Nigerian Military Justice System: The Need for Its Civilianization

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Abstract. The paper deals with the need to civilianize Nigerian military justice system. By this civilianization, it denotes the reform of traditional aspects of a military justice system to resemble its civilian criminal justice counterpart. The aim of the paper is to discuss briefly the different areas of military justice that need to be reformed viz: the commander's investigating authority, role of the Convening authority, selection of panel members and summary trials. It is the contention of the paper that as a result of the steady expansion of individual rights in Nigeria and the expanded Nigerian judiciary reviewability of courts-martial decisions, there is the need to civilianize military justice system in Nigeria. The methodology adopted in the article included both primary and secondary sources of information.

The paper concludes that no major military reform acts have been passed in Nigeria. Hence, the basic court structure, method of selection of the court, the commander's control of the court machinery and the heavy reliance of administrative reviews rather than judicial appeals have not been substantially altered.

Key words: civilianization, military, military justice, Nigeria

Introduction

In any examination of military justice with an eye towards reformation, there is the notion that the traditional military justice system no longer works well. The notion stems from the belief that this system needs a reformation in order to be in line with society's broader understanding of what constitutes a fair system of justice. To bring military justice into the modern age, many reformers have called for major overhauls and fundamental structural changes to the military justice system as a whole. These calls for reforms have been particularly prevalent in countries with a common law tradition. The reforms are clearly towards civilianizing military justice. This simply means reforming military justice so that it mirrors the civilian justice system in a particular country to a much greater degree. However, the phenomenon of the multiple roles of the commander in the prosecution of matters under the military justice system gives concern for the fair trial standard of an impartial trial process. That is because in the military environment, it gives rise to the perception of command influence; that the person making all these decisions can bring their influence to bear to ensure conviction. However, military justice system is to be reformed to improve their effectiveness, the quality of justice delivered by military courts, and to adapt to the changing domestic legislation, to international standards or specific needs of the military institution.

Consequently, the uniqueness of the military justice system as a *sui generis* does not preclude adopting elements of the civilian criminal justice system to enhance the fairness and transparency of courts-martial. However, caution is advised when considering the impact of importing civilian criminal justice practices to a military disciplinary system under the assumption that the former is the standard to which the latter must aspire. Military and civilian justice systems are divergent in a key respect in that the former has the primary role to assist the chain of command in maintaining order and discipline under the Nigerian Armed Forces Act. While there appears to be fissures (cracks) in the historical traditions of the commanding officer and other challenges to military justice in Nigeria, those responsible for superintending

military justice have been steadfast in their support and confidence in the traditional model of military justice system.

The military criminal justice system has stood as a system apart, a system designed to advance the needs of military commanders for efficient and effective control of service men. Equally, the military justice system has consistently lagged behind its civilian counterpart in its concern for the broad protections associated with fundamental rights. However, while many in military command has worked to incorporate the protections into military criminal justice over time, other military leaders have resisted such changes as unnecessary "civilianizing" and a direct threat to their ability to run a proper military (Grosso et al., 2010). There is a history of resistance by some military leaders to "civilianize" the military criminal justice system. This resistance appeared most famously during the 1920s in the office of the Judge Advocate General of the Army over the availability of appeal from certain court-martial cases (Lindley, 1990).

In Nigeria, for example, military justice was further militarized since the passing of the "Military Courts (Special Powers) (Amendment) Decree 1985" which ousted jurisdiction of civilian court's power of appeal over court-martial or military court decisions (Jemibewon, 1989). Further, the establishment of Special Tribunals (Military Tribunal) with majority of their members consisting of Armed Forces personnel to try offences hitherto criminalized has placed military justice over and above civilian justice. Besides, appeals from the decisions of these tribunals go straight to the confirming authority (The Armed Forces Ruling Council) which possessed the power of review of an accused person's case. As the civilian courts have no roles to play under these Decrees, their functions have greatly been limited to the trial of offences for which no tribunal has been set up by the Federal Government (Jemibewon, 1989).

Even in the 21st century, there are still calls for a change in the military justice system. Thus, the Secretary of Defence of the United States, Chuck Hagel has proposed amending the legal authority that empowers commanding officers to bring order and discipline to the military criminal justice. The authority in question, currently authorized by Congress, is Article 60 of the Uniform Code of Military Justice (UCMJ). Hagel's proposal stems from a United States Air Force case in which a military jury convicted an officer of sexual assault (United States v Lt. Col James H. Wilkerson III) but the officer responsible for reviewing the conviction, a lieutenant general overturned the jury's verdict using his Article 60 power as the convening authority.

Commanders resisting such change perceive the military criminal justice system principally as a means of promoting discipline to protect the authority and effectiveness of the military command and view efforts to civilianize the military system as a threat to those goals. This tension pits the "demands of discipline" against "the requirements of justice" (Barry, 2002).

