NOLLE PROSEQUI IN GHANA: REFLECTIONS OF CRIMINAL JUSTICE PRACTITIONERS

Samuel Opoku-Agyakwa†

ABSTRACT

At common law, when a prosecutor enters a nolle prosequi, there is no requirement to explain or judicial review of the decision. Ghana follows the common law, although some common law jurisdictions, including India, Kenya, Nigeria, and the United Kingdom, have gravitated away from the common law on nolle prosequi. These countries have made the process of entering nolle prosequi transparent, victim-centred and in some cases subject to judicial scrutiny. In this article, I collect and discuss the views of 52 criminal justice practitioners (defence lawyers, judges, and prosecutors) on Ghana's nolle prosequi law. Seventy-five per cent of them want the Attorney-General's nolle prosequi power to be subject to judicial oversight. The respondents' views suggest mistrust between prosecutors and defence lawyers regarding how the Attorney-General enters a nolle prosequi, with the majority of defence lawyers indicating that partisan considerations influence the exercise of this prosecutorial discretion. I identify the benefits of infusing transparency and accountability in exercising this power while advocating for judicial oversight over how a nolle prosequi is entered and for the Ghanaian taxpayer to compensate victims when there is evidence that a prosecution and nolle prosequi were initiated or entered, arbitrarily, capriciously illegally, unfairly, or out of dislike.

Keywords: Nolle Prosequi, Judicial Oversight, Judicial Scrutiny, Transparency, and Accountability

†Samuel Opoku-Agyakwa, PhD, M.Phil. (Walden University); MSc., (University of Maryland); L.L.M (Robert Gordon University); M.A., L.L.B (University of Ghana); QCL (Ghana); Judicial Affairs Officer, United Nations. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations. Contact the author via email: samagyakwa@gmail.com.

1 INTRODUCTION

At common law, an Attorney-General or their equivalent has the power to enter a *nolle prosequi* as part of exercising their prosecutorial authority, and this power is not subject to judicial review.[1] *Nolle prosequi* originated in England as a tool available to the Crown's appointed Attorney-General to halt criminal proceedings deemed not in the Crown's interest or frivolous.[2] Private individuals prosecuted in England during that era, so the Crown created and used *nolle prosequi* to control prosecutions.[3] The first recorded instance of resort to this common law arbitrary tool dates back to 1555.[4] Many common law jurisdictions, including the United Kingdom, have modified the common law approach to entering a *nolle prosequi*.[5] Ghana continues to adhere to the common law approach, despite having a Constitution that emphasises transparency and accountability in how government business is conducted.

In Ghana, the Attorney-General's power to enter nolle prosequi is set out in section 54 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30).[6] The Attorney-

[1] *R v. Comptroller-General of Patents* (1899) 1 Q.B 909

[2] Rebecca Krauss, 'The Theory Of Prosecutorial Discretion In Federal Law: Origins And Developments,' (2012) 6 Seton Hall Circuit Review 17 < https://scholarship.shu.edu/circuit_review/vol6/iss1/1> accessed 3 May 2023.

[3] ibid, 18

[4] Gambo Abdulsalam 'A Critique of the Powers of the Attorney General in the Administration of Criminal Justice in Nigeria' (LLM Thesis, Ahmadu Bello University 2015) citing Michael Ajomo, 'Nolle Prosequi; An Unquestionable Tool in the Hand of Attorney General' in Yemi Osibanjo (ed), *Towards Better Administration of Justice in Nigeria*, (vol 4, Federal Ministry of Justice 1990)17

[5] I have had the opportunity to set out Ghana's nolle prosequi law in an article entitled *Ghana's jurisprudence and judicial genuflection on the Attorney-General's nolle prosequi power: Learning from other jurisdictions.* Submitted to the Editor of the UGLJ for consideration for publication.

[6] It states that: (1) In a criminal case, and at any stage of a criminal case before verdict or judgment, and in the case of preliminary proceedings before the District Court, whether the accused has or has not been committed for trial, the Attorney-General may enter a nolle prosequi, by stating in Court or by informing the Court in writing that the Republic does not intend to continue the proceedings. (2) Where the Attorney-General enters a nolle prosequi under subsection (1), (a) the accused shall be discharged immediately in respect of the charge for which the nolle prosequi is entered, or (b) the accused shall be released where the accused has been committed to prison, or (c) the recognisances of the accused shall be discharged where the accused is on bail. (3) The discharge of the accused shall not operate as a bar to subsequent proceedings against the accused in respect of the same case. (4) Where the accused is not before the Court when the nolle prosequi is entered, the Registrar or Clerk of the Court shall ensure that notice in writing of the entry of the nolle prosequi is given to the keeper of the prison in which the accused is detained and where the accused has been committed for trial, to the District Court by which the accused was committed. (5) The District Court shall cause a similar notice in writing to be given to a witness bound over to prosecute and to the sureties, and also to the accused and the sureties of the accused where the accused has been admitted to bail.

General may enter a *nolle prosequi* at any stage of criminal proceedings before judgement or verdict, and during Committal Proceedings before a Committal Order is made, and in a trial, before a verdict or judgement.[7] Where a *nolle prosequi* is entered during Committal Proceedings, the accused is discharged.[8] In a trial, if a *nolle prosequi* is entered before the prosecution closes its case, the accused is discharged.[9] If it is entered after the prosecution has closed its case, the accused is acquitted.[10] Like the common law, Ghana's Attorney-General is not required to explain the decision to enter a *nolle prosequi* and even worse, the practice is that the decision is not amenable to judicial scrutiny. This position of Ghanaian law was recently expressed in the Supreme Court decision in Afoko v. The Attorney-General.[11] The plaintiff, in that case, was being prosecuted for murder and had closed his defence. Following this, the judge adjourned the case for the prosecution and defence to file their addresses. The judge intended to set a date after the addresses were filed for the summing up and the jury's verdict. However, the Attorney-General entered a *nolle prosequi* after the case's adjournment and then re-arraigned the plaintiff and another person for fresh Committal Proceedings. Aggrieved by the Attorney-General's decision, the plaintiff, invoked the Supreme Court's original jurisdiction to determine the fairness of the Attorney-General's *nolle prosequi* in the light of articles 11(7) and 296, especially clause (c) of Ghana's Constitution. Among other things, the plaintiff sought a declaration that the defendant's *nolle prosequi* decision was inconsistent and a violation or infringement of articles 23 and 296 of the 1992 Constitution, hence, unconstitutional, null, and void.

The defendant challenged the competence of the plaintiff's writ, arguing that the writ did not properly invoke the Supreme Court's original jurisdiction. The defendant urged the Court to dismiss the writ, arguing that the Attorney-General's exercise of the power to enter a *nolle prosequi* is authorised by the Constitution.

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[7] Act 30, s 54.
[8] ibid, s 59 (2) (a).
[9] ibid, s 59 (2) (i).
[10] Austin Amissah *Criminal Procedure in Ghana*, (Sedco Publishing Limited 1981) 22
[11] [2018-2019] 1 GLR 1 141.

The issues before the Court were whether the plaintiff had properly invoked the Court's original jurisdiction and whether the Attorney-General's power to enter a *nolle prosequi* is subject to articles 296 (c) and 11(7) of the Constitution. The Court dismissed the defendant's objection and, among others, held that the plaintiff's writ raised a legitimate issue in controversy relating to an alleged breach of article 296 (c). On the second issue, the Court observed on page 151 that:

> … counsel for plaintiff failed in his reliance on article 296 (a) and (b), which insist that such discretionary powers are exercised fairly and not arbitrarily, capriciously and biased. **The plaintiff did not in his statement of case properly make out a case of bias, unfairness, arbitrariness or capriciousness in the entry of *nolle prosequi* by the defendant** (emphasis added)**.** Indeed, from the processes filed in this case, the plaintiff failed to adduce any evidence or allege any conduct on the part of the defendant in the exercise of her mandate, that could be used to measure the standard set by article 296 (a) and (b) of the Constitution, 1992.

Speaking through Marful-Sau, JSC, the Court opined that the plaintiff had narrowed the Attorney-General's alleged violation to article 296(c), which requires that persons or authorities exercising discretionary power, other than judges or judicial officers, to publish Constitutional or Statutory Instruments indicating how they intend to exercise such power.

