively recent origin and relates to judicial review of prosecutorial misconduct in exceptional circumstances,⁶⁹ such as flagrant impropriety or malicious prosecution.⁷⁰ In addition, the publication of directions regarding the Attorney General's mandate, where statutorily required, has received judicial recognition as vital to ward off allegations of impropriety, reinforce the public perception of the rule of law, and foster transparency in the performance of the Attorney General's duties.⁷¹

⁶⁸ *Taman v Canada (Attorney General)* 2015 FC 1155 (CanLII) para 17.

⁶⁹ Canada: *Krieger v Law Society of Alberta* 2002 SCC 65; Australia: *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 paras 81 – 82 (HCA); South Africa: Selabe BC (2015) The Independence of the National Prosecuting Authority of South Africa M Phil Thesis: University of the Western Cape at 257; *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (2) SACR 107 (SCA) para 51; *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP).

⁷⁰ *Krieger v Law Society of Alberta* 2002 SCC 65 paras 46, 47, 49.

⁷¹ *Vogel v Canadian Broadcasting Corp., Bird and Good* [1982] 3 W.W.R. 97 (BCSC); *Blackmore v British Columbia (Attorney General)* (2009) BCSC 1299.

In Nigeria, this covers the power vested in the Attorney-General under Sections 174 and 211 of the Constitution to institute, continue, or discontinue criminal proceedings in any court of law, save for a court-martial. This discretion is, in theory, to be exercised in the interest of justice, to prevent abuse of legal process, or where continued prosecution would not serve the public interest. However, the vagueness of the term ‘public interest’ allows for wide latitude in interpretation.

In Nigeria, there have been multiple instances where Attorney-Generals have exercised their Constitutional powers in favour of individuals facing corruption charges or politically sensitive allegations. The Constitution does not require that reasons be given, nor does it subject the Attorney-General’s discretion to judicial review — a situation that creates fertile ground for abuse. This unchecked power becomes problematic in a polity riddled with patronage and political interference.

2.2.5. Nolle Prosequi

The expression *nolle prosequi* is derived from the Latin legal phrase, with the meaning: unwilling to pursue. It can also be said to mean: do not prosecute. Its origin is traceable to the common Law criminal justice system, where the prosecution is unwilling to proceed with, or voluntarily withdraws from the prosecution of a criminal charge proffered against an accused person(s).⁷²

Nolle prosequi has been defined by Merriam Webster Dictionary to mean entry on the record of legal action denoting that the prosecutor or plaintiff will proceed no further in an action or suit either as a whole or as to some count or as to one or more of several defendants.⁷³

Nolle prosequi amounts to a formal declaration made by a prosecutor in a criminal case, or by a plaintiff in a civil lawsuit, that the case against the defendant is being dropped. In criminal

⁷² *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

⁷³ < <https://www.merriam-webster.com/dictionary/nolle%20prosequi> > accessed 7th June 2025.

cases, *nolle prosequi* may be used in situations in which there is a fatal flaw in the prosecution's case, the prosecutor realizes he cannot prove the charges, he cannot prove the charges, or even that the prosecutor no longer believes the defendant is guilty.

Nolle prosequi may be entered in a civil lawsuit for similar reasons, such as when evidence and testimony take a turn, and the plaintiff no longer has confidence that it will prove their case. In both civil and criminal cases, the entry of *nolle prosequi* has the same effect as a voluntary dismissal of the case, or certain claims, charges, or defendants of a case.⁷⁴

The power to discontinue a criminal proceeding, otherwise referred to as *nolle prosequi*, is exclusively vested in the Attorney General without any judicial review.⁷⁵ Although Section 108 of the ACJA seems to have whittle down the power of the Attorney General of the Federation in this regard, the Constitution did not expressly provide for the mode, style or procedure for the exercise of the power of AG in entering *nolle prosequi*, save for the fact that it was provided that the power can be exercised by the AG in person or through an officer of his department.⁷⁶

Other procedural legislations prescribe the mode in which the power of the AG can be exercised in line with the provisions of Sections 174 and 211 of the 1999 Constitution. The ACJA under Section 107 provides that the Attorney General can exercise his power of *nolle prosequi* in person by informing the court of his intention to discontinue orally or by informing the court in writing. Section 107(1) of the ACJA provides thus:

In any criminal proceeding for an offence created by an Act of the National Assembly, and at any stage of the proceeding before judgment, the Attorney General of the Federation may discontinue the proceedings either by stating in court in writing that the Attorney General of the Federation intend that the proceeding shall not continue and based on the notice the suspect shall immediately be discharged in respect of the charge or information for which the discontinue is entered.

⁷⁴ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

⁷⁵ *State v Ilori* (1982) 2 SC. 155.

⁷⁶ Section 174 (2) & 211 (2) of the constitution of the Federal Republic of Nigeria 1999.

It is to be noted that in some states in the United States, the mode of filing a ⁷⁷*nolle prosequi* is through a motion in court. Upon entering a *nolle prosequi* concerning a criminal matter by an AG, the defendant is still prone to prosecution on the same offence. It therefore suffices to say that the entry of *nolle prosequi* is not acquittal, and the principle of double jeopardy therefore does not apply. The implication is that the defendant may later be re-indicted on the same charge.⁷⁸ It is trite that the entry of *nolle prosequi* by the AG does not serve as a permanent shield from prosecution, nor does it serve as an atonement for criminal liability. The effect of the entry of *nolle prosequi* on the accused will largely depend on the prevailing circumstances and the stage of the case at the time of the entry of *nolle prosequi*.⁷⁹ This is well captured under the ACJA, where the effect is highlighted in different circumstances. For instance, Section 107(4) of the ACJA provides thus: *‘Where discontinuance is entered by the provisions of this section, the discharge of a suspect shall not operate as a bar to any subsequent proceedings against him on account of the same facts.’*⁸⁰

2.3. Theoretical Framework

To provide a robust analysis of the topic, this project draws on several theoretical frameworks. These frameworks help in understanding not only how legal power operates, but also why certain legal outcomes persist in spite of apparent legal contradictions.

2.3.1. Theories Of Justice

In this segment, the retributive, restorative, and distributive theories of justice will be discussed.

a. Retributive Justice

⁷⁷ <<https://legaldictionary.net/nolle-prosequi/>> accessed 7th June 2025.

⁷⁸ *FRN v Osahon and Ors* (2006) Law Pavilion Electronic Law Report - 3174 (SC).

⁷⁹ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

⁸⁰ It is also essential to note the provision of Section 108 of the ACJA as it relates to the effect of discontinuance of criminal proceedings against a defendant.

Retributive justice is one of the oldest and most widely accepted theories of justice, rooted in the principle that individuals who commit wrongful acts deserve to suffer proportionate consequences. This theory is grounded in moral philosophy and the maintenance of social order. The central idea is that justice is achieved when a sanction is imposed on a wrongdoer in a manner that corresponds to the severity of their offence. The purpose of this form of justice is not to rehabilitate the offender or compensate the victim, but to affirm the rule of law, uphold moral accountability, and reinforce societal norms. At its core, retributive justice operates on the premise of moral desert that people should get what they deserve. When crime disrupts the societal equilibrium, punishment becomes the vehicle through which the moral balance is restored. However, this theory also demands consistency and impartiality in the administration of justice. If the criminal justice system arbitrarily exempts certain individuals, particularly the wealthy, politically connected, or powerful, from punishment through instruments such as executive pardon or the discontinuance of prosecution, it creates a moral hazard. Such selective application of justice sends a dangerous message: that some lives, liberties, or reputations are more sacrosanct than others. This undermines the concept of equality before the law and weakens public confidence in the impartiality of legal institutions. The resulting inequality not only violates the principle of retribution but also subverts the rule of law itself, replacing justice with privilege.

b. Restorative Justice

In contrast to the punitive focus of retribution, restorative justice emphasises the repair of harm caused by criminal conduct. It is a relational model of justice that prioritises healing over punishment, viewing crime not merely as a violation of law, but as a rupture in human relationships. Restorative justice encourages the active participation of all stakeholders, victims, the offenders, and the wider community, in a process that seeks accountability, empathy, and reparation. The core values of restorative justice include acknowledgment of

harm, genuine remorse, forgiveness, reintegration and the prevention of future wrongdoing. Within this context, pardon may be seen as a tool for reconciliation and closure, especially where an offender has demonstrated accountability and undertaken steps to repair the damage caused. However, the misuse of pardon or prosecutorial discretion seriously undermines restorative goals. A pardon that is granted without transparency, excludes victims' input or lacks evidence of remorse or rehabilitation does not serve restorative aims. Instead, it becomes a political or personal favour, shielding offenders from responsibility and denying justice to victims. In such cases, the instrument of pardon ceases to be restorative; it becomes an extension of injustice cloaked in the language of mercy.

c. Distributive Justice

Distributive justice addresses the fairness of the allocation of resources, rights, and burdens within society. It examines whether institutions and laws distribute societal benefits and sanctions in a manner that promotes equality, fairness, and the common good. From this perspective, the discretionary powers of pardon and non-prosecution must be examined not only on a case-by-case basis but also through the broader lens of systemic equity. A legal system governed by distributive justice cannot tolerate patterns where leniency is consistently extended to a privileged few while marginalised or indigent offenders are subjected to the full weight of punitive law. Where pardon and prosecutorial discretion become tools of selective indulgence, favouring those with political ties or economic influence the justice system effectively transforms into an instrument of social stratification. The result is the erosion of the principle that justice should be blind to status, wealth, or affiliation. In this context, the law ceases to function as a social leveler and instead becomes a mechanism through which inequality is entrenched. True distributive justice demands that the administration of pardon and discretion reflect a commitment to equality not elitism.

2.3.2. Rule of law and Separation of Powers

The rule of law is a foundational principle of Constitutional democracy. It connotes a legal order in which all persons, regardless of status, power, or influence, are equally subject to and protected by laws that are publicly promulgated, transparently enforced, and impartially adjudicated. The rule of law safeguards against arbitrariness and tyranny by demanding consistency, legality, and accountability in the actions of all public and private actors. In the context of criminal justice, this principle ensures that justice is administered fairly, without fear or favour, and according to due process.

The abuse or arbitrary exercise of the powers conferred by Sections 174 and 211 of the Nigerian Constitution, which vest the Attorney-General with the authority to institute, continue, or discontinue criminal prosecutions, undermines the rule of law when used selectively to shield powerful individuals from legal consequences. When such discretion is exercised without oversight, and in circumstances that suggest political bias or personal interest, it weakens public trust in the neutrality of legal processes. The appearance, or reality, of executive interference in judicial matters diminishes the law's moral force and leaves citizens with the impression that justice is for sale or subject to political bargaining. It blurs the line between legal entitlement and executive favour, corroding the very foundation of democratic governance.

