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NOLLE PROSEQUI AND PREROGATIVE OF MERCY IN NIGERIA: THE POSITION UNDER ISLAMIC LAW

BY

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A dissertation submitted in fulfilment of requirement for the degree of Master of Comparative Law

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ABSTRACT

Nolle prosequi and prerogative of mercy in Nigeria context are separate constitutional powers. The former is the power vested on the Attorney- general to terminate criminal proceedings in any court before judgment. The latter is vested on the president of the federation and governors to forgive a criminal who has been convicted and ex-convicts. These powers have been subject of both legal and political discourse as a result of the perceived abuse of these powers by the authorities concerned. As such this research deals with some notorious cases of abuse of these powers and the decision of the Supreme Court on ILORI v STATE which is a locus classicus on Nolle prosequi. More so, the position of these powers under Islamic law is examined by this research and recommendations are also preferred to prevent continuous abuse of these powers by the delegated authorities.

ملخص البحث

(Nolle prosequi) وحق الرحمة سلطتان دستوريتان مستقلتان في سياق نيجيريا. أما الأولى فهي سلطة مخولة للنائب القضائي العام لإنهاء الاجراءات الجنائية في أي محكمة قبل صدور الحكم. بينما تناط الثانية لرئيس الدولة الاتحادية وحكام الولايات أن يغفروا للمجرمين الذين تمت إدانتهم والمدانين السابقين. ولقد خضعت هاتان السلطتان للمناقشات القانونية والسياسية على حد سواء، نتيجة تجاوز صلاحياتهما من قبل الجهات المعنية. بناءا على هذا، فإن هذا البحث يتناول دراسة بعض الحالات السيئة في استخدام هذه الصلاحيات، بالإضافة إلى قرار المحكمة العليا في إلورى ضد الدولة الذى يعد مثالا كلاسيكيا على Nolle prosequi. علاوة على هذا، فإنه تمت دراسة هذه القوى وصلاحياتها من وجهة نظر الشريعة الإسلامية الغراء. كما أوصى البحث بجملة توصيات تحول دون استمرار إساءة استعمال هذه القوى من قبل السلطات المعنية.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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This work is dedicated to Almighty Allah, the Creator of the universe for giving me the grace to finish the course of my study. I shall forever be grateful.

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TABLE OF CONTENTS

Abstract ii
Abstract in Arabic iii
Approval Page iv
Declaration v
Copyright vi
Dedication vii
Acknowledgements viii
List of Statutes xii
List of Cases xiii

CHAPTER ONE: INTRODUCTION 1
1.1 Background of Study 1
1.2 Statement of Problem 2
1.3 Aims and Objectives of Study 3
1.4 Hypothesis 3
1.5 Methodology 4
1.6 Literature Review 4
1.7 Scope and Limitation 7

CHAPTER TWO: NOLLE PROSEQUI IN NIGERIA 8
2.1 Introduction 8
2.1.1 The Concept and History of Nolle Prosequi 10
2.2 Nolle Prosequi Under The Nigerian Law 16
2.3 Cases of Abuse of Nolle Prosequi in Nigeria 20
2.3.1 Dr. Julius Makanjuola's Corruption Case 21
2.3.2 Nolle Prosequi and Hamman Ahmed 22
2.3.3 The Grant of Nolle Prosequi to the Murderers of Chief Bola Ige 22
2.3.4 The Supreme Court Judgment in State V Ilori (Supra) 23
2.4 Conclusion 25

CHAPTER THREE: PREROGATIVE OF MERCY IN NIGERIA 27
3.1 Introduction 27
3.2 Prerogative of Mercy under the Nigerian Law 27
3.3 Cases of Abuse of Prerogative of Mercy in Nigeria 30
3.3.1 Diepreye Alamieseigha's Case 30
3.3.2 The Grant of Pardon to Olaolu Adegbaju and Ekundayo Odubade ... 31
3.3.3 The Grant of Prerogative of Mercy Posthumously 33
3.4 Conclusion 34

CHAPTER FOUR: NOLLE PROSEQUI, PREROGATIVE OF MERCY AND ISLAMIC LAW 36
4.1 Introduction 36
4.2 Crime and Punishment under Islamic Law 38

