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An Appraisal of the Powers of the Attorney-General of the Federation to Prosecute Violators of the Presidential Order Suspending the Operations of Twitter in Nigeria

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Abstract

The directive reportedly given to the Director of Public Prosecutions of the Federation (DPPF) to commence the process of prosecuting those who violate the Federal Government's order suspending the operations of Twitter in Nigeria has brought to the fore again the scope of the powers of the Attorney-General of the Federation (AGF) to control criminal prosecutions in Nigeria. This article examines the legality of this directive in the context of the relevant laws embodying the prosecutorial powers of the Attorney-General. Adopting the doctrinal research approach, the paper takes a look at the relevant provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Administration of Criminal Justice Act 2015, and the Police Act 2020 dealing with the control of criminal proceedings by the Attorney-General. The paper finds that while the prosecutorial powers of the AGF are well preserved under section 174 of the 1999 Constitution they can only be validly exercised by him directly or through an officer in his department or any other person or authority when an offence known to law has been committed. It further finds that the Government's order suspending the operations of Twitter in Nigeria cannot qualify for a written law within the meaning of section 36(12) of the 1999 Constitution. The paper recommends the insulation of the office of the Attorney-General from partisan politics to prevent abuse of powers by an incumbent Attorney-General. To achieve this, the paper suggests the insertion of a clause in the Constitution that will grant security of tenure to the Attorney-General in the same way as judicial officers are shielded under section 291 of the 1999 Constitution from arbitrary removal.

Keywords: Powers; Attorney-General; Prosecute; Presidential Order; and Violators

1.0 Introduction

The attachment of sanction to a legal rule is what differentiates it from a moral norm. As correctly submitted by Hans Kelsen, the author of 'Pure Theory of Law', any legal norm or rule that imposes a duty, as opposed to one which merely permits the doing of an act, should have a sanction attached to it.[1] In criminal law, a sanction could take the form of a fine, an imprisonment (for life or for a specific number of years), or even a death sentence. The jurisprudential basis for imposing sanctions is that a legal rule or norm will be useless or otiose unless violators are penalized appropriately. It is also to avoid a culture of impurity, lawlessness and anarchy.

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[1]Hans Kelsen, *The Pure Theory of Law* (Berkeley 1967)200. See also JM Elegido, *JURISPRUDENCE* (Spectrum Law Publishing 2010) 84.

It is against this background that the decision by the Attorney-General of the Federation and Minister of Justice to attach sanction to the controversial order made by the Nigerian Government for the suspension of the operations of Twitter in Nigeria can be appraised. According to news ports,[2] the Attorney-General has directed the Director of Public Prosecutions of the Federation (DPPF) to swing into action and commence in earnest the process of prosecuting the violators of the Federal Government's order imposing the ban. The DPPF has further been directed to liaise with the Ministry of Communication and Digital Economy, the National Communications Commission and other relevant government agencies to ensure the prosecution of all 'offenders' without any further delay.

It is intended in this paper to examine the legality of the directive issued by the Attorney-General for the prosecution of all alleged offenders for violating the Government's order on Twitter ban. In this connection, the prosecutorial powers of the Attorney-General of the Federation shall be examined under the relevant laws, such as the Constitution of the Federal Republic of Nigeria, 1999 (as amended)[3] and the Administration of Criminal Justice Act (ACJA) 2015.

2.0 Background to the Paper

The face-off between the Nigerian Government and the micro-blogging giant, Twitter, apparently began late last year (2020), in the build-up to the historic #ENDSARS protests. The Government, through its spokesperson, Lai Mohammed, had blamed Twitter for the escalation of the unrest, triggered by bitter complaints against the brutality of the citizens by the SARS, an anti-crime unit of the Nigeria Police Force. It was specifically alleged that Twitter funded the protests which lasted more than one week in different parts of Nigeria.[4]