Closely intertwined with the rule of law is the principle of separation of powers, which dictates that the functions of governance be divided among the legislative, executive, and judicial arms of government. This division is designed to create a system of checks and balances that prevents the concentration of power and ensures that no single branch usurps the role of another. Although the Constitution permits the Attorney-General, a member of the Executive to make prosecutorial decisions, these decisions ought to be executed within the judicial domain. The courtroom is the arena in which justice is dispensed, but when the

executive actors use their Constitutional powers to manipulate judicial outcomes or prematurely terminate prosecutions for improper reasons, they infringe on judicial independence.

2.4.Literature Review

Bello, M. K., and Alkali, A. H., both noted in their work⁸¹ that it is obvious that the power granted to the 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’, which have not in any way helped 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 be summoned 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.

B M Tijjani, in his work,⁸² asserted that it would be a height of deception to categorically state that the exercise of the power of *nolle prosequi* by the AG has yielded tremendously in combating and reducing the crime rate in society. The opinion is predicated upon the fact that the exercise of the power has been politicized in many ways, as the Executive arm often used it as a weapon of destruction on other foes and a weapon of protection for their political allies. This act on its own is criminal.

Onuche stated in his work⁸³ that it must be emphasized that the office of the Attorney General of either the Federation or the State is sensitive. The occupier’s position as the chief law

⁸¹ Bello, M. K. and Alkali, A. H., ‘Discretionary Powers of the Attorney General: Whether Or Not’, IRLJ 1 (1) 2019, page 41.

⁸²B. M. Tijjani, ‘The Power of the Attorney General to Enter Nolle Prosequi in Criminal Proceedings: Lessons for Nigeria’, Bayero University Journal of Public Law (BUJPL) Vol. 6, No.1, June, 2023. P. 154.

⁸³Onuche, ‘ATTORNEY GENERAL’S POWER OF NOLLE PROSEQUI: A RELIC OF COLONIALISM OR A BURDEN TO RULE OF LAW?’ AJLHR 5(2) 2021.

officer of the Federation or State and the responsibilities thereof give it enormous prestige and moral burden to act justly. It is the fear of corrupting the sanctity of the office of the Attorney General that has sustained the call for the separation of the office of the Attorney General and that of the Minister for Justice. These fears are founded on the premise that the appointment of the Attorney General within the current structure exposes the occupant of that office to politicians and political influence. By implication, his decisions, actions, and exercise of discretion will be smeared by political considerations. His association, interaction, and official judgments cannot be completely free from those influences. The Attorney General's power of *nolle prosequi*, as confirmed by the Supreme Court in *Ilori's case*, is entirely based on the Common Law position. After 60 years of Independence, 20 years of uninterrupted democracy, coupled with a rebranded Presidential system of government, it is time for the country to take a turn and untie itself from the colonial relics of having an Attorney General who is a law unto himself. This can be done by entrenching a system of egalitarianism, the rule of law, and the independence of the judiciary. It is time to curb the arbitrary use of power and abuse of the same, consciously leaving behind the Common Law practice in this regard.

Salau⁸⁴ noted that a balanced consideration by prosecutors of the severity of the alleged corruption, the strength of the evidence, and the potential impact of the case on society is good for accountability and fairness. Moreover, the appropriate decisions to prosecute high-profile corruption cases can serve as deterrents against corrupt behaviour, but if inappropriately handled, could undermine the deterrence effect and erode public confidence in the ability of the legal system to combat corruption and uphold justice. Accordingly, to avoid selective justice, prosecutors must implement the law consistently in line with legislation. The author called for requisite Constitutional, legal, and policy reforms as these

⁸⁴Aaron Olaniyi Salau, '*the Abuse and Misuse of Prosecutorial Discretion in High Profile Corruption Cases in Nigeria: A Call for A Paradigm Shift*', JACL 8 2024 pp. 110 – 139.

are required to pave the way for judicial review, as appropriate, of the discretionary powers to prosecute sensitive and complex cases under the Nigerian criminal justice system.

Osamor, B.⁸⁵ examines some sections of the 1999 Constitution relating to the prosecutorial powers of the Attorney-General. The author dwelt so much on the powers of the Attorney General to institute, take over, continue, and discontinue criminal proceedings in Nigeria, which is relevant to this project.

Imhanobe O discusses the power of the Attorney-General to institute criminal proceedings, discontinue and take over the same. The author also discusses abuse of legal process, the delegation of powers of the Attorney-General. However, the author also did not take into account arguments of whether the powers of the Attorney General are subject to judicial review or not. The author examined issues such as history, origin, establishment, qualifications, appointment, tenure, and removal of the Attorney-General.

Omoriegie E. B.⁸⁶ examines the power of the Attorney-General over public prosecutions under the 1999 Constitution. In doing so, he discussed the power of the Attorney-General to institute, take over and continue, and terminate criminal proceedings before any Court in Nigeria except the Court Martial. The author concluded that the judicial attitude toward the Attorney-General's power over public prosecution is supportive of the current status quo as it relates to the powers vested in the A.G. under the Nigerian 1999 Constitution.. However, the Author did not make any critiques of the powers of the Attorney General and whether the powers are absolute or not.

Assudaisiy A.⁸⁷ examines the meaning of the phrase 'Attorney-General'. The author goes further to trace the origin of the office of the Attorney-General, the powers of the Attorney-

⁸⁵ . Osamor, B: Fundamental of Criminal procedure Law in Nigeria (1st Edition), (dee-sage Nigeria Limited, Bwari Abuja 2004) P. 110-125.

⁸⁶ Omoriegie E.B: Powers of the Attorney-General over Public Prosecution under the Nigerian Constitution the need for judicial restatement: A Faculty of Law lecture series, University of Benin, 4 November, 2004.

⁸⁷ Assudaisiy, a: Prosecution Powers of the Attorney-General (2012), Article on Matters of Islamic Teaching Law and Politics, on prosecutorial Powers of the Attorney-General.

General under the 1999 Constitution. But his work falls short, having not made any critiques in such powers, and finally did not discuss the issue of judicial review of the powers of the Attorney General.

Edosomwan C. U.⁸⁸ discussed the historical perspective of the office of Attorney-General. He traced the evolution of the office of the Attorney-General to the present time. The power conferred on both the Attorney-General of the Federation and that of the State is discussed by the author. The author also discussed the delegation of powers by the Attorney-General. He concluded that the powers of the Attorney-General are very wide and expansive.

Duru⁸⁹ O. in his work discussed the powers conferred on both the Attorney General of the Federation and that of a State. Similarly, the powers to institute, overtake, continue, and discontinue were also discussed.

Francis T,⁹⁰ in his article, examines the powers of the Attorney-General of the Federation to institute, take over, and discontinue the proceedings, and also the limitations of the power of the Attorney-General. More so, the author did not stop at that; he also discussed the delegation of power of Attorney-General, where he categorized the mode of delegation by Attorney-General into personal and delegated.

Mba, O,⁹¹ in his article, discusses the powers of the Attorney-General by referring to the common law of England and Wales and the Nigerian Constitution. The author said in his project that the Attorney-General, as the chief law officer of the State, is the chief legal adviser to the State and specifically in all Court proceedings. He went on to discuss the power extensively that in many Jurisdictions, including Nigeria, the Constitution confers on the

⁸⁸Edosomwan, C. U, powers of the Nigerian Attorney-General in prospective; a project presented by Hon. Charles Suwensuyi Esomwan SAN, Attorney-General and Commissioner for Justice, Edo State of Nigeria on 4th October, 2006.

⁸⁹Duru, O. (2012) the Powers and duties of the Attorney-General under the Nigerian Law. Published online also available at SSRN: <http://ssrn.com> accessed 14th July 2025.

⁹⁰Francis, T, (2008): 'An Appraisal of the Power of the Attorney-General of the Federation with respect to Criminal proceedings under the Nigerian Constitution.

⁹¹Ibid.

officer with similar powers as under common law prerogative to exercise ultimate control over prosecution. Similarly, the author discussed the power of the Attorney-General under English Law, common law, English statute, and under Nigerian Law. Under Nigerian Law, the author discussed the powers under the 1963 Constitution, the 1979 Constitution, and finally under the 1999 Constitution of the Federal Republic of Nigeria. The author also discussed extensively the power of the Director of Public Prosecutions under the Department of Attorney-General of the Federation.

Mamman T,⁹² in his book titled *Course Handbook on Criminal Procedure*, discusses the powers of the Attorney-General under the 1999 Constitution. In doing he also examined the delegation of powers by the Attorney-General. He also discussed the power of *Nolle prosequi* vested in the Attorney-General.

The reviewed literature collectively reveals deep concern over the unchecked and politically influenced discretionary powers of the Attorney General in Nigeria, particularly regarding the exercise of *nolle prosequi* and control over prosecutions. Scholars such as Bello and Alkali, Tijjani, and Onuche criticize the colonial origins and politicization of the office, emphasizing that the wide discretion vested in the Attorney General has been consistently abused for political purposes. They argue that constitutional phrases such as “public interest” and “interest of justice” have done little to curb the misuse of power. Conversely, authors like Omorekegie, Imhanobe, Duru, and Assudaisiy only describe the constitutional provisions and historical development of the office without adequately critiquing its excesses or proposing effective accountability measures. This descriptive approach limits the practical value of their work in addressing the abuse of power. The most compelling contributions are those by Onuche, Salau, and Tijjani, who advocate constitutional and institutional reforms to separate the offices of the Attorney General and Minister of Justice, and to subject the AG’s

⁹² Mamman, T, (2008): *Course Hand Book on Criminal Procedure* (1st edition).

discretionary powers to judicial review. Their arguments highlight the urgent need to reform prosecutorial authority in Nigeria to ensure transparency, impartiality, and fidelity to the rule of law.

CHAPTER THREE

ANALYSIS OF DISCRETIONARY POWERS OF THE ATTORNEY GENERAL

UNDER THE PRESENT CONSTITUTION

3.1. Introduction

The Attorney General, 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 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 Attorney General is empowered to choose who to prosecute.⁹³ 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.⁹⁴ Whatever reason given by the Attorney General in exercising his discretion, the action is valid.⁹⁵

In the case of *Nigeria Engineering Works v Denap Ltd*,⁹⁶ the supreme court of Nigeria 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 Attorney General 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 process⁹⁷. 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

⁹³ J.A. Agaba, Practical Approach to criminal Litigation in Nigeria (Revised 3rd edn Renaissance 2017) P. 349.

⁹⁴ *State v Ilori* (1983) SCNLR 94.

⁹⁵ Ibid.

⁹⁶ (2002) F.W.L.R. (Part 89) p. 1062.