Stemming from the above, this article will look at several unique aspects of traditional military justice system that have been identified for reform in order to civilianize the system. These are lack of tenure for military judges, the selection processes of military members empaneled to sit on court-martial, the commanders investigating authority, the commander's role in convening court-martial and exercising clemency and summary court. These reforms are designed to limit the commander's ability to unlawfully influence a case. In other words, the commander's role in military justice remains at the heart of most reforms and it will be the focus of this article.

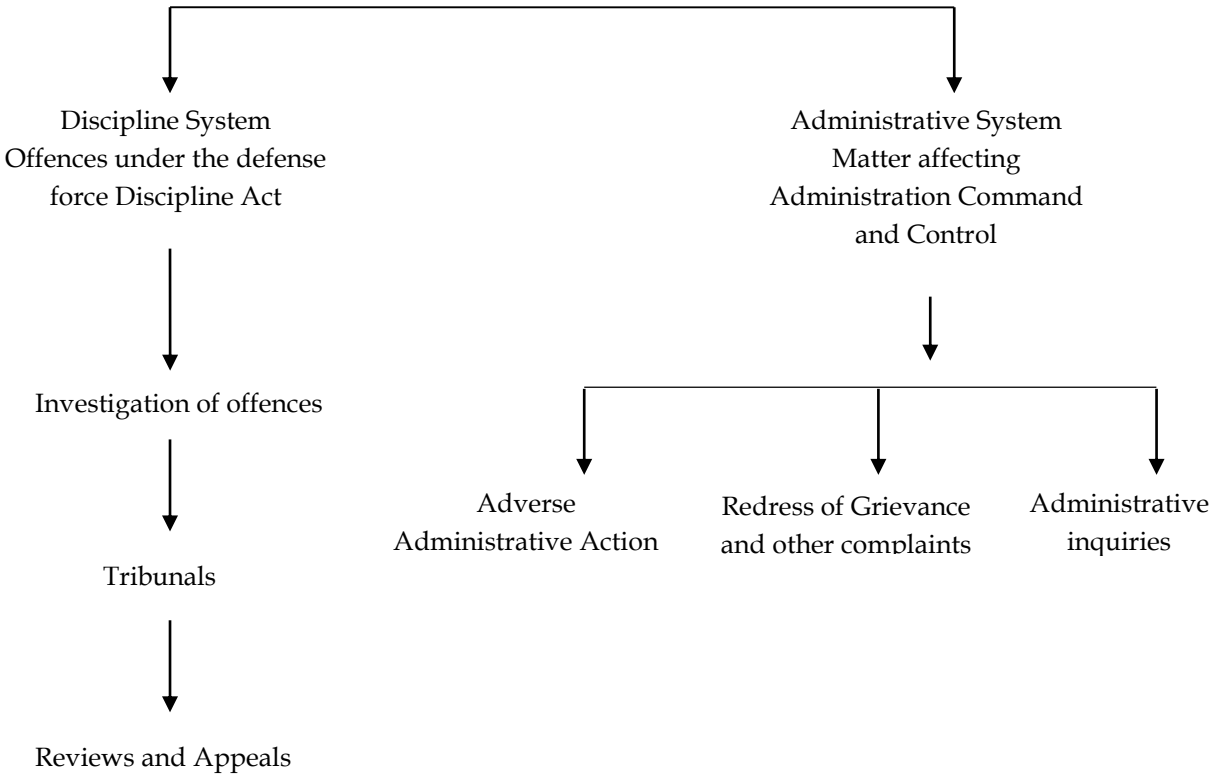
The best place to start this article is to briefly delve into the historical development of military justice in Nigeria.

Historical Development of Military Justice in Nigeria

It is impossible in this thesis to trace the history of Nigerian Military justice system; however, one can confidently posit that the history of military justice in Nigeria dates back to the pre-independence era. Therefore, the origin of the military justice in Nigeria cannot be complete without reference to the British military law which was codified before their arrival in Nigeria. Therefore, when, the British realized the need to raise a force for the protection and advancement of their interest in West Africa, they introduced their laws for the discipline of the force. This law was initially known as the 'West African Frontier Force' (WAFF) (Nigerian Regiment) Ordinance' and later as the Royal Military Force Ordinance). This was renamed the Queens Own Nigerian Regiment (QONR) in 1954. But before then, the administration of military in Nigeria started with the enactment of the Military Court (Special Powers) Decree No. 4, 1968 which came into effect on 1st June 1967. Later in 1984, following the military intervention, the administration promulgated Decree No. 23 of 1984 known as the Military Courts (Special Powers) Decree No. 23 as amended (George-Akinseye, 2007). It was amended by the Military Courts (Special Powers) (Amendment) Decree No. 9, 1985. It is important to note that while the jurisdiction of the military courts established under the 1977 Decree was limited to certain offences, the jurisdiction of the military courts created under the 1968 and 1984 Decrees was not so limited, as it applied to all offences created under the service laws if the commanding officer of the accused so determined.