The Federal Government/Twitter relationship became frostier when the latter decided to site its first branch office in Africa in Ghana. That action was interpreted as a snub on Nigeria considering the comparably huge patronage the micro-blogging company enjoys in Nigeria. And in what was probably the last straw that broke the camel's back, Twitter, on Wednesday 2 June 2021, deleted a tweet by the Nigerian leader, President Muhammadu Buhari, for allegedly evoking the dark memories of the Nigerian civil war. President Buhari had tweeted thus:

> *Many of those misbehaving today are too young to be aware of the destruction and loss of lives that occurred during the Nigerian civil war. Those of us in the fields for 30 months, who went through the war, will treat them in the language they understand.*

The controversial tweet was reported to the company by many aggrieved individuals who also called for the suspension of the President from the social media platform. Twitter responded to the complaints by deleting the tweet, after determining that it violated its 'abusive behaviour rules.'

[2]See Dennis Erezi. 'Twitter Ban: Nigeria's Attorney-General to Prosecute Offenders' *The Guardian Newspaper* (Lagos 5 June 2021) <https;//guardian.ng> accessed 16 June 2021.
[3]Referred to subsequently in this paper as 'CFRN 1999' or simply 'the 1999 Constitution'.
[4]Erezi (n 2).

Nigerian Government reacted promptly and objectionably to this action, accusing the micro-blogging company of double-standards. Addressing a news conference in Abuja, the nation's capital, on Thursday 3 June 2021, Government spokesperson, Lai Mohammed, alleged that Twitter had deliberated ignored inciting tweets by separatist and leader of the Indigenous People of Biafra (IPOB), Nnamdi Kanu, and his supporters, alleging that the company displayed the same bias during the #ENDSARS protests. According to Mohammed, 'The mission of Twitter in Nigeria is very suspect. Has Twitter deleted the violent tweets that Nnamdi Kanu has been sending? Has it? The same Twitter that was funding the #ENDSARS protests?'

The day after the press conference, the Government announced that it had suspended Twitter from operating in the country, with effect from Saturday 5 June 2021.[5] There were reports, however, that with millions of users blocked from accessing the site, many young Nigerians were circumventing the ban by using the Virtual Private Network (VPN). This apparently led to the threat by the Attorney-General to prosecute all violators of the order. The statement credited to the Attorney-General has raised queries as to whether he can legally prosecute anyone for violating an order not backed by a written law.

3.0 Evolution of the Office of the Attorney-General

The concept of an Attorney-General dates back to the Anglo-Norman system of government in England at a time when French legal terms were introduced into the English system of government. The first mention of the term, *attornus Regis*, or 'King's attorney' was made in 1253.[6] The first formal appointment of an Attorney-General was made in England in the year 1472. The office of the Attorney-General (AG) has since then been of great importance in politics. The AG was, in the early days, the legal representative of both the king and the royal government as well as the guardian of public interest (the *parenspatriae)*. Accordingly, he was charged with the duty of protecting the rights of both the Crown and the public.

In the United States of America, the history of Attorney-General dates back to the American Revolution and the creation of a federal government free from Great Britain. Despite the fact that the Americans were not interested in creating a monarchy (like Britain) they considered it important to institute an office similar to that of the British Attorney-General. Consequently, the historic Judicial Act 1789, passed by the first US Congress and signed into law by the then President George Washington, created the office of the Attorney-General of the United States of America.[7] The Act conferred on the President the power to appoint the US Attorney-General. As individual States drafted their own Constitutions, most modelled their governments on the federal system, thereby establishing the office of the Attorney-General in their respective States.

In Nigeria, the office of the Attorney-General is probably as old as the country itself. After securing independence from Britain on 1 October 1960, Nigeria simply adopted, from its erstwhile colonial master, the practice of appointing an Attorney-General of the Federation (AGF). Accordingly, the first AGF, Hon. Justice Teslim Elias, was appointed in 1960 and he

[5]Ibid.
[6]Sarah Winkler, 'How an Attorney-General Work's<https://people.howstuffworks.om> accessed 16 June 2021.
[7]*Ibid*.

served till 1966.[8] Under the 1963 Constitution, provision was made for the appointment of an AGF.[9] And as of the time the Constitution of the Federal Republic of Nigeria, 1999, came into force, provisions were made for the appointment of the Attorney-General of the Federation[10] and of a State.[11] Under the Constitution of the Federal republic of Nigeria 1999 (as amended), it is provided in sections 150 and 195 respectively that there shall be an Attorney-General of the Federation and of a State.