⁹⁷ Black's law Dictionary, Ninth Edition p. 1350.

treatment of issues in accordance with the twin pillar of justice i.e. *audi alteram partem* rule and *nemo judex in causa sua*⁹⁸ 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.⁹⁹

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 Attorney General¹⁰⁰, these checks are insufficient since they do not have control over the actions of the Attorney General in view of the fact that the discretionary powers are so enormous under the Constitution of the Federal Republic of Nigeria.

3.2.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 interest¹⁰¹.

During the early days of the office the holder was largely concerned with representing the Crown in litigation, and held no political role or duties¹². The office first took on a political

⁹⁸ Comptroller General of Prison v. Adekanky (1999) 5 FWLR. Pt. 602 p. 167.

⁹⁹ Attorney General of Anambra State v. Uba (2005) ALL. FWLR. Pt. 277 p. 909 at 913 ratio 7.

¹⁰⁰ 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.

¹⁰¹ S. E. Jones, 'The Office of Attorney-General' *the Cambridge Law Journal* (1969) (27) 43.

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 1742¹⁰².

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.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵ 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

¹⁰² Ibid P.44

¹⁰³ Ibid P.45

¹⁰⁴ Ibid

¹⁰⁵ Ibid P.46

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 case in front of the International Court of Justice.¹⁰⁶ 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.¹⁰⁷ The Attorney General also superintends the Government Legal Department and the Serious Fraud Office.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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.¹¹²

¹⁰⁶ Ibid P.48

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Constitutional Affairs Committee. '*The Constitutional Role of the Attorney General*'. (United Kingdom Press 2007) P.23

¹¹⁰ Ibid P.24

¹¹¹ *R. v Comptroller General of Patents* (1899) 1 Q.B (Pt. 909) 914

¹¹² Ibid. Pp. 913 – 914.

In the United State of America, the AG is equally granted similar power of public prosecution which is also not subject to judicial review¹¹³. 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.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ 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

¹¹³ *United State v. Thompson* 251 US 457, *Orobona v. Linscott* 49 RI 443, 144 A, 52 53

¹¹⁴ *ibid*

¹¹⁵ Larry J. Siegel, *Essentials of Criminal Justice* (4th ed.) Wadth Worth & Thompson learning. Belmont CA94002 – 3098, U.S.A. p. 236 – 237.

¹¹⁶ A. Gambo, *a Critique of the Power OF Attorney General in the Administration of Criminal Justice in Nigeria*. (Being an LLM. Dissertation of the Faculty of Law, Ahmadu Bello University Zaria 2015).

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 1, 1914.¹¹⁷

Then came the Law officer's ordinance¹¹⁸ 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.¹¹⁹

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.¹²⁰ This does not

¹¹⁷ T. Elias 'The Office and Duties of the Federal Attorney General in Nigeria' *The Nigerian Law review journal* (1972) (149) 149.

¹¹⁸ Officers Ordinance, Section 2. 1936

¹¹⁹ 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.

¹²⁰ . O. Mba *Supra*.

preclude a person from filing a criminal complaint directly but subject to the overriding powers of the AG.

3.3. 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 Attorney General of federation shall be a minister of the Government of federation.¹²¹ The Constitution equally vested 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.¹²²

In the same vein, the Constitution further re-affirmed the absoluteness of this power by providing that in exercising his power, the Attorney General is not subject to the direction or control of any other person or authority.¹²³ 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.

¹²¹ 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.

¹²²Ibid

¹²³Section 104(6) Constitution of the Federal Republic of Nigeria 1963.

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 General¹²⁴ 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 AGF¹²⁵

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 recommended¹²⁶ 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:¹²⁷

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.

¹²⁴ Ibid.

¹²⁵ Section 104(1) Constitution of the Federal Republic of Nigeria 1963.

¹²⁶ Section 159(2) of the 1979 Draft Constitution of the Federal Republic of Nigeria.

¹²⁷ Ibid, Sections 160 and 191.

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.¹²⁸

It is pertinent to note that before the 1963 Constitution, the Attorney General (like other officers) was a civil Servant. However, the 1963 Constitution¹²⁹ 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.

3.4. Attorney General's Power to Initiate and Prosecute Criminal Matters in Nigeria

In Nigerian Criminal System, there are four (4) categories of persons who are lawfully empowered to institute criminal proceedings in Nigeria, namely: The Attorney General (of Federal or State), police, private person and special prosecutors.¹³⁰

The AG ranks high in the hierarchy of persons empowered to initiate and prosecute criminal matters in Nigeria.¹³¹ The reason for this primacy is not farfetched, it is as a result of the enormity of power vested on the AG by the 1999 Constitution the office of the Attorney General exists both at the Federal and State levels. Precisely, Section 150 of the 1999 Constitution provides, thus:

1. There shall be an Attorney General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation.
2. A person shall not be qualified to hold and perform the office of the Attorney General of the Federation unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than 10 years.¹³²

¹²⁸ Ibid.

¹²⁹ Section 88(1) Constitution of the Federal Republic of Nigeria 1963.

¹³⁰ Administration of Criminal Justice Act, 2015 (as Amended.)

¹³¹ Ibid, Section 106.

¹³² Section 150 of the Constitution of the Federal Republic of Nigerian 1999 (as amended.).

In the same vein, Section 194 of the 1999 Constitution provides for the office of the Attorney General of the State as follows:

1. There shall be an Attorney General for each state who shall be the Chief Law officer of the state and the Commissioner for justice of the Government for that state.
2. A person shall not be qualified to hold or perform the functions of the Attorney General of a state unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than 10 years.¹³³

A careful project of the above sections reveal that the Constitution permits the fusion of the office of Attorney General and the office of the Minister for Justice at the federal level and Commissioner of justice at state level.¹³⁴ These provisions have been widely criticized over the years, and several doyens within the legal profession have called for Constitutional amendment that would feature a separation between the office of the Attorney General and the Minister/Commissioner for Justice.

According to Niyi Akintola, the learned Senior Advocate of Nigerian is of the view that the office of the Minister of justice is strictly political while that of the AG is purely legal.¹³⁵ The amalgamation of these two offices poses a great threat to the dispensation of justice. He further suggested that the Minister or Commissioner of Justice may be a political appointee, but the AG be a career civil servant, who cannot be removed by the whims and caprices of the President or Governor.¹³⁶ The AG should have a secured tenure and should be insulated from the control of any arm of government.¹³⁷

¹³³ Ibid, Section 194.

¹³⁴ Ibid, Sections 150 (1) &195 (1).

¹³⁵ <https://gurdian.ng/features/office-of-attorney-general-and-minister-of-justice-better-together-or-not/> accessed 15 August 2025.

¹³⁶ Ibid.

¹³⁷ Ibid.

Wole Olanipekun holds a contrary opinion. In his own opinion, the fusion of the two offices both at the Federal and State levels is in order and poses no threat whatsoever to the effective dispensation of justice. He opines thus;

The position of the Attorney General should be a political, it is a position that should be not be politicized. It is a position that the occupier should see himself as the Chief Law officer of the Nation. Once he is appointed, he does not belong to any political party. Therefore, whoever that is appointed should see himself as card carrying member of any political party but see himself first and foremost as the foremost law officer of the nation.

He further maintains that once we key into that, the argument about separating the office of Attorney General from that of the Minister of Justice will go into oblivion.¹³⁸ Taking a critical look at the provisions of the law as contained in the 1999 Constitution and considering various argument and opinion as canvassed by different authors, it is the humble opinion of this project that the fusion of the office of Attorney General and Minister/Commissioner for justice is *strictu sensu* not out of place.

However, considering the political antecedent and realities of Nigeria, it is safer and more appropriate to create a clear separation and distinction between the two offices. Another compelling reason why this position should be accorded a positive consideration is the fact that this practice was inherited from British Colonial Government, and the position is no longer the same in the United Kingdom, as it was abolished about nine years ago.

The Attorney General simply means everything pertaining to the law, he is the justice, while the Minister of Justice is in charge of the ministry. The Minister of Justice has nothing to do with the operation of the dispensation of justice.¹³⁹ Therefore, if Britain can divide office into two, why should Nigerian not do so?

Similarly in the United States, the two offices are clearly separated. The office of the Attorney General of the United State of America and the office of the head of department of

¹³⁸ Ibid.

¹³⁹ Ibid.

justice as the Chief law officer of the Federal Government who represents the United States in legal matters generally and gives advice and opinions to the president and the heads of the executive departments of the government when so required.¹⁴⁰

3.5. Qualification and Appointment of Attorney General

As noted above, the law regulates and prescribes the minimum qualification that must be met before any individuals can be appointed to hold the office of the Attorney General.

Section 150 (2) of the *CF.R.N* provides as follows:

‘A person shall not be qualified to hold or perform the functions of the office of the Attorney General of the Federation (AGF) unless he is qualified to practice as a legal practitioner in Nigerian and has been so qualified for not less than ten years’.¹⁴¹

The Constitution did not expressly provide for the authority responsible for the appointment of the person to the office of Attorney General of the Federation or Attorney General of the State, but rather provides for the person for the appointment of the Minister at the Federal level and Commissioner at the state level. By the combined provisions of Sections 147 and 192 of the 1999 CONSTITUTION¹⁹⁹⁹, it is the President and the Governor of a state that have exclusive right to appoint qualified individuals to become a Minister or Commissioner of Justice respectively. This appointment is however subject to approval by the Senate or a State House of Assembly as the case may be.

However, since the Minister/Commissioner of justice dovetails as the AG, it suffices to say that the President/Governor having the power to appoint a Minister/Commissioner also impliedly appoints the AG.¹⁴²

¹⁴⁰ Larry, J.s., & Joseph, J.s. (2004), *Essentials of Criminal Justice* (4th ed.), Thomson Learning Inc., Canada, P. 232.

¹⁴¹ *See also*, Section 195 (2) of the constitution of the Federal Republic of Nigeria 1999.

¹⁴² Sections 147 (2) and 192 of the Constitution of the Federal Republic of Nigeria 1999.

3.6. 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 Constitutional¹⁴³ as well as political.¹⁴⁴ 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.¹⁴⁵ 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 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.¹⁴⁶

¹⁴³ Section 150 constitution of the Federal Republic of Nigeria.

¹⁴⁴ The AG is an appointee of the President or Governor as the case may be.

¹⁴⁵ *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.

¹⁴⁶ *ibid*

It is quite common in Nigeria to find the Attorney General 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'.¹⁴⁷

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*¹⁴⁸ which is the most celebrated case on this issue and the case of *Abacha v the State*.¹⁴⁹ 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*¹⁵⁰ 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.¹⁵¹

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

¹⁴⁷ 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.

¹⁴⁸ Ibid.

¹⁴⁹ *Abacha v State* (2002) II NWLR PT.779, (P .437).

¹⁵⁰ (1982) 2 SC. 155.

