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Fiat, Private Prosecution, and the Powers of the Attorney-General: Dissecting the Decision of the Supreme Court in Obijiaku v Obijiaku (2022) 17 NWLR (Pt. 1859) 377

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Abstract

The power of prosecution of offenses is constitutionally vested in the Attorney-General of the Federation and Attorney-General of the State respectively under sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) hereinafter referred to as CFRN. However, the power of prosecution is also conferred on other agencies and private persons. Such bodies or persons can be empowered by law to lay a complaint before a court of competent jurisdiction. The inevitable question is whether such person can prosecute the complaint without the authority or fiat of the Attorney-General? To what extent will the Attorney-General have control over such process? This paper examines the power to lay a complaint and the power to prosecute by persons other than the State. While not disputing the power to lay a complaint, it will be argued that the private person will not be able to prosecute without the fiat or authority of the Attorney-General. This article examines the recent case of Obijiaku v Obijiaku and contends that the statement that a private criminal complaint can be prosecuted by a private legal practitioner without the fiat of the Attorney-General does not accord with respect, to the present position of the law. It will be shown that other than officers in the Attorney-General's office, or agencies recognised to prosecute on his behalf, no private person can prosecute without the fiat or authority of the Attorney-General. The peculiar provision of the Administration of Criminal Justice Law of Anambra State cannot be interpreted to mean that as a rule, private persons can prosecute without the fiat of the Attorney-General.

Keywords: *Attorney-General, Complaint, Fiat, Private Prosecution, Public Prosecution*

1. Introduction

Public prosecution is the primary constitutional responsibility of the Attorney-General.[1] Thus, all prosecutions by persons other than the Attorney-General must emanate from the office.[2] Other agencies and persons are authorised to prosecute offences created by statute such as the Police,[3]

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[1] Sections 174 and 211, Constitution of the Federal Republic of Nigeria 1999 (as amended).

[2] *Amah v Federal Republic of Nigeria* (2019) 6 NWLR (Pt. 1667)160.

[3] Section 66 Police Act 2020.

Customs,[4] the Economic and Financial Crimes Commission (EFCC),[5] National Drug Law Enforcement Agency (NDLEA),[6] National Agency for Food and Drug Administration and Control (NAFDAC),[7] Independent Corrupt Practices and Other Related Offences Commission (ICPC)[8] and private persons but subject to the power of the Attorney-General to take over and continue such proceedings. This is the import of sections 174 and 211 of the CFRN, 1999 (as amended).[9] Would such agencies or person require the *fiat* or authority of the Attorney-General to commence the proceedings? This will depend on the method of commencement of the criminal proceedings and the authority concerned.

This paper focuses on the methods of commencing criminal proceedings, the persons or agencies authorised to commence the proceedings and under what circumstances will the *fiat* of the Attorney-General be required to commence such proceedings. Private complaint by persons will be examined to determine whether the *fiat* of the Attorney-General will be required to prosecute such complaint by a private legal practitioner. The recent case of *Obijiaku v Obijiaku*[10] is examined in the light of earlier authorities on the power of a private person to prosecute a private complaint without the *fiat* of the Attorney-General.

2. Method of commencing criminal prosecution in Nigeria

There are different modes of commencing criminal prosecution in Nigeria. This however depends on the court and the jurisdiction under reference. For clarity, we will commence with the Magistrates' Court in the South using Anambra State and Lagos State as a case study.

2.1 Methods of commencing criminal prosecution in Anambra State in the Magistrates' Court

In Anambra State there are two methods of commencing criminal prosecution in the Magistrate court, and they are[11]

2.2 Preferring a charge:

This is the predominant method of commencing criminal matters in the Magistrates' court of Anambra State. In this method, an officer of the Nigeria Police prepares the Charge sheet specifying the parties that committed the offence, the date the offence was committed, the place and the magisterial district the offence was committed, the alleged offence, the section of the law contravened, and signed by the Police officer. This may be accompanied by statement of witnesses and other evidence to be relied upon in the trial referred to as proof of evidence.[12]

2.3 Laying a complaint before a magistrate:

[4] Section 176 Nigeria Customs Service Act 2023.

[5] Sections 6(m), 7(2)(f),13(2) & 19 (1) EFCC Act, *Amadi v FRN* [2008] 18 NWLR (Pt 1119) 259 (SC), *Nyame v FRN* [2010] 7 NWLR (Pt 1193) 344.

[6] Section 7, 8(2) National Drug Law Enforcement Agency Act Cap N30 LFN 2004.

[7] Section 26 National Agency for Food and Drug Administration and Control Cap N1 LFN 2004; *Umezinne v Federal Republic of Nigeria* (2013) 13 NWLR (Pt. 1371) 269.

[8] Section 61 Corrupt Practices and Other Related Offences Act 2008.

[9] *Bakare v Ladipo* [2017] LPELR 43152 (CA) at 13-23; *Comptroller, Nigerian Prison Service (No.1) v Adekanye* [2002] 15 NWLR (Pt 790) 318.

[10] (2022) 17 NWLR (Pt 1859).

[11] Section 174 (a) Administration of Criminal Justice Law Anambra State 2010; See now section 157(1), 160, 163, 164 Administration of Criminal Justice Law Anambra State 2022.