4.2.1 Prescribed Punishments 42
4.2.2 Retribution 43
4.2.2.1 The Wisdom behind Retribution 44
4.2.3 Discretionary Punishments 45
4.3 The Objectives of Punishment under Islamic Law.................................... 46
4.4 Nolle Prosequi and Prerogative of Mercy under Islamic Law 49
4.5 Forgiveness in Islamic Criminal Law.. 51
4.5.1 Forgiveness and Qisas in Relation To Murder.................................. 54
4.5.2 Forgiveness by Heirs of the Victim in Case of Intentional Killing.. 57
4.6 Alternative Dispute Resolution and Qisas.. 63
4.7 Conclusion 64

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION...................... 67
5.1 Conclusion 67
5.2 Recommendation 71

BIBLIOGRAPHY 73

LIST OF STATUTES

The Constitution of Federal Republic of Nigeria 1999
The Criminal Procedure Act
The Criminal Procedure Code

LIST OF CASES

A-G of Ondo State v. A-G of the Federation (2002) FWLR (PT 111) 1972 at 2073
Alamieyeseigha v Federal Government of Nigeria (2006)16 NWLR (pt.1004)1
Anyebe v. The State (1986) 1 SC 87
Emelogu v. The State (1988) 2 NWLR (Pt 78) 524
Okeke v. The State (2003) 15 NWLR (Pt. 842) 25
State v. Chukwura (1964) NMLR 64
State v. Ilori (1983) 2 SC 155

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF STUDY

In the Administration of Criminal Justice system in Nigeria both the Attorney-General of the state and that of the federation plays important role. Both Attorney-Generals have the power to initiate criminal proceedings in any court established under any law in Nigeria except with the exclusion of the court martial[1]. The Attorney-General of the federation can institute criminal proceedings in respect of offences created by the federal legislation, while that of the state has the power to initiate criminal proceedings in respect of the offences created by the State Laws. As can be seen in the decision of the Supreme Court in *ANYEBE V STATE*[2] that the Benue State Attorney General cannot validly prosecute an accused person for an offence under section 28 of the fire arms Act, an offence under the legislative list of the 1979 Constitution except with the express authority of the Attorney General of the federation to prosecute such offences. Note that where Federal Law is to operate within the state the Attorney-General of the State has the power to prosecute under such law because it is deemed to be a law made by the state's legislative body.

It follows therefore, that he is the executive enforcement law officer of the state and the federation as the case may be. Another stakeholder in the Nigeria criminal justice system is the president of the country and the Governor of the state. They are the supreme being of the federation and the state respectively. They

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[1] Section 174(1)(a) and 211 (1)(a) of the 1999 Constitution

[2] Anyebe versus State (1986) 1 S.C 87.

determine who to be punished or not after such offenders have been convicted by the competent court in the land[3].

Therefore, the Attorney General of the Federation and the state, the president and the governors are vested with very sensitive powers by the constitution that if misused, the society will be affected because it will lead to injustice and disorderliness in the society. This dissertation shall focus on the abuse of power by the authorities mentioned above and the position of Islamic criminal law as regards to NOLLE PROSEQUI which is the power vested on the attorney general of the federation and that of the state to terminate criminal proceeding before any court in the federation and the state as the case may be[4]. And PREROGATIVE OF MERCY which is the power of the President of the federation and the Governors of the states to grant pardon to any convict or ex-convict in their respective jurisdiction.[5]

1.2 STATEMENT OF PROBLEM

Prerogative of mercy and Nolle prosequi has been a concept in Nigeria legal system which undermines the true nature of justice which is equality before the law. This is so because there are lots of criminals who have committed heinous crimes and were supposed to languish in prison or sentence to death but have been let loose and they are gallivanting freely in the society due to the fact that they are very influential or related to those who are in the realm of affairs of the country or society concerned. These exonerated criminals are still permitted to hold sensitive position in the country as a result of abuse of power which was exercised by the president, governors and the attorney general of the federation and that of the state. This is evident in the case of

[3] This right is provided for under sections 212(1) and 175(1) & (2) of the Constitution for the Governor and the President respectively

[4] Section 174(1)(a) and 211 (1)(a) of the 1999 Constitution of the Federal Republic of Nigeria

[5] Sections 212(1) and 175(1) & (2) of the 1999 constitution of the Federal Republic of Nigeria

Alamieyeseigha V Federal Government of Nigeria[6], where the defendant was granted pardon after being convicted on a six count charge including money laundering without recourse to the interest of the public and justice as required by the constitution. Also, in *STATE VS ILORI.*[7]where the Attorney-General of Lagos State entered a plea of Nolle prosequi in favor of two police officers who initiated a malicious prosecution against the defendant in this case without regard for public interest, interest of justice and the need to prevent the abuse of Legal process in exercising such power as provided for by section191(3) of the1979 constitution of the federal republic of Nigeria.