¹⁵¹ Ibid.

judgment 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 judgment 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 judgment 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*¹⁵², 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.¹⁵³ While preferring the information the A.G. expressly stated in writing that he was acting pursuant to the power

¹⁵² (2002) II NWLR PT.779, (P .437).

¹⁵³ The offences are contrary to sections 324, 319 (1) and 322 respectively of the criminal code Cap 32, Laws of Lagos State, 1994.

conferred on him¹⁵⁴ 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 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 face¹⁵⁵. 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

¹⁵⁴ By virtue of Section 211(1) of the CFRN 1999.

¹⁵⁵ *Ibid*.

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's 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 Attorney General 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.¹⁵⁶ 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 been criticized over these two judgments 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 power¹⁵⁷ to which the Court has failed to apply in this case.

3.7. The Power of *Nolle Prosequi* and Ever Increasing Crime Rate

The intent of the draftsmen of the 1999 Constitution providing for the office of the AG could not have been anything short of the fact that they want it to aid the course of justice and curtail the incessant spread of crime in the society. However, the effectiveness of the exercise of the power of the AG in giving effect to the intendment of the draftsmen remain a troubling question which is yet to be answered by anyone. There is no doubt that the AG is significantly powerful and occupies a strong position in government, whether in the state or federal level. This is not just because the 1999 Constitution has clothed him with a volume of

¹⁵⁶ Ibid.

¹⁵⁷ Section 6 (a) Constitution of Federal Republic of Nigeria 1999; see also *African Newspaper v Nigeria* (1985) 2 NWLR (Pt.137).

functions, but his office as a minister of or commissioner for justice is an express creation of the 1999 Constitution unlike other political appointees.¹⁵⁸

Looking at the enormity of power concentrated in the office of the Attorney General, and considering the body language of the courts in interpreting the Constitutional provision on the power of the Attorney General, it will not be farfetched to refer to an AG as a law unto himself. Although the 1999 Constitution provides for the guiding principle for the exercise of his power as it relates to criminal matters, yet this has not deter the court in holding in plethora of cases that the power of the AG in entering a *nolle prosequi* is unfettered. The 1999 Constitution in these regard provides under Section 174 (3) as follows: ‘in exercising his powers under this section, The Attorney General of the Federation shall have regard to public interest, the interest of justice and the need to prevent abuse of legal process.’¹⁵⁹

There are quite a number of reasons why the Attorney General might have a *nolle prosequi* with respect to a criminal cases. Some of the reasons include but not limited to:

- i. A key witness has been discredited, or is now refusing to co-operate;
- ii. Evidence has been re-evaluated and found lacking, or found to prove the opposition's point; or
- iii. New evidence, which proves the defendant's innocence, or brings doubt as to his guilt, has come to light etc.

With the advent of the mechanism of the Alternative Dispute Resolution, the concept of plea bargaining has become another necessitating factor for the exercise of the power of *nolle prosequi* by the Attorney General. This often happens when despite the charges against the defendant, the Attorney General may decide to discontinue the case against the defendant.

¹⁵⁸ Sections 150 (1) and 195 (1) of the Constitution of the Federal Republic of Nigeria 1999.

¹⁵⁹ Ibid, Section 211 (3).

The Attorney General has become politicized, as the Constitution has subjected it to the whims and caprices of the Executive.¹⁶⁰

Since the player of the pipe will always dictate the tune, the Executive being the almighty figure who has the Constitutional power to hire and fire the Attorney General, has in many instances used the his office to perpetrate gross injustice in several respects. One of the common ways in which the Executive usually utilize the office of the Attorney General to promote personal interest is the inordinate prosecution, persecution and witch-hunting of their political foes. This attitude obviously does not in any way have positive effect on the reduction of crime in the society, rather, the act itself is criminal.

There has been instances where the AG was said to have derives personal benefit from the exercise of his power of *nolle prosequi*. In the case of *State v Ilori*¹⁶¹ the Attorney General was alleged to have collected bribe in exchange to the exercise of his power of *nolle prosequi*. Even though the court in the case refrained from concerning itself with whether or not the allegation reflect the true state of affair, but rather went ahead to hold that the mere allegation that the Attorney General collected the bribe will not vitiate the exercise of his Constitutional power to discontinue criminal proceedings. The court further held that if such allegations in real sense reflect the actual state of affairs, then it makes the AG liable to be removed either by the legislature or his appointer.¹⁶²

¹⁶⁰ Folorunso OOF (2023) 'Plea Bargain and the Fight Against Corruption in Nigeria' 7(1) Wukari International Studies Journal 502 – 520 at 513.

¹⁶¹ (SC. 42/1982); (1983) NGSC 37.

¹⁶² Ibid.

CHAPTER FOUR

ANALYSIS OF SECTIONS 36(10), 174 AND 211 OF THE 1999 CONSTITUTION

1999

4.1. Introduction

This chapter dwells on a critical analysis of the powers of the Attorney General over public prosecution under the 1999 Constitution. Leading cases like *State v Ilori*¹⁶³ and *Abacha v State*¹⁶⁴ will also be critically examined, among others relating to the powers of the Attorney General, as well as the general provisions of Sections 36(10), 174, and 211 of the 1999 Constitution of Nigeria. The chapter argues that although the Constitution grants these powers, their exercise must be subject to higher accountability standards. The failure of the judiciary to develop a robust review mechanism effectively allows the Attorney General to truncate prosecutions unilaterally, regardless of the public interest. As a result, the prosecutorial process may be used not to uphold the law, but to protect powerful individuals or settle political scores.

4.2. Highlights from Sections 36(10), 174 And 211 of the 1999 Constitution

The Nigerian Constitution of 1999, being the supreme law of the land, encapsulates the foundational principles governing the exercise of State power and the protection of individual liberties. Within its elaborate framework, certain provisions regulate the criminal justice system, particularly concerning the administration of prosecutions and the rights of the accused. Among the most critical of these are Sections 36(10), 174, and 211. Each of these provisions performs a distinct but interrelated role in the equilibrium between State authority and individual rights. While Section 36(10) affirms the finality of criminal trials and proscribes double jeopardy, Sections 174 and 211 invest prosecutorial discretion in the hands

¹⁶³ (1983) 14 N.S.C.C P.69.

¹⁶⁴ (2002) 11 NWLR Pt.779 P.437).

of the Attorney General at the federal and State levels, respectively. A comprehensive appraisal of these provisions reveals both their normative significance and their potential for distortion in practice due to the discretion that comes with the exercise of these powers. Before delving into a proper analysis of the above sections, it is pertinent to state what these sections provide under the Constitution.

a. Section 36(10):

Section 36(10) falls under Chapter IV of the Constitution, which contains the fundamental rights guaranteed to every person within the Nigerian legal order. It stipulates that no person who has been tried and either convicted or acquitted by a court of competent jurisdiction shall again be tried for the same offence, or an offence having the same ingredients, except upon the order of a superior court. The principle embodied in this provision is well-rooted in the doctrine of double jeopardy, a doctrine recognised globally as a cornerstone of criminal justice and due process. Its primary rationale is to protect the individual from the oppressive machinery of the State being used repeatedly for the same set of facts, thus promoting finality in criminal adjudication and preventing abuse of prosecutorial power. This Constitutional safeguard is congruent with international human rights norms, particularly Article 14(7) of the International Covenant on Civil and Political Rights¹⁶⁵, which Nigeria has ratified.

b. Section 174 provides that:

- (1) The Attorney General of the Federation 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 of the National Assembly; (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and The Constitution of the Federal Republic of Nigeria Updated with the First, Second, Third, Fourth and Fifth Alterations (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.

¹⁶⁵ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966, entered into force on March 23, 1976.

- (2) The powers conferred upon the Attorney General of the Federation 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 of the Federation shall have regard to the public interest, the interest of justice, and the need to prevent abuse of legal process.

c. Section 211 provides that:

- (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; (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 of a State under subsection 1 of this section may be exercised by him in person or through officers of his department. The Constitution of the Federal Republic of Nigeria, Updated with the First, Second, Third, Fourth, and Fifth Alterations 141.
- (3) In exercising his powers under this section, the Attorney General of a State shall have regard to the public interest, the interest of justice, and the need to prevent abuse of legal process.

Sections 174, which relates to the Attorney General of the Federation and Section 211, which relates to the Attorney General of the states, are substantively identical in language and effect. Each of these provisions confers on the respective Attorney General three core powers: the power to institute and undertake criminal proceedings; the power to take over and continue criminal proceedings instituted by other authorities or persons; and the power to discontinue criminal proceedings at any stage before judgment is delivered.

The power of discontinuance, often exercised through the procedural tool of *nolle prosequi*, has proven particularly contentious. Though designed to promote prosecutorial efficiency, prevent abuse of the court process, and safeguard public interest, it has frequently been criticised as a conduit for impunity. The Constitution, as interpreted by the courts in cases like *State v Ilori*¹⁶⁶, treats the discretion of the Attorney General in this respect as absolute

¹⁶⁶ (1983) SCNLR 94.

and not subject to judicial inquiry. In the above case, the Court held that the Attorney General need not give reasons for the exercise of this power, and that even if his motives are suspected to be improper, the court lacks the jurisdiction to interfere unless a clear case of bad faith can be established.

While such deference may be justified on grounds of prosecutorial independence, it also presents grave risks to the rule of law. In practice, the *nolle prosequi* power has often been invoked to terminate criminal proceedings against politically exposed persons, powerful public officials, and other influential actors, sometimes at advanced stages of trial. This undermines the prosecutorial function as a tool of justice and renders it vulnerable to executive manipulation. The risk is not merely theoretical. Experience in Nigeria has shown repeated instances where high-profile cases involving corruption, abuse of office, and human rights violations have been curtailed on account of this discretion, often with little or no justification proffered to the public.¹⁶⁷

Moreover, the exercise of this power intersects awkwardly with Section 36(10). While the latter guarantees finality only after conviction or acquittal, the use of *nolle prosequi* interrupts the judicial process prior to any decision made by the court.¹⁶⁸ As a result, an accused person in such circumstances may avoid a final judgment entirely, thereby escaping not only conviction but the stigma of acquittal. This situation frustrates the aims of justice both for victims and for society at large, while also raising questions about selective justice and unequal treatment before the law.

Looking at Sections 174 and 211 holistically, it reflects, to a large extent, the principle of prosecutorial discretion in cases. The logic is that prosecutorial decisions should not be rigid or mechanical; they must consider public interest, evidentiary sufficiency, and other policy

¹⁶⁷ Olarewaju Saraju, 'Presidential Pardon for Diepreye Alamieyesegha: Abuse of Power and Morality', Shara Reporters.com, available at: <<https://saharareporters.com/2013/03/18/presidential-pardon-diepreye-alamieyesegha-abuse-power-and-morality-olanrewaju-suraju>> accessed 2nd June 2025.