Under the 1999 constitutional framework, the Attorney-General is a member of the cabinet of the President of the Republic or the Governor of a State, as the case may be. He is for that matter the only cabinet member whose position is specifically provided for in the Constitution.[12] Under section 147 of the Constitution, it is merely stated that, 'There shall be such offices of ministers of the Government of the Federation as may be established by the President.'[13]

The AGF also doubles as the Minister of Justice and the Chief Law Officer of the Federation[14] and, *ipso facto,* the Chief Legal Advisor of the Government. At the State level, he is the Chief Legal Advisor of the respective State. The Nigerian Constitution combines the office of the Attorney-General and Minister (or Commissioner at the State level) in one person. Accordingly, at the Federal level, the holder of the office is referred to as the Attorney-General and Minister of Justice, while at the State level, he is called Attorney-General and Commissioner for Justice.

The AGF is the head of the Federal Ministry of Justice. By virtue of his position, he is also the leader of the Bar. At the State level, he is the leader of the State's Bar i.e. the Nigerian Bar Association.[15] In view of his status as the leader of the Bar, the Attorney-General enjoys some privileges in the court of law. For example, he enjoys priority of audience in the court, being the representative of the State in all legal matters. He also enjoys some rights and privileges at the Bar one of which is the right to preside over the General meetings of the Bar[16] and to be appointed a member of the Legal practitioners Disciplinary Committee, a body established under the Legal Practitioners Act to hear and determine complaints against members of the Bar.[17]

4.0 Appointment of the Attorney-General

At the Federal level, the AGF is appointed by the President subject to the confirmation of the Senate. The Governor of a State is empowered at the State level to appoint the Attorney-General of the State, subject to the confirmation of the House of Assembly. It is worthy of note that there is no special provision in the Constitution for the appointment of an Attorney-General. However,

[8]Past Attorney-General of the Federation <https://www.justice.gov.ng> accessed 16 June 2021.
[9]See the Constitution of the Federal Republic of Nigeria, 1963, No 2, 588.
[10]Constitution of the Federal Republic of Nigeria 1979, s 138.
[11]*Ibid*, s 176.
[12]See CFRN 1999, s 150. For a similar provision for a State, see CFRN 1999, s 195.
[13]See CFRN 1999, s 150. For a similar provision for a State, see CFRN 1999, s 195.
[14]*Ibid*, s 150.
[15]Under section 1 of the Legal Practitioners Act (LPA), cap L11, Laws of the Federation of Nigeria, 2004, it is provided that there shall be a General Council of the Bar of which the Attorney-General shall be the President. There is no doubt that it is this provision that effectively makes the Attorney-General the leader of the Bar.
[16]For more on The Privileges enjoyed by the Attorney-General, see LPA 2004, s 5(1).
[17]LPA 2004, s 11.

since section 150(1) describes him as a 'Minister of the Government of the Federation', his appointment is deemed to be subject to the procedure stipulated under section 147(2) of the Constitution, that is to say, his nomination to the office of a Minister by the President must be confirmed by the Senate.[18]

However, despite not providing specifically for the procedure for the appointment of an Attorney-General, beyond the general provision for the appointment of a Minister, the Constitution makes specific provisions for the qualification for the office of the Attorney General. In this connection, section 150(1) and (2) states as follows:

> *150(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.*[19]
>
> *(2). A person shall not be qualified to hold office or perform the functions of the office of Attorney-General of the Federation unless he is qualified to practise as a legal practitioner in Nigeria and has been so qualified for not less than ten years.*[20]

It is arguable, from the foregoing provisions, that the idea of making one person the holder of the offices of both the Attorney-General and Minister of Justice is not strictly a constitutional requirement; it is simply expedient and cost effective. There is nothing in subsection (1) of section 150 that bars the President from appointing a separate person as Minister of Justice while the person appointed as Attorney-General functions mainly as the Chief Law Officer of the country. Under this arrangement, it will be possible to divest the office of the Attorney-General of partisan politics. The Nigerian approach of combining the two offices in one individual is apparently intended to reduce the cost of governance. This seems sensible, *prima facie.* However, the politicization of this office by successive regimes to such an extent that a holder of that office now sees himself as the Attorney-General of the sitting President rather than that of the Federation, is doing more harm than good to the nation's polity.