When Nigeria attained independence in 1960, Parliament enacted law to regulate the army, and this was the Nigerian Army Act, 1960. The Nigerian Navy and the Nigerian Air Force Acts were created in 1963. Therefore, these three Acts governed and regulated the Nigerian Armed Forces until 1993, when owing to the need to have one law regulating the three services, the Armed Forces Decree (AFD) 105, 1993 was promulgated. The AFD as an existing law under section 315 of the 1999 Constitution has been renamed Armed Forces Act (AFA) Cap A20 Laws of the Federation 2004. The AFA is the current law governing the three services of the Nigerian Armed Forces. The Act became more or less the UCMJ for the AFN. For one thing, it enhances uniformity in the administration of justice particularly in the event of joint operations. The advantage of such a unity in the regulation of the armed forces is highlighted briefly by Popoola as: the unity of the system also accommodates members from one service to sit in a court-martial convened by the other. The former arrangement makes such accommodation difficult particularly when exigencies in one service make inevitable the invitation of members of another service to serve in a judicial capacity in matters arising within that service inevitable (George-Akinseye, 2007).

The Nature of the Military Justice System



Source: Department of Defence, Military Justice System (2009)

The military has created their own guidelines, which is somewhat similar to the civilian community, to handle and punish criminals. This means that when someone joins the military, he or she is subject to a different legal system. In Nigeria, the Armed Forces Act, 2004, establishes the standards of conduct expected of members of the Armed Forces. The conduct is enforced through a system of service tribunals, i.e., the courts-martial, the military substitute for civilian courts. In essence, the military justice system complements the civilian justice system to accommodate in theory, at least, the unique operational demands of the military.

Most of the differences between the two court systems derive from the difference in the way of life between civilians and military. Since there is such a significant difference between the two, the military has created a criminal justice system different from the civilian community in order to parallel the differences found within the military (Watkins, 1991). However, too many people fail to understand those differences and the rationale for them. While the civilian system operates to protect the populace and punish those who violate the law, the military justice system operates under a similar premise but relies on commanding officers to maintain good order and discipline within the armed forces. This separate system is necessary and justified for several reasons:

a. The need for instant mobility of personnel,
b. The need for a speedy trial to avoid loss of witnesses due to combat and deployment needs,
c. The peculiar nature of military life, and
d. The need for disciplined personnel (Gilligan & Lederer, 2006).

The need for a distinct justice system for the military has been aptly introduced by Abubakar, Chief Legal Adviser of the Nigerian Army thus:

> I know you may be wondering why there is the necessity for a separate and distinct justice and law enforcement regime for the military as against the rest of the society.

> Is the military not part of the society? The answer is simple. The soldier and the military profession is different, separate and distinct from the rest of the society. He is trained to be different; he dresses differently, walks differently and talks differently. His distinction is not just a hype or image created for the sake of just being different; it is because a soldier has a very special and different job to do. A job which other components of society cannot or are not trained or prepared to do. A soldier's duty to his nation is usually described in the quaint or very academic phrase as the 'Management of Violence'. The cold reality is that it is actually a job of dispensing violence and death; and of spilling guts and blood. (Abubakar, 2009)

A classic and internationally cited articulation of the necessity for the existence of a separate military justice system in a modern liberal democracy is that provided by Chief Justice Lamer in his reasons for judgment in the Supreme Court of Canada in the 1992 case of *R v. Genereux* [1992] (1 SCR 259) where the court stated as follows:

> The purpose of a separate system of military tribunals is to allow Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and wellbeing of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case of a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military…

In the earlier case of *Orloffv v. Willoughby*, the United States Supreme Court held as follows:

> We know that from top to bottom of the army, the complaint is often made and sometimes with justification, that there is discrimination, favouritism or other objectionable handling of men, but the judges are not given the task of running the Army…The military constitutes a specialized community governed by separate discipline from that of the civilian. Orderly government requires that the judiciary be scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

Furthermore, structures, rules and procedures in military justice can be substantially different from their civilian counterparts. Usually, military justice operates in a separate court system with stricter rules and procedures in order to enforce internal discipline and to ensure the operational effectiveness of the armed forces. Military judges possess expertise in military criminal law and disciplinary procedures. They understand the specifics of military life and culture. Why the civilian judges on the other hand do not have specialist knowledge of military affairs and usually have limited experience of practicing military criminal law. The system also affords for fast procedures for minor offences and disciplinary infractions.

In the military, each person reports to another in the chain of command. Those in command have extraordinary responsibilities that include, but are not limited to, the responsibility to train, equip, and lead personnel under their command. Order and discipline are integral components of the chain of command and must be maintained.

To that end, commanders have a myriad of tools to effectuate their duties. With respect to maintaining order and discipline, commanders have administrative (Manual for Courts-Martial United States, 2012) such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges or any combination of the above. They also have quasi-criminal tools to carry their duties. Military and justice seem to be oxymoron as it cannot be fashioned or imagined that military as a concept that deals with force or authority can also be associated with justice. This has been vividly summed up by George-Akinseye thus:

> The concept of 'military justice' appears to be contradictory in terms. If the idea being conveyed is the application of law to military personnel, then we should rather talk of 'justice in the military' rather than 'military justice'. The word military connotes the use of weapons or arms. When used in conjunction with the word, 'justice' it neutralizes the notion of fairness and equality which is what justice is all about (George-Akinseye, 2007).