¹⁶⁸ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

implications. However, the absence of institutional or procedural checks, such as mandatory judicial oversight or legislative accountability procedures, renders these powers susceptible to abuse. Unlike other jurisdictions where independent prosecution services or judicial review mechanisms act as safeguards, Nigeria's framework centralises this immense power in a single individual who may simultaneously serve as a political appointee, cabinet member, and chief law officer. This fusion of legal and political roles further dilutes the impartiality expected of the office.

It is instructive to note that some comparative jurisdictions have recognised the dangers of unchecked prosecutorial discretion and taken steps to mitigate them.¹⁶⁹

In light of these considerations, it becomes evident that Nigeria's Constitutional framework requires reform. Not to eliminate prosecutorial discretion, but to guide and regulate it. This could take the form of statutory instruments that delineate the parameters of *nolle prosequi*, mechanisms for judicial review in specific circumstances, or independent prosecutorial oversight bodies to investigate and report on the exercise of the Attorney General's powers. Additionally, the Constitutional guarantee under Section 36(10) could be strengthened by requiring that withdrawals of criminal cases be accompanied by judicial pronouncements that preserve the rights of victims and the integrity of the justice process.

4.3. Case Law Analysis

a. *State v Ilori*¹⁷⁰

In this case, Mr. Fred Egbe was charged with obtaining money by false pretences and stealing by the first respondent, the Lagos State DPP. Following the dismissal of the charges, Mr. Egbe requested the Lagos State Attorney General to prosecute the DPP and the two police

¹⁶⁹ In South Africa, for instance, the National Prosecuting Authority operates with a greater degree of institutional autonomy and is bound by a prosecutorial policy subject to parliamentary scrutiny. Similarly, in the United Kingdom, the Crown Prosecution Service operates independently of the Attorney General and is required to provide detailed justifications for decisions to discontinue prosecutions, particularly in sensitive or controversial cases.

¹⁷⁰ Ibid.

officers who investigated the case for conspiracy to bring false accusations against him and for conspiracy to injure him in his profession. The Attorney General declined the request. Mr. Egbe then instituted a private prosecution, but the Attorney General filed a *nolle prosequi* in exercise of his powers under section 191 of the 1979 Constitution. The trial judge heard arguments on the propriety of the *nolle prosequi* and upheld the Attorney General's decision. Mr. Egbe appealed the decision, contending that the trial judge should have taken evidence and examined his allegations of malice and extraneous considerations against the Attorney General under section 191(3).

The Court of Appeal dismissed the appeal on the ground that Mr. Egbe started the private prosecution without obtaining the consent of a judge as required by law, but nevertheless held that the Attorney General's decision was justiciable.

In a further appeal, a full bench of the Supreme Court unanimously allowed the respondent's appeal.¹⁷¹ Justice Eso held¹⁷² that:

‘All these cases have shown that both in England and this country before the 1979 Constitution, what guided the Attorney General in the exercise of his discretion, whether in the institution or the discontinuance of a case, were public interest, interests of justice, and the need to prevent abuse of legal process. When sub-section (3) of section 191 prescribes what the Attorney General ‘shall have regard to’ ... the sub-section is merely declaring, in the 1979 Constitution, what had obtained at common law and under the Constitutions which preceded the 1979 Constitution.’

It is noteworthy that this case dealt not only with the Constitutional power of the Attorney General to discontinue criminal prosecution, but also with the Attorney General's power to commence criminal prosecution (or to continue the same). Thus, in his leading judgment, Eso JSC said:

‘It is one thing to point out the dangers of an Attorney General in deciding 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 precondition to the exercise of his power under

¹⁷¹ Relying on English authorities like *R v Allen*, *R v. Comptroller-General of Patents* and the Nigerian case of *Layiwola v The Queen* (1959) 4 F.S.C. 119.

¹⁷² Ibid, at page 109.

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.’

He further held that:

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

b. *Abacha v State*¹⁷³

On 4th June, 1996, Alhaja Kudirat Abiola, wife of the 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 General Sani Abacha, and three others were arrested for the murder. The Attorney General of Lagos State, through the State Director of Public Prosecution (DPP), 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 for murder, conspiracy to commit murder, and accessory after the fact to murder.

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. The ingredients of all the alleged offences and the list of

¹⁷³ (2002) II NWLR PT.779, (Pp. 437).

witnesses disclosed that the information is an abuse of process, that the Statement of the offences disclosed in the information is prejudicial to the appellant's right to a 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 appeal 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 an indictment on information, should not be indicted to face trial, which from the outset he should face. The Supreme Court held even further that the Court of Appeal was wrong when it opined that a challenge to quash information should not be encouraged. In his leading judgment, Belgore J.S.C. said:

‘All power to settle issues between parties is vested in courts, and courts must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through the 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 an indictment on an information, should not be indicted to face a trial that, from the outset, it was clear he should not face.’

It is worth noting that in filing the indictment, the Lagos State Attorney General expressly stated that he was doing so under 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 the 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 an offence created by or under any law of the House of assembly.¹⁷⁴

He further held that:

‘The State Attorney General must 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 interest of justice and the need to prevent abuse of legal process. The power is exercised only by the Attorney General and he holds ministerial responsibility for it, not collective executive responsibility.’¹⁷⁵

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 due respect that by so holding, the Supreme Court exercised the power of judicial review and indeed judicially reviewed the power of the Lagos State Attorney General to have acted under section 211 of the 1999 Constitution, when he filed the information against the Appellant.

By this decision, it could appear that the *Lori case* no longer represents the law as far as the Attorney General’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*¹⁷⁶. Significantly, the Supreme Court did not expressly overrule *Llori*, much less mention or consider it. Rather, the Court acknowledged the discretionary power of the Attorney General 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.

The Supreme Court, again with respect, ignored the fact that the Attorney General expressly stated that he filed the indictment under his power under section 211 of the 1999 Constitution (and not under the Criminal Procedure Law of Lagos State). Surely, the Supreme Court does

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ (2002) II NWLR PT.779, (P .437).

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 Court's decision in the *Ilori's case* is not subject or amenable to any review?¹⁷⁷

c. *Usman v FRN*¹⁷⁸, Jombo-Ofo, JCA held that¹⁷⁹:

‘Under Section 174 (1) (a), (b) and (c) of the Constitution supra which is reproduced hereafter for better appreciation provides thus: 174- (1) The Attorney General of the Federation 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 of the National Assembly; 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 of the Federation 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. See also Section 211 of the Constitution supra. Under the foregoing, it is clear that the Attorney General of the Federation and, by extension that of a State, as the case may be, has the power to institute and undertake criminal proceedings against any person, and such power may be exercised either by him or through officers of his department. As rightly argued by the learned counsel for the respondent, the section does not contemplate that those officers under the department of the Attorney General need his fiat before they can proceed to initiate and or undertake any such criminal proceedings. This is to say that the power of the officers in the Attorney General's office to initiate and undertake criminal proceedings is exercisable independently of the authority or fiat of the Attorney General. Aside from the officers in the department of the Attorney General, ‘any other authority or person’ may also institute or undertake criminal proceedings. Such power of the officers and any other authority or person, though constitutionally guaranteed, is, however, subject to the right of *nolle prosequi*, which rests on the Attorney General. In this regard, the Attorney General can take over or discontinue prosecution at any point in such criminal proceedings... Since the institution and prosecution of criminal proceedings in that regard is not within the

¹⁷⁷ Ibid.

¹⁷⁸ (2015) LPELR-40584(CA).

¹⁷⁹ See the cases of *FRN. V. OSAHON* (2005) 5 NWLR (PT. 973) 361; *COMPTROLLER, NIGERIA PRISON SERVICE V. ADEKANYE* supra; *AMADI V. FRN.* (2008) 18 NWLR (PT. 1119) 259; and *AUDU V. A-G., FED.* (2013) 8 NWLR (PT. 1355) 175

exclusive preserve of the Attorney General whether of the Federation or Nasarawa State as the case may be, the EFCC as 'the authority or person' as envisaged by Section 174 of the Constitution supra rightly initiated the criminal proceedings against the appellant. EFCC, in this regard, did not need to seek and obtain the fiat of either the AGF or the Attorney General of Nasarawa State to institute the criminal proceedings against the appellant and others. It follows by extension that Mr. Chile Okoroma, Esq., being a staff member of the EFCC, more so the Head of its Legal Unit at the time, was duly qualified to sign the 170 charge on behalf of his office, the EFCC. The EFCC in turn rightly donated or delegated its authority to initiate and prosecute the matter to Mr. Niyi Akintola, SAN under Section 8(3) of the EFCC Act, which provides as follows: The Commission may, from time to time, appoint such other staff or second officers from government security or law enforcement agencies or such other private or public services as it may deem it necessary, to assist the Commission in the performance of its functions under this Act.' [Underlining mine].¹⁸⁰

d. *Mohammed v State*¹⁸¹ AKA'AHS, JSC held that:

Sections 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999, which have almost identical wordings, set out the powers of the Attorney General of the Federation and that of the State, respectively. Sections 174(1) and 211(1) are reproduced as follows: '174(1) The Attorney General of the Federation 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 of the National Assembly; (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. 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. (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.' The wordings in paragraphs (b) and (c) in Section 211(1) are the same as the ones in paragraphs (b) and (c) in Section 174 (1). A cursory look at the two sections will make one to accept the submission of learned counsel for the appellant that it is only the Attorney General of the Federation that has the power to file information against the appellant since the charge of robbery is laid under the Robbery and Firearms (Special Provisions) Act which is deemed to be an Act passed by the National

¹⁸⁰ (Pp. 58 - 61 Paras C - D).

¹⁸¹ (2015) LPELR-24397(SC).

Assembly. This is, however, not the case. The legal history of this Country, supported by case law, has demonstrated that apart from the Attorney General of the Federation, the Attorney General of a State can validly institute criminal proceedings for any offence created by or under any Act of the National Assembly.¹⁸²

e. *FRN v Osahon & Ors*¹⁸³ PATS-ACHOLONU, JSC held that:

‘Section 174(1) of the Constitution which States as follows: ‘The Attorney General of the Federation 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 of the National Assembly; (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.’ It must be admitted that there are three elements ingrained in this provision namely: (a) Power of the Attorney General to institute and undertake criminal proceedings before any Court of law in Nigeria (b) a recognition that power to institute criminal proceedings is not exclusively vested in the Attorney General, *id est*., it impliedly admitting of initiating of criminal proceedings by other authorities, agencies and persons (c) The office of the Attorney General can use its discretion to do any of the things mentioned in that section. Because he shall have a discretion to do any of these things mentioned therein if he so chooses or desires, it then means that he ought not be unduly overzealous in taking over or continue to prosecute a case, initiated by any other body, thereby tacitly recognizing that the Attorney General does not have the monopoly of instituting criminal prosecutions, *fiat* or *no fiat*.’¹⁸⁴

This work holds 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 provisions such as sections 174(3) and 211(3) of the 1999 Constitution.