On pages 151-152, the Court also indicated that:

> The plaintiff only seemed aggrieved that the defendant exercised the right of *nolle prosequi* virtually at the end of his trial, but the defendant in so doing, acted within the law. The Criminal & Other Offences (Procedure) Act, 1960 (Act 30) by its section 54, gave the defendant the right to file *nolle prosequi* in a criminal trial at any time before the verdict or judgment. In the plaintiff's case, the *nolle prosequi* was entered, by his own account, before judgment. The defendant therefore did no wrong against the law, when she entered the *nolle prosequi*. The fact that plaintiff's trial was almost at the tail end, could not

> legally bar or restrain the defendant from exercising her right to enter *nolle prosequi*. Though, we sympathise with the plaintiff that his trial was not completed, but terminated as it were, for a new trial to begin, that in law does not amount to unfairness, arbitrariness, bias or capriciousness. **In effect, the plaintiff failed to show how, defendant breached article 296(a) and (b), of the Constitution**. (Emphasis added).

The Court also stated that the Attorney-General's *nolle prosequi* is akin to his/her power to prosecute and arises from his/her constitutional mandate under Article 88 (3). The Court, on page 152 of the judgement, agreeing with Akuffo-Addo CJ (as he then was) in Captan v. Minister of Interior,[12] took the view that any expectation that the Attorney-General must publish a Constitutional or Statutory Instrument anytime he/she decides to enter *nolle prosequi* would stifle the Attorney-General's mandate. In Akuffo-Addo CJ's words:

> There is a very loose sense in which it can be said that most decisions taken by ministers in the day to day performance of their ministerial duties involve the exercise of some discretion, and it is in this sense that the minister's act in revoking a residence permit may be said to involve the exercise of discretion. But can it be seriously argued that the exercise of discretion in this sense by ministers must comply with the requirements of article 173, and in particular, with article 173 (c) which requires that the minister shall 'make and publish Regulations… which shall govern the exercise of that discretionary power? The government could hardly govern if this were so…

In the Afoko case, the Supreme Court also cited with approval its earlier decision in Ransford France (No. 3) v. Electoral Commission & Attorney-General,[13] which reechoed Akuffo-Addo CJ's words in the Captan case, *supra*. The Supreme Court held that the Attorney-General's *nolle prosequi* power is not subject to article 296 (c). According to the Court, article 296 (c) applies only where quasi-judicial functions

[12] (1970) CC 35.
[13] [2012] 1 SCGLR 705.

are discharged by non-judicial officers when exercising discretionary power. On page 154 of the decision, the Court quoted Dr. Date-Bah, JSC in the Ransford France case (supra), at page 723, thus: -

> Restricting the scope of article 296 (c) by purposive interpretation is not equivalent to removing due process from the exercise of discretionary power. Clauses (a) and (b) of article 296 contain the standards for the application of such process. Those two clauses of article 296, read in conjunction with article 23, assure residents in Ghana of fairness and impartiality in administrative processes. Limiting the scope of the obligation to publish regulations before the exercise of discretionary power does not significantly impair due process in administrative powers in Ghana; rather it avoids the unravelling of the system of government as we have known it since 1969. The standard embodied in article 296 (c) may well offer a desirable benchmark for good practice and we commend it to those who exercise discretion to adhere to it whenever practicable, but non-compliance with it should not be treated as resulting in invalidity, for reasons already explained above.

The Supreme Court observed on page 154, that "… the plaintiff has had the right to subject the exercise of the discretion to the standard of fairness, impartiality, arbitrariness and capriciousness under article 296 (a) and (b) of the Constitution, 1992. The institution of this case itself by the plaintiff affirms this right to ensure due process as required under article 296 (a) and (b)."

The question of whether the Attorney-General's *nolle prosequi* decisions are subject to judicial review was not an issue before the Court in the Afoko case. However, it can be implied from the Court's judgement that when the Attorney-General enters a *nolle prosequi*, that decision is subject to judicial review under article 296 of Ghana's Constitution. I hold this opinion because the Court observed that the plaintiff had failed to properly make out a case of bias, unfairness, arbitrariness, or capriciousness in the Attorney-General entering a *nolle prosequi* in his case as required under article 296 (a) & (b). A logical consequence of this inference is that

when a nolle prosequi is entered, it must adhere to the standards enshrined in article 296 of Ghana's Constitution. A person who believes that the entering of a *nolle prosequi* fails the "Article 296 test" can seek redress in the court, by way of judicial review. Consequently, the exercise of the prosecutorial discretion to enter a *nolle prosequi* is subject to judicial oversight.

Before I proceed any further, it is apposite to discuss the constitutional foundations of, and highlight some judicial pronouncements on, judicial review in Ghana.

1.1 Ghana's Constitution, judicial review, and nolle prosequi

The constitutional basis of judicial review, in Ghana, is beyond doubt. For instance, article 141 of Ghana's Constitution provides that "[T]he High Court shall have supervisory jurisdiction over all lower Courts and any lower adjudicating authority, and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power." Secondly, article 23 provides that "[A]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or tribunal." Article 296 breathes life into articles 23 and 141 by providing the standards that public officers holders must adhere to in exercising their functions. Article 296 also serves as the yardstick for the Courts to measure the actions of these officers. It states that:

> Where in this Constitution or in any other law discretionary power is vested in any person or authority (a) that discretionary power shall be deemed to imply a duty to be fair and candid; (b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument,

regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power.

Based on articles 23, 141 and 296 of Ghana's Constitution, it is unassailable that all the actions and inactions of the Attorney-General as a public office holder must adhere to article 23 and pass the "Article 296 test" and anyone aggrieved by the said actions and inactions, including entering a *nolle prosequi*, are subject to judicial review under article 141.

1.2 Judicial Review in Ghana's Courts

In Republic v. High Court, Denu; *Ex Parte* Kumapley (Dzelu IV Interested Party),[14] Dr Seth Twum JSC stated, about judicial review being manifested in certiorari or prohibition, that "… these remedies have grown to be comprehensive remedies for the control of all kinds of administrative as well as judicial acts".[15] In Republic v. High Court, Sekondi, *Ex Parte* Ampong aka Akrufa Krukoko I (Kyerefo III and Others)—Interested Parties,[16] the Supreme Court noted at page 722 thus, "[A]n order of certiorari, …, is a discretionary remedy granted on grounds of excess of jurisdiction and/or some breach of rule of natural justice." This point was reechoed by the Court in Republic v. High Court, Accra; *Ex Pate Charge D' Affairs* Bulgarian Embassy.[17]

In Republic v Court of Appeal; *Ex Parte* Tsatsu Tsikata,[18] the Supreme Court held that the purpose of certiorari as a judicial review mechanism is to correct errors of law and not errors of fact. According to the Court, "…any perceived error was to be corrected by way of appeal since the judicial review process was to be used to correct mistakes of law apparent on the face of the record, not mistakes of fact."[19] In Republic v High Court, Kumasi; *Ex parte* Bank of Ghana & Others (Gyamfi & Others

[14] [2003-2004] 2 SCGLR 719.
[15] ibid, 737
[16] [2011] 2 SCGLR 716.
[17] Suit No. J5/34/2015 dated February 24, 2016.
[18] [2005-2006] SCGLR 612
[19] ibid, 614

– Interested Parties) (No 1),[20] Dotse JSC examined the considerations that will influence the courts to grant an application for certiorari and prohibition and stated on page 511, that:

> It is well settled that the Court would exercise its supervisory jurisdiction on the grounds of want or excess of jurisdiction, failure to comply with the rules of natural justice, breach of the Wednesbury Principle, namely that **an administrative action or decision would be subject to judicial review on the grounds that it was illegal, irregular or procedurally improper,** and the superior court must have made an error patent on the face of the record (emphasis added).

Instructively, Ackaah-Boafo J, (as he then was) in laying down the scope of judicial review In the Matter of the Minerals and Mining Act, 2006 (Act 703) and Others v. Minister for Lands and Natural Resources *Ex Parte* Exton Cubic Group and Attorney General (2018)[21] stated in paragraph 77 that "… in a judicial review, the Court's powers are limited to quashing and re-mitting only and nothing more. It cannot make consequential orders".