1.3 AIMS AND OBJECTIVES OF STUDY

1. To examine the existing laws relating to Nolle prosequi and prerogative of mercy in Nigeria.
2. To identify the lacuna therein.
3. To provide solution to these lacuna.
4. To examine the position of Nolle prosequi and Prerogative of mercy under the Islamic law and how it could be used as a model for improving the existing laws.

1.4 HYPOTHESIS

In carrying out this research, I am convinced that the instrument that vested these powers on the concerned authorities is supposed to be amended in order to checkmate the abuse of such powers. Even though, the constitution went through amendment in 2011 but the people from grass root were not involved and those sections of the

[6] Alamieyeseigha v Federal Government of Nigeria (2006)16 NWLR (pt.1004)1
[7] See the State versus Ilori (1983) 2 S.C. 155.

constitution that affect the interest of the public were not dealt with. Therefore, the power of prerogative of mercy should be withdrawn from the president and the governors and be vested on the victims of the crime where it affects individual. Where such crime affects the state or community, it should be granted based on public polls.

As regards the power of Nolle prosequi vested on the Attorney-General of the state and that of the federation, the power should be limited to the commencement of action exclusively. The power to discontinue any criminal case before any court in the country should be abolished, so that all criminal offenders against the state and individuals will be brought to book.

1.5 METHODOLOGY

The dissertation shall adopt doctrinal research. This will be library based research which involves the use of statutory laws, law reports, textbooks, journal articles, newspapers, paperwork and the likes of them. This research shall explore these materials in exhibiting Nolle prosequi and prerogative of mercy in Nigerian concept, the laws which provides for these powers and the qualitative analysis of the cases of abuse of Nolle prosequi and Prerogative of mercy in Nigeria including the position of these powers under the Islamic criminal law.

1.6 LITERATURE REVIEW

In undertaking this review of available literature, I have selected carefully those ones that are very similar to this research based on their importance. Nolle prosequi and prerogative of mercy in Nigeria context are powers that have been conferred on the Attorney-General of the federation and that of the state including the president and the

governors of the state respectively.[8] [9] The power that is conferred on the Attorney-General is the power to determine legal proceedings which has been subjected to legal scrutiny.[10] This power which is an extension of the royal prerogative of the monarch in England is exercised by the Attorney General.[11] Accordingly, the England court has said that this power is not subject to judicial review but to the expectation that the Attorney General 'will never prostitute those functions which he has to perform'. Likewise the power of Nolle prosequi has been firmly established under Nigeria Legal Jurisprudence for over five decades. However, it was not until recently that the priority of conferring such power has become the centre focus of legal arguments.[12]

The power of Nolle prosequi has been used by various Attorney-Generals in the fourth republic to terminate corruption proceedings against prominent politicians accused of stealing billions of naira. It was also used to discontinue criminal proceedings against politicians charge with murder[13]. Despite the constitutional provision that recourse must be laid to public interest, interest of justice and to prevent abuse of legal process the violation for which (is unquestionable by the appropriate authority.

Prerogative of mercy is the power vested on the president of federal republic of Nigeria in relation to federal offences while for the state offences is vested on the governor of the state[14]. Once pardon has been granted to a convicted person, he shall

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[8] Bob Osamor. *Fundamental Principles of Criminal Procedure in Nigeria* (2006) at 224

[9] Agaba J.A. *Practical Approach to Criminal Litigation in Nigeria: Pre-trial and trial proceedings*. (2011).

[10] Ogidi Henry, Stephen Chukwuma *Rethinking the Power of Nolle Prosequi in Nigeria: The case of Ilori vs State,* (2014).

[11] Osita 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 2.* (2010). Retrieved from www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2056290. On 12/ 12/ 2013.

[12] Ogidi Henry, Stephen Chukwuma (2014).

[13] Abdul Salam Abdulfatai (2014). *Iyiola Omisore and the Guba race in Osun State; TNV the Nigerian Noice,* 11 Feb 2014

[14] Bob Osamor (2009). Agaba J.A (2011).

not serve the penalty again and whatever is left of the penalty shall be removed[15]. Thus, no one shall be liable to be tried or punished again in criminal proceeding under the jurisdiction of the same state for an offence for which he has already been pardoned[16].