Section 174(3) provides that in exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice, and the need to prevent abuse of legal process.

¹⁸² Pp. 26 - 28 Paras F - C).

¹⁸³ (2006) LPELR-3174(SC).

¹⁸⁴ (Pp. 40 - 41 Paras B - C).

While Section 211(3) provides that in exercising his powers under this section, the Attorney-General of a State shall have regard to the public interest, the interest of justice, and the need to prevent abuse of legal process.

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 a declaration of those powers. This is so because the Court was of the view that section 191(3) of the 1979 Constitution did not alter the pre-1979 power of the Attorney General to enter a *nolle prosequi*¹⁸⁵.

Before the 1979 Constitution, the judicial view of the power of the Attorney General to issue *nolle prosequi* was fairly consistent in favor of the established English common law position of absolute discretion. It was therefore needless for the framers of the Constitution to be anxious to freshly declare that power in the Constitution 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 also cover the power to commence and continue criminal prosecution. The wording is: ‘*In exercising his powers under this section...*’ This expressly relates to all the powers conferred on the Attorney General of the Federation under Section 174, and the Attorney General of the State under Section 211 of the Constitution.

In the *Abacha case*, Belgore J.S.C. held that:

‘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 an act of prosecution; if not, we shall have persecution in place of prosecution.’¹⁸⁶

In the case of *African Newspaper v Nigeria*¹⁸⁷, the Supreme Court held Inter alia:

¹⁸⁵ Ibid.

¹⁸⁶ Ibid at P. 437

¹⁸⁷ (1985) 2 NWLR pt. 6 P. 137

‘When a Court is deciding whether it has jurisdiction or not over a matter before it, it should be guided by the following... 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.’¹⁸⁸

The Court further held that the judges must expound the jurisdiction of the Court, but it is not part of their duty to expand it¹⁸⁹.

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's 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 Attorney General over public prosecution, even when 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 *Ilori's case* that the power of the Attorney General over public prosecution is not subject to review when no such provision excluding judicial review exists 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.

In *Abacha's case*, the Court of Appeal said *obiter* that the Appellant took a premature step of challenging the indictment when he could have waited until the time for no case submission to move that he had no case to answer¹⁹⁰. The Supreme Court, however, declared this view to

¹⁸⁸ Ibid at p. 141

¹⁸⁹ Ibid

¹⁹⁰ *Abacha v State*, at p. 452

be wrong and held that such an objective 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 under an information which discloses no offence with which he is in 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 umpires 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 witnesses 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 latter being called upon to enter a defence against the indictment. This procedure is time-honored and has aided the Court in terminating unfounded criminal proceedings¹⁹¹.

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 concept relevant to those cases. The notion of 'public interest' on its part is also not a

¹⁹¹ *Emedo v state* (2002) 15 NWLR pt.780 p.196

novel idea to lawyers and jurists. Our justice system is quite familiar with the concept 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 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's sanguineous interest if the consideration for such action is the connection between the duo.

On the other hand, however, an Attorney General who refuses to commence or discontinues criminal proceedings against an Ambassador of a friendly foreign 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.

4.4. Comparative Insights

The office of the Attorney General (AG) occupies a pivotal place in constitutional democracies, serving as the chief legal adviser to the government and, in many systems, as the custodian of prosecutorial discretion. Across jurisdictions such as the United States, the United Kingdom, and South Africa, the AG's discretionary powers—particularly in relation to prosecution, public interest, and legal representation—are exercised with varying degrees of autonomy and accountability. This paper examines the scope, nature, and limits of these powers across the three jurisdictions. A comparative assessment reveals a continuum between politicized discretion and institutional independence. The U.S. Attorney General operates within a politically accountable yet administratively centralized framework, where discretion is extensive but potentially susceptible to executive influence. The UK Attorney General, though politically situated, exercises discretion primarily in gatekeeping functions, constrained by constitutional convention and parliamentary accountability. In contrast, South

Africa has constitutionally insulated prosecutorial discretion from political control, vesting it in the NDPP rather than the AG.

The discretionary powers of the Attorney General remain both essential and controversial across common law jurisdictions. While the AG's authority facilitates coherent national prosecution policy, unchecked discretion risks politicization and erosion of public trust. The comparative experiences of the United States, United Kingdom, and South Africa underscore that the key to legitimacy lies not in the breadth of discretion but in the mechanisms ensuring its transparent and accountable exercise.

Across these jurisdictions, the principle of legality acts as a universal check. In the U.S., selective prosecution doctrine limits abuse; in the UK, judicial review of AG decisions on public interest grounds remains theoretically available; and in South Africa, constitutional supremacy ensures that discretionary power aligns with rationality and fairness. The evolution of the AG's role, particularly in South Africa, demonstrates a broader global trend toward depoliticizing prosecution and entrenching institutional independence as a safeguard against executive overreach.

4.4.1. The United States

In the United States, the Attorney General heads the Department of Justice (DOJ) and is the chief law officer of the federal government.

The U.S. AG's discretion is both administrative and prosecutorial. This encompasses the ability to prioritize enforcement policies, direct investigations through subordinate bodies such as the Federal Bureau of Investigation (FBI), and issue prosecutorial guidelines to U.S. Attorneys nationwide (Davis, 2019). Although prosecutors in the U.S. enjoy significant independence, they operate within the hierarchy of the DOJ, ultimately answerable to the AG.

However, this discretion is not absolute. The separation of powers and judicial review operate as indirect checks. For example, in *United States v. Armstrong*,¹⁹² the Supreme Court reaffirmed that while prosecutorial decisions are generally not subject to judicial scrutiny, selective prosecution claims may be examined where there is clear evidence of discriminatory intent. Moreover, the AG's decisions are politically accountable to the President, as the AG serves as a cabinet officer appointed under Article II of the U.S. Constitution. This has raised concerns about political influence, particularly in administrations accused of using the DOJ for partisan ends.¹⁹³

4.4.2. The United Kingdom

The Attorney General for England and Wales is a constitutional officer of the Crown and chief legal adviser to the government. Unlike the U.S. model, the UK AG's role combines legal advice, limited prosecutorial oversight, and certain public interest functions. The AG's powers are rooted in constitutional convention rather than codified statutes.

The most critical discretionary function of the UK AG lies in consenting to certain prosecutions—notably in cases affecting national security, contempt of court, or offences with political implications. For instance, prosecutions under the Official Secrets Act 1989 require the AG's consent (s 9(2)).

A notable instance of the AG's discretionary authority was the Boris Johnson prorogation case, *R (Miller) v. Prime Minister*,¹⁹⁴ where the AG's legal advice to government faced criticism. Though not a prosecutorial decision, it highlighted the AG's dual role as both legal

¹⁹² 517 U.S. 456 (1996).

¹⁹³ Green B and Roiphe R, 'Can the President Control the Department of Justice?' (2018) 70 Alabama Law Review 1.

¹⁹⁴ [2019] UKSC 41.

adviser and political actor, underscoring the delicate balance between independence and executive loyalty.

4.4.3. South Africa

In South Africa, the prosecutorial function has undergone significant transformation post-apartheid. The Constitution of the Republic of South Africa 1996 separates the Attorney General's advisory functions from the prosecutorial powers vested in the National Director of Public Prosecutions (NDPP) under section 179. The Minister of Justice, not the AG, provides political oversight, while the NDPP—heading the National Prosecuting Authority (NPA)—enjoys constitutional independence.

However, the historical evolution of the office still reflects discretionary traditions. Before 1998, the AG combined both advisory and prosecutorial powers under the Attorney-General Act 92 of 1992, with wide discretion to initiate or discontinue prosecutions. The post-1996 dispensation curtailed this discretion, establishing the NPA as an independent authority subject only to the Constitution and the law. Section 179(5) (d) of the Constitution mandates that the NDPP “must exercise his or her functions without fear, favour or prejudice.”

In *NDPP v. Zuma*,¹⁹⁵ the Supreme Court of Appeal held that the power to discontinue prosecutions must not be exercised arbitrarily or for improper motives. The judgment emphasized that prosecutorial discretion, though broad, is subject to the rule of law and rationality review under administrative law principles.

Thus, in modern South Africa, while the AG no longer controls prosecutions, the principles governing discretion—independence, legality, and accountability—remain central. The AG's current functions are largely advisory, representing the state in civil matters and giving legal opinions to government departments.

¹⁹⁵ [2009] ZASCA 1.

CHAPTER FIVE

SUMMARY, CONCLUSION, AND RECOMMENDATIONS

5.1. Summary

The research starts with an analysis of Constitutional and jurisprudential aspects of prosecutorial discretion in Nigeria, especially focusing on the Attorney General's Constitutional power to terminate criminal cases through *nolle prosequi*.¹⁹⁶ The project's backdrop unveils a persistent challenge in Nigeria's criminal justice system—the improper use of prosecutorial discretion by Attorneys General, who, often wielding near-absolute authority, may favor political expediency over justice. The dual role of the Attorney General as both the Minister and Commissioner for Justice exposes this legal figure to potential executive manipulation, raising vital concerns about the implications for the rule of law, fairness, and judicial integrity. The research issue arises from the Constitutional vagueness surrounding the restrictions on prosecutorial discretion and the lack of judicial oversight to avert its misuse. Although Constitutional provisions require the Attorney General to act in the public interest, courts have consistently interpreted these guidelines to suggest that the AG's discretion is absolute and not subject to judicial review. This has led to the arbitrary dismissal of criminal cases, often appearing politically motivated. Such instances raise critical questions regarding the alignment of this unchecked power with the principles of justice, separation of powers, and accountability within a democratic context. To address these issues, the project outlines key research questions: What powers does the Attorney General possess under Sections 174 and 211 of the 1999 Constitution? How has this discretion been misused in Nigeria's legal and political context? Can such discretion be subjected to judicial review? What can Nigeria learn from other countries with similar legal and political frameworks? The primary aim of this project is to investigate the Constitutional and practical dimensions of the

¹⁹⁶ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

Attorney General's authority to invoke *nolle prosequi*, assess its impact on the administration of justice, and propose practical legal reforms. Specific objectives include analyzing the Constitutional provisions that grant public prosecution powers to the AG; identifying instances of misuse of this power; evaluating the judiciary's response to these abuses; and exploring theoretical justifications or critiques of prosecutorial discretion in democratic governance. The research primarily concentrates on Nigerian Constitutional and criminal law while drawing comparative insights from jurisdictions like the United Kingdom, the United States, and Kenya to demonstrate more effective regulation of prosecutorial authority. It avoids addressing the procedural intricacies of criminal trials or offering an exhaustive doctrinal analysis of all statutes related to criminal prosecution, emphasizing instead the Constitutional aspects of *nolle prosequi* and its implications for justice. The project is significant in advancing ongoing discussions about judicial independence, prosecutorial accountability, and legal reform in Nigeria. As the nation faces issues related to corruption, political interference in justice delivery, and executive overreach, this research aspires to enrich Constitutional jurisprudence and policy advocacy, offering actionable recommendations to reinforce the rule of law. Methodologically, the project adopts a doctrinal approach, utilizing primary materials like Constitutional texts, judicial rulings, and statutory instruments, while also integrating secondary sources such as academic articles, commentaries, and comparative analyses. Furthermore, the research incorporates theoretical and conceptual frameworks to deepen its exploration of prosecutorial discretion in relation to justice and legal accountability.

