

Law Enforcement, Military Discipline, and the Notion of Military Justice: Building a Case for the Constitutional Rights of Service Personnel in Nigeria


Olusola Babatunde Adegbite

Olusola Babatunde Adegbite

Department of Public Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria,
Ph. D. Candidate, Rhodes University, Grahamstown, Eastern Cape, South Africa
✉ adegbite@law.cardozo.yu.edu, g19a2584@campus.ru.ac.za

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Law enforcement is the pivot on which every society and institution stands and essentially survives on. An institution where enforcement of the law is in abeyance will surely not endure, as whatever goals are set is condemned to smoulder in total indiscipline. Without doubt, no institution would want to set off on that footing. However, where law enforcement takes place in a special institution like the Military, its deployment is bound to raise deep questions regarding the Constitutional rights of the accused persons. Over the years, the Nigerian Military appear to have been caught in this miasma in which the Constitutional rights of its service men has remained trapped in the notion of upholding Military discipline. It is to this end that this paper appraises the question of law enforcement in the Nigerian Military, querying its attitude towards the safeguards of these rights, and accordingly building a case for a new and better regime, in which Constitutional rights of Service personnel are not only guaranteed, but regarded as pre-eminent.

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INTRODUCTION

WITHIN the context of the general society, the responsibility of Law enforcement lies in the hands of the Police ([The Police Act, Nigeria 2004](#)), and other relevant State Security Agencies¹. The Police and these other bodies act as agents of the State in the maintenance of law and order, and in

¹ Notable amongst these include specialized institutions such as the Nigerian Customs Service, The Nigerian Prisons Service, Nigeria Security and Civil Defence Corps (NSCDC), Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and other related Offences Commission (ICPC), National Drug Law Enforcement Agency (NDLEA), National Agency for Food Drug Administration and Control (NAFDAC), Federal Road Safety Commission (FRSC), Standards Organization of Nigeria (SON), e.t.c.

extension regulate the conduct of human affairs. However, aside from the Civilian type of law enforcement, there also exists another type more *sui generis* in nature. Servicemen just like other members of the Society are subject to the general laws of the land and bound by the jurisdiction of the conventional courts. Additionally, they are also, more specifically this time, subject to a regime of special laws which strictly regulates their profession, conduct, behavior, duties, obligations, rights, and other areas of their job as Soldiers. This refers to law enforcement within the province of Military law².

The Status of the Soldier/Service personnel within a democratic cum constitutional framework is a complicated one. On the one hand, upon his enlistment into the Armed Forces it is deemed that there now exist a change in his legal status which compels that he is subject to the terms of the 'Military contract' as well as the provisions of relevant Military laws, which serves the dual purpose of regimenting him to military discipline, as well as preparing him as a ready asset for the overall fighting force. On the other hand, given that such soldier still remains a citizen of the State, it is equally deemed that he is not only subject to the same liabilities as other citizens, but more importantly that he is still assured of his constitutionally guaranteed rights that Military service does not attenuate. It is within this complicated web that the punishment of service personnel for Offences comes into scholarly focus.

We hear of the term "Court Martial" all the time, but not many have a clear insight into what goes into the final determination of matters in this special court. Can we say that the rules in Military books ensure that justice is done at all times, or is it just a question of justice their own way? What about the question of the Serviceman's Constitutional rights? Does the spirit and letters of Military compacts signals the death of the Soldier's rights, or is there a mutually beneficial co-existence of the two? Striking the right balance between these important, but unequal streams of law, requires a deep understanding of where they meet and where they part. These are current issues at the core of the intellectual ferment surrounding the Constitutional rights of service personal in Military law enforcement.

THE MILITARY LIFE AND THE NOTION OF MILITARY DISCIPLINE

THERE is no gainsaying that Soldiers are creatures of discipline, with nearly all aspects of their professional lives governed by orders (ICRC 2011). While on the one hand Military justice and discipline appears to operate independently of each another, on the other hand both are not mutually exclusive, as they interconnect and serve as the legal pedestal on which law

² Generally, Military Law is defined as "the body of laws, rules, and regulations that have been developed to meet the needs of the military. It encompasses service in the military, the constitutional rights of service members, the military criminal justice system, and the international law of armed conflicts".

enforcement is applied in the Military (Ghiotto 2014). The historical premise of Military discipline and the concept of punishing Soldiers for unlawful conducts, as well as illegal acts has its roots in ancient practices of the Roman Military establishment (Brand 1968). Under the old Roman Military justice system, soldiers of Rome's legion when accused of violations of extant military laws were made to undergo summary trials with the result that the punishment was always brutal in nature (Brand 1968). Appearing to illuminate the brutality involved in early forms of military discipline, a leading Military law Scholar Joseph Bishop once opined that the popular legal doctrine which states that it is better that ninety-nine guilty men go scot-free, than for one man to be innocently convicted, has no basis in the notion of Military discipline (Bishop 1964). In making this assertion, Bishop was of the view that if a soldier who deserts and manages to run away is eventually shot, the heartening effect is greatly reduced if not obliterated where correspondingly ninety-nine out of a hundred deserters also get away (Bishop 1964). Bishop's postulation appears to sum up the state of mind regarding law enforcement in the Military.