[12] *State v Okpegboro* (1980) 2 NCR 291.

In Anambra State a private person is empowered by law to lay a complaint before a Magistrate.[13] Also a Police officer in certain circumstances bordering on cases of assault may make such a complaint even where the aggrieved party declines to make a complaint.[14] The law further provides that it is not necessary for such complaint to be in writing when made, as the registrar or the Magistrate is empowered to reduce it into writing.[15] Such complaint need not be on oath except the law strictly requires it.[16] The time limit for laying a private complaint before the court is within a period of six months of the alleged commission of the offence.[17] However, it must be noted that criminal proceedings cannot be commenced by way of complaints in Lagos State as criminal proceedings can only be instituted by a charge in the magistrates' court and by information in the High Court.[18] It should be noted that under the Administration of Criminal Justice Law of Anambra State 2022[19] for the complaint to be filed in court it must be accompanied with a certificate by the Attorney-General indicating his unwillingness to prosecute and the evidence that the complaint was made to the Police and investigated.

3. Methods of Commencing Criminal Prosecution in Federal Capital Territory (Abuja) Magistrates' Court and in the North

3.1 First Information Report

Like Complaint in the South is what is referred to as First Information Report (FIR) in Federal Capital Territory Abuja and in other Northern States. The procedure refers to a process whereby the police arraign suspects in the Magistrate Court in the Federal Capital Territory and Magistrate Court of other Northern States of Nigeria.[20] Such complainant is usually made to the police and upon investigation, the suspect is invited to the police station for investigation and the response of the suspect is recorded. The police will after the interrogation, if convinced that the suspect has committed the offence, file the First Information Report in court which shall contain the name and address of the suspect, the nature of the offence and the signature of the police officer prosecuting the case to court.[21] The suspect will be brought to the Court and the content of the information will be read to him in the language he understands in open court. If the suspect understands the information, the magistrate will ask the suspect if the information is true or false, if the suspect says the information is true, he will be summarily convicted without the need for the magistrate to frame a formal charge[22]. However, if the suspect says the information is false, the prosecution will be required to call its witnesses and the suspect will also be given opportunity to cross examine all the prosecution witnesses.[23] At the end of the prosecution's case, the court will rule whether the prosecution has made out a *prima facie*case against the defendant.Where the magistrate finds that

[13] Section 168 (1) Administration of Criminal Justice Law Anambra State 2010.
[14] Section 168 (2) Administration of Criminal Justice Law Anambra State 2010.
[15] Section 169 (1) Administration of Criminal Justice Law Anambra State 2010.
[16] Section 169 (2) Administration of Criminal Justice Law Anambra State 2010.
[17] Section 172 Administration of Criminal Justice Law Anambra State 2010; See now section 161 Administration of Criminal Justice Law Anambra State 2022.
[18] Section 77 (a) and 230 Administration of Criminal Justice Law Lagos State 2015.
[19] Section 157(3) Administration of Criminal Justice Law Anambra State 2022.
[20] Sections 109 (a) and 110 (1) (b) of Administration of Criminal Justice Act, 2015; Sections 126 (a), 127(1) (b) Administration of Criminal Justice Law Kano State, 2019.
[21] See section 129 (6) (f) Administration of Criminal Justice Law Kano State 2019;
[22] See section 129(8) Administration of Criminal Justice Law Kano State 2019.
[23] Section 129(9) Administration of Criminal Justice Law Kano State 2019.

no case has been made against the defendant, the defendant will be discharged.[24] However, where the magistrate finds that a case has been made against the defendant that will require him to enter upon his defence, the magistrate will frame a formal charge against the defendant.[25]

4. Methods of Commencing Criminal rosecution in the High Court in the North, South and Federal Capital Territory Abuja

The only acceptable method of commencing criminal proceedings in the High Court in Anambra State, other States in the South and in the North is by filing Information.[26] In all jurisdictions consent of the High court judge is not required to file information.[27]

5. The Attorney- General

The office of the Attorney-General of the Federation and the Attorney- General of the State are created by the Constitution of the Federal Republic of Nigeria.[28] They are the Chief Law officers of the Federation and of the States.[29] They also function as the Minister of Justice of the Federation and as Commissioner for Justice in the State level, thus acting as legal adviser to the Government. Consequently, at the Federal level there is the Federal Ministry of Justice and at the State levels the State Ministry of Justice. Section 150 of the constitution provides as follows:

(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 or perform the functions of 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 ten years.

Due to the sensitive nature of the Attorney- General's office, qualification for the occupant of the office is that such legal practitioner must have practiced law for a period not less than 10 (ten) years prior to the appointment.

It is noteworthy to state that criminal trials are territorial which has been captured in this latin maxim *lex non velet extra territiorum* which means that *a law is not valid outside its territory.*[30] Therefore the State Attorney -General is only empowered to prosecute offences that occurred within the territory of the State, that is, those offences created by House of Assembly of the State.[31] This power extends also to prosecution of categories of offences of which elements occurred partly in another State as seen in the case of **Njovens v State**[32]being an exception to the

[24] Section 112 Administration of Criminal Justice Act, 2015.