It is to be noted, importantly, and with reference to the above comment, that the Nigerian Senate made an attempt to separate the office of the Attorney-General of the Federation and of the State from that of the Minister of and Commissioner for Justice respectively in the Constitution of the Federal Republic of Nigeria (Fourth Alteration) Bill No 19, 2017. The Bill, yet to see the light of the day, seeks to alter sections 150, 174,195,211,318 of and the Third Schedule to the Constitution, to separate the office of the Minister of or Commissioner for Justice from that of the Attorney-General of the Federation and of a State with a view to 'creating an independent office of the Attorney-General of the Federation insulated from partisanship.' It also seeks to

[18]See also CFRN 1999, s 192 (2) which requires the nomination of a person to the office of a Commissioner by the Governor to be confirmed by the House of Assembly of that State.

[19]It is noted that in some jurisdictions, like Uganda, the office of the Attorney-General is severed from that of the Minister of Justice. By virtue of section 119 of the Constitution of the Republic of Uganda 1995 (as amended) it is provided that, 'there shall be an Attorney-General who shall be a cabinet Minister.'

[20]See CFRN 1999, s 195(1) and (2), for corresponding provisions with respect to the Attorney-General of a State.

'redefine the role of the Attorney-General, provide a fixed tenure, provide the age and qualification for appointment and for a more stringent process for his removal.'

There is no doubt that the goal of the proposed amendments is to insulate the office of Attorney-General from partisan politics. It is strongly suggested that the current Senate should take a passionate look at the recommendations contained in this Bill in its ongoing attempt to review the 1999 Constitution. Having said this, it must be added that the goal of divesting the office of the Attorney-General from partisan politics may not be significantly achieved as long as the President retains the power to appoint the holder of the office. But the character, integrity and professional competence of the appointee can go a long way to make the desired difference.

5.0 Power and Functions of the Attorney-General

The word 'power' refers to influence or authority which confers on a person or institution the ability to do something or act in a particular way.[21] In this context, power means the authority that a person has to carry out some functions. Being a creation of law, specifically the Constitution, the Attorney General of the Federation (or of a State) derives his power from the said Constitution. The power conferred on the Attorney General is to enable him carry out come functions or duties which are also stipulated in the Constitution. In this respect, section 174(1) of the Constitution declares 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; 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.[22]

Let us, for ease of analysis, take these functions one after the other before considering the sundry elements introduced by subsections (2) and (3).

5.1 Power to Institute Criminal Proceedings

The basis of this power is the recognition, by the Constitution, of the Attorney General as the Chief Law Officer of the Federation.[23] He is deemed to be the chief custodian of the Nigerian law and whenever a criminal infraction is committed the Constitution imposes a duty on him to prosecute the offender.

[21]Della Thompson, *The Concise Oxford Dictionary of Current English* (9thedn, Clarendon Press 1995) 1071.

[22]See CFRN 1999, S 211(1) for a similar provision embodying the power and functions of the Attorney-General of a State.

[23]See again CFRN 1999, s 150 (1).