Under the Roman system, offences deemed legally impermissible could be classified as atrocities, even where such were carried out relying on lawful orders (Green 1985)³, a framework that was further developed under canon law, and has since been sustained through the middle ages up to contemporary times (Dawson, D & Dawson, James D. 1996). This today forms the crux of what is known as the Doctrine of Obedience to lawful superior orders, a doctrine firmly at the core of law enforcement in the Military⁴ (Lippman 2001; King 2002; Insko 2003; Bilsky 2004; Moghalu

³ For example, the Roman Digest is known to have excluded certain acts regarded as "heinous" from the defense of obedience to lawful orders. See IV The Digest of Justinian, Law 157, tit. XVII, Lib. L, Theodore Mommsen & Paul Krueger (eds.) (University of Pennsylvania Press, 1985). This Roman rule appear to have greatly inspired most modern Military laws, which today have provisions excluding from the defense of 'lawful orders', all forms of crime and criminality particularly those that are regarded as clearly "gross, indisputable, outrageous, universal, and without any doubt".

⁴ The doctrine of superior orders is a defense a Soldier pleads to a charge for crimes committed in the course of a war, on the ground that the acts so referred to, were carried out based on lawful superior orders. The superior order plea is deemed also deemed as a corollary of the complementary to the command responsibility defense which seeks to help a Soldier escape personal liability for executing superior orders. The superior orders defense is rooted in more than four centuries of pre-modern historical practice, starting with the 1484 trial of Peter Von Hagenbach who claimed that all the atrocities that were alleged of him were not of his personal decision. Its significance in contemporary times however came to the fore during the Nuremberg trials where some of the accused persons tried to raise it in defense, but its applicability for such an Ad hoc prosecutorial process was struck down following the promulgation of the London Charter of the International Military Tribunal which stated clearly that the defense of superior orders was invalid when it comes to allegations of War Crimes. This position appears to have been inspired by the earlier position under Roman law in which acts considered as very atrocious and impermissible did not come under the superior orders rule. Specifically, Nuremberg Principle IV provided that, "The fact that a person acted pursuant to order of

2006). Under the current rule, the leading position is one that excuses only non-atrocious misdeeds by soldiers, while criminalizing all acts deemed as egregious. This rule is also a subset of the established military doctrine of *respondeat superior*⁵ (Shakespeare, Collins (ed) 1995), a rule that holds that the superior officer alone would be held liable for any unlawful conduct commanded of subordinates. The key behind this rule is that it helps institutionalize a system of total obedience to orders, so Military discipline is maintained always. In an obedience to superior orders regime, Military discipline flourishes and respect for Military authority remains at an all times high. This is exemplified in the works of William Westmoreland, who speaking of Military discipline opined as follows:

Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task that is to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly in-consistent with his basic instinct for self-preservation (Westmoreland 1971).

Thus, the military life is one in which the Soldier in a proper understanding of the delicateness of his assignment, is expected to display peculiar virtues of character and general moral principles of an uncommon nature, all within a highly regimented framework that is followed through

his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him". However, the doctrine was to later resurface on the international scene during the trial of the notorious Nazi War Criminal, Adolf Eichmann. Over the years, the doctrine has evolved in a rather chequered manner, such that its application in international criminal prosecution has been greatly narrowed. For instance, the Rome Statute of the International Criminal Court under Article 33 referred to as "Superior orders and prescription of law", provides that; "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful". The doctrine has remained a most controversial item in most scholarly works.

⁵ Shakespeare captures the idea of *respondeat superior* perfectly, in his dramatic account in one of his works Henry V, where an infantryman had hailed the King's cause as 'just and honorable'. The conversation then went thus—"That's more than we know", replies a second infantryman; then add a third, "Ay, or more than we should seek after, for we know enough if we know we are the King's subjects. If his cause be wrong, our obedience to the King wipes the crime of it out of us".

consistently⁶ (Clausewitz, Rapoport (ed.) 1968; Huntington 1957; Miller 1996). For instance, matters such as the Soldier's daily regime of different strata of rigorous exercises, difficult tasks, and hard labor, as well as a form of seclusion from the society which is signified by the 'barrack life' (Boane, 1990), are things carefully designed to disconnect him from unwarranted behaviors and a corresponding capacity not to contemplate any.