[25] Section 129 (10) Administration of Criminal Justice Law Kano State 2019; Section 112(10) Administration of Criminal Justice Act 2015.

[26] See section 77 (1)(b) (i) Administration of Criminal Justice Law Lagos State 2015; Section 109 (b) Administration of Criminal Justice Act 2015; Section 126 (b) Administration of Criminal Justice Law Kano State 2019.

[27] Section 77 (1) (b) of ACJL; Section 109 Administration of Criminal Justice Act, 2015; Section 126 (b) Administration of Criminal Justice Law Kano State 2019.

[28] Sections 150 and 195 Constitution of the Federal Republic of Nigeria,1999 for the Federal and the State respectively.

[29] *Ibid* sections 150(1) and 195 (1).

[30] See section 12(a) Criminal Code; Section 4 (1) Penal Code.

[31] Section 270 (1) 1999 Constitution of the Federal Republic of Nigeria (as amended).

[32] (1973) NNLR 76.

general rule.[33] This principle was also upheld in the case of **Mbah v State.**[34]Having established that criminal trial is territorial, the question therefore is whether the Attorney -General can prosecute a suspect in the State Court where no element of the offence occurred, only that the suspect after committing the offence in a different State enters the State. It is submitted that the Attorney- General in which State he entered can prosecute him based on the provision of section 12A (2)(b) of the Criminal Code which clearly provides that *if that act or omission occurs elsewhere than in the state, and the person who does that act or makes that omission afterwards comes into the state, he is by such coming into the state guilty of an offence of the same kind and he is liable to the same punishment, as if the act or omission had occurred in the state and he had been in the state when it occurred.*[35]

5.1 Powers of the Attorney -General

The constitution having created the office of the Attorney-General did not leave the Attorney-General without responsibilities and powers as it proceeded to confer certain powers on the Attorney-General. The constitution provides:[36]

(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 judgement 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.

The above constitutional provision is clear and unambiguous, thus by the literal rule of interpretation established in the case of **Nigerian Army v Abuo**[37] the section confers certain powers upon the Attorney-General regarding the Nigerian Criminal Justice System. Virtually all the criminal procedural laws of States in Nigeria acknowledge the untrammelled powers of the Attorney-General. Section 70 Administration of Criminal Justice Law of Lagos State[38] provides as follows:

> *"Where any person other than the Attorney-General of the State initiates or prosecutes in any criminal proceedings for an offence against the law of a State on*

[33] See section 12 (2) (a) Criminal Code.
[34] (2014) 235 LRCN 1.
[35] Ibid *Njovens v State*
[36] Sections 174 and 211 of 1999 Constitution of the Federal Republic of Nigeria (as amended) for Attorney General of the Federation and of the State.
[37] (2022) 12 NWLR (Pt. 1844) 349 at 367.
[38] Administration of Criminal Justice Law Lagos, 2015.

> *behalf of the State or where any public officer initiates or prosecutes in his official capacity in any such criminal proceedings, such person or public officer shall initiate or prosecute such case subject to such general or specific direction as may be given by the Attorney-General of the State".*

Similarly, section 270 (1) of Administration of Criminal Justice Law Kano[39] provides:

> *"Where a private legal practitioner prosecutes on behalf of the Attorney-General or a public officer prosecuting in his official capacity in any criminal proceedings, the private legal practitioner or public officer shall prosecute subject to such directions as may be given by the Attorney-General".*

These powers have been recognized in plethora of cases and most recently in the Supreme Court case of **Obijiaku v Obijiaku.**[40]The powers are as follows:

5.1.1 Power to Institute Criminal Proceedings

The power conferred on the Attorney -General of the Federation or of the State to institute criminal proceedings against any person in any court excluding a Court Martial is absolute and unfettered.[41] In **Abacha v State**[42]the Supreme Court held that it is at the discretion of the Attorney-General to charge some offenders and decline to charge others. Thusthe Attorney-General, in the exercise of his power to institute criminal proceeding against any person reserves the discretion to elect whether or not to prosecute, and against whom to prosecute.

It follows that the office of the Attorney-General is a corporation sole and accordingly in the absence of an incumbent Attorney-General the law officers in the Ministry of Justice are empowered by law to institute proceedings.[43] This principle was approved by the Supreme Court in the case of **Saraki v Federal Republic of Nigeria**[44]when it held that it is immaterial that when the action was instituted there was no Attorney-General in office.

5.1.2 Power to Take over and Continue Criminal Proceedings

The Attorney-General is conferred with an unlimited and unfettered power to take over and continue criminal proceedings.[45] In so doing it is immaterial that the proceedings were not commenced by the Attorney-General. In **Amadi v Federal Republic of Nigeria**[46] the Supreme Court held that the Attorney-General of the Federation or the State as the case may be is clothed with the power to take over and continue any criminal proceedings instituted by any other authority or persons in Nigeria or the State.[47] In so doing, it does not matter whether or not the prosecutorial agency is the only agency statutorily empowered to prosecute such offence. The Attorney-General as the Chief Law Officer does not have to proffer reason to any judicial officer or authority as to