In Chapter Two, the project delves into key concepts and theoretical frameworks that underpin the research. The conceptual framework defines five crucial terms essential for understanding the topic. The term 'pardon' refers to the act of forgiving or excusing an offense, typically granted by an executive authority in the form of clemency. 'Amnesty' is a

broader term associated with political offenses or mass pardons, primarily aimed at fostering reconciliation and restoring peace after conflicts. The term ‘justice’ is explored in both its legal and moral dimensions, emphasizing fairness, accountability, and equitable treatment under law. ‘Prosecutorial discretion’ denotes the legal authority of officers to determine whether, when, and how to prosecute a case, considering factors like evidence sufficiency, public interest, and wider policy implications. Lastly, ‘*nolle prosequi*’ is discussed as a procedural mechanism enabling the Attorney General to halt criminal proceedings without influencing the case's merits. The theoretical framework also examines three theories of justice: retributive, restorative, and distributive. Retributive justice emphasizes punishment as a response to wrongdoing, focusing on deterrence and moral balance, ensuring offenders are held accountable and prosecuted fairly. Restorative justice seeks to repair harm and foster reconciliation among offenders, victims, and society; it is often relevant in transitional justice contexts but is increasingly significant for prosecutorial decision-making. Distributive justice concerns the fair allocation of rights, duties, and resources, including access to justice, urging prosecutors to administer justice impartially across all social classes and political affiliations. These justice theories are closely linked to the legal principles of the rule of law and separation of powers. The rule of law mandates that everyone, including government officials, must abide by the law, significantly restricting arbitrary power by officials such as the Attorney General. Conversely, the separation of powers denotes a Constitutional system where the executive, legislature, and judiciary operate independently, maintaining checks and balances to prevent overreach. When the AG exercises judicial-like discretion to terminate proceedings in politically sensitive scenarios, this principle faces significant challenges. The literature review consolidates academic perspectives on the extent and potential misuse of prosecutorial authority, particularly within the Nigerian context, highlighting a scholarly consensus on the need for legal reform, with many advocating for judicial review of AG

powers. It also incorporates international literature and reports on legal reforms, assessing various models of prosecutorial oversight, institutional independence, and safeguards against misuse.

Chapter Three offers a thorough and critical examination of the discretionary authority granted to the Attorney General (AG) in Nigeria, especially regarding the constitutionally authorized option to enter *nolle prosequi*—a formal declaration allowing the AG to end criminal proceedings before a judgment is rendered. Within the larger context of Nigeria's legal and political history, the chapter traces the evolution of the AG's office, the theoretical justifications for its powers, and the practical effects of its use, particularly when discretion becomes politicized or is misused for personal gain. The AG, at both federal and state levels, functions as both the Chief Law Officer and a political appointee, serving as Minister or Commissioner for Justice. This combination of legal and political authority raises significant concerns, particularly due to the near-unlimited discretion currently exercised by the AG under the Nigerian Constitution. Sections 174 and 211 of the 1999 Constitution grant the AG the power to initiate, continue, or discontinue criminal proceedings, though the AG 'shall have regard to the public interest, the interest of justice, and the need to prevent abuse of legal process.' However, these Constitutional provisions are often undermined by vague language and the judiciary's consistent hesitance to interpret them as effectively curbing AG discretion. Historically, the AG's office originated in 13th-century England as a legal representative for the Crown. Over time, it evolved to encompass political roles, largely adopted into Nigeria's legal system during colonial times. By the time Nigeria achieved independence, the Attorney General had become integral to its legal framework. Importantly, the 1960 Constitution appointed the AG as a Minister of the Federation, granting prosecutorial powers that were once exclusive to the Director of Public Prosecutions (DPP). This change solidified the AG's position as both a legal and political entity, a status

maintained under the 1979 and 1999 Constitutions, despite calls for judicial oversight of AG powers from legal reform advocates. The chapter critiques the current Constitutional arrangement, underscoring that the AG's powers are often exercised for private or political gain rather than the pursuit of justice or public welfare. Several historical examples illustrate this concern. For instance, a serving governor in Kwara State dismissed the Attorney General, appointing himself to halt proceedings against his political allies. In another case, an AG previously defending a defendant wielded his prosecutorial authority to discontinue that same trial upon his appointment. Such instances reflect a broader pattern of leveraging the AG's office for partisan advantage, thus undermining public trust in the justice system. The chapter further scrutinizes judicial responses to these abuses, examining two Supreme Court decisions: *State v Ilori*¹⁹⁷ and *Abacha v State*¹⁹⁸. In *Ilori*, the Court ruled that the AG's discretion to enter *nolle prosequi* could not be challenged, even if alleged to be motivated by malice or bad faith. The Court stated that the AG's obligation to consider public interest was merely declarative and did not legally constrain the AG's discretion. This decision has since provided a shield for AGs aiming to protect political allies or obstruct legitimate prosecutions. Conversely, in *Abacha v State*¹⁹⁹, the Supreme Court displayed a measure of judicial restraint, asserting that an accused should not face trial lacking a *prima facie* case. Nonetheless, this ruling did not overturn *Ilori* or establish a framework for substantive judicial review of AG decisions. Consequently, the legal environment remains precarious, amid rising concerns about prosecutorial misconduct. The discussion then examines the *nolle prosequi* power and its intended function within the criminal justice system. Ideally, the AG would opt to discontinue proceedings if critical witnesses become unavailable, new evidence emerges that weakens the prosecution's case, or plea bargaining offers a more favorable resolution.

¹⁹⁷ (1982) 2 SC. 155.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

However, in practice, this authority has become politicized.²⁰⁰ Often, the AG's decision to halt a case is not based on a thorough assessment of the evidence but rather on the executive's impulses or the AG's personal interests. This trend diminishes public confidence and paradoxically contributes to the crime surge the AG is constitutionally tasked with addressing. A central theme of this chapter is the pressing need to sever the Attorney General's office from political influences. Some, like Wole Olanipekun, argue that merging the AG and Minister of Justice roles is innocuous as long as the officeholder remains impartial, while others, including Niyi Akintola, warn that the political nature of the ministerial role renders the AG's legal obligations vulnerable to misuse. Given Nigeria's political context, this combination of roles is more harmful than beneficial. As such, the chapter advocates for a Constitutional division of the AG's legal duties from ministerial responsibilities, akin to reforms in countries like the United Kingdom and the United States. Furthermore, it claims that the misuse of prosecutorial powers constitutes not just a legal issue but a Constitutional crisis, indicative of broader challenges related to unchecked executive authority. Despite the Constitution's mandate for the AG to act in the public interest, courts have refrained from enforcing this principle through judicial review. This judicial restraint allows the executive to weaponise the AG's office against adversaries while shielding allies from prosecution. The chapter concludes with strong recommendations, urging amendments to Sections 174 and 211 of the Constitution to authorize judicial oversight of the AG's prosecutorial choices. Citing Kenya's recent shift away from the English common law tradition of non-reviewability, the chapter contends that Nigerian courts must also embrace their Constitutional role in restricting executive power. Additionally, the AG's appointment should prioritize merit, integrity, and legal expertise over political ties.

²⁰⁰ Folorunso OOF (2023) 'Plea Bargain and the Fight Against Corruption in Nigeria' 7(1) Wukari International Studies Journal 502 – 520 at 513.

Ultimately, Nigeria must reassess its inherited legal institutions and adapt them to fit its democratic and developmental realities.

Chapter Four critically examines Sections 36(10), 174, and 211 of the amended 1999 Constitution of the Federal Republic of Nigeria, particularly emphasizing the powers granted to the Attorney General regarding public prosecutions. It explores how these essential provisions of the criminal justice system have been applied or misapplied by successive Attorneys General, who frequently prioritize political convenience over justice. Citing significant judicial decisions and case law, including *State v Ilori* and *Abacha v State*, the chapter raises alarms concerning the unchecked prosecutorial discretion afforded to the Attorney General and its broader implications for justice and accountability. The chapter starts by noting that while Section 36(10) enshrines double jeopardy, it lacks protection against pre-judgment dismissals. This clause safeguards individuals from being retried for the same crime after a conviction, acquittal, or pardon, adhering to both domestic and international standards against repetitive prosecutions. This principle fosters finality in criminal proceedings and protects individuals from potential abuses within the prosecutorial system. Sections 174 and 211, regarding the powers of the Attorney General at both federal and state levels, are nearly identical. They grant three primary powers: initiating criminal proceedings, taking over existing cases from others or authorities, and discontinuing these proceedings at any stage before a verdict. Importantly, the Attorney General can exercise these powers personally or delegate them to department officials. Both sections stipulate that the Attorney General must consider public interest, justice, and the avoidance of legal process abuse when wielding these powers. Nonetheless, the interpretation and application of these provisions have been contentious. The most debated aspect is the authority to halt prosecutions via a *nolle prosequi*. Originally intended to uphold the legal system's integrity by preventing frivolous or politically motivated prosecutions, this power has transformed into

a means of shielding politically powerful persons from prosecution. This misuse is bolstered by judicial deference, prominently highlighted in *State v Ilori*²⁰¹ where the Supreme Court ruled that the Attorney General's discretion in terminating cases is absolute and does not subject to judicial review unless bad faith can be demonstrated. Even in situations where malicious intent is suspected, courts have been reluctant to intervene, effectively rendering the Attorney General 'a law unto himself.' This ruling has far-reaching implications, motivating Attorneys General, typically political appointees to elevate partisan interests over true justice. As a result, prosecutions against influential figures often conclude without public justification or accountability. The chapter argues that this situation weakens the rule of law, supports selective justice, erodes public trust in the legal system, and deprives victims of closure and justice. It also addresses the clash between Section 36(10) and the discontinuation powers outlined in Sections 174 and 211. While the former emphasizes trial finality and protection against multiple prosecutions, the latter permits the Attorney General to terminate trials without judicial assessments of guilt or innocence, creating a legal void where justice or exoneration often remains unachievable, especially in politically charged cases. The chapter delves into the legal precedents, notably the key case of *State v Ilori*²⁰², where the Supreme Court determined that the Attorney General's discretion is not only absolute but also rooted in common law traditions. Justice Kayode Eso remarked that considerations of public interest, justice, and preventing process abuse were merely declaratory and not meant to constrain. This ruling effectively eliminated any possibility for judicial oversight, despite the Constitutional expectation for the Attorney General to weigh these factors when exercising prosecutorial discretion. In contrast, the nuanced and somewhat contradictory ruling in *Abacha v State*²⁰³ suggested that indictments should not proceed unless a prima facie case is established. Even though the Attorney General initiated the indictment under Section 211, the

