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Internal strategies and mechanisms of combating corruption: The *Nolle Prosequi* phenomenon in Zambia

Chidongo Phiri

The University of Zambia, School of Education, Lusaka, Zambia

Corresponding Author: Chidongo Phiri

Abstract

This article examines internal mechanism and strategies of fighting corruption at Konkola Copper mines (KCM) in Zambia. The study used the *Nolle prosequi* [The unwilling to pursue in Latin] law of the Criminal procedure Code (CPC) of Zambia to examine the weaknesses in the strategy and mechanisms of combating corruption. The commonly held understanding of the *Nolle prosequi* phenomenon by the Zambian people is that it is corruption in form of racketeering and abuse of authority by the state prosecutors and business executives. From observation, one issue affecting the attainment of the sustainable development goals in Zambia is the selective enforcement of the *Nolle prosequi* law contained in the CPC. Of particular concern is an assumption that evoking the *Nolle prosequi* law of the penal code, Chapter 87 of the laws of Zambia and the international law on corruption has not helped to reduce corruption but exacerbated it. Theoretically, the concept of *Social Justice* as represented in the writings of Amartia Sen, (1999) guided this article with emphasis placed on the notion of human capabilities key components in his social

justice conception. Sen, contends that inequality discourages the healthy economic activities that shatters development processes (1999:75). To avoid this, Sen suggests the need for political freedom which guarantees economic development and good governance practice. The researcher argues that this can be achieved with fair enforcement of the *Nolle prosequi* law. Unfortunately, those affected by it have no much choice to contribute to the reduction of corruption because of not being members of the inner network social relations at KCM.

Methodologically, this article is based on library research though the large part of it involves interviews to those offered criminal amnesty by the prosecutors in entering *Nolle prosequi*. The argument in this article is that failure to analyse *Nolle prosequi* within prisms of social relations reduces the chance for eliminating Corruption at KCM in Zambia. This is because, a much closer examination of *Nolle prosequi* in content and practice gives the reasons of why the law is misapplied hence corruption persistence at KCM in Zambia.

Keywords: *Nolle prosequi*, Social Relations, Social Justice, Public Prosecutors, Phenomenon

1. Introduction

The people of Zambia have different understandings concerning the fundamental paradigms of corruption. This is because corrupt acts at Konkola Mine can be carried out in many forms such as bribery, extortion, fraud and favoritism. Nevertheless, one of the corrupt acts that is carried out but rarely reported in print and electronic media is the *Nolle prosequi* phenomenon at KCM in Zambia. In academic fields, historians describe corruption as a long-running historical phenomenon, which is divisible into discernible epochs since 3,000 B.C (Ryan, 2000). Nevertheless, Sociology scientist consider the roots of corruption being social and cultural (Husted, 1999). This is where corruption blocks social development and reduces national wealth (Mbao, 1996). For Economists, corruption hinders economic growth and decreases FDI (foreign direct investment) (Cuervo-Cazurra, 2006)^[4]; and political scientists hold that corruption leads to non-transparent institutions and decision-making processes as well as closed and under-performing market mechanisms (Luo, 2005).

The World Bank (2017)^[30] has defined corruption as the abuse of public office for private gain; Transparency International (2019) refers to corruption as the misuse of entrusted power for private benefits; the European Commission (2019) also states that corruption is the abuse of power for private gain. According to these corruption definitions offered by institutions, two keywords can be identified, which are “power abuse” and “private gain”. In short, contemporary concepts in terms of corruption concentrate on the kinds of behaviours that misuse power for personal interests. In the public sector, it means the

misuse of public power by civil servants, and in the private sector, it relates to organizational power misuse by superiors). Yet, worldwide, corruption from a legal localized concept is grossed over by most scholars. For example, when the Latin word *Nolle prosequi* is used, most Zambians think it is the perpetuation of corruption by prosecutors under the auspices of the director of public prosecution (DPP), Zambia. The DPP has discretionary powers to enter *Nolle prosequi* subject to judicial review.