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[39] Administration of Criminal Justice Law Kano, 2019; See also section 268(1) Administration of Criminal Justice Act, 2015.
[40] (2022) 17 NWLR (Pt. 1859) 377 at 400.
[41] See sections 174 (1)(a) and 211 (1)(a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
[42](2002) 11 NWLR (Pt. 779) 437 at 499; *Baguda v Federal Republic of Nigeria* (2004) 1 NWLR (Pt. 853) 183.
[43] See sections 174 (2) and 211 (2) 1999 Constitution of the Federal Republic of Nigeria (as amended).
[44](2016) 3 NWLR (Pt. 1500) 531 @ 581.
[45]174(1)(b) and 211 (1)(b)1999 Constitution of the Federal Republic of Nigeria (as amended).
[46] (2008) 18 NWLR (Pt. 1119) 259 @ 276.
[47]*Amaefule v State* (1988) 2 NWLR (Pt.75) 156.

his motivation to take over the proceedings.[48] It is also instructive to note that upon the taking over of the case from any other authority hitherto prosecuting, the Attorney-General reserves the right to elect whether or not to continue with the case or to re-assign the case to a private legal practitioner.[49] Consequently, no action can be maintained against the Attorney-General to compel him to continue with the prosecution of the case. It is instructive to note that the Attorney-General's power to take over and continue the prosecution can be exercised by officers in his department whether or not there is an incumbent Attorney-General in office.[50]

5.1.3 Power to Discontinue Criminal Proceedings

This is the most radical power possessed by the Attorney-General and known in legal parlance as ***"NOLLE PROSEQUI"*** which means that the State shall no longer prosecute.[51] Section 174 (1) (c) of the Constitution[52]empowers the Attorney-General: 'to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person'. By the literal interpretation of the section under reference the entry of the application to discontinue the criminal proceedings must be made before the delivery of judgment by the court. It follows therefore that the application to discontinue the criminal proceedings may also be made on the day scheduled for the delivery of the judgment provided that the judgment has not been delivered or that the court has not started reading the judgment. This is different from the principle established in the case of **Newswatch Communications Ltd. V Atta[53]**wherein the Supreme Court held that an application to arrest a judgment of the court about to be delivered is alien to the rules of court.

The power of the Attorney-General to discontinue criminal proceedings is only available at the trial court and not on appeal. The Attorney-General cannot exercise this power before the appellate court. Appellate court in this instance could be the State High Court sitting on appeal from judgments of Magistrates' court in the State.

The power of the Attorney-General to discontinue criminal proceedings going by the section under reference is not subject to judicial review. The Attorney-General is not obliged to give reasons to the judicial officer why the application was made as it is subjective and within the discretion of the Attorney-General. This principle was upheld by the Supreme Court in the case of **State v Ilori.**[54] Therefore it is not within the discretion of the court to consider the propriety or otherwise of the application for discontinuance.

6. The prosecutorial powers of agencies empowered to prosecute criminal offenses in Nigeria

Criminal prosecution in Nigeria is the primary duty of the Attorney-General of the Federation and of the States respectively.[55] They are regarded as the chief law officers of the Federation and of the State. Section 150 (1) of the Constitution establishes the office of the Attorney-General and

[48] See sections 174 (1) (b) and 211 (1) (b) 1999 Constitution of the Federal Republic of Nigeria (as amended).
[49] See section 268 (1) Administration of Criminal Justice Act, 2015; Section 121 (2), 123 (1) (b) Administration of Criminal Justice Law Kano, 2019.
[50] See section 4 Law Officers Act,Cap L8 Laws of the Federation of Nigeria 2004.
[51] See sections 174 (1) (c) and 211 (1) (c)1999 Constitution of the Federal Republic of Nigeria (as amended).
[52]*Ibid.*
[53] (2006) 12 NWLR (Pt. 993) 114 SC.
[54](1983) 2 S.C. 155; *Audu v Attorney General of the Federation* (2013) ALL FWLR (Pt. 667) 607.
[55] See sections 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

provides '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' while section 195(1) provides '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'. Consequently, the Attorney-General is clothed with radical powers in relation to criminal prosecutions in Nigeria above any other authority or agency. In the recent Supreme Court case of **Sani v State*[56]*** the apex court held that the Attorney-General is the ultimate authority and custodian of the powers of the State to prosecute.

It is submitted that other prosecutorial agencies and or authorities like the Nigeria Police,[57] National Drug Law Enforcement Agency, the Economic and Financial Crimes Commission,[58] Independent and Corrupt Practices Commission,[59] the officers of the Nigerian Customs, and Private persons[60] etc. exercise such prosecutorial powers subject to the overriding power of the Attorney-General.[61] For instance, section 66 of the Police Act[62] provides:

> *"(1) Subject to the provisions of sections 174 and 211 of the Constitution and section 106 of the Administration of Criminal Justice Act which relates to the powers of the Attorney-General of the Federation and of a State to institute, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria, a police officer who is a legal practitioner, may prosecute in person before any court whether or not the information or complaint is laid in his name.*
>
> *(2) A police officer may, subject to the provisions of the relevant criminal procedure laws in force at the Federal or State level, prosecute before any court those offences which non-qualified legal practitioners can prosecute".*