Despite the above observation, military justice is the body of laws and procedures governing members of the armed forces. The military justice system is the primary legal enforcement tool of the armed services. It is similar to but separate from the civilian criminal justice system (Mukhtar, 2009).

In Nigeria, the Armed Forces Act, 2004 is the major body of laws enacted by the National Assembly to govern the conduct of service members. Many countries have separate and distinct bodies of law that govern the conduct of members of their armed forces. In the United States, military justice refers to the set of laws by which members of the United Armed Forces must abide. These laws were established by the United States Congress in 1950 when it enacted the Uniform Code of Military Justice known as UCMJ. All servicemen and servicewomen must follow this code, which contains not only basic criminal laws but also laws specific to the duties of soldiers.

The method of enforcing military justice in the United States is through the court-martial process, which ensures a fair trial for all enlistees while enforcing the laws contained in the statutes, while in Nigeria, the AFA provides for two types of trials, summary trial and court-martial. Military justice system encompasses all matters relating to the arrest and powers thereof, investigation of crimes, summary trial, court-martial trials including appointment of members and the judge advocate, calling of witness etc., post-trial action and extra regimental appeals to the Court of Appeal and Supreme Court (Abubakar, 2009).

Concept of Civilianization of Military Justice

Despite the arguments from those within the military justice systems that it is not only a fair system, but that it ought to remain exceptional in status, military justice systems in many countries have been the subject of significant scrutiny and, in some cases, substantial reform over recent decades. This process is known as "civilianization". In other words, it is the consensual incorporation into military law of perceived beneficial civilian legal norms. It denotes the reform of traditional aspects of a military justice system to resemble its civilian justice counterpart.

Civilianization was a term first applied to military justice transformation in 1970 (Sherman, 1970). The concept has since been described in a number of ways, including the quite general: civilianization means the incorporation of civilian values into the military life (Groves, 2005). It has also been defined with a focus on the decision makers, in which civilians, and in particular civilian judges, have an increased role in the composition of military court (Fidell & Sullivan, 2002). The concept has also been defined more expensively to describe an evolutionary process whereby the military justice system was previously an autonomous legal system with little civilian input at the administrative, judicial and policy- making levels,

military law became subject to a consensual policy of civilianization from the early 1960s, reflected primarily in the adoption of civilian criminal law norms by the military justice system.(Rubin, 2002).

Former United Nations Sub-Commission on Human Rights examined the administration of justice through military tribunals. The UN special Rapporteur, Mr. Louis Joinet (2002) traced the civilianization of military justice system and identified the following successive stages of civilianizing reform to military justice systems:

a) The inclusion of civilian judges on military tribunals;
b) Increasing use of civilian lawyers;
c) Transferring appeals to civilian courts;
d) Abolishing military tribunals in peace time;
e) Enshrining the right to a fair trial by military tribunals in war time; and
f) Excluding the trial of serious human rights violation from military tribunals.

The Need for Civilianization of Military Justice System

Discipline is the soul of any army. Because it is a tool for maintaining discipline, military justice is "command centered." The procedures and protections available in a given military justice system compared to the civilian systems procedures differ greatly. Hence, the society considers that the procedures in the military differ and seem to provide less protection. Therefore, it is the contention that the system be overhauled. Invariably therefore, the military justice is inherently unfair and must therefore be brought in line with the civilian system. While other personnel may report, investigate or bring charges, commanders alone decide how to dispose of offences, against persons in their command.

Military justice system needs reformation in order to be in line with society's broader understanding of what constitutes a fair system of justice. Hence, to bring military justice into the modern age there is the need to overhaul and make fundamental structural changes to the system as a whole. This therefore should be towards the civilianizing the military justice system. This means reforming military justice so that it mirrors the civilian justice system in Nigeria to a much greater degree.

A one-time Honourable minister of defence in Nigeria, Abbe strongly canvassed for the reform of AFA to conform to constitutional provisions on fundamental human rights as well as international human rights. To him therefore:

> Military law and military justice administration like every other facet of human endeavour is not static but fluid and continuously evolving. It is therefore necessary to also modify and fine tune our operating systems to conveniently align and conform with emerging trends and developments. I am aware that there is presently an increasing clamour for military justice administration to conform to constitutional provisions on fundamental human rights as well as international human rights norms as codified in sundry international instruments; a lot to which Nigeria has subscribed as a signatory. In the face of reality, it is crystal clear that there is need to change. Such regeneration should begin with tweak with the laws regulating military justice administration starting with the Armed Forces Act (AFA) which is the *grundnorm* of military law in Nigeria (Abbe, 2009)