As per article 296, decisions made by public office holders while exercising discretionary power are subject to judicial scrutiny. In Enekwa & Others v. Kwame Nkrumah University of Science & Technology (KNUST),[22] the Supreme Court held that generally, a body performing a public function is amenable to judicial review. I contend that this an unimpeachable conclusion flowing from the Enekwa v. KNUST case *supra* is that public officers like the Attorney-General in performing public duties are subject to judicial review. On page 251, Anin Yeboah JSC (as he then was) speaking for the Court, stated that "[I]f it is established that there was abuse of any power vested in them in the discharge of their functions, judicial review should avail any member of the public who has suffered from such abuse." However, the Court cited with approval the works of De Smith, Woolf, and Jowell

[20] [2013-14] 1 SCGLR 477.
[21] JELR 65808 (HC).
[22] [2009] SCGLR 242

(1999 ed) entitled *Principles of Judicial Review*, where the learned authors gave examples of instances where an entity performing a public function may not be subject to judicial review. These instances occur when the parties agree to resort to other branches of the law to resolve their disputes, and secondly, when a contract between the parties implicitly or explicitly regulates how they resolve their conflicts. Outside these situations, the Court stated at page 251 that "… the courts are more than willing to grant judicial review in appropriate circumstances to redress administrative abuses." I am of the firm conviction that, no amount of legal ingenuity can legitimately and constitutionally bring the Attorney-General's *nolle prosequi* power under these exceptions.

That said, the following are evident from the authorities, regarding the purpose and scope of judicial scrutiny of administrative and judicial actions and inactions:

- First that, generally, a body performing a public function is amenable to judicial review, although there are exceptions—where parties agree to resort to other branches of the law to resolve their disputes, or where a contract between the parties regulates how they resolve their conflicts. In these situations, even though an entity is performing public functions, those functions might not be subject to judicial review.
- Secondly, judicial review is a remedy that seeks to regulate administrative and judicial acts of public officials in Ghana, and I daresay that these acts include the Attorney-General entering a nolle prosequi.
- Essentially, through an available judicial remedy, judicial review, is a discretionary judicial remedy; hence, the courts will not grant it automatically. Individuals who allege that their rights have been violated by the omissions and commissions of a public officer must demonstrate that these acts are grievous and central to the offending act or inaction.
- Rightly, the courts will intervene where the public officer holder has acted ultra vires and/or breached the rules of natural justice or the Wednesbury Principles.

- Significantly, the court's judicial review powers are circumscribed to quashing and remitting, i.e., they are prohibited from making consequential orders.

From the judicial decisions, it is evident that, faced with determining whether the Attorney-General's *nolle prosequi* power is subject to judicial review, Ghana's courts will answer in the affirmative. I have already asserted in this article and elsewhere that, in the Afoko case, Marful-Sau, JSC, observed that the plaintiff had failed to properly make out a case of bias, unfairness, arbitrariness or capriciousness in the Attorney-General entering a *nolle prosequi*. Implicitly, if the Court had determined otherwise, it would have pronounced on it, with the possibility that the pronouncement would have gone in the plaintiff's favour. Admittedly, given the minimal, although potent, scope of a court's powers in judicial review i.e., to quash and to remit, the Supreme Court, in the Afoko case **may** (emphasis mine) only have quashed the decision and not made any consequential orders. I used "may" because the Supreme Court cannot be bound by a High Court decision i.e., the *Ex Parte* Exton Cubic Group *supra*; and even if it was a Supreme Court decision, nothing bars the Supreme Court from departing from its previous decision. Most importantly, a careful review of the Ackaah-Boafo J decision, (as he then was) in *Ex Parte* Exton Cubic Group, reveals that he cited the Australian case of Attorney-General [NSW] v. Quin[23] to support this proposition. I must stress the point that, the circumscribed scope of a court's judicial review power could be further complicated and arguably worse in judicial scrutiny of nolle prosequi decisions in Ghana. This is because under article 88 of the Constitution, the decision to prosecute is the sole preserve of the Attorney-General. Hence, if in exercising his/her prosecutorial discretion, the Attorney-General elects to enter a nolle prosequi, can he/she be compelled in law to prosecute? The situation becomes even more complicated if a court determines that the Attorney-General has breached articles 23 and 296 and so quashes the decision to enter a *nolle prosequi* but makes no consequential order(s) because it lacks that authority. In such a situation, the tangible value, to an accused person who

[23] [1990] 170 CLR 1.

successfully challenges the propriety of the Attorney-General's *nolle prosequi* could be in question.

Now that I have outlined the general contours of judicial review as a remedy available to individuals aggrieved by an alleged violation of their rights by a public office holder or entity, I return to conclude my discussion of the Supreme Court's judgment in the Afoko case. The issue before the Court in the Afoko case was limited to the publication of Regulations by non-judicial officers exercising discretionary power. Regrettably, the Court's lead opinion did not think that the Attorney-General must publish Regulations governing how or why he/she will enter a *nolle prosequi*. However, Pwamang, JSC on page 158 rightly observed that "… it cannot be contested that there are certain species of executive discretionary powers that were intended to be covered when the framers of the Constitution, 1992 inserted the provision in article 296(c). After all, the provision excluded judicial discretionary power."

Admittedly, publishing Regulations to guide how non-judicial officers exercise discretionary power does not address the practical challenges the Court identified with requiring the Attorney-General to publish Regulations. However, respectfully, I think the Court took a broad view of the issue, as I do not believe that the Framers of Ghana's Constitution envisaged a situation where Regulations must be published in every case when the Attorney-General decides to enter a *nolle prosequi*. For obvious reasons, this would be practically impossible, debilitating, and lead to absurdities. I have stated elsewhere that the Attorney-General can publish regulations that cover issues that are common to all *nolle prosequi* situations, like when a *nolle prosequi* can be entered, the Attorney-General's duties when exercising this power, which may include informing the accused and his/her lawyers in advance, and the non-legal consequences, including financial implications for the Ghanaian taxpayer when a *nolle prosequi* is entered late into a criminal trial.[24] Criminal cases put the accused person's liberty in jeopardy and have many other impacts, including placing emotional and economic burdens on the accused person,

[24] Samuel Opoku-Agyakwa, 'Upholding the Rights of Suspects and Accused Persons under Ghana's 4th Republican Constitution: Deeds of the Supreme Court' (2022) 2 UPSA Africa International & Comparative Law Journal 123-162.

victims, witnesses, relatives, friends, lawyers, and the judicial process.[25] Engaging counsel and supporting witnesses to attend court proceedings all have cost implications.[26]

This article is the second and concluding part of my research on Ghana's law and practice on nolle prosequi. Part one was published in the University of Ghana Law Journal.[27] In that article, I reviewed and discussed the *nolle prosequi* legal framework of five common law jurisdictions: Canada, India, Kenya, Nigeria, and the United Kingdom and determined that these countries have departed from the common law on nolle prosequi by infusing oversight, including judicial review—in some of these jurisdictions, judicial review of a *nolle prosequi* decision is limited to situations where there are allegations of an abuse of the process, or the entering of the *nolle prosequi* is against the public interest or the interest of justice.

1.3 Summary of nolle prosequi laws and practices in the jurisdictions previously reviewed

To put this article into context, I provide highlights of the *nolle prosequi* law in the jurisdictions reviewed in my previous article.

In the Federal Republic of Nigeria, section 174 (c) of the Federal Constitution permits the federal Attorney General: "to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person. Section 174 (3) states that "In exercising his powers under this section, the Attorney-General of the Federation shall have regard to **the public interest, the interest of justice and the need to prevent abuse of legal process** (**emphasis added)**."

Tobechukwu and Chukwuma acknowledge that Nigeria's Constitution (1999) circumscribes the Attorney-General's nolle prosequi power and subjects the

[25] Andrew Abuza 'The Power of the Attorney-General to enter a Nolle Prosequi under the 1999 Constitution of Nigeria: An Analysis of the Issues Involved' (2021) 7(2) International Journal of Science and Qualitative Analysis, 41-54 <doi: 10.11648/j.ijsqa.20210702.1> accessed 3 May 2023.

[26] ibid

[27] Samuel Opoku-Agyakwa, 'Reforming Ghana's Nolle Prosequi Jurisprudence: Lessons from other Jurisdictions' (2024) 33(2) University of Ghana Law Journal 86-129.

exercise of this power to judicial review.[28] The authors further note that in a democracy, to treat the Attorney-General's nolle prosequi power as unquestionable is equal "to inadvertently rob the courts of the constitutionally granted as well as limit to which the citizens can enforce and enjoy their fundamental human rights."[29] Under article 157 (6) (a) of Kenya's Constitution, the Director of Public Prosecutions (DPP) can enter a nolle prosequi at any stage before judgement.[30] A nolle prosequi entered after the prosecution closes its case results in the accused person's acquittal.[31] When a nolle prosequi is entered after the accused has been invited to enter his/her defence, the accused person is acquitted.[32] Kenya's DPP needs the court's approval to effect a nolle prosequi.[33] Like Nigeria's Constitution, the Kenyan Constitution enjoins the DPP to act in the public interest, in the interest of justice, and must avoid abusing the legal process.[34] These perimeters were tested in the Kenyan case of *R v Adan Keynan Wehilye,*[35] where the prosecution, without an explanation, entered a *nolle prosequi* after it had called eleven witnesses. The accused person challenged the decision and the court among others held that "[F]or the prosecution, to seek to terminate the trial and charge the applicant afresh would be to give the prosecution an unfair advantage in the prosecution of the new case and that would lead to an unfair and unjust result."[36]

In India, section 321 of India's Code of Criminal Procedure, 1973, permits a prosecutor to withdraw from prosecuting a person, although with the court's consent, at any time before judgement.[37] Section 333 required the Advocate General

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[28] Henry Tobechukwu and Stephen Chukwuma, 'Rethinking the Power of Nolle Prosequi in Nigeria: The Case of State V. Ilori' (2014) 2(1) Global Journal Politics and Law Research, 1 <https://doi.org/10.37745/gjplr.2013> accessed 3 May 2023.