It is important to note that this power is recognized under the Administration of Criminal Justice Act (ACJA), the main instrument regulating criminal proceedings in Nigeria. To this effect, section 104(1) of the Act states that, 'The Attorney-General of the Federation may prefer information in any court in respect of an offence created by an Act of the National Assembly.'[24]

One question that has generated some concern is whether the Attorney-General must exercise this power personally or he can delegate it to any officer in his department or, for that matter, any other person or authority? In addressing this question, the Supreme Court in *Amah v FRN*[25] held as follows:

> *Section 174 of the Constitution provides for the power of the Attorney-General of the Federation to undertake criminal prosecution in relation to offences created by or under an Act of the National Assembly. Section 211 of the Constitution makes similar provisions for the office of the Attorney-General of a State in relation to offences created by or under any law of the House of Assembly. Section 174(1) (b) and (c) which refers to proceedings initiated by 'any other authority or persons' is a clear indication that the power of the Attorney-General of the Federation or State to institute criminal proceedings is not exclusive to his office.*[26]

The court further held in this case that the use of the word 'may' in section 211 does not restrict the delegation of the Attorney-General's power to only officers of his department. What this means, in effect, is that the Attorney-General can delegate his prosecutorial powers to any other person or agency or institution outside the Ministry of Justice. The basis for this rule was restated by the Supreme Court in *Amadi v FRN*[27] where Peter-Odili, JSC, noted as follows:

> *To ensure speedy disposal of criminal cases, the Attorneys-General do delegate their powers to the various Commissioners of Police who institute and prosecute criminal matters in the name of the Attorney-General. Such powers are also delegated to other agencies such as the Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and Other Related Offences Commission (ICPC), Customs and Excise, and the National Drug Law Enforcement Agency (NDLEA). The arrangement is made possible subject to section 174(1) (b) and (c) of the Constitution in respect of the powers of the Attorney-General of the Federation.*

It was held in the *Amadi's case* that the Attorney-General of Katsina State can validly issue a fiat to anyone or prosecuting agency outside Katsina State to prosecute a criminal matter pursuant to the Penal Code.[28]

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[24] For the power of the Attorney-General to control criminal proceedings, see generally ACJA 2015, ss 104-108.
[25] (2019) 6 NWLR (pt 1667) 160.
[26] See pages 185-186 of the report. See also *Saraki v FRN* (2016) 3 NWLR (pt 1500) 531 and *FRN v Adewunmi* (2007) 10 NWLR (pt 1042) 399.
[27] (2008) 18 NWLR (pt 1119) 259.
[28] See pages 384-385 of the report.

5.2 Power to Take Over Criminal Proceedings

There is a presumption that all criminal proceedings instituted in any court in Nigeria in relation to any offence created by or under an Act of the National Assembly have been initiated by the Attorney-General of the Federation, being the Chief Law Officer of the country. This is without prejudice to the powers of other prosecuting agencies to prefer criminal charges against alleged offenders. As a matter of fact, aside from the Attorney-General, criminal proceedings in Nigeria can be instituted by the police, special prosecutors and private prosecutors.[29] This notwithstanding, there is a presumption created by section 150 of the 1999 Constitution that the Attorney-General, being the Chief Law Officer of the Federation, is the one who has a bourgeoning control over criminal litigation in Nigeria in so far as Federal offences are concerned. The same rule applies to the Attorney General of a State in respect of all offences created by or under the laws passed by the House of Assembly. The powers conferred on all other prosecuting persons and authorities are therefore deemed to have been delegated to them by the Attorney-General.[30] It is on this premise that the Attorney-General's power to take over any criminal proceedings that were not even initiated by him can be understood.[31]

5.3 Power to Discontinue Criminal Proceedings

Of the three major powers vested in the Attorney-General of the Federation under section 174 of the Constitution the most controversial is the one that allows him to discontinue criminal proceedings, whether instituted by him or not. This power is otherwise known as *nolleprosequi.* There does not seem to be any issue with the proceedings instituted by the Attorney- General either directly or on his behalf by a State counsel in his department. What people, especially non-lawyers, may find difficult to understand is why an Attorney-General appointed by a political leader (President or Governor) can validly terminate a criminal trial not initiated by him?

This question seems to have been, at least partially, answered by the decisions of the Supreme Court that have been reviewed in this paper. The same justification for conferring on the Attorney-General the power to take over a criminal case, even though same was not initiated by him, could apply to entering *nolleprosequi*. In the *Ezekiel's case*,[32] the Supreme Court stated at page 22 of the report that all criminal prosecutions are under the control of the Attorney-General and that this explains why he can take over and continue criminal proceedings or discontinue them even if they were instituted by any other person or authority.