In addition, it is important to have a look at the observation of the former Chief Judge of the Federal Capital Territory of Abuja, Nigeria when he stated (Gummi, 2009):

> …It was a period when private legal practitioners were not welcomed in the halls of court-martial, let alone being granted audience. It was equally a period when the military lawyers were too cautious not to run afoul of the expectations of their superior officers in defending an accused person. Knowing full well the implication of putting "too much" defence for an accused. Members of the courts-martial were

> equally not insulated from the atmosphere of fear that then pervaded the country during such trials, especially, coup trials. The chances of a member or even a presiding officer of a court-martial becoming an accused were not farfetched. Therefore, the courts-martial either in their bid to play safe or show absolute loyalty to their superior officers or both paid little or no attention to the letter and intendment of AFA, the Evidence Act and/or even the Constitution. The result was the avalanche of upturned cases emanating from courts-martial. This made the Act look as if there are so many things inherently wrong with it.

Moorman once stated that "sound changes cannot be properly advocated, evaluated, or implemented, if one doesn't comprehend what military justice system is intended to accomplish." (Mooreman, 2006). Fidell, writing on "A Worldwide Perspective on Change in Military Justice", has this to say about obvious reforms in military justice:

> Military justice is going through a period of ferment that is both rare and broad. In country after country, dramatic change either has occurred in the recent past or is under active consideration. Nothing like this has happened since the years just after World War II. There is no way of telling how long this phase will last, but there can be no question that it exists and is worthy of consideration. (Fidell, 2000)

In view of the above, some jurisdictions have enacted major reforms in their military justice administration. In United Kingdom (Armed Forces Act, 1996), it was hastened by a series of cases in the European Court of Human Rights, and in Canada, where decisions of the Supreme Court and Court-Martial Appeal Court have played a major role. In South Africa, new military justice legislation (Military Discipline Supplementary Measures Act, No. 16, 1999) was required when the government conceded that the former system, dating to the era of apartheid, was unconstitutional (*Freedom of Expression Institute v. President of the Ordinary Court-Martial*, 1998). Australia has been considering the need to reform its military justice in the light of the report prepared by Mr. Justice Abadee of the Supreme Court of New South Wales. In India, the Law Commission has recommended the creation of an Armed Forces Appellate Tribunal. These reforms will be discussed in details below. In the United States, the American Bar Association's Standing Committee on Armed Forces Law has, under consideration, a proposal to recommend legislation creating a commission to study military justice in connection with the fiftieth anniversary of enactment of the Uniform Code of Military Justice (1999).

This segment is better started with the remarks of Hudson when he said:

> But we can't stand apart because too many people believe that we don't have a good system. Pertinent is a remarkable attributed to Justice Holmes "A system of justice must not only be good, but it must be seen to be good." If our system is not seeming to be good, then we have to take some action, and the action in this case must be more than a Madison Avenue public relations campaign. We must think and plan ahead; if we don't propose acceptable improvements, we may get an unacceptable code of military justice thrust upon us by a well-intentioned but not too well informed Congress.

Today, debate over military justice reform is much in evidence, in Washington, D.C., and around the world. Many critical areas of military law and operations-including interrogation methods, detention practices, military commissions, bomb targeting practices, claims of foreign governments and people, environmental hazards, the "don't ask/don't tell" policy service members' access to the Supreme Court, and the extent of court-martial jurisdiction-have been the subject of official inquiry, media attention, and non-profit advocacy. This scrutiny presents both challenges and opportunities for practitioners and policy makers in the field of military justice. The enactment of the Uniform Code in 1950 was an effort to change 175 years of history. It has proved to be a significant, yet still only a partial and incomplete

success but despite periodic updates to UMCJ and the Manual for Courts-Martial, the United States has yet to perfect the delicate, integrated system of justice and discipline on which commanding officers, and the American people depend. As a result, new wave of reforms responded to the harsh criticisms of military justice system. The Military Justice Act, 1968 sought to improve the perceived fairness of courts-martial by creating the position of military judge and requiring that a military judge be detailed for every general court-martial. The Act also created formal appellate courts within each branch. The Military Justice Act, 1983 enacted further reforms. Concomitant with these legislative changes, the services themselves adopted in ways designed to improve the perceived fairness of courts-martial. For example, in the late 1970s and early 1980s, both the Army and the Air Force created independent chains of command for defence counsel. The Navy followed suit in 1998. Judges joined the push for reform as the Court of Military Appeals (later renamed the Court of Appeals for the Armed Forces) developed doctrines specifically aimed at reducing the appearance of unfairness in the military justice system. At least among the Justices of the Supreme Court, this wave of reforms seems to have significantly altered perceptions of military justice: In 1978, the Court overturned its earlier decision and removed the service-connected requirement for court-martial jurisdiction. Then, in 1994, the Court upheld the system of non-tenured military judges against a due process challenge. Concurring in that decision, Justice Ginsburg wrote: "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history. …" Thus, the military justice system seemed to have achieved its goal of improving its legitimacy in the eyes of those observing it. (Harvard Law review). There remains room for improvement, especially with respect to subjects-such as the extent of appellate review, and the conduct of criminal investigations-that fail to generate the media attention and popular debate that other issues attract.