It will be observed that the section began with the phrase "subject to". What does the phrase mean in law? The courts in plethora of cases have interpreted it. The Supreme Court in the case of **Oloruntoba-Oju & Ors. VAbdul-raheem & Ors**[63]interpreted the phrase 'subject to' as follows:

> '*Whenever the phase "subject to" is used in a statute the intention, purpose and legal effect is to make the provisions of the section inferior, dependent on, or limited and restricted in application to the section to which they are made subject to. In other words the provision of the latter section shall govern, control and prevail over the provision of the section made subject to it. It renders the provision of the subject section subservient, liable, subordinate, and inferior to the provisions of the other enactment.'*

[56] (2023) 2 NWLR (Pt.1867) 77.
[57] Section 66 Police Act 2020.
[58]*Alao v Federal Republic of Nigeria* (2018) 10 NWLR (Pt. 1627) 284.
[59]*Commissioner of Police v Tobin* (2009) 10 NWLR (Pt. 1148)62 at 85.
[60] See sections 104 (2) and 106(b) Administration of Criminal Justice Act, 2015.
[61] See section 174 (1) (b) Constitution of the Federal Republic of Nigeria 1999 (as amended).
[62] Police Act 2020.
[63](2009) LPELR-2596(SC) at P.60, Paras B-E, per Adekeye J.S.C.

In a nutshell, the implication of the above provisions is that a Police officer whether or not he is a legal practitioner in the legal department of the Nigeria Police does not have a radical and untrammelled power over criminal prosecutions in Nigeria. The exercise of such prosecutorial power is subject to the power 'donated' to him by the Attorney- General under the CFRN (as amended) which can be withdrawn at any time and in any proceedings.[64]

7. The Power of Private Person to Prosecute

Under the Nigerian law, Private persons are empowered to prosecute criminal offenses in Nigerian courts. It is submitted that there are three categories of Private Persons with powers to prosecute under the Nigerian Criminal Laws, viz:

7.1 A person who is not a legal practitioner.[65]

A legal Practitioner means'a person entitled in accordance with the provisions of the Act[66] to practice as a barrister or solicitor, either generally or for the purposes of any particular office or proceedings'. For such person to be entitled to practice law in Nigeria as a barrister and solicitor, must do so if, and only if, his name is on the roll of legal practitioners kept at the Supreme Court.[67] Therefore any person whose name is not on the roll, is not a qualified legal practitioner in Nigeria. In **Ajibode v Gbadamosi**[68]the Supreme Court per Ejembi – Eko, held that:

> *"By section 2(1) of the Legal Practitioners Act, no person or institution other than that prescribed in the Act shall be allowed to practice as legal practitioner in Nigeria. And section 24 of the said Act states that "legal practitioner"means a person entitled in accordance with the provisions of the Act to practice as a barrister or solicitor, either generally or for the purposes of any particular office or proceedings. The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner in Nigeria, he must have his name on the roll of legal practitioners, otherwise, he cannot engage in any form of legal practice including the signing of legal documents for use in court. In this case, the originating process was signed by Chief Toye Coker & Co. a law firm, and not a legal practitioner on roll of legal practitioners in Nigeria".*

The implication of the above decision is that only a natural person not an artificial person[69] that can practice law in Nigeria provided his name is on the roll and accordingly a law firm is not qualified to practice law in Nigeria. A Private person can prosecute subject to such Information being endorsed by a law officer.[70]

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[64] See section 174 (3), 211 (3) CFRN 1999 (as amended).

[65] See section 381(d) Administration of Criminal Justice Act, 2015; Section 254 Administration of Criminal Justice Law, Lagos State 2015.

[66] Section 24 Legal Practitioners Act Cap L11 Laws of the Federation of Nigeria, 2004.

[67] See section 2 Legal Practitioners Act Cap L11 Laws of the Federation of Nigeria, 2004; *O'bau Engr. Ltd v Almasol* (2022) 16 NWLR (Pt. 1855) 35 SC.

[68] (2021) 7 NWLR (Pt. 1776) 475 at 482 – 484, *Okafor v Nweke* (2007) 10 NWLR (Pt 1043) 531

[69]*Salomon v A. Salomon & Co. Ltd*. (1897) A.C 22.

[70] See section 254 Administration of Criminal Justice Law Lagos 2015.

7.2 Private legal practitioner acting without a *Fiat* of the Attorney-General.[71]

For such private legal practitioner to file information before the court and be entitled legally to appear before the court, the information must be endorsed by the Attorney-General of the Federation/State or a law officer acting on his behalf stating that he has seen the information and has declined to prosecute the offence set out in the information.[72] Such legal practitioner must enter into a recognizance for a fixed sum to be fixed by the court with a surety to conduct diligent prosecution from commencement to conclusion of the case and apply to the Attorney-General to grant consent to prosecute. Such consent where it will be refused must be communicated to the private legal practitioner within fifteen (15) working days from the date the Attorney-General received the application.[73] It should be stated that in Kano State, a private person cannot prosecute but can only make a Complaint.[74]