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

Court intervened, asserting that judicial review was warranted when insufficient evidence was presented. This creates a contradiction: while *Ilori* indicates that courts cannot challenge the Attorney General's power, *Abacha* suggests that courts maintain authority when Constitutional protections are neglected. While *Abacha* did not directly oppose *Ilori*, the inconsistency between the two decisions continues to generate doctrinal confusion. Other cases, such as *Usman v FRN*²⁰⁴, *Mohammed v State*²⁰⁵, and *FRN v Osahon*,²⁰⁶ have further elucidated the prosecutorial powers stated in Sections 174 and 211. These decisions affirm that the Attorney General is not the sole entity authorized to commence prosecutions; law enforcement agencies, like the EFCC and ICPC, can act independently. However, these powers remain under the Attorney General's jurisdiction to assume control or dismiss cases, perpetuating the concentration of authority within a single office. Despite Constitutional wording suggesting that prosecutorial discretion should be exercised with respect to public interest and justice, courts have not treated these as enforceable constraints. The chapter criticizes the judiciary's reluctance to utilize its inherent powers to address the misuse of executive authority. It asserts that courts are constitutionally obligated to ensure that all public powers, including prosecutorial ones, are exercised lawfully and aligned with democratic principles. Thus, the decision in *Ilori*²⁰⁷ represents a judicial failure in this obligation, and any claims of prosecutorial independence must balance with the judiciary's responsibility to prevent misuse. The chapter proposes several reforms: First, it suggests amending Sections 174(3) and 211(3) to explicitly permit judicial reviews of prosecutorial choices, particularly concerning *nolle prosequi*. Second, it advocates for separating the powers of the Attorney General and Director of Public Prosecutions to lessen the political influence on criminal prosecutions. Third, it recommends the establishment of a Prosecution

²⁰⁴ (2015) LPELR-40584(CA).

²⁰⁵ (2015) LPELR-24397(SC).

²⁰⁶ (2006) LPELR-3174(SC).

²⁰⁷ Ibid.

Guidelines Act to define clear criteria for prosecutorial decisions. Fourth, rationales for case dismissals based on public interest should be documented and publicly accessible. Fifth, mechanisms for parliamentary oversight of prosecutorial decisions in major national cases should be created. Additionally, the chapter encourages implementing a judicial threshold before any indictment, requiring prima facie evidence to ensure only legitimate cases advance to trial. It also proposes forming independent review panels to evaluate prosecutorial decisions in sensitive or politically charged contexts. Finally, legal education and ongoing judicial training on prosecutorial ethics and discretion are seen as critical for fostering a more responsible and transparent criminal justice system.

The concluding chapter summarizes the research, presenting conclusions and practical recommendations. The project finds that the powers of the Attorney General, as currently defined and exercised, are excessively broad and insufficiently regulated. This has led to a systemic issue where justice is often subordinated to political interests. The misuse of the Attorney General's authority, devoid of public justification or independent oversight, undermines public confidence in the judicial system and raises serious concerns about prosecutorial ethics. To address this, the project advocates for legal reforms that clarify the boundaries and scope of prosecutorial discretion. It recommends developing judicial review processes to assess the legality and appropriateness of discontinued prosecutions. Additionally, the appointment process for the Attorney General should be depoliticized to uphold prosecutorial independence. The rights and interests of victims must also be integrated into the prosecutorial framework, particularly in cases where dismissals affect justice outcomes. Ultimately, this research argues that while discretion is essential in any justice system, it should not be absolute. Sections 174 and 211, as they are presently interpreted and applied, have contributed to a distortion of justice rather than its enforcement. If Nigeria aspires to maintain the rule of law and Constitutional governance, a rebalancing of

prosecutorial authority is necessary, aligning discretion with transparency, accountability, and a genuine commitment to justice.

5.2. Recommendations

1. A fundamental issue contributing to the misuse of prosecutorial discretion in Nigeria is the merging of the Attorney General's office with that of the Minister (or Commissioner) for Justice. Although the Attorney General is a legal officer, they also hold a political appointment and are a cabinet member under the authority of the President or Governor. This dual capacity frequently undermines the independence of the office, leading legal judgments to be swayed by political considerations. By separating the Attorney General's legal responsibilities from political roles, we can shield prosecutions from executive interference, thereby safeguarding the integrity of criminal cases and ensuring that decisions are made exclusively on legal grounds.
2. The existing Constitutional structure regards the AG's ability to enter *nolle prosequi* as almost entirely unchallengeable, exempt from judicial scrutiny. This has enabled arbitrary and politically driven halting of criminal proceedings. An amendment to Sections 174(3) and 211(3) should clearly allow for limited judicial review. Courts should have the authority to assess whether the AG's decision stemmed from bad faith, violated public interest, or represented an abuse of discretion. This safeguard would not undermine the AG's power but would promote accountability in its application.
3. Nigeria needs to implement a prosecutorial model that maintains structural independence from the executive branch, akin to the Crown Prosecution Service in the UK or South Africa's National Prosecuting Authority. This institution should be headed by a Director of Public Prosecutions (DPP) who enjoys security of tenure and operational autonomy over criminal prosecutions. While the Attorney General may oversee legal policy, the authority to decide whom to prosecute or exonerate must lie with an impartial, professionally insulated prosecuting body.

4. To remove arbitrariness and ensure consistent application of prosecutorial discretion, Nigeria ought to implement a statutory framework that clearly delineates how and when the authority to enter *nolle prosequi* can be utilized. This legislation should clarify important Constitutional terms such as ‘public interest,’ ‘interest of justice,’ and ‘abuse of legal process.’ It must also specify procedural requirements and ethical duties for prosecutors, including consultation processes, evidential standards, and record-keeping practices.
5. In a Constitutional democracy, even the most autonomous offices must be subject to some form of oversight. The National Assembly and State Houses of Assembly should be empowered to summon and question the AG on the use of discretionary powers in controversial or high-profile cases. This does not equate to legislative interference but serves as a soft check, compelling the AG to justify prosecutorial decisions and increasing transparency in the justice system.
6. The Attorney General (AG) currently operates at the discretion of the executive and can be dismissed at any time, leaving the officeholder susceptible to executive influence. Providing the AG with a constitutionally protected, fixed term akin to the Chief Justice or the Chairman of INEC would enhance decisional autonomy. A set term of five or six years, permitting removal only for specifically defined misconduct or incapacity with legislative consent, would empower the AG to perform duties without the fear of unwarranted termination.
7. Non-governmental organizations, human rights organizations, and investigative media play a vital role in holding public officials accountable. By meticulously monitoring and publicly examining the use of *nolle prosequi*, these groups can expose abuses and create public pressure for reforms. In particular, legal NGOs should maintain databases that track the use of *nolle prosequi* throughout the federation and issue

annual reports that assess the ethical performance of state and federal Attorneys General.

8. The AG must provide a written explanation detailing the legal and evidentiary reasons for each decision to enter *nolle prosequi*. This explanation should be submitted to the court and made accessible to the public (with sensitive information redacted). Transparency in these decisions promotes public confidence that actions are grounded in law rather than political motivations, while also discouraging careless or corrupt uses of discretion.
9. The judiciary must overcome its historical reluctance to check the excesses of the executive, especially in prosecutorial matters. Courts should embrace a more active role in upholding Constitutional safeguards and should be willing to nullify prosecutorial decisions that lack a reasonable legal basis or violate fundamental rights. The emerging jurisprudence from countries like Kenya, where courts have ruled that *nolle prosequi* decisions can be challenged, should serve as a model for Nigerian courts seeking to reinforce the rule of law.
10. To cultivate a culture of integrity and Constitutionalism, Nigeria's legal education institutions, including the Nigerian Law School, need to prioritize prosecutorial ethics, rule of law principles, and accountability in public office. Ongoing professional development for prosecutors and Attorney Generals (AGs) must encompass training on ethical challenges, public interest law, and best practices in democratic governance. Additionally, the Legal Practitioners Disciplinary Committee should enforce stringent disciplinary measures against AGs who misuse their powers for personal or political advantage.

Together, these recommendations represent a comprehensive framework for legal and institutional reform. They are designed not to weaken the office of the Attorney General but

to ensure that it is exercised with integrity, accountability, and fidelity to justice. Only through such deliberate efforts can Nigeria build a prosecutorial system that truly upholds the rule of law and protects the public from both impunity and tyranny.

5.3. Conclusion

This project critically analyzes the Constitutional and legal aspects of the discretionary powers held by the Attorney General in Nigeria, with special emphasis on Sections 36(10), 174, and 211 of the 1999 Constitution. It explores the extent to which the Attorney General's extensive discretion to initiate, take over, and discontinue criminal proceedings, particularly through *nolle prosequi*, conforms to principles of justice, the rule of law, and democratic accountability²⁰⁸. While these powers are ostensibly framed around public interest, justice, and preventing abuse of the legal process, the Constitution lacks explicit limitations or avenues for judicial review. This absence renders these powers susceptible to political manipulation and misuse. The research employs a blend of doctrinal, theoretical, and comparative analyses, revealing that merging the roles of the Attorney General with that of the Minister or Commissioner for Justice, along with insufficient institutional checks, creates an environment where prosecutorial discretion can be exercised without accountability. Case law analysis, specifically in *State v Ilori* and *Abacha v State*, demonstrates the judiciary's hesitation to impose meaningful restrictions on the AG's prosecutorial powers, even in cases of clear misuse. The research also incorporates theoretical frameworks such as retributive, restorative, and distributive justice to argue that unchecked prosecutorial discretion erodes the objectives of justice, particularly when decisions to drop criminal cases are influenced by personal, financial, or political motives. For Nigeria to move towards a more accountable, transparent, and equitable justice system, it must rethink the structure, appointment, and

²⁰⁸ *State v Ilori* (1982) 2 SC. 155. *Audu v Attorney General of the Federation* (2013) All FWLR, Part 667 at 623.

authority of the Attorney General, aligning them with democratic ideals and international best practices.

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