Civilianization of Military Justice System in Nigeria

Reviews and petitions mark the beginning of the end of military jurisdiction; appeals trigger the civilianization, hitherto, through the Armed Forces Disciplinary Committee (AFDAC) to the Court of Appeal, and from thence, to the Supreme Court (Oshuntoye, 2010). The AFDAC having been abolished in 1997, its functions and powers were transferred to the Court of Appeal.

In Nigeria, an attempt was made in 2007 to amend the Armed Forces Act (AFA) by the Nigerian Army when it submitted a memorandum at a public hearing held by the House of Representatives' Committee on Defence to bring the AFA in line with the Constitution of the Federal Republic of Nigeria, 1999. Unfortunately, nothing concretely came out of it in terms of reform of the AFA. However, in May 2009, the Nigerian Army Law Reform Committee, made up of six officers was mandated to articulate NA imputes into the review of the AFA. The Committee has since submitted its report. The review Committee identified 62 sections of the AFA that require amendments. Regrettably, since the review Committee submitted its report over four years, the AFA is yet to be amended to be in consonance with the 1999 Constitution of Nigeria. It should be noted that under the provisions of AFA, the process of military justice is steered off the course of the civilian court procedures except at the appellate levels. Hence, no serious effort has been made to civilianize military justice system in Nigeria. The writer's conviction is based on the under mentioned areas of military justice where the influence of the conveying authority is heavily felt in the dispensation of military justice administration in Nigeria.

In view of the above, some critical areas of the military justice system have been identified for reform in order to civilianize it: a) the commander's investigation authority, b)

role of the convening authority, c) selection process of the military members, d) summary trials and e) lack of tenure for military judges.

The Commander's Investigating Authority

In Nigeria, like what obtains in many traditional military justice systems, the commander has the authority to initiate and conduct investigations into misconduct within the unit. Hence, the commander usually appoints an investigating officer within the unit to investigate allegations of misconduct. Once the investigations are completed, reports are made available to the commander. Hence, according to Victor Hansen, a system that relies so heavily on the commander's authorization before investigations into misconduct can be initiated are certainly subject to manipulation and potential cover-up by the initiating commander (Hansen, 2001). It may therefore be proposed that the commander of the unit involved in the alleged misconduct should not be the one responsible for initiating or conducting investigations. This investigative responsibility should be passed to some other office outside of the unit's command structure, such as a centralized office of military prosecutions. This type of reform has the advantage of removing those who might have the most at stake personally and professionally from initiating and conducting investigations. This might lead to a greater independence and reduce the risk that allegations of misconduct will go unreported and uninvestigated. This reform approach should take into consideration the command responsibilities of a commander. Hence, he should not be completely removed from investigative process. The best approach is a system that gives the commander the authority and responsibility to conduct investigations, but also vests investigative authority to independent offices outside the chain of command. This hybrid approach addresses the risk of command cover-up while still incentivizing (*motivating*) the commander to take personal responsibility to investigate allegations of misconduct.

Role of the Convening Authority

Under the civilian criminal justice, especially in Nigeria, the prosecutor or police file charges against an accused person. These charges are filed in a trial court, such as superior or district courts. However, in the military justice system, there are no standing courts contrary to what obtains under civilian criminal justice system. For every single court-martial to be set up, a court must be "created". The entity that creates a court-martial (s. 291 Armed Forces Act), is called the convening authority.

Under the Armed Forces Act, 2004, the President or the Chief of Defence Staff or Service Chiefs or GOCs (and equivalents) or Brigade Commanders (and equivalents) may convene a general court-martial or a special court-martial. However, under sections 131 (2), 131 (4), 128(1) and 286 of the Armed Forces Act, the Chief of Air Staff can validly authorize another officer to sign a convening order for a general court-martial. Thus in *State v. Sqd. Ldr. Olatunji*, the Supreme Court held that a community reading of sections 131 (4) and 128(1) of the Armed Forces Act clearly gives rise to the conclusion that the Chief of Air Staff can legally delegate the power vested in him under section 131(2), Armed Forces Act to convene a general court-martial. Equally, in United States, the convening authority creates a court-martial by issuing a convening order. The convening authority can be the President of the United States, the Secretary of Defence, or other high ranking officers in the military. This is the commander who determines that a case should be tried by court-martial (and by which type of court) and who has the authority to refer the charges to trial. He also appoints the court members. The convening authority performs the act of referral (i.e. the formal act of sending a particular case to trial). Normally, the convening authority will be identified by the level of court that he is authorized to convene. For example, one would be referred to as the Summary Court-Martial Convening Authority (SCMCA, the Special Court-Martial Convening Authority (SPCMCA) or the General Court-Martial Convening Authority (GCMCA). The authority to convene a

court-martial is established by the statutes, (AFA and UCMJ), based generally on the size of the unit commanded.