[29] ibid, 8.
[30] Kenyan Constitution, 2010, Article 157(6) (c).
[31] ibid, art 157 (7).
[32] ibid, 82 (b).
[33] ibid, art 157(8).
[34] ibid, art 157(11).
[35] [2005] eKLR <Kenya Cases - SheriaHub Court Cases Database Repository - [2023]> accessed on 3 May 2023.
[36] ibid, 13.
[37] The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal, - (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be

to 'inform' the presiding judge about his/her intention to withdraw from prosecuting the defendant. It appears, on the face of secion 321, that the court is enjoined to halt the proceedings. As per section 321, a defendant is discharged if a prosecution is successfully withdrawn before the accused is charged,[38] the accused is acquitted if the withdrawal is made after he/she is charged.[39]

In the United Kingdom, sections 23 and 23A of the Prosecution of Offences Act, 1985 permit the Director of Public Prosecution (DPP) and/or a Public Authority to discontinue criminal prosecutions at the preliminary stage[40] or after the accused has been sent for trial.[41] The DPP is required to inform the court about his/her decision to discontinue the trial,[42] and this notice must include the reasons for the decision to discontinue the trial.[43] The DPP is also required to inform the accused about the decision to discontinue proceedings, but the DPP is not obliged to explain to the accused the reason for the discontinuance.[44] The accused has the right to insist that the proceedings continue,[45] and this must be communicated to the court.[46] Where the accused person gives such notice, the case is automatically revived, and the trial must continue.[47] Under section 23, a *nolle prosequi* operates as a discharge.[48] A *nolle prosequi* may also be entered after the accused has been sent for trial.[49] A decision to enter a *nolle prosequi* under section 23A can be made at any time before the

acquitted in respect of such offence or offences: Provided that where such offence--(i) was against any law relating to a matter to which the executive power of the Union extends, or (ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or (iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or (iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.

[38] ibid, s 321 (a).
[39] ibid, s 321(b).
[40] Prosecution of Offences Act 1985, s 23.
[41] ibid, s 23A (1).
[42] ibid, s 23(3).
[43] ibid, s 23(5).
[44] ibid, s 23(6).
[45] ibid, s 23(3) & (7).
[46] ibid, s 23(7).
[47] ibid.
[48] ibid, s 23(9).
[49] ibid, s 23A (1).

indictment is preferred.[50] Regarding whether the accused person can be charged with the same offence and on the same facts, sections 23A and 23 have the same legal effect.[51] Where the DPP or Public Authority enters a *nolle prosequi* under section 23A, an accused person is barred from insisting that the criminal proceedings must continue.

Canada's *nolle prosequi* law and practice are inherited from its common law heritage and relationship with the United Kingdom. There is no express provision in her law on *nolle prosequi*. This was acknowledged in *R v McHale*[52] when Watt JA observed about *nolle prosequi* in Canada that "Despite the absence of express or necessarily implied authority in the Criminal Code it is well-established that the Attorney General has the authority to withdraw an information[53] prior to plea …". [54] Lieff J, in R. v. Dick[55] at page 156 of his judgement stated that when a *nolle prosequi* is entered after an accused person enters a plea, the court's leave and the accused person's consent are required to effectuate the *nolle prosequi*. Parker J in *Re Blasko and The Queen*,[56] stated that "Prior to the preferring of an indictment or the entering of a plea and the tendering of evidence, an information[57] may be withdrawn without the leave of the Court. Where a Crown Attorney has tendered evidence after the taking of a plea, the trial Judge is seized with jurisdiction, and the information cannot be withdrawn without the consent of the trial Judge."[58]

It is evident from the foregoing that, as part of their reforms, Canada and the United Kingdom have included the accused person whose criminal trial is being truncated by a *nolle prosequi* in the decision-making process to effectuate the *nolle prosequi*. This accused-centred approach is commendable, as the accused's rights are in jeopardy during the prosecution and must have a say in its truncation, especially in scenarios

[50] ibid, s 23A (2).
[51] ibid, s 23 (9) and 23A (5).
[52] *R. v. McHale*, 2010 ONCA 361 (CanLII) <https://canlii.ca/t/29rrx> accessed on 11 June 2023.
[53] An information is a formal criminal charge which begins a criminal proceeding in the courts.
[54] ***R v. McHale*** (n 52)
[55] [1969] 1 CCC 147 <https://www.canlii.org/en/on/onsc/doc/1968/1968canlii231/1968canlii231.html.> accessed on 6 June 2023
[56] Re Blasko and The Queen, 29 CCC (2d) 321 <https://canlii.ca/t/htxl2> accessed on 11 June 2023.
[57] An information is a formal criminal charge which begins a criminal proceeding in the courts.
[58] Blasko (n 56) 322.

like the Afoko case. In the United Kingdom, the Attorney-General or the prosecutor is required to justify the entering of a *nolle prosequi*. In India and Kenya, the court's consent is key to effect the prosecutor's decision to discontinue the prosecution.

I argued in my previous article on the subject that, contrary to Ghana's Supreme Court decision in the Afoko case, Ghana's Attorney-General, as a non-judicial officer exercising discretionary power by entering a *nolle prosequi*, must formulate and publish Regulations under article 296 (c) of the Constitution. The Regulations must set out how he/she will exercise the prerogative to enter *nolle prosequi*. I contended that publishing such Regulations would promote legal accountability and certainty, providing the yardstick, at least for the courts, to evaluate the Attorney-General's decision to enter a *nolle prosequi*. It is for this reason that I described the decision in the Afoko case as a missed opportunity to hold the Attorney-General in check when entering a *nolle prosequi*. I counselled the Attorney-General to explain to the accused person whose criminal trial is truncated why a *nolle prosequi* is being entered and asserted that the trial court must approve the Attorney-General's decision to truncate the prosecution by way of judicial review. I grounded my recommendations partly in recent legislative and executive action in the enactment of legislation like the Office of the Special Prosecutor Act, 2017 (Act 959) and the Freedom of Information Act, Act 2019, Act 989, as these laws indicate Ghana's Parliament's recognition of the need for transparency and oversight in governance including the Attorney-General's exercising the power to enter a *nolle prosequi*. For ease of reference, I reproduce below what I said about Acts 959 and 989 and how their enactment signals a desired shift in how governance is conducted, including the opaqueness around considerations that influence the Attorney-General when he/she elects to enter a *nolle prosequi*:

> …, section 80 (2A) of the Office of the Special Prosecutor Act 2017 (Act 959), which amends section 54 of Act 30, grants the Special Prosecutor power to enter nolle prosequi and, section 80(2) requires the Special Prosecutor to

assign reasons for entering a nolle prosequi ….[59] The Special Prosecutor's obligation to explain their decision to enter a nolle prosequi plea is to infuse transparency and legal accountability in Ghana's fight against corruption, arguably a formidable threat to the country's development. It must be noted that while the Special Prosecutor is granted the power to prosecute corruption-related offences under Act 959, the Attorney-General is not constitutionally barred from also prosecuting such corruption-related offences. However, when the Attorney-General prosecutes a corruption-related offence and decides to enter a nolle prosequi, there is no legal obligation for them to provide an explanation. Therefore, enjoining the Special Prosecutor to assign reasons for entering a nolle prosequi when they exercise the Attorney-General's delegated constitutional power, creates confusion and lends itself to abuse. This is because, in law, the Attorney-General can always reclaim their constitutional power delegated under Act 959. This means that when the Attorney-General reasserts the power to prosecute corruption-related cases, either by taking a case away from the Special Prosecutor or by pursuing a corruption-related matter independently, the Attorney-General can enter a nolle prosequi without being required to explain or have the decision subject to judicial review. This results in the application of inconsistent standards. The transparency and accountability intended by section 80(2) of Act 959 will be eroded just by the Attorney-General asserting his/her constitutional mandate under Article 88 of the Constitution. Why promote such confusion? Why must different rules and standards govern nolle prosequi, one promoting transparency and legal accountability and another defeating the same?