The last two decades has witnessed Zambia embark on a constitutional system of governance based on liberal democracy to combat corruption using the *Nolle prosequi* constitutional provision. This is one mechanism and strategy of the legal reforms instituted by the government of Zambia to eliminate corruption. Unfortunately, a characteristic feature of the pre-constitutional era that continues to feature prominently in the new and old politics in Zambia undermining the new constitutional dispensation is the *Nolle prosequi* phenomenon as a constitutional discretion. The *Nolle prosequi* law is increasingly showing a danger of unregulated discretion of public prosecutors in Zambia. This paper examined the particular manifestation of the problem in the context of the DPP's power to enter a *Nolle prosequi* as stated in Article 87 of the Zambian constitution. In performing this duty, the DPP has the power to enter *Nolle prosequi*. This power allows the DPP to halt a criminal prosecution at any stage in a trial court before a verdict is pronounced. Nevertheless, the Zambian people believe this discretion by the DPP to enter a *Nolle* is the perpetuation of corruption by prosecutors. This is because the DPP does not have to give any reasons for the *Nolle prosequi* even though his decision is subject to judicial review. The DPP's power to enter a *Nolle prosequi* is given to him to promote the objective of the criminal proceedings, for the purposes of determining the truth of allegations against an accused person. It cannot be used for any other purpose which unfortunately it has.

2. Background to the study

Zambia has a long history of mining and a large known resource base of copper, emeralds and other deposits (WORLD BANK, 2016), as well as good potential for further discoveries given the high degree of prospectively. Unfortunately, this natural resource has always been exposed to theft, fraud, nepotism during mining process. Simply, these are corrupt activities in terms of its management and ownership. Even though it is true that the mining sector is important to the Zambia's economy and is likely to continue to be so but is has always been controversially managed (Ndulo, 1996). This against the background that the mining sector is a major contributor to foreign direct investment (FDI), and mining tax revenues that contribute a significant portion of total government revenue. The sector is also a significant source of formal employment, both directly and indirectly which is a result of it being a more mature mining economy.

Two aspects of the Zambian mining environment are key to understanding today's context of the mining investment and governance environment. One is the recent historic context of the sector's ownership and management that is prone to corruption. The other is the overall national economic and social development status. Even though the Zambian mining sector has undergone fundamental ownership transformation in recent decades, from being nationalized in 1969 under the

Zambia consolidated Copper Mining (ZCCM) umbrella and re-privatized in the late 1990s but this is not without controversy of corruption, mostly actualised through *Nolle prosequi*. The period of state ownership and management had an enduring impact on national and popular perceptions of the role and performance of the sector, such as a community's expectations of the mine-provided social services believed to be corruptly provided. You have to belong to the network to provide social services in the mines (Scott, 2009). The Mines and Minerals Development Act 2008 revoked Minerals Development Agreements on which privatization had been based equally not without controversy in its execution. It established a legal framework based on international good practice, and strove to create a favourable environment for foreign investment. Since then, FDI has risen steadily, notwithstanding price fluctuations for major minerals including copper and cobalt. The private sector companies that purchased the de-nationalized mines raised corruption (i.e., theft and fraud) concerns that the complexity of the mining business was not well understood by the public or government creating fraud suspicions to the Zambian people. As a result of this mutual lack of understanding, the mining sector and government have had a somewhat volatile relationship over the past decade (WORLD BANK, 2016). This period has seen a fluctuating copper price, inadequate consultation between government and industry (and with and changing political priorities). This means that there has been absence of policy continuity that has been particularly apparent concerning mining taxation. This affected most mining firms such as *Mopani, Konkola, Lumwana, Chambeshi* and *Konkola* copper mines believed that the new owners' evaded tax through a process of social network.

Since 1995, there have been eight amendments to the Mineral Royalty Tax system, as well as imposition and revocation of three Statutory Instruments related to financial requirements affecting the mining sector. These changes included a proposed (but eventually not enacted) windfall tax on "excess" profits created by a rise in copper prices, and a proposal in late 2014 to increase royalty rates and introduce a one-tier tax regime where expenses did not appear to be taken into account. After the change was announced (with little consultation within or beyond government), and implemented for a short period, government returned to a two-tier royalty and profit tax system in mid-2015 as mining companies struggled to remain profitable under the all-royalty system as the copper price dropped. This resulted in most mining firms to be placed on receivership

3. Problem statement

The problem statement is simply: what can be done to make the law of *Nolle prosequi* more equitable and socially justifiable? This because, worldwide, the retention of the *Nolle prosequi* law has evoked growing debate in most commonwealth jurisdictions. Most Zambians, have complained about the unfair application of the *Nolle prosequi* law, arguing it is being used as a political strategy and mechanism to "punish" and "silence" political opponents, rather than it to curb corruption, therefore, it is unjustly evoked. Academics such as Mensah (2006:47) ^[16] argued that the DPP has powers to enter *Nolle prosequi* in any matter that is deemed right confirms the biases in the enforcement of *Nolle prosequi law*. For example, the