One other related question is whether this power (of *nolleprosequi*) can be questioned in a court of law. The Supreme Court has held in a plethora of cases that the powers conferred on the Attorney-General of the Federation and of the State under sections 174 and 211 of the

[29] See, for example, Police Act 2020, s 4 and ACJA 2015, s 348.
[30] See again the dictum of Peter- Odili, JSC, in *Amadi v FRN* (2008) 18 NWLR (pt 1119) 259.
[31] See further *Ezekiel v AGF* (2017) 12 NWLR (pt 1578) 1 at 28 where the Supreme Court noted that 'all criminal prosecutions are under the Attorney-General's control as he can institute, take over… any criminal prosecution instituted by him or on his behalf or by any person or authority'.
[32] Ibid 22-28.

Constitution respectively, including that (of *nolleprosequi)* cannot be questioned by the court.[33] In other words, the powers are absolute. But is subsection (3) of section 174 a limitation to or restriction on the powers conferred by subsections (1) and (2), particularly that of *nolleprosequi?* Let us take a look at the wordings of the subsection.

> *(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.*

This provision must be analyzed in the context of the power to enter *nolle*. Interpreting this clause in the case of *Lord Halsbury in London County Council v Attorney General*,[34] as far back as 1902 in England, the court held that the Attorney-General's discretion, vis- a-vis the power of *nolle*, is neither questionable nor subject to control by the courts. This decision was referred to and applied by the Supreme Court of Nigeria in *State v Ilori*[35] where ESO, JSC, (of blessed memory) noted thus, on the scope of the Attorney-General's constitutional powers.

> *At common law, the Attorney-General, subject only to ultimate control by public opinion and that of the legislature, is a master unto himself, law unto himself and under no control whatsoever, judicial or otherwise, in relation to his powers of instituting or discontinuing criminal proceedings by entering a nolleprosequi whether such criminal proceedings are by the State or by any other person or authority.*

In the same case, Idigbe, JSC, (of blessed memory), while interpreting the phrase 'shall have regard to', held as follows:

> *The Attorney-General has always at common law taken into consideration the general public interest, interest of justice and the need to prevent abuse of legal process in exercising his powers of entering a nolleprosequi and there is nothing new in the provisions of sections 160 (1) and (2) and 193 (1) and (2) of the 1999 Constitution[36] and consequently the courts cannot pronounce on the validity of the exercise of the powers of the Attorney-General under section 160 (1) and (2) and 193 (1) and (2) by virtue of the provisions of subsection (3) in each case of 160 and 191.[37]*

The phrase 'shall have regard to', according to Justice ESO, 'only enables something to be done. The expression is what is known in the interpretation of statutes as a permissive language, a language which imports a discretion but certainly does not create a condition.' In the words of His Lordship, 'the words, "shall have regard to," are certainly not equivocal. They are plain and

[33] See*Amadi v FRN* (2008) 18 NWLR (pt 1119) 259; *State v Ilori*(1983) 1 SCNLR 94; *Ezomo v Attorney- General of Bendel State* (1986) NWLR (pt 36) 448; and *Audu v Attorney-General of the Federation* (2013) 8 NWLR (pt 135) 174. See also the English case of *Lord Halsbury in London County Council v Attorney-General* (1902) AC 165.
[34] (1902) AC 165.
[35] (1983) 1 SCNLR 95.
[36] Now sections 174 (1) and (2) and 211 (1) and (2) of the 1999 Constitution.
[37] At page 110 of the report.

unambiguous. They are words which are merely declaratory of what the Attorney-General takes into consideration in the exercise of his powers.'[38]

If the Attorney-General's powers over criminal prosecutions are this wide and imperial, what measures can be taken to prevent an abuse? His Lordship Kayode Eso, JSC, tried to address this question in the *Ilori's case* in the following words:

> *The appellant has strenuously harmed on the possibility of abuse of his powers by an Attorney-General who is left with this absolute discretion. I have already pointed out earlier that the sanction lies in the reaction of his appointor and also in public opinion. But more importantly is the fact that a person who has suffered from unjust exercise of his powers by an unscrupulous Attorney-General is not without remedy; for he can invoke other proceedings against the Attorney-General. But certainly, his remedy is not to ask the court to question or review the exercise of the powers of the Attorney-General.*[39]

Another crucial question that must be addressed at his juncture is, can there be any limit to the scope of the powers vested in the Attorney-General over criminal proceedings? Put in other words, can the Attorney-General, while exercising his powers under the Constitution, do what is legally impossible? Before addressing this question, it is important to state that the discharge of a suspect consequent upon a *nolleprosequi* entered by the Attorney- General does not operate as a bar to any subsequent proceedings being instituted against him (the suspect) on account of the same facts. In effect, such a suspect cannot be heard raising the special plea of *Autrefois acquit.*[40]

6.0 Limits to the Attorney-General's Powers Over Criminal Prosecutions

The constitutional powers vested in the Attorney-General over criminal prosecutions may be very wide and almost unfettered but they are not without any limit. Two of such limits will be identified and discussed in this paper. The Supreme Court of Nigeria pointed out the first one in the case of *Martins v FRN.*[41] The issue in controversy in this case was whether the prosecutorial powers vested in the Attorney-General of the Federation by section 174 extends to his appointing legal practitioners who have no manifest interest in the outcome of a case to prosecute or undertake criminal proceedings in any court of law in Nigeria. The court resolved the issue against the AGF holding that the Chief Law Officer of the Federation does not seem also to have powers to appoint prosecuting counsel for the Economic and Financial Crimes Commission (EFCC), a prosecuting authority established by an Act of the National Assembly. The court took the view that the EFCC Act does not contain any provision authorizing the AGF to appoint counsel for the Commission.[42] By the decision of the Supreme Court in this case, the rule has now been laid down that although the Attorney-General can delegate his prosecutorial powers to

[38] See also *Julius v Lord Bishop of Oxford* (1880) 5 AC 214 at 222.
[39] See page 111 of the report.
[40] ACJA 2015, s 107 (4). See further CFRN 1999, S 36(9).
[41] (2018) 13 NWLR (pt 1637) 523.
[42] Under the Administration of Criminal Justice Act (ACJA) 2016, the EFCC is recognized as a special prosecutor and has the power to act as a prosecuting authority in criminal matters. See ACJA 205, s 109 (d). See also *EFCC v Oriji Kalu*(2014) 1 NWLR (pt 479).

any other person or agency, like the EFCC, he has no power to dictate to any prosecuting authority as to the counsel to be appointed to prosecute a criminal case.

The second and, perhaps, more significant limit to the scope of the prosecutorial powers of the Attorney-General can be inferred from the provision of section 36 (12) of the 1999 Constitution which states thus:

> *(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this section, a written law refers to an Act of the National Assembly or a Law of the State, any subsidiary legislation or instrument under the provisions of a law.*

It is clear from the afore quoted constitutional provision that the Attorney-General's prosecutorial power are exercisable only in the context of a written law, defined by the Constitution as 'an Act of the National Assembly or a Law of a State or any subsidiary legislation or instrument under the provisions of a law. This limitation is in line with the time-tested rule in criminal law and procedure that an act cannot constitute an offence unless it is so declared by a written law. This is expressed in the Latin Maxim *nullum crime nnulluapoena sine lege*, meaning there is neither crime nor punishment except in accordance with the law.[43]

7.0 The Legality of Agf's Order to Prosecute Twitter Users

The pertinent question for determination at this juncture is whether the executive order issued by the Federal Government suspending the operations of Twitter in Nigeria can be properly regarded as a written law, within the meaning of section 36(12) of the 1999 Constitution? To answer the question requires taking a close look at the definition of 'a written law' as contained in this provision. The subsection defines it as 'an Act of National Assembly or a Law of the State, any subsidiary legislation or instrument under the provisions of a law'.