Another recent legislation that demonstrates Ghana's decision to operate a transparent governance system and hold public officials accountable is the Right to Information Act 2019, Act 989. As its name suggests, Act 989 seeks

[59] Office of the Special Prosecutor Act 2017 (Act 959) in s 80(2) states: 'The Criminal and Other Offences (Procedure) Act 1960 (Act 30) is amended in (a) sections 54 and 55 by the insertion after 'Attorney-General' of or 'Special Prosecutor' wherever it appears; and (b)section 54 by the insertion of a new subsection (2A) as follows: (2A) Where the Special Prosecutor enters a nolle prosequi under subsection (1), the Special Prosecutor shall state reasons for doing so.'

to ensure that public officials and institutions make information available to the public.[60] Public institutions are to keep information and inform the public annually about the kind of information they are keeping.[61] I contend that a vital piece of information that the Office of the Attorney General must keep and publish as required by section 3(1) of Act 989 pertains to the nolle prosequi pleas entered and the reasons for entering them. In fact, even without Act 989, this information, especially the reasons for the decision, must be accessible to any interested person. Beyond keeping this information and making it available upon fulfilling all legal condition precedents, the Attorney-General must inform the court and the accused why they have decided to discontinue a prosecution.[62]

Overall, I recommended that Ghana should reform her *nolle prosequi* law to reflect global trends without omitting the need to tailor the reforms to suit the Ghanaian context. In this regard, I recommend that Ghana looks to Canada and India in search of ideas to reform its nolle prosequi law.

In this article, I take the discussion on Ghana's nolle prosequi law and practice further by presenting and discussing the responses of judges, prosecutors, and lawyers on the issue, and reaffirm my recommendations for law reform.

2 METHODOLOGY

I collected qualitative data from 52 Ghanaian judges, magistrates, defence lawyers, and prosecutors who are currently working in or have previously worked in Ghana's justice system. The survey's questionnaire was divided into three parts. Part One collected information on the respondents' demographics. Part Two had separate sections targeting each of the three categories of respondents: defence lawyers, judges/magistrates, and prosecutors—these sections included similar

[60] Right to Information Act 2019 (Act 989).
[61] ibid, s 3(1).
[62] Samuel Opoku-Agyakwa (n 27)

questions, although the respondents answered them separately. Part Three included general questions that all respondents were required to answer, and it also elicited their overall responses to Ghana's nolle prosequi law and practice. I administered the survey's questionnaire by using Google Forms. Generally, participants were randomly selected as the questionnaire was sent to relevant informal WhatsApp Groups[63] with lawyers and judges as members. However, in a few instances, I targeted specific individuals whom I had determined were invaluable sources of information because of their experience—admittedly most of them had served, at various times, as Ghana's Attorney-General. I sent the questionnaire directly via WhatsApp to them. All responses were anonymous, although Part One of the questionnaire required respondents to indicate which of the three categories of respondent's that they belonged to. The respondents' answers were sent directly to the Google Forms and these were automatically collated, in an Excel file, and stored in the Cloud—I assessed them after the period of the survey had elapsed. I downloaded this file to aid my analysis of the information that I collected. Each respondent's answer was captured in the columns and rows in the Excel file. I first reviewed each of the entries to get a sense of the views expressed by the respondents. In the process, I sought to determine whether, based on the provided answers, I could objectively conclude that the data collection had reached saturation. To reach this conclusion, I aimed to examine from my initial review whether the collected data suggested any possibility that additional data collection could reveal new information, patterns, or themes. Following this review, I concluded that data collection had reached saturation as I was gleaning significant coherence in the pattens and themes emerging from my analysis of respondents' answers. After this conclusion, I set out to code the data collected. I adopted the deductive coding approach—the questionnaire's questions informed my coding. I also clustered the responses collected according to the categories of the respondents, i.e., lawyers, judges, and prosecutors. These aided me in synthesising the collected data and formed the basis of my analysis, conclusions, and recommendations.

[63] If you sent it to groups, through members whom I knew.

To facilitate the presentation and analysis of the views expressed by the respondents and ensure anonymity, I identified respondents with alphanumeric numbers derived from the first alphabets of their profession – I assigned a three-digit sequential number based on when the sequence in which the respondent appeared on the Excel sheet, with "001" as the first number – I assigned a different set of numbers although they all started from 00, to each category of respondents—so the first defence lawyer or judge/magistrate or prosecutor lawyer respondent was assigned the alphanumeric number DL 001, JM 001, and PL 001 respectively.

I must state that since the survey in late 2022 and early 2023, the debate over how the Attorney-General enters a *nolle prosequi* has been reignited following a series of *nolle prosequi* decisions entered in January and February 2025 in connection with criminal trials involving politicians and/or politically exposed or affiliated persons. These decisions were made after the change in government in Ghana on January 7, 2025. The newly appoint Attorney-General decided to discontinue prosecutions against Dr Johnson Asiama, Dr Samuel Ofosu Ampofo, Dr Cassiel Ato Forson and Mr Richard Jakpa.[64] The Attorney-General addressed a press conference and explained to the public why he truncated the said prosecutions. His reasons and the reactions of this immediate predecessor, who had initiated most of the said prosecutions, were at the heart of the ensuing debate on opaqueness of the considerations that influence an Attorney-General's decision to enter a *nolle prosequi*.[65] The debate between the Attorney-General and his immediate predecessor, as well as within the population, was a manifestation of the possible politics, partisanship, and arbitrariness around the exercise of the Attorney-General's prosecutorial discretionary power to prosecute and/or to enter a *nolle prosequi*. I will return to this later in this article.

[64] 'Criminal Prosecutions: AG drops cases against four politically exposed persons' (Channel 1 News, 1 February 2025) <https://channel1news.com/2025/02/01/criminal-prosecutions-ag-drops-cases-against-four-politically-exposed-persons/> accessed 2 February 2025

[65] 'Document: Reasons why A-G "cleared" NDC politicians and others from prosecution' (The Law Platform, 1 May 2025) <https://www.thelawplatform.online/post/document-reasons-why-a-g-cleared-ndc-politicians-and-others-from-prosecution> accessed 1 May 2025

3 THE SURVEY

I present below the views expressed by the respondents about Ghana's *nolle prosequi* law and practice. Before that, I provide a summary of the respondents' backgrounds.

3.1 About the respondents

Fifty-two respondents, comprising 21 females and 31 males, participated in the survey, which included 13 prosecutors, 19 defence lawyers, and 21 judges/magistrates. Seven (53.8%) of the prosecutor-respondents had between one and 10 years of experience as prosecutors, five (38.5%) had between 10 and 20 years of prosecutorial experience, and one (7.7%) had between 21 and 30 years of experience as a prosecutor. Eleven (84.6%) of the 13 prosecutor respondents reported having entered a *nolle prosequi* at least once, with seven (53.8%) stating that they had entered a *nolle prosequi* at most five times, and one (7.7%) having entered more than ten *nolle prosequi*. Almost all the prosecutors were lawyers—a insignificant number of them were prosecutors from the Ghana Police Service.

Ten (majority) of the defence lawyer-respondents, i.e., 52.6%, had between 11 and 20 years of experience as defence lawyers, and six of them (31.6%) had between one and 10 years of experience. Two of them (10.5%) had between 21 and 30 years of experience, and one (5.3%) had over 30 years of experience. Only six (31.6%), i.e., less than a third of the 19 defence lawyer-respondents, had been involved in a case where the Attorney-General had entered a *nolle prosequi.*

A majority (61.9%) of judges/magistrates participating in the survey, i.e., 13, had at most 10 years of experience as judges/magistrates. The remaining eight (38.1%) had between 11 and 20 years of experience as judges/magistrates. Eleven of the 21 judge/magistrate respondents (52.4%) indicated that they had presided over a case where the Attorney-General had entered a *nolle prosequi*.

3.2 Views expressed by respondents

I now present (often verbatim) and analyse the views expressed by the respondents.