7.3 Private legal practitioner acting with the *Fiat* of the Attorney-General.[75]

The law empowers the Attorney-General of the Federation and of the State as the case may be to authorize any other person to exercise any or all the powers conferred on him.[76] In this regard the legal practitioner is in possession of a document authorizing him to represent the office of the Attorney-General for purposes of such proceedings. In **State v Ughanwa**[77] the Court of Appeal on the meaning of a *fiat* held that it is a Latin word which means 'let it be done' denoting the grant of power on another by a person having complete authority on the issue upon which the *fiat* is given in matters of prosecution'. In **Federal Republic of Nigeria v Adewunmi**[78]the Supreme Court acknowledged the discretion and power of the Attorney-General to donate his prosecutorial powers to private legal practitioners to prosecute criminal offenses on his behalf. It has been held also on the life span of a *fiat* that a *fiat* issued by the Attorney-General to a private legal practitioner extends to the right or power to commence an appeal emanating therefrom by the legal practitioner until the right of appeal is exhausted. In **State v Okoye**[79]the Court of Appeal held that the *fiat* covers the prosecution of the matter in any court of law at all levels and includes an appeal, especially since an appeal is not an inception of a new case but a continuation of the original suit. However, the researchers opines that the wordings of the *fiat* must be taken into consideration to determine whether it covers the entire proceedings from trial court to an appeal court or limited to a specific trial only and in any particular court as seen in the case of **Emeakayi v Commissioner of Police**.[80]

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[71] See sections 383 and 384 of the Administration of Criminal Justice Act, 2015; *Commissioner of Police v Tobin* (2009) 10 NWLR (Pt. 1148) 62 at 94.

[72]*Ibid* section 383 of the Administration of Criminal Justice Act, 2015; Section 254 Administration of Criminal Justice Law Lagos, 2015.

[73]*Ibid* section 383 (1) (2) of the Administration of Criminal Justice Act, 2015.

[74] See Sections 106, 107, 129 (4) Administration of Criminal Justice Law Kano, 2019.

[75]See section 104(2) Administration of Criminal Justice Act, 2015; Sections.121(2), 377(c) Administration of Criminal Justice Law Kano 2019; Section 70 Administration of Criminal Justice Law, Lagos 2015.

[76]*Ibid* section 104 (2) Administration of Criminal Justice Act, 2015; Sections.121(2), 377(c) Administration of Criminal Justice Law Kano 2019; Section 70 Administration of Criminal Justice Law, Lagos 2015.

[77] (2020) 3 NWLR (Pt.1710) 22.

[78](2007) 10 NWLR (Pt. 1042) 399.

[79] (2007) 16 NWLR (Pt. 1061) 607.

[80] (2004) 4 NWLR (Pt. 862) 158.

8. The Holding of the Supreme Court in Obijiaku v Obijiaku (2022) 17 NWLR (Pt. 1859) 377.

In the above case under reference the Supreme Court was faced with a major question as to 'whether a private legal practitioner can prosecute a criminal complaint/charge at the Magistrate Court of Anambra State without the *fiat* of the Attorney-General of the State'. The respondent initiated a Private Complaint against the Appellant at the Magistrate Court of Anambra State, Nnewi for alleged defamation of their character contrary to section 325 of the criminal code of Anambra State. The appellant was summoned to appear on 29th July 2016 for arraignment. He filed a motion on 28th July 2016 challenging the jurisdiction of the court and praying that the Summons be quashed. When the matter came up at the trial Magistrates' Court for the first time, appellant was absent. His counsel informed the court that he was arrested by the defendant. The respondent counsel denied knowledge of such arrest and applied for bench warrant. The court was also not informed of the pendency of the motion filed by appellant challenging the jurisdiction of the court and accordingly it was not moved neither was it ruled on. The appellant counsel raised objection to the appearance of the respondent counsel when he announced appearance on the ground that as a private legal practitioner the counsel lacks the power to prosecute a criminal matter in Anambra State without the *fiat* of the Attorney-General of the State. The Court overruled the objection and issued bench warrant for the arrest of the appellant for failing to appear before the court on the said date having been served with summons.

Appellant's appealto the High Court was dismissed. The appellant further appealed to the Court of Appeal. The Court of Appeal refused to rule on the application seeking to quash the summons for lack of jurisdiction stating that since the trial court did not hear the motion and its attention was not drawn to it, it cannot be an issue in the appeal and dismissed the appeal while setting aside the bench warrant. Dissatisfied, appellant approached the Supreme Court which also dismissed the appeal. The Supreme Court held that by virtue of section 301 of Administration of Criminal Justice Law Anambra State 2010 that both the complainant and defendant shall be entitled to conduct their respective cases in person or by a legal practitioner without the *fiat* of the Attorney-General and that there is no conflict between section 211 of the Constitution and section 301 of Administration of Criminal Justice Law Anambra State. The court further held that section 77 Magistrates Court Law Cap 88 Revised Laws of Anambra State[81] which provides for persons authorized to conduct cases for the State is inferior to the specific provision of section 301 of Administration of Criminal Justice Law Anambra State.