position of the Zambian Supreme Court in the celebrated case of *Director of Public Prosecutions v Mbayo Mutwala Augustino (1977) ZR 287 (SC)* confirms political actions meant to silence opponents through *Nolle prosequi*. This is notwithstanding the fact the office of the Director of Public Prosecutions (DPP) is an “independent” constitutional office not subject to political control. There are so many examples indicating the growing concern in the unfair evoking of the *Nolle prosequi* law in Zambia. Other examples are: Milimo Lungu *Nolle prosequi* debacle in 2021, as well as in the *People v Fred M'membe and the Post Newspapers Limited Ex Parte Rupiah Bwezani Banda HPR/06/2014*. This piece seeks to argue that the retention of the *Nolle prosequi* law as a strategy and mechanism to reduce corruption is problematic, but found to exacerbate it. The question is: if the DPP discretion cannot be controlled legally, how can one be sure that the office is using such powers solely to advance political persecution and never reduce corruption? In a liberal democratic society, there is a promise to all its members that everyone will be treated fairly regardless of political affiliation (Galligan, 1996)^[8], which is not the case for actors involved in the KCM saga in Zambia.

4. Literature Review: The *Nolle prosequi* law in the Criminal procedure Code of Zambia.

The DPP's power to enter a *Nolle prosequi* can be found in section 88 of the Criminal Procedure Code of Zambia. It states that: in any trial before a subordinate court, any Public Prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions (DPP), at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal

(a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) If it is made after the accused person is called upon to make his defence, he shall be acquitted.

A notable example of the exercise of this power in recent times by the DPP intervention in case of Milimo Lungu the provisional liquidator involving the insolvency of KCM in 2021 (News Diggers, 2022)^[18]. It should be noted that most Zambians consider *Nolle prosequi* as the preserve to friends of prosecutors. Nevertheless, there are notable differences between *Nolle prosequi* and criminal withdraw. For example, in agreement with Mensah (2006)^[16] a *Nolle prosequi* can be entered at any criminal trial. Yet, according to section 88 of the penal code of Zambia, withdrawals can only occur at district magistrates' courts. Equally, only the DPP or his delegate can enter a *Nolle prosequi*. Any prosecutor either with the consent of the Attorney-General, the DPP or the consent of the trial court can only enter a withdrawal. Further, they have different consequences. The effect of a *Nolle prosequi* is a discharge of the accused person only. The effect of a withdrawal could be a discharge or an acquittal depending on the stage the trial reached before the withdrawal was entered. It is important to note the similarities between these two procedures in the criminal legal process. This is because, both procedures involve the exercise of discretion. The conventional assumption in Zambia is that both powers of criminal withdraw and *Nolle prosequi* are not subject to judicial review because they are applied only to political opponents or friends. Arguably, this paper has dealt specifically with *Nolle prosequi* law

conceptualised under Sen's social justice theory and underpinning the social network phenomenon flourishing corrupt acts in Zambia's mines.

5. Theoretical framework: The Social justice theory and the *Nolle prosequi* law.

The theory of *social justice* in this article has been interpreted in distributive terms. This infers that all people should be treated equally in relation to receiving social benefits that are available in their lives. There are many situations in life where equality is not an inherent condition, or may not even be possible (Sullivan, 2006). For example, sometimes, it can appear as though state institutions and government legislation are biased in favour of the better off in society, and that they often contrive to exacerbate the oppression of those in the lowest social group. Such practices can result in those at the bottom of the social ladder suffering the effects of injustice and inequity. This is the situation the Zambian people have often complained about when it comes to the states evoking of the *Nolle prosequi* law. Most political opponents often find themselves in this situation, and this injustice leads to legal impositions of the *Nolle prosequi*. In exposing this type of legally based injustice, this article explicate such incidents (i.e., the Milimo Lungu debacle) arguing that the *Nolle prosequi* law need to be grounded in principles and practices of social justice if it is to be approved as better strategy and mechanism to eliminate corruption in the mining sector. Amissah (2006)^[2] argues that the power of the adjudicators to enter a *Nolle prosequi* is an example of complete discretion that must be based on the principle of social justice. In theory, it should be possible to ensure that social justice acts as a guiding principle in evoking the *Nolle prosequi* as the best way of achieving fairness and equality in a liberal democracy such as Zambia. One would expect, all criminal suspects would be treated equally within the legal system of Zambia in the application of the *Nolle prosequi* law. But in reality, this is never the case. This inequitable treatment of crime suspects from lower classes of the Zambian society constitutes an injustice towards them on the part of legal institutions. In this article the argument is that it is important that the DPP and Attorney generals' operations are premised on principles of social justice to all so that the less politically connected criminal suspects can experience a sense of belonging to legal systems of these institutions. However, this theory is grounded in my embodied values of justice and equality, and encourages social practices that are premised on a logic that promotes inclusion and diversity as ways of living to my values.