Prosecutor-respondents: Eight (61.5%) prosecutor-respondents who had entered a *nolle prosequi* said they did not give reasons for entering a *nolle prosequi* while three (23.1%) said they had given reasons. Eight of the 13 prosecutor-respondents explained that they did not give reasons because the law does not require them to do so. In the words of PL 010 *"… I don't give reasons because I am not required to, by the law. However, in high-profile cases with public interest in the case, I have given the court the reasons for entering the NP [nolle prosequi] so that the public interest component is catered for adequately*."

Seven (53.8%) of prosecutor-respondents indicated that they will not hesitate to give reasons for their decision to enter a *nolle prosequi*. In comparison, six (46.2%) indicated that they have reservations about assigning reasons for their *nolle prosequi* decisions. PL 003, who belongs to the latter group, asserted amongst others that if the reasons are not satisfactory to the defence, it will result in speculation. Another prosecutor-respondent claimed that entering *nolle prosequi* is within the discretion of the Attorney-General and must be exercised with candour. A third prosecutor-respondent in this category found assigning reasons as amounting to the judiciary interfering with the Attorney-General's prosecutorial discretion. On the other hand, those who support the Attorney-General assigning reasons grounded their stance in ensuring transparency, promoting judicial oversight, equality before the law, and justice.

Prosecutor-respondents chose from a list of 15 possible reasons why the Attorney-General will enter a *nolle prosequi*. These reasons were:

- mistakes in the charges/charge sheet,
- to change/amend charge(s),
- political pressure/politics, pressure from superiors,

- national security and/or national interest,
- plea bargaining, international relations/diplomacy,
- death of a key witness, unwillingness of a complainant/victim to proceed,
- wrong timing, ill-health of accused/key witness,
- witness protection measure,
- in the interest of justice,
- poor internal supervision/negligence, and
- unknown—respondents were also at liberty to add to the list.

The three top reasons selected by prosecutor-respondents for entering a *nolle prosequi* were the '*death of a witness' and 'the interest of justice'* – 38.5% selected these reasons, with each reason being selected five times. The third reason selected by prosecutor-respondents *is 'mistakes in the charges,'* chosen by 30.8% of prosecutor-respondents, and this reason was selected four times.

Defence lawyer-respondents: Sixteen (84.2 %) of defence lawyers-respondents preferred that the Attorney-General explain their decision to enter a *nolle prosequi*. According to them, this will promote transparency, accountability, natural justice, the accused's and his/her lawyer's right to know, the interest of justice, and the avoidance of an abuse of the judicial process. On the other hand, three (15.8%) defence lawyer-respondents did not support the suggestion that the Attorney-General should explain his/her decision to enter a *nolle prosequi*. One of them - DL 010 indicated that *"It will serve no useful purpose."*

Defence-lawyer respondents also selected from the same list of 15 possible reasons why an Attorney-General will enter a nolle prosequi. Most of them, i.e., 10 (52.6%), identified political pressure/politics as the primary reason why the Attorney-General will enter a *nolle prosequi*. Three other reasons, i.e., 'pressure from superiors,' 'a mistake in the charges,' and 'unknown' were each selected by eight (42.1%) defence lawyer-respondents, making these reasons the second topmost reason selected by defence lawyer-respondents. The third reason that this category of respondents selected was '*unwillingness of a complainant to proceed*'. This reason was selected six times (31.6%) by this category of respondents. Perhaps DL 015's

response sums up the defence lawyers' views on this question. According to this respondent, "*We usually know. Either the prosecution finds they cannot win the case or vital witnesses are not available because they are apprehensive of reprisals or simply go into hiding or [the] government due to diplomatic concerns especially where the Accused is a foreigner, or it is politically expedient so to do or where the charges need to be reviewed to strengthen the prosecution or decide to use an Accused as a Witness*".

Judges/magistrates: Only two (11.1%) judge/magistrate-respondents indicated that the Attorney-General explained his/her decision to enter a *nolle prosequi*. Most of this group of respondents, i.e., 12 (57.1%), preferred that the Attorney-General explain his/her nolle prosequi decision. They asserted that this would promote accountability and avoid speculation, abuse, or a semblance of arbitrariness and collusion between the prosecution and the accused. Central to their views was a quest to promote transparency and judicial oversight, and according to JM 015, "*To maintain the integrity of the judicial process.*" Nine (42.9%) judge/magistrate respondents did not see why the Attorney-General should explain his/her nolle prosequi decisions—their responses included: JM 005 who stated that: "*The nolle prosequi has policy and political considerations. It is not all decisions of the state which should be for public considerations. Governance is complex", and* JM 004 said, *"It is one case off the cause list, no need to complain."*

Judges/magistrates, like the other two categories of respondents surveyed, had the same list of 15 possible reasons why the Attorney-General may enter a *nolle prosequi*. The three top reasons they selected were: a 'mistake in the charges' (38.1%), 'national security and/or national interest' (33.3%), and 'unknown'(33.3%).

3.3 Respondents' views on transparency in the Attorney-General's nolle prosequi power

Respondents expressed their views on transparency in how the Attorney-General exercises the *nolle prosequi* power. Overall, 39 (75%) of all the survey's respondents preferred that the Attorney-General explain his/her *nolle prosequi* decision. They cited the following reasons for their stance: promoting accountability and transparency in the judicial process, avoiding speculations of bribery, political

interference, and abuse. PL 007, explaining the reason for this position, said: "The *system is oftentimes abused for political convenience. If the AG [Attorney General] is mandated to give reasons, he might be cautious in rushing opponents to court.*" According to DL 006 "*[the] Defense must be involved in coming to the conclusion*". *DL 005 indicated that "Every action must have a rational explanation."*

One quarter (25%) of respondents supported the status quo, i.e., that Attorney-Generals should not assign reasons for entering a *nolle prosequi*. For instance, PL 005 said that: "*It takes away the discretionary power granted to the AG* [Attorney-General] *to initiate and conduct criminal cases on behalf of the State pursuant to article 88. Separation of powers, as the AG* [Attorney-General] *is seen as being under the executive arm of government,*" PL 006 said, "*The law does not require him to do so. Besides, NP [nolle prosequi] is entered sparingly and for very good reasons known to the prosecution.*" According to PL 008, "*In the interest of justice and to allow [the] prosecution [to] remedy certain errors/defects or deal with challenges without disclosing to the court or defense counsel* [the Attorney-General should not assign reasons]." JM 005 noted that "*Not all reasons are suitable for public consumption*" PL 010 stated that, "*No, because it is not necessary in every case to assign reasons for the discontinuance of the case. Even though we are not required to give reasons, we sometimes do so where the public interest in the case is high. In most cases where NP's [nolle prosequi] are entered, it is done to enable us move the case to the right forum or prefer more appropriate charges*". DL 015 said "*The Authority to prosecute lies at the discretion of the AG [Attorney-General] so he cannot be compelled by Mandamus to prosecute if he is [not] interested*" PL 011 also indicated that "*Some reasons although valid are difficult to fully explain on paper.*"

Twenty-nine (55.8%) respondents advocated for the Attorney-General's *nolle prosequi* power to be subject to judicial review, to promote accountability and check abuse. For instance, DL 003 said, "*There are times that there may be overwhelming evidence against the accused person but because of the accused (SIC) political affiliation, NP [nolle prosequi] is entered to terminate the prosecution, so in such a case Judicial Review should be applicable. The power of the Attorney General to enter NP may be subject to abuse, and it must be subject to judicial review. The power of the Attorney General to enter NP [nolle prosequi] may be used to frustrate accused persons when there is evidence that an*

application for submission of no case will succeed." PL 007 asserted that *"Prosecutions is (sic) not the ultimate in the judicial process. A judge can still strike out the process if they're unfair or abusive."* DL 011 indicated that *"[it] strengthens the justice system"* DL 012 also suggested that *"To avoid abuse of the discretion. OSP [Office of the Special Prosecutor] Act requires explanation for resort to NP [nolle prosequi]."* JM 012 claimed that "*This will help reduce political interference and abuse of the process*". JM 014 also argued that "*Similar to plea bargaining, there should be judicial supervision [of how nolle prosequi is used]."* DL 018 said, *"If the AG [Attorney General] knows he will be required to give reasons or that his actions will be put to scrutiny, he won't bow to political pressure."* JM 019 opined that "*The offenses [are] against the state or private individuals, and there must be someone overseeing that the right things are done. NP [nolle prosequi] may be filed for political reasons, which may not help the nation."*