9. Implications of the Holding of the Supreme Court in Obijiaku v Obijiaku.

The decision of the Supreme Court in the above case undermines the principle of law that a criminal case is between the State and the assailant or defendant. This principle has been established in a long line of cases.[82]. A wrong to an individual or a citizen is deemed as a wrong to the State. In **Commissioner of Police v Tobin**[83]the Court of Appeal held as follows:

[81] See section 69(1) High Court Law of Anambra State which provides 'Subject to this section in the case of prosecution-(a) by or on behalf of the State, or (b) by a Public Officer in his official capacity, the State or that public officer may be represented by (i) a law officer (ii) Police officer; or (iii) a legal practitioner duly authorized in that behalf by the Attorney General, or in revenue cases authorized by the head of the department concerned".

[82] See *James V Okereke* (2008) 13 NWLR (Pt. 1105) 554; *Rabiu v State* (1980) 8-11 SC 130.

[83] (2009) 10 NWLR (Pt. 1148) 62 at 85.

> *"Under the Nigerian adversarial judicial system, criminal matters are generally between the State (which symbolises the people) and the accused person involved. Thus, any commission of a crime against the citizen of the State is deemed to have been perpetrated against the State itself. The State as the supreme protector of the citizens' lives and properties imposes upon itself the fundamental duties of not only apprehending, but also prosecuting offenders before a court of law. Such a power is invariably delegated by the State to specific agencies and officers like the Attorney-General of the Federation and of a State, the Police, the Economic and Financial Crimes Commission, the Independence Corrupt Practices Commission, etc".*

The implication therefore is that an individual cannot commence a criminal matter on its own without recourse to the State, that is, the Attorney-General of the State being the Chief Law officer; else it will open a flood gate of phantom criminal cases that the court cannot control and attendant abuse of the same by legal practitioners. This is a marked difference between criminal wrong and civil wrong where a private citizen has an untrammelled right to commence matters in court by filing necessary originating processes without the consent of anyone.

The holding of the Supreme Court also neglects the principle that the Attorney-General is in control of criminal matters in the State and can delegate his power to any person. This is confirmed by Section 211 of the Constitution which provides as follows:

"(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 judgement 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 b him in person or through officers of his department.

(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 holding by the Supreme Court in *Obijiaku's* case that a Private person or a Private legal practitioner can commence and prosecute a private complaint without the fiat of the Attorney-General of the State pursuant to section 301 of ACJL of Anambra State 2010, we submit with respect, conflicts with section 211 CFRN. We submit that it undermines the principle that if any other law is inconsistent with the constitution that other law shall to the extent of the inconsistency be void. Section 1 of the CFRN provides:

"(1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void".

For avoidance of doubt, section 301 (1) of the Administration of Criminal Justice Law of Anambra State[84] provides '*both the Complainant and the Defendant shall be entitled to conduct their respective cases in person or by a legal practitioner'*. The side note to the section reads 'counsel for complainant and for defendant'. The provision of section 301 above was retained in section 290 (1) of the new law[85] with slight changes to the side note which now reads 'access to legal representation'. However, the constitution in section 36 (6) (c) provides on the right to legal representation that 'every person who is charged with a criminal offence shall be entitled to defend himself in person or by a legal practitioner of his own choice'. The implication therefore is that the constitution never envisaged that a private citizen could commence criminal case in Nigerian court without recourse to the Attorney-General or other prosecutorial agencies. Consequently, any provision of any law negating the radical powers conferred on the Attorney-General over criminal prosecution in Nigeria ought to and must be declared void. The same Supreme Court in **Udeogu v Federal Republic of Nigeria***[86]*had struck down the provisions of section 396 (7) of the Administration of Criminal Justice Act[87] for being inconsistent with provisions of section 253 of the constitution.[88] It is submitted that section 301 (1) Administration of Criminal Justice Law of Anambra State 2010 upon a strict interpretation usurped the powers of the Attorney-General regarding criminal prosecution in Nigeria and ought to be declared void by the apex court as in *Udeogu's* case.

Nevertheless, for a Private Person to prosecute a private complaint, we submit that such criminal complaint must have been reported to the Nigeria Police for investigation. Without investigation, possible evidence with which such offence will be tried, and conviction achieved will be unavailable. It is submitted that the Magistrate cannot be the investigator and at the same time the adjudicator, else discretion will be fettered, and the principle of fair hearing destroyed.[89]

10. Legislative amendment of the Supreme Court case of Obijiaku v Obijiaku.

To underscore our point regarssding the implications of the holding of the Supreme Court in the case under reference, the Anambra State House of Assembly (Legislature) in recognition of this *lacuna* in the repealed Administration of Criminal Justice Law Anambra State 2010, have inserted a new provision recognizing the overriding prosecutorial powers of the Attorney-General of the State. The sub section provides in section 157 (3)[90] as follows:

> *"A valid complaint made by a private person under sub section (1) of this section may be filed in court and when so filed shall be accompanied by:*
>
> (a) A certificate by the Attorney-General indicating unwillingness to prosecute; and

[84] Administration of Criminal Justice Law Anambra State 2010.
[85] Administration of Criminal Justice Law Anambra State 2022.
[86] (2022) 3 NWLR (Pt. 1816) 41.
[87] Administration of Criminal Justice Act, 2015.
[88] Constitution of the Federal Republic of Nigeria 1999.
[89] Section 36(1), (4) Constitution of the Federal Republic of Nigeria 1999; *Umar v Onwudine* (2002) 10 NWLR (Pt.774) 129.
[90] Administration of Criminal Justice Law Anambra State 2022.