6. Methodology

Data used for this article was drawn from KCM because it is one of Africa's largest integrated copper producers and the world's largest diversified natural resources companies (WORLD BANK 2021). Further, data was sought from the Attorney General, the DPP'S offices and from criminal suspects affected by the *Nolle prosequi* law through interviews and documentary analysis. The methodologies used were commensurate with my embodied values of social justice and equality in my practice as a civic education lecturer at the University of Zambia. I interviewed 10 senior miners, 5 crime suspects and 10 prosecutors in the order of seniority. The data from this group is dependable because they shared their experiences as law enforcement officers on

the subject of corruption and *Nolle prosequi* law application. Equally, I also interviewed prosecutors on the challenges and criteria that is applied to enter *Nolle prosequi* on criminal suspect.

7. Data Analysis and Interpretation

The genesis of data analysis was in the data collection phase itself and not after. In this article, audio-recorded data was transcribed and translated from *Chinyanja* and *Ichibemba* into English. Recordings of interviews with prosecutors and criminal suspects were in these languages. It allowed participants to fluently express their beliefs, experiences and convictions about the *Nolle prosequi* phenomenon weakness as a strategy and mechanism to combat corruption. This article used the method of inductive content analysis as the basis for its data analysis. Patton (1990)^[19] holds that, “the strategy of inductive designs is to allow the important analysis dimensions to emerge from patterns in the cases under study without presupposing in advance what the important dimensions will be”. Hammersley *et al.*, (1995: 209)^[10] suggest that in analyzing qualitative data, the initial task is to find concepts that help “make sense of what is going on”. Patton (1990)^[19] seems to suggest that these concepts about data analysis start arising during data collection and that marks the beginning of the analysis in this article. Narratives helped to exploit clues about how prosecutors enter a *Nolle prosequi* as a discretionally power exclusively to themselves and unchallenged. It helped me to begin examining patterns of speech by prosecutors, the repetition of the words to be considered as *Nolle prosequi* phenomenon. The idea here was to understand prosecutor’s experiences when evoking the *Nolle prosequi* law. From the narrations they gave to me whilst at the mines, the understanding of the *Nolle prosequi* phenomenon outcomes emerged from interaction with them and their lived experiences during the legal process.

8. Discussions of findings

Core reasons for understanding the weaknesses in the *Nolle prosequi* law to combat corruption in Zambia are presented within the two themes discussed during interviews and documentary analysis. These are: behavioural patterns of prosecutors influenced by *Nolle Prosequi* as a discretion mutually exclusive to prosecutors. These highlighted themes are contextualized in social network relations. The themes are discussed in sequence as patterns of behavior weakening the *Nolle prosequi* law to combat the *Nolle prosequi* phenomenon in the mining sector of Zambia. By interviewing prosecutors, miners and criminals involved in corruption the first theme influencing the weaknesses in the strategies and mechanisms to combat corruption is the *Nolle prosequi* phenomenon anchored on **social networking**.

In agreement with Knote and Kuklinski (1982), Scott (1992); Wasserman and Galaskiewicz, (1993) *et al.*, on networking as a strategic connotation was found to influence *Nolle prosequi* phenomenon thereby perpetuating corruption at Konkola mine, and not eliminating it. For example, one informant during interviews said: “in everyday mining activities, we speak of *grassroots and old boys’ network*” (2021). This acts as self-help to guide new entrants into mining knowledge and skills. It is a guide to evade security actualized in *Nolle prosequi*. This means that the building block for *Nolle prosequi* to be effected lies in social relations between prosecutors and crime suspects of

corruption at *Konkola* mine. Social networking creates interpersonal trust between prosecutors and miners. It is a guarantee for profits that are shared between friends in the process of mining activities.