4 THE COMPLEXITIES OF JUDICIAL SCRUTINY OVER THE ATTORNEY-GENERAL'S NOLLE PROSEQUI POWER

From the foregoing responses, it is important to consider the following questions: beyond an appeal through the courts and a review in the Supreme Court, what happens if a judge determines that the reasons for entering the nolle prosequi do not pass the 'Article 296 test'? Considering article 88 of the Constitution, can the Attorney-General be compelled to prosecute? Should an Attorney-General who refuses to proceed with a prosecution following a judicial review that the reasons for a *nolle prosequi* failed the 'article 296 test' remain in office? Will this situation amount to a violation of the oath the Attorney-General took 'to uphold, preserve, protect and defend the Constitution …, freely give my counsel and advice for the good management of the public affairs of the Republic of Ghana'? Will it be appropriate in such a situation for Parliament, under Article 82 of the Constitution pass a vote of censure against the Attorney-General? Who is constitutionally clothed with the authority to prosecute a case where the Attorney-General is unwilling to

do so? Can a citizen from whom "sovereignty resides,"[66] "justice emanates,"[67] and "for whose welfare the powers of government are to be exercised"[68] petition the President, who can in turn instruct the Attorney-General, under article 88(2), to go ahead with a prosecution? Is it at this stage that oversight of entering a *nolle prosequi* becomes a political matter, thus subject to the court of public opinion? These constitutional, legal and political issues expose the complexities of infusing judicial oversight over the Attorney-General's *nolle prosequi* power. Notwithstanding these, I doubt that the Attorney-General's prosecutorial discretion is and should be beyond judicial review.

Twenty-three (44.3%) respondents opined that the Attorney-General's *nolle prosequi* power should not be subject to judicial review. Some of them justified their position as follows: PL 003 indicated that "*Judicial control will make the exercise of the power, which is essentially political, less effectual.*" PL 006 indicated that "*It is power granted to the Attorney General by law. Making it subject to Judicial Enquiry will lead to absurd situations. Besides, it would mean that, that power resides in the Judiciary and not the Attorney General." PL 008 said "NP [nolle prosequi] will fail to serve its purpose if it was subject to judicial review.*" JM 005 explained that "*Public opinion is the best tool to control the use of nolle prosequi*." PL 011 stressed that "*It is and should remain the sole prerogative of the AG [Attorney-General] whether or not to go ahead with a prosecution. He should not be compelled by way of* judicial *review to continue with a case they no longer want to prosecute*". JM 007 asserted that "[*T]he decision as to who should be prosecuted should not be the business of judiciary (sic), … that judge would be venturing into investigation, and other areas which in my view is the preserve of the AG [Attorney General] and the police and other institutions, division of labour breeds excellence because the resultant factor is concentration. The judiciary should not be overburdened, so it can be focused*".

5 THE AFOKO DECISION: A CALL FOR REVIEW

[66] Constitution of Ghana 1992, art 1(1)
[67] ibid, art 125(1)
[68] Criminal Prosecutions (n 64)

On 12 February 2025, Ghana's newly appointed Attorney General, Dr Dominic Akuritinga Ayine, held a press conference to "account to his fellow citizens" for his *nolle prosequi* in, and withdrawals from, some high-profile criminal prosecutions initiated by his two immediate predecessors. He quoted Pwamang JSC's view in the Afoko case on emerging transparency and accountability in some common law jurisdictions, particularly regarding how prosecutors enter a nolle prosequi, to support his decision to explain his choices in the said cases. He acknowledged that, as Attorney-General, his decision must pass the "Article 296 test." He then devoted some attention to narrating the steps he had taken before deciding to *nolle prosequi* or withdraw from the said cases. According to him, these steps included consulting state attorneys in his office, defence counsel and investigators in the cases. The Attorney-General stated that he was very familiar with the cases and had acted as counsel in some of them. He emphasised that his decisions were motivated by professional and ethical considerations, as some of the charges against the accused persons were defective. Dr Dominic Ayine also opined that in some cases, the evidence presented by the prosecution in support of the charges led him to conclude that there was reasonable doubt about the accused person's guilt. The learned Attorney-General cited the relevant laws, recited the facts of the various cases, and discussed them to justify his conclusions/stance—in effect, he justified his decision to enter the *nolle prosequi* in the court of public opinion, as though he were doing the same before a court of law.

As expected, his immediate predecessor, Mr Godfred Yeboah Dame, responded to him, also setting out the facts of the said cases, the existing evidence, and the applicable law. He asserted that his successor's justification was essentially a rehashing of the argument made by defence counsel in the affected cases. Like the current Attorney-General, his predecessor also argued this case against Dr Ayine's decisions in the court of public opinion.

The transparency and accountability demonstrated by the learned Attorney-General are commendable, and I congratulate him for this. Dr Ayine's decision to make a public statement regarding his consideration for his *nolle prosequi* choices, along with Mr Godfred Yeboah Dame's reaction, also in public, confirms the

common law view that accountability for *nolle prosequi* decisions lies in the court of public opinion and not the law courts. However, more than ever, their statements convince me that the justification or otherwise of the Attorney-General's decision to enter a *nolle prosequi* is at best a legal and political matter that must be subject to judicial scrutiny. By this view, I am not discounting or excluding views from the court of public opinion. My position that the Attorney-General's *nolle prosequi* powers must be governed by Regulations, and that this decision must be subject to judicial review has been reinforced by the exchanges between Dr Ayine and Mr Dame as well as the population. Although the evaluation of the public statements by the Attorney-General and his predecessor is outside the scope of this article, it would be remiss of me if I fail to observe at least that their statements raised numerous legal, constitutional, and governance issues surrounding the Attorney-General's prosecutorial discretion to enter a *nolle prosequi* and article 296, and these require judicial review.

6 DISCUSSION OF RESPONDENTS' VIEWS

The ensuing discussion flows from respondents' views.

First, *nolle prosequi* is a discretion the Attorney-General seldom exercises. While this is true, it is no justification for the absence of transparency and accountability in its administration. Although prosecutor-respondents, who generally defended the *status quo*, indicated that they were not averse to explaining their *nolle prosequi* decisions, their primary reason for not providing reasons is that they are not legally obligated to do so.

The Attorney-General must justify nolle prosequi decisions

Overall, 75% of the survey's respondents preferred that the Attorney-General explain his/her *nolle prosequi* decisions. Coincidentally, prosecutor-respondents constitute 25% of the survey's respondents, so there is a tendency to assume that all of them 'voted' against the Attorney-General being required to explain his/her *nolle prosequi* decisions. However, the information collected from the respondents does

not support this assertion, as seven (53.8%) prosecutor-respondents, slightly above half, indicated that they did not mind explaining why the Attorney-General had decided to enter a *nolle prosequi*. Surprisingly, although most of the judge/magistrate respondents advocated for the Attorney-General to explain their *nolle prosequi* decisions, they constituted the largest group of the surveyed respondents, i.e., nine judges compared to six prosecutors and three defence lawyers, who preferred that the *status quo*, i.e., that the opacity surrounding the Attorney-General's *nolle prosequi* power remain.

Nolle prosequi and judicial scrutiny

Most respondents, i.e., 55.8%, opined that the decision to enter a *nolle prosequi* must be subject to judicial review. There was a variance of almost 20.8% between these respondents and the 75% of respondents who wanted the Attorney-General to provide reasons for entering a *nolle prosequi*. The variance may be evidence of a clash between the quest for transparency and accountability on one hand and respondents acknowledging the reality that article 88(3) of Ghana's Constitution gives the Attorney-General the prerogative to initiate and manage prosecutions on the other hand. Respondents belonging to the latter group may argue that since no court can compel the Attorney-General to prosecute, there is no utility in subjecting the Attorney-General's *nolle prosequi* decisions to judicial review, because where the court rules against the Attorney-General, it cannot compel the accused person's prosecution.

While this is true, as previously noted, I believe there is a constitutional basis for judicial review of the Attorney-General's *nolle prosequi* decision, even when the reasons involve diplomatic, security, or similar concerns. As previously suggested, this could also be implied from the Supreme Court's judgement in the Afoko case. Respondent JM 005 summed up the challenges with explaining a *nolle prosequi* decision, subjecting it to judicial review, and article 88(3) by stating that: "*The nolle prosequi has policy and political considerations. It is not all decisions of the state which should be for public consideration. Governance is complex.*" Without doubt, this partly means that the reasons for entering a *nolle prosequi* are not always grounded in law,

or that not all *nolle prosequi* decisions are legally and/or objectively justifiable. Although governance is indeed complex and not all information is suitable for public consumption, these considerations are prone to abuse by human frailties, so they must be checked through a competent judicial oversight authority. This reality vindicates my call for the Attorney-General to provide reasons for entering a *nolle prosequi* and subjecting those reasons to judicial scrutiny, even if *in camera*, with the accused person's lawyer present. As noted earlier, prosecutor-respondents identified the death of a witness, the interest of justice, and a mistake in the charges as the three top reasons for entering a *nolle prosequi*. These are reasons that can always be provided, even in open court. I noted, however, that these reasons apply more to less high-profile cases. Admittedly, so far, those cases are not the ones where the Attorney-General's *nolle prosequi* is controversial and likely to be abused.