(b) Evidence that the complaint was made to the Police and investigated".

Furthermore, section 160 (3)[91] provides that "All complaints made to the Magistrate directly under this section shall first be referred to the Police for investigation before the court takes any action."

The combined effect of the two provisions above are that there is now a condition *sine qua non* before a private complaint may be made to the Magistrate and prosecuted by the private person or his legal practitioner in Anambra State thereby recognizing the power of the Attorney-General as the lord over criminal prosecution in Nigeria which inevitably has now modified the principle in the case of **Obijiaku v Obijiaku**.[92]In the new law any application to a Magistrate by a private person to prosecute a private complaint must be accompanied by evidence showing that such complaint was hitherto made to the Police and that it was investigated. Also, the application must be accompanied by a certificate by the Attorney-General stating its unwillingness to prosecute the alleged offence. Where these conditions are not fulfilled by the applicant, the private complaint will not be accepted.

11. Right to file Information by a Private Person under the Nigerian Criminal Law

We are not unmindful of the general position of the law which is that any individual may make an allegation against any other person who is said to have committed an offence unless it appears that the law upon which the allegation is predicated provides that only a particular person or class of persons can make such allegations. This simply provides for the power of prosecution by a private individual subject to certain restrictive provisions of any enactment or law. Reference is made to the provisions of section 254 of Administration of Criminal Justice Law of Lagos State[93] which empowers a private person to file Information. The section provides:

> "T*he Chief Registrar of the High Court shall receive an information from a private person if—*
>
> *(a) it has endorsed on a certificate by a Law Officer to the effect that he has seen such information and declines to prosecute at the public instance the offence contained in the information; and*
>
> *(b) such private person has entered into a recognisance in the sum of ten thousand Naira (N10, 000:00) together with one surety to be approved by the Chief Registrar in the like sum, to prosecute the information to conclusion and to pay such costs as shall be ordered by the Court, or, in lieu of entering into such recognisance, to deposit the said sum in Court to abide by the same conditions".*

The above section is on all fourswith section 223 of the Administration of Criminal Justice Law of Anambra State 2010 and now section 212 of the Administration of Criminal Justice Law of Anambra State 2022 on the right of a Private person to file information. The only difference is that in the new Anambra State law, it is the Attorney-General that will endorse and not a law officer.

It is an inexorable inference from the above that for a private person to file a private information based on the above provision in Lagos, such person must show or exhibit before the Chief Registrar of Lagos State High Court the endorsement of a Law Officer in the Lagos State Ministry of Justice

[91] *Ibid.*
[92] (2022) 17 NWLR (Pt. 1859) 377.
[93] Administration of Criminal Justice Law Lagos State 2015.

stating that they have seen such information but declines to prosecute based on the interest of the public. This is the first hurdle that must be crossed before such Information may be received by the registrar before other conditions will be applied.

Similarly, section383 (1) of the Administration of Criminal Justice Act[94] provides thus:

> *"(1) The registrar shall receive an information from a private legal practitioner where:*
> *(a) the information is endorsed by the Attorney-General of the Federation or a law officer acting on his behalf stating that he has seen the information and has declined to prosecute the offence set out in the information; and*
> *(b) the private legal practitioner shall enter into a recognizance in:*
> *(i) such sum as may be fixed by the court, with a surety, to prosecute the information to conclusion from the time the defendant shall be required to appear,*
> *(ii) pay such costs as may be ordered by the court, or*
> *(iii) deposit in the registry of the court, such sum of money as the court may fix".*

The above provisions are in agreement with sections174 and 211 of the Constitution relating to the power of the Attorney-General of the Federation and States respectively to control criminal prosecution. This is to create a restriction against abuse by private persons and legal practitioners though under the Administration of Criminal Justice Act a private person cannot prosecute.

12. Conclusion

The Attorney-General's power over the control of criminal proceedings and prosecution in Nigeria is constitutionally guaranteed. Consequently, any criminal prosecution in Nigeria by any agency or private person must flow from the powers conferred upon the Attorney-General. In *Obijiaku's* case, the Supreme Court in an attempt to accommodate the right of a private person to lay a private complaint and prosecute same under the ACJL of Anambra State 2010 overlooked the constitutional powers of the Attorney-General over criminal prosecution in Nigeria pursuant to sections 174 and 211 of the CFRN. It is our submission that a private person even though he has the right to make a private complaint, prosecution of the complaint must be with the manifest consent of the Attorney-General. Accordingly, any other law to the contrary must and ought to be declared null and void in line with section 1 (3) CFRN 1999. In recognition of this untrammelled power, the Anambra State House of Assembly in section 157 (3) ACJL 2022 repealed the 2010 law by making it a condition precedent that the complaint filed by the private person must be accompanied with a certificate from the Attorney-General indicating his unwillingness to prosecute. It is submitted that without this amendment, an unrestricted power in private persons to commence and prosecute criminal cases will lead to an abuse of the process with attendant consequences. It is hoped that the Supreme Court will review its decision in *Obijiaku* when another opportunity arises.

[94] Administration of Criminal Justice Act 2015.