Now, it is clear that the order is not an Act of the National Assembly or the Law of a State. It can also not be regarded as a subsidiary legislation or an instrument under the provisions of any law. The latter description will not apply to this order because it was not made pursuant to any law or an instrument under any law. It is therefore respectfully submitted that the Attorney-General acted *ultra vires* his powers when he instructed the Director of Public Prosecutions of the Federation (DPPF) to commence the process of prosecuting the violators of what is now popularly called 'Twitter ban.' While the prosecutorial powers of the Attorney-General are solidly preserved under section174 of the Constitution, it is the law that they can only be exercised either by him directly or through any other person or authority when an offence has been committed. Where the act or omission of a defendant does not constitute an offence in law, as in the case of the users of Twitter, the AGF's prosecutorial powers cannot be lawfully evoked, let alone being validly exercised.

[43] See*Aoko v Fagbemi*(1961) 1 All NLR 400.

8.0 Conclusion

The Attorney-General of the Federation (or of a State) is, to use the words of His Lordship, Eso, JSC, in *Ilori's case,*[44] a Lord unto himself vis-a-vis his control over criminal proceedings.[45] Subject to the two limitations discussed in this paper, the Attorney-General exercises a bourgeoning control over criminal prosecutions to such an extent that he can terminate a criminal trial that he did not initiate. One of the risks of being imbued with such powers is the tendency to abuse them, or to act *ultra vires.* This seems to have been the case with the decision of Nigeria's Attorney-General over the Twitter ban controversy. This particular decision may not hold much water as it has no basis in law. But what can be done when the Attorney-General is abusing, but not acting beyond, his powers, in which case the court cannot be invited to question or review his action? After all, his discretion to undertake, take over, continue or discontinue criminal proceedings is absolute.

The search for remedy must begin with the procedure for the appointment and removal of an Attorney-General. As already noted in this paper, in spite of the huge powers vested in him with respect to criminal litigation, the Attorney-General is appointed and removed like any other cabinet Minister.[46] It is submitted, with respect, that this is not proper. An Attorney-General who holds office at the pleasure of his appointor (the President or Governor, as the case may be) is likely to kowtow to the policies and actions of his principal. The nomenclature assigned to this office is 'Attorney-General of the Federation' and not Attorney-General of the President. As long as the President can appoint the Attorney-General (although subject to Senate confirmation) and remove him at will, it will be difficult, if not impossible to insulate the holder of the office from partisan politics.

To redress this situation, it is humbly suggested that the Attorney-General be made to enjoy security of tenure, like the Chief Justice of Nigeria and the Chief Judge of a State. In this wise, a special provision should be inserted in the Constitution for the appointment and removal of the Attorney-General. In addition to subjecting his appointment to confirmation by the Senate, the provision should also state that the Attorney-General shall not be removed from office before the end of the tenure of the administration appointing him except by the President, acting upon an address supported by two-thirds majority of the Senate praying that he should be removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or body) or for misconduct or contravention of the Code of Conduct.[47]

It is observed that high ranking judicial officers enjoy security of tenure under the Constitution due to the delicate and sensitive nature of their job as custodians of the rule of law and constitutionalism. The same protection, it is respectfully submitted, should be extended to Attorneys-General who are Chief Law Officers in their respective jurisdictions. The job of an Attorney-General is even, in our view, more sensitive than that of a Judge whose hands can

[44] *State v Ilori* (n 33).
[45] See again CFRN 1999, s 174(1).
[46] Pursuant to CFRN 1999, ss 150 and 147.
[47] This will bring the conditions for the removal of the Attorney-General of the Federation at par with those of the Chief justice of Nigeria or a Justice of the Supreme Court as stipulated under CFRN 1999, s 291 (1). The same rule will apply to the removal of the Attorney-General of a State.

easily be tied when a *nolleprosequi* is entered by the former. The need to insulate the holder of such a sensitive office from partisan politics by granting him a security of tenure can therefore not be over emphasized.