Overall, respondents desired more control and judicial oversight, as well as less arbitrariness, in determining the rights of accused persons in connection with *nolle prosequi* decisions. Respondents acknowledged the potential influence of politics and/or partisanship on the Attorney-General's decisions. They emphasised the need to protect accused persons, who are the vulnerable party and face jeopardy during a criminal trial. Defence lawyers' mistrust of prosecutors was also manifested in their answers to the survey's questions. This is evidenced by the fact that defence lawyers identified politics and political pressure as the primary factor influencing the Attorney-General's decision to enter a *nolle prosequi*. This view may sound a bit far-fetched, but it may apply in a few cases, i.e., high-profile, or public interest cases involving politicians or politically exposed persons. Such cases usually make media headlines and often have partisan or political colouration. Examples of such instances in Ghana's recent politico-legal history are the *Afoko* case and the cases involving ace broadcaster Kwasi Kyei Darkwah and the so-called Galamsey Queen Aisha Huang as well as those already mentioned in this article.[69]

[69] ibid

All these involved high-profile individuals, including politicians and politically affiliated persons.

Mistrust between prosecutors and defence lawyers is unhealthy for the administration of justice. As officers of the court, prosecutors and defence lawyers must have one goal—to ensure that the ends of justice are served while the law is enforced and accused persons have their day in court. In this regard, judicial light must shine on the opaqueness associated with entering a *nolle prosequi*, as this will contribute to fostering confidence between these key actors in criminal proceedings. It will also have a *domino* effect and could create opportunities to reduce the public's cynicism over the Attorney-General's independence in exercising prosecutorial discretion by way of entering a *nolle prosequi*.

Generally, respondents' views promote the values of Ghana's Constitution, which include accountability, transparency, the right to know, judicial oversight, and an aversion to arbitrariness. These views align with the rationale for the reforms undertaken by other common law jurisdictions. The quest to maintain the *status quo* in Ghana, i.e., upholding the common law position, perpetuates the obscurity surrounding the Attorney-General's exercise of prosecutorial discretion, particularly in the context of *nolle prosequi*. This approach makes the Attorney-General judicially unaccountable when entering a **nolle prosequi**. As noted by the learned Mr Justice Pwamang in the Afoko case:

> *The decisions to prosecute and to terminate prosecution of suspected offenders is a matter of immense public interest. Furthermore, it affects the rights of the suspect offenders who may be compelled to suffer the indignation of prosecution when there is seriously no point in mounting prosecution on the facts of the case.* ***It is because of these considerations that the modern trend in democracies is for prosecutorial authorities to be open about the factors on which they take the decisions to initiate or terminate prosecutions*** (emphasis added).[70]

[70] [2018-2019] 1 GLR 1 141 at 148.

7 CONCLUSION AND RECOMMENDATIONS

Before I share my conclusions and recommendations, I must acknowledge limitations of this study. First, the number of respondents surveyed for this article is small—arguably this could affect my conclusions. Relatedly, the recent and relatively large number of cases that the Attorney-General "nolle prosequied," could have generated more interest among potential respondents if I had conducted the survey after the Attorney-General's recent series of nolle prosequis. The timing may have increased the number of respondents and perhaps their views—although I doubt that the overwhelming call for transparency and judicial scrutiny, from the surveyed respondents, would have been different if the number of respondents were larger. Thirdly, the process of selecting the respondents, i.e., posting the survey's questionnaire on various informal WhatsApp groups and in some cases targeting respondents, is another limitation because my choice of the groups and individuals that I should send the questionnaire to were heavily influenced by my personal knowledge, particularly, of which groups exist and my association with them, however remote. Lastly, the responses to the survey's questions could have been enhanced if majority of the respondents had been involved in cases where a nolle prosequi had been entered. For instance, only six (31.6%), i.e., less than a third of the 19 defence lawyer-respondents, had been involved in a case where the Attorney-General had entered a nolle prosequi. Admittedly the Attorney-General's entering a nolle prosequi is more an exception than the norm, hence criminal justice practitioners will seldom encounter such "privileged" situations.

With these limitations in mind, I now turn to my conclusions and recommendations. In this article, I gauged the views of practitioners in Ghana's criminal justice process to ascertain the chances of successfully implementing reforms that will make nolle prosequi in Ghana transparent and subject to judicial review. Ascertaining the views of the surveyed respondents was also intended to provide evidence that what I had advocated for in my previous article was not alien or a slavish call for reforms.

In both articles, the voices, and thoughts from within and afar coalesce in calling for change in Ghana's nolle prosequi law and practice.

The trend in many democracies with common law roots is for the Attorney-General's nolle prosequi power to be transparent and accountable—even the United Kingdom, which created nolle prosequi to manage prosecutions, has departed from unilaterally exercising this power. I repeat my recommendation in my previous article that Ghana should consider changing direction and infuse judicial oversight and accountability in how and when the Attorney-General enters a nolle prosequi.

Considerations of transparency, accountability, and upholding the rights of the accused person must outweigh every other factor articulated by some surveyed respondents such as saving judicial time, addressing the complexities of governance, and the right to know. I contend that these other factors are not paramount when the rights of an accused person are at stake, particularly in high-profile, partisan cases where there is a perception that the Attorney-General's nolle prosequi power is used to further parochial, partisan interests. No matter how few such cases are, accused persons in those cases must not suffer or benefit from the consequences of the unbridled exercise of the Attorney-General's prosecutorial discretion. There are constitutional, legal, and practical challenges if the call for judicial oversight and transparency is limited to only high-profile cases. Therefore, the call for judicial oversight relates to all nolle prosequi decisions of the Attorney-General. I hold this view fully aware that section 80 (2) of the Office of the Special Prosecutor Act, 2017 (Act 959), mandates the Special Prosecutor to assign reasons for entering a nolle prosequi.

As previously noted, Ghana's nolle prosequi law breeds mistrust, particularly between prosecutors and defence lawyers, and this is unhelpful for the administration of justice and so must be addressed. A bold and arguably near-perfect solution is to make nolle prosequi decision-making transparent and subject to judicial scrutiny. This must include the Attorney-General publishing Regulations on when and how he/she will exercise this discretionary power. I have already

articulated the potential benefits of infusing transparency and accountability in such decisions for deepening constitutional governance and the administration of justice. Ghana's unswerving hold onto the common law approach is unusual particularly when the global trend suggests that jurisdictions with legal, political, and historical traditions akin to Ghana, like India, Kenya, and Nigeria, have abandoned the common law position, and most importantly, that Ghana's constitutional imperatives require transparency and judicial review of such decisions.

Judicial scrutiny over the Attorney-General's nolle prosequi power must bring benefits to "victims" of the decision, i.e., the accused person, who suffers further jeopardy and indignation when a nolle prosequi is entered and fails the "Article 296 test." These benefits may include the Ghanaian taxpayer covering the accused person's legal fees and other compensation, like the benefits under article 14(7) of Ghana's Constitution—compensation for truncated prosecutions that were arbitrarily initiated and the Attorney-General must be punished as a member of the legal profession and/or public officer. Undoubtedly, there will be some accused persons who will benefit from the Attorney-General's unilateral entry of of a nolle prosequi power—they have no moral, legal or political justification to seek redress or compensation from the state. I am more concerned about those who are prosecuted for reasons other than the law.

In my previous article, in recommended that the Attorney-General must publish Regulations to govern how he/she enters a nolle prosequi. The Attorney-General must give reasons for entering a nolle prosequi, and the court must evaluate the reasons with article 296 (a) & (b) as the yardstick. This will promote legal accountability, check possible abuses of this discretionary power, aid in building a victim-centred criminal justice system, and uphold the letter and spirit of Ghana's Constitution. It will also bring Ghana in harmony with the evolving practice and law on nolle prosequi in other common law jurisdictions. Importantly, these reforms will be in sync with the wishes of criminal justice practitioners, as evidenced by the respondents surveyed for this article. As a first step, the Attorney-General

must, without any further delay, implement Pwamang JSC's directive in the Afoko case by publishing Regulations on how and when a nolle prosequi is entered.