Once a pardon is granted, the accused person cannot be tried again and if he has already been convicted, he cannot be punished anymore.[17] However, as a special power held in public trust by the Governor or the President, it ought to be exercised with the highest sense of responsibility, probity and circumspection by the person vested with such powers[18]. State pardon is a discretionary power to be exercised judiciously and judicially and not meant to be used as an instrument of patronage for political benefactors or for self enhancement and aggrandizement but must be exercised in a reasonable manner devoid of bias and public umbrage and should be strictly consistent with the letters and spirit of the law and code of conduct for all public officials.[19]

Furthermore, these powers do not have any connection with Islamic criminal justice system because of its contradiction to Maqasid sharia which is justice, fairness and equality before the law. The Quran has prescribed the concept of forgiveness which can only be exercised by the heirs of the victim or the victim himself as the case may be.[20] Prophet Mohammed (S.A.W) is also known to be just in dealing with people irrespective of socio class or status of the person concerned. Therefore, the central notion of justice in sharia is based on mutual respect of one human being by

[15] Bob Osamor (2006).
[16] Agaba J.A. (2011).
[17] Bob Osamor (2006).
[18] Frank Agedo. *Presidential Pardon under the constitution. The Nation*, (Nigeria Newspaper); March 19, 2013
[19] Ibid.
[20] Majida Zawawi, Nasimah Husin Forgiving the enemy: The concept of forgiveness in the Law of Qisas relating to Murder and its application in the modern world. (International conference on law, order and criminal justice, 2014).

another[21]. Judicial power according to sharia must always operate in conformity with equality, even to the benefit of an enemy and to the detriment of a relative [22] which is not in the dictionary of the Nigeria leaders who has been exercising this power.

Although some of these authors mentioned that these constitutional powers vested on the authorities concerned should be amended to prevent continuous abuse of such powers. But none of them have ever mentioned how to go about the amendment. Therefore the aim of this dissertation is to contribute to the existing literature by examining the position of these powers under the Islamic Law, and to give recommendation as to the prevention of abuse of these powers under the constitution.

1.7 SCOPE AND LIMITATION

The research is based on the need for the prevention of the abuse of NOLLE PROSEQUI and PREROGATIVE OF MERCY in Nigeria. In doing this, it shall examine the law that establishes these powers, the instances in which these powers have been abused and to provide solutions that will prevent future abuse of such power by the authorities concerned.

Finally, it shall examine the position of these powers under the Islamic law and to determine whether it's in accordance with Maqasid sharia or not.

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[21] Abdur Rahman I. Doi. *Sharia: The Islamic Law* (AS Noordeen Malaysia, 7th edition, 2007)
[22] Ibid.

CHAPTER TWO

NOLLE PROSEQUI IN NIGERIA

2.1 INTRODUCTION

In discussing the concept of Nolle prosequi in Nigeria, it is pertinent to give a brief insight into her structure and legal system. Nigeria which is officially known as the Federal Republic of Nigeria is a federal constitutional republic comprising of 36 States and its Federal Capital Territory, Abuja.[1] Each state of the federation has its own governor who is the chief executive and head of government of that state, and there is also an Attorney-General of the State who is the Commissioner of Justice and the chief law officer of the state in which he was appointed[2].

More so, the president is the head of the government of the whole federation and all the governors of the 36 states of the federation are accountable to him[3]. The federation also has the office of the minister of justice who is the Attorney–General of the federation whom all the Attorney–Generals of all the states of the federation are accountable to[4].

The Nigerian legal system has been greatly influenced by English law. It inherited the British Common Law and applied it until 1999. However, the Nigerian legal system is somewhat complex and has several sub-systems. At the national level, the federal legal system is applicable throughout the country. At the state level, each

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[1] Section 2 and 3 of the1999 constitution of Federal Republic of Nigeria.

[2] See section 176 of the constitution, which provides for the office of the governor of the state and section 195 of the constitution, which provides for the office of the attorney-general of the state.

[3] Section 130 of the constitution

[4] Section 150 0f the constitution

state has its own legal system. In some states, Shari'a and customary laws are the applicable laws.[5]

The Federal Constitution establishes the grundnorm for the Nigerian legal system and it shall have binding effect on all persons and authorities throughout the republic. Therefore, any law or legislation which is contrary to the provision of the constitution will as a result of that be null and void.[6] Other laws include subsidiary legislation on specified matters for example criminal law, administrative law, revenue law, etc. The sources of Nigerian law include Nigerian legislation, consisting of the adopted English law, the common law, the doctrines of equity, and statutes of general application which was in force in England on January 1, 1900, Islamic law, customary law and judicial precedence.[7]