During the pretrial stages of the case, it is the convening authority that approves or disapproves of requests for expert and other witnesses from either the trial or defence, and it is the convening authority that approves of any plea offers from the accused.

In the United States, in the event of conviction, Article 60 of the UCMJ requires the findings and sentences of the court-martial to be reported to the convening authority. The convening authority is also required to take action on the sentence of a court-martial. The convening authority may approve, disapprove, commute, or suspend the sentence in whole or in part. Under sections 150 and 151 of AFA, the confirming authority has the power to review the findings and sentences of the court-martial. The prospect of the legal reform succeeding is enormous bearing in mind that the military justice system will be brought in consonance with the CFRN 1999 as well as with the rule of law. Therefore, these inelegant and ambitious sections that tend to negate justice should be removed.

Selection Process of the Military Members

The first, and by far the most controversial power that a convening authority has under the Nigerian military code are selecting the individuals who will serve as the court members that sit in judgment of the accused service member. Certainly, the commander may abuse this power by hand picking those members who will be inclined to see the case as he does rather than deciding the case on its merit. It is not hard to imagine a convening authority that has a mind to manipulate or unduly influence the outcome of a court-martial using this authority to hand pick those members who will be inclined to see the case as he does rather than deciding the case on its merits. This selection power of the commander should be replaced with random selection even though it may be resisted by the military command. This again, will not undermine his responsibilities as a commander. Therefore, there is certainly a justification for removing this power from the commander and placing it in the hands of an independent office.

Summary Trials

A commanding officer is given authority after an investigation to deal summarily with a charge against a noncommissioned officer subject to and in accordance with the provisions of Part XIII of the Armed Forces Act, Cap. A20, Laws of the Federation, 2004. The summary trials provide the commanders with a method of dealing simply and expeditiously with less serious disciplinary infractions. It also gives the Armed Forces an avenue for dealing with minor disciplinary offences, which may not readily fit into, or be compatible with a complex adversarial process (Chris Griggs 2002). These courts are quite limited in the types of punishment that can be imposed. However, a charge not dealt with summarily shall, after investigation, be remanded for trial by court-martial (sec. 124 of AFA).

Despite its important utilitarian purposes in the Armed Forces and also the relative formality of proceedings before a summary trial, the preponderance of informed legal opinion on the subject is that summary trials cannot be appropriately classified as ‘courts’. Neither can the adjudicating commanding officer be classified as a ‘judicial officer’. Rather it would appear that the more appropriate character of a summary trial is an administrative action by executive officer rather than a judicial action by a judge (Rowe, 2006).

Critics of the summary courts point to them as are tools of the military commander to quickly adjudicate and impose swift punishment for relatively minor offences. Another serious shortcoming on the operation of the summary trial is that under the AFA, the punishments meted out to the officers and non-commissioned officers of the armed forces whose cases are summarily dealt with are not the same. While the officers are not to be sent to the prisons when their cases are summarily dealt with, the non-commissioned officers, soldiers, etc, may be

summarily tried and punished to the extent permitted and in accordance with the provisions of the AFA and can be sent to the prison.

Based on the belief that these courts are overly vulnerable to command influence and do not provide sufficient procedural protections for service members facing a summary court, they should be modified. However, in the alternative, there should be appropriate limits on the authority to prevent the commander from abusing his power. Most importantly, summary courts should only be used for relatively minor offences and the punishment that a commander can impose must be quite limited. This will ensure that summary courts strike the right balance between supporting the commander's responsibilities while also protecting service members from unfair or arbitrary action. Reforms that completely remove the commander's authority to convene summary courts would go too far (Hansen, 2001).

Efforts towards Civilianizing Military Justice in Other Jurisdictions

Despite the above, the 1980s and 1990s saw many predominantly European countries abolishing military tribunals in peace time, including Denmark, France, Guinea, Norway, Sweden, Germany, Slovenia, Estonia, the Netherlands, the Czech Republic and Senegal.

Similarly, as a consequence of entering into the inter-American Convention of Human Rights as well as various Inter-American human rights convention (for example, the Inter-American Convention on Forced Disappearance of Persons), several Latin American countries introduced reforms in the 1990s resulting in the exclusion of serious human rights violations from military tribunals (Bolivia, Haiti, Venezuela, Colombia) and the abolition of military courts to try civilians (Colombia, Haiti, Guatemala and Nicaragua). In Paraguay, the use of military courts to try civilians was abolished in all instances, apart from allegations arising from international armed conflict when civilians could still be tried in the military court system. In countries such as China and Cuba, military courts have been abolished and service personnel tried by the civilian system. By dint of history, Japan had its military courts completely abolished when the new Constitution was adopted in May 1946. For entirely different historical reasons, when Costa Rica abolished its Army in 1948, the abolition of the military courts followed. By 1996, the post-Apartheid Constitution of the Republic of South Africa 1990 enshrined equality and independence for all. Based on this, the High Court of South Africa ordered that the Code of Military Justice should be suspended. The court held that, "the military is not immunized from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure" (ICT Report).