The other core reason for the persistence of *Nolle prosequi* phenomenon weakening the strategy and mechanism to combat corruption lies in “**social justice theory**”. This is the wish to obtain social justice for those accused of corruptly acquiring the mining rights not limited to acquiring extra resources. Social justice here is based values around humanity and dignity of all people. If implemented, it will compel the government of Zambia to promote the idea of equality of respect to suspects for which yet such is grossed over. For example, DPP’s power to enter a *Nolle prosequi* is given to him to promote the objective of the criminal process, which is to determine the truth of the allegations against an accused person (Mensah, 2006)^[16]. It cannot be used for any other purpose. Unfortunately, the relevance of social justice is ignored by the DPP in Zambia. For instance, in case of the former DPP, on 10th March, 2015, the Pandora box of prosecutorial misconduct, abuses and excesses was opened by the former Republican President Edgar Chagwa Lungu who set up a tribunal to investigate alleged misconduct of entering a *Nolle prosequi* for Mutembo Nchito, who was the DPP’s friend (Chirwa, 2015). This shows the actions of the DPP that produced gain to his friend at the expense of destroying the public trust in the application of *Nolle prosequi* law. This is an example of the weaknesses of *Nolle prosequi* law not grounded in principles of social justice and equality for all in Zambia.

Equally, data analysed states that the power of “**discretion**” by the DPP when evoking *Nolle prosequi* has contributed to the weak strategies and mechanisms to curb corruption at *Konkola*. The case in point is the Milimo Lungu saga where the state entered *Nolle prosequi* due to discretionary powers of the DPP. Though, this has been the subject of intense scholarly debate, others have argued that *Nolle prosequi* cannot be a major mechanism for reducing corruption anywhere because it is offered under the guise of “discretion”. This implies that it also has great potential for abuse, thereby perpetuating *Nolle prosequi* phenomenon in the mining sector of Zambia. For example, Galligan (1986) on discretion states that it involves two elements to be actualized. These are the autonomy of the official to act and an acceptance within the administrative system of this autonomy. An official is said to have discretionary power when he has significant scope for settling the reasons for it. However, the argument that law is constituted by standards that are made up of rules and principles (Dwonkin, 1978a) are absent in the *Nolle prosequi* law. Principles apply because they are requirements of justice, fairness or morality (Akufo, 2001)^[1]. According to Dworkin (1978b)^[6], there is a logical distinction between rules and principles. First, rules apply in an all-or-nothing manner. A rule either applies in a given situation or it does not. Secondly, if two rules clash, then one of the rules is not valid and it has to be jettisoned. This shows the problem of discretion powers in the *Nolle prosequi* law hence inconsistencies in its enforcement hence weakening the fight against corruption. Simply, discretion in Zambia is used arbitrary.

The other reason for the weaknesses in the strategy to combat corruption was located in the “**bureaucratic locus**”. Interviews with miners and prosecutors reviewed that “bureaucratic locus” has contributed to the weaknesses in

strategies and mechanism to reduce corruption at KCM. The interviews suggest that private firms are engaged in bribery to avoid paying tax due to inconsistencies taxation laws created by bureaucratic systems through “policy networking”²¹ at KCM. This practice is actuated through gift-giving to prosecutors by mining executives to avoid prosecution. In agreement with Van Waarden (1992) [28] policy network is that it helps to map up the actual relations that emerges from the bureaucracy with various actors participating in the network flourishing the *Nolle prosequi* phenomenon at KCM. Therefore, it becomes obligatory by the company in its policy to offer gifts to the bureaucratic structures of government, a practice solely made for future help to KCM.

9. Conclusion

This article examined the *Nolle prosequi* phenomenon arguing that it is perpetuated by the arbitrary application of the *Nolle prosequi* law to combat corruption at Konkola Copper mine (KCM) in Zambia. The paper does that by zooming into the complex social relation between actors involved in the phenomenon. One of the major themes observed, is the importance of understanding *Nolle prosequi* within the prism of social relations is often ignored by the authorities.

Equally, part of the contention of this paper is that it is a requirement of article 88 of the Zambia constitution of 1996 that all public officials with discretion must act fairly. This implies that all legal standard must be fulfilled before they can be said to have been properly exercised as “discretion”. Consequently, no official has absolute discretion. The DPP’s power to enter a *Nolle prosequi* weakens the strategy and mechanism to combat corruption because this discretion allows him to use judgment to balance the various requirements of the Zambian constitution to attain social justice. Through evoking *Nolle prosequi*, social justice is completely unattainable contrary to my values of equality for all, since it allows no space for human dignity. This shows the weakness in the *Nolle prosequi* law for not respecting values of social justice hence the perpetuation of corruption at KCM.

Most often, commentators view *Nolle prosequi* phenomenon as illegal, unjust or immoral actions but the practice should not be dismissed as immoral and illegal; it has to be contextually understood as habitual practice by prosecutors as “social networking” that creates entrepreneur benefits between actors. This perpetuates corruption in the Zambia’s mining sector.

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