This chapter shall focus on the concept and history of Nolle prosequi, its meaning and nature in Nigerian concept which denote the power of the Attorney general of the federation and that of the state to discontinue any criminal proceedings at any stage before judgment is given in any court of law in Nigeria and the state as the case may be. It shall also touch the law that establishes Nolle prosequi and the existing laws under which it operates. (i) It is governed by the Constitution of Federal Republic of Nigeria 1999 which is the primary source of Nigerian Law. (ii) The Criminal Procedure Code Act Cap 491 Laws of Federation 1990 which guides all criminal proceedings in the Southern part of the country. (iii) The Criminal Procedure Act Cap 41 Laws of the Federation 2004 which guides criminal proceedings in the

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[5] Section 4 of the 1999 constitution of the federal republic of Nigeria. See also, Obilade A.O (1979). The Nigerian Legal system (Spectrum law publication, Ibadan)

[6] This is the supremacy of the constitution which is evident in section 1(1) and (3) of the 1999 constitution.

[7] See section 45(1) Interpretation Act, cap24 Law of Federal Republic of Nigeria 2004; See also Niki Tobi (1996); sources of Nigerian Law, (MIJ Professional Publishers Limited, Lagos) at 25-28

Northern part of Nigeria. (iv) The administration of Criminal Justice Law No 10, 2007 which is applicable in Lagos State.

More so, the cases of abuse of Nolle prosequi in Nigeria shall also be examined in this present chapter including the conclusion.

2.1.1 The Concept and History of Nolle Prosequi

Nolle prosequi is a concept dating from the 1600s it is a Latin phrase which denotes "will no longer prosecute", "be unwilling to pursue", or any variation with the same meaning. It is a declaration made to the judge by a prosecutor in a criminal case (or by a plaintiff in a civil lawsuit) either before or during trial, indicating that the case against the defendant is being dropped.[8] The statement is an admission that the charges cannot be proved, that evidence has demonstrated either innocence or a fatal flaw in the prosecution's claim, or the district attorney has become convinced that the accused is innocent. The prosecution invokes nolle prosequi when it has decided to discontinue an entire prosecution or just part of it. The term is used in reference to a formal entry upon the record made by a plaintiff in a civil lawsuit or a prosecutor in a criminal action in which that individual declares that he or she wishes to discontinue the action as to certain defendants, certain issues, or altogether.[9] It is commonly known as *nol pros*.[10]

In England, nolle prosequi was a procedural device that the royally appointed Attorney General could use to terminate an ongoing criminal prosecution[11]. In the beginning of 16th century, the Attorney General used the procedure to dismiss

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[8] *West's Encyclopedia of American Law* (The Gale Group, Inc. edition 2, 2008) See also Collins Dictionary of Law © W.J. Stewart, 2006
[9] Ibid.
[10] Ibid.
[11] See Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* 12 (1981).

prosecutions that he regarded as frivolous or in contravention of royal interest[12]. Since most criminal prosecution in the early modern period were initiated and managed by private citizens and it was the only form of prosecutorial discretion exercised by a public figure. The nolle was an executive procedure available only to the Attorney General and often exercised at the explicit direction of the crown. No form of judicial review was available if a party contested the propriety of the procedure; when the Attorney General issued a nolle, the court will terminate the prosecution without any inquiry[13].

American criminal procedure absorbed the nolle prosequi and in federal practice both the American president and line prosecutors inherited the power to nol pros.[14] Although the name was the same but the nolle served a different purpose in America than it had in England. In the English system of private prosecution, the nolle was an isolated control point available to the crown. In America, public prosecutors used the nolle to terminate prosecutions that were initiated by them. As a result, the American nolle was one of the procedural devices that public officials used to control criminal prosecutions.

Public debate regarding the power of nolle prosequi in the United States occurred at the end of the eighteenth century. In February 1799, Jonathan Robbins also known as Thomas Nash was arrested in South Carolina and accused of participating in a mutiny on a British ship the Hermione[15]. Britain formally requested his extradition pursuant to the Jay Treaty[16]. Robbins was one of many sailors who had

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[12] Goddard v. Smith, 87 Eng. Rep. 1007, 91 Eng. Rep. 632 (K.B. 1704) (issuing a *nolleprosequi* to remedy a wrongful charge).
[13] See Goldstein.
[14] Ibid.
[15] Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robins, 100 YALE L.J.229, 237 (1990).
[16] Treaty of Amity, Commerce and Navigation, U.S.- Gr. Brit., Nov.19, 1794, art.27, 8 stat.116, 129, T.S. No. 105.