Subsequently, the continuing process of post-Apartheid law reform led by the South African Minister of Defence to appoint a Ministerial Task Team to review South African military justice and ensure it met constitutional requirements of independence, impartiality and equality for all (Tshivhase, 2006).

Conclusion

It has been argued that as military personnel operate within a rank structure that is inter-connected, and as the military court is broadly controlled from within this structure, there can be no true independence of a military from the structure itself. The distinction between the administrative, prosecuting, and judicial authority is not clear enough, as persons within the military system also appoint the members of the court. The only way, in which a military court could be independent from the military as an institution, is to be totally separated from each authority. Furthermore, shrinking military jurisdiction so that some crimes committed by service members are prosecuted by civilian courts could help disrupt the isolated culture of the military and educate civilians about military life. For instance, if an alleged rape, robbery, or drunken driving offences were prosecuted by civilian authorities, military resources could be

conserved for military operations, training, and discipline rather than spent on criminal investigation, prosecution and punishment. Also, a modest shift in the direction of civil authority would signal the military's openness to change and progress, as well as its essential connection to civil law and government.

In arriving at this conclusion, the writer is aware that the nation holds commanders responsible for everything their unit does; therefore, nothing can be more damaging to the discipline and safety of troops than disabling the commanders' ability to deal with a crime. According to Victor Hansen, reforming, upgrading, and modernizing military justice is an important and worthwhile goal for any legitimate system of justice. Over the past 20 years, there has been a virtual revolution in military justice reform and many of the most traditional and respected justice systems have undertaken significant changes. One overreaching theme is confronting military justice to the prevailing caviling justice systems to a much greater degree than was the case in the past. However, in the push to modernize and civilianize military justice, caution is warranted. It is important to consider that there are important reasons why military justice is separate from the civilian system. Victor Hansen further cautions that rather than reforming military justice with the end goal of making it more like civilian justice systems, any reforms that impact on commander's traditional role in military justice must be carefully examined.

Recommendations

Based on the foregoing, it is recommended as follows:

From the treatise above, the following suggestions are proffered in order to make the civilianization of the military justice system a reality. Thus, there should be more exposure of judges and the civil populace to the administration of military justice system. For courts-martial to be generally accepted as courts of law, albeit as *sui generis* courts, serious consideration should be given to certain aspects as permanent courts-martial, specialized and permanent legal officers, security of tenure for the members of the military courts, the introduction of Military Court of Appeal or at least a statutory right of appeal against all decisions emanating from courts-martial. In essence, the independence, availability and responsibilities of military judges should be increased.

In addition, military justice system must adopt mechanisms that embody protections of the rights of suspect/defendants in the domain of military justice. This must also include the mechanism of *habeas corpus*, i.e. the mechanism for questioning and testing the legality of an arrest or imprisonment, as well as other mechanisms. With these mechanisms, the basic rights of the suspect and his family under military justice can better be guaranteed and protected. Furthermore, in principle, in peacetime, jurisdiction of military justice must be limited. Consideration must also be given to abolishing jurisdiction of military justice during peacetime. Also, jurisdiction of military justice based on the perpetrator of criminal acts (*ratione personae*) limited only to those who are members of the military or their equivalent. Involvement of civil society must be empowered in the process of formulation and discussion of the Draft Law on Military Justice System that is democratic and modern to put it on the pathway to democracy and human rights. There is the need for the periodic review of the Armed Forces Act (AFA) by the National Assembly in order to update as well as embark on corrective and innovative measures of the military justice system.

Therefore, a holistic review of the AFA should be embarked to bring it in line with the Constitution of the Federal Republic of Nigeria, 1999. Plus, the above, reforms must be made to ensure that alternative sentencing options are available to sentencing courts-martial similar to the concept of plea bargain, restorative justice and community work plans. There is the need for a military justice system that will speed up and simplify processes, supported by modern technology, to make them more effective and responsive that will be transparent and fair. The

public should be informed and consulted so that they can be confident that the military justice system is fair, effective and meets local needs. The confirming of the reviewing authority should be capable of being appealed to the High Court so that legal points which were not sufficiently appreciated by the trial or reviewing authority could in the interest of justice be scrutinized. There is need for commanding officers to have smattering knowledge of law. Administration of justice is a serious business that should not be left to laymen. In absence of knowledge in law assistance by somebody so learned should be encouraged. Therefore, military judges and the civil populace should be more exposed to military justice. There should be clear provision that only legally trained persons should act as Judge Advocate. The President of military courts should possess legal training as well. Records of military courts proceedings should be kept and used for the training of officers and those likely to be involved in administration of justice in the military and basic military law books i.e. Manual of Military Law 1972, The Queens Regulations for the Army 1975 should be indigenized, updated and distributed throughout the military formations and units.

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