In the Military, discipline is a fundamental hallmark of military service. This tradition evolved from certain historical objectives separating the Soldier from other members of the society. First is the fact that the work of the military which involves defending the nation from external aggression and territorial integrity is a hard one that requires troop's preparedness, and a high level of morale from the rank and file, as well as the Officers corps. Second, the principal job of the military is about fighting wars and most often, particularly when the call out of troops is based on an emergency, the military objective is not always entirely clear both to the Commanding Officer as well as his troops, as such there is a measure of discipline required so as not to lose focus, and to be able to switch strategy at the slightest call. These apparently uncommon characteristics make the service personnel's work a unique one in which control must be activated at all times. Where a Commanding Officer loses control of his troops, or where the Military High Command loses authority of its forces, it is as good as saying that all is lost. It is within this context that Offences are viewed quite seriously in Military circles.

OFFENCES IN THE MILITARY

GENERALLY, any act of service personnel which brings disgrace or contempt to the Military as an Institution is subject to the penalties of military law (Monroe 1942). In the Nigerian context, offences punishable in Military circles range from minor infractions related to military discipline, to very serious offences occasioning death. Under Nigerian Military law, Offences are specifically defined with corresponding sanctions or punishments as the case

⁶ This unique life of the Serviceman appears to be the theme of the renowned Military strategy theorist Carl Clausewitz, when he said, "every special calling in life, if it is to be followed with success, requires peculiar qualifications of understanding and soul". Clausewitz was equally of the opinion that "at the heart of any army, there would always be a cadre of professionals who would fight, not out of patriotism but...from sheer professional pride". According to him, the professional army, "is mindful of all these duties and qualities by virtue of the single powerful idea of the honor of its arms-such an army is imbued with the true military spirit". Adding to this understanding, Samuel Huntington on his part postulates on a kind of Military Ethics that speaks of "the permanence, irrationality, weakness and evil in human nature... the supremacy of society over the individual and his rights", including, "the importance of order, hierarchy, and division of functions". The same idea is further reflected in the works of Richard Miller who in expanding this thought, spoke about the Excellency of character and this finds expression in individual personal identity.

may be.⁷ For military personnel, offences are broadly of two types, there are: (1) Military Offences, and (2) Civil Offences.

1. Military Offences

MILITARY Offences are simply contraventions of the rules laid down for the enforcement of military discipline. These regulations are contained in Nigeria's principal military law, the Armed Forces Act⁸ (Hereinafter referred to as 'The Act'). Persons to be tried under this Act must be subject to what is known in Military circle as Service Laws. Section 168 and 169 of the Act provides grounds for bringing offenders who have ceased to be subject to Service Laws for trial under the Decree. These offences are peculiar to Service Personnel and Civilians who come under Section 272 of the Act. It will be noted that a few civil offences are reflected in what constitutes Military offences. Under the Act, Military offences includes the following - Aiding the Enemy ([The Armed Forces Act, Section 45\(1\)\(2\)\(3\) Nigeria 2004](#)), Communication with the Enemy ([Section 46\(1\)\(2\)\(3\)](#)), Cowardly Behavior ([Section 47\(1\)\(2\)\(3\)](#)), Offences against morale ([Section 48](#)), Becoming a Prisoner of war through disobedience or willful neglect and failure to rejoin Armed forces ([Section 49\(1\)\(2\)\(3\)](#)), Offences by or in relation to sentries ([Section 50\(1\)\(2\)\(3\)\(4\)\(5\)\(6\)](#)), Looting ([Section 51](#)), Mutiny ([Section 52\(1\)\(2\)\(3\)](#)), Failure to suppress mutiny ([Section 53\(1\)\(2\)](#)), Insubordinate behavior ([Section 54\(1\)\(2\)\(3\)](#)), Fighting, quarrelling and disorderly behavior ([Section 55](#)), Disobedience to particular orders ([Section 56\(1\)\(2\)](#)), Disobedience to Standing orders ([Section 57\(1\)\(2\)](#)), Obstruction of Provost Officers ([Section 58](#)), Absence without leave ([Section 59](#)), Desertion ([Section 60\(1\)\(2\)\(3\)\(4\)](#)), Assisting and concealing desertion and absence without leave ([Section 61](#)), Failure to perform Military duties ([Section 62](#)), Malingering ([Section 63\(1\)\(2\)\(3\)](#)), Drunkenness ([Section 64\(1\)\(2\)](#)), Drug: Wrongful use, possession, e.t.c of uncontrolled substance ([Section 65\(1\)\(2\)](#)), Offences in relation to property ([Section 66](#)), Offences in relation to properties of members of the Armed Forces ([Section 67](#)), Miscellaneous Offences relating to property ([Section 68 \(1\)\(2\)](#)), Loss or hazarding vehicle, Ship, or Aircraft ([Section 69](#)), Dangerous Flying ([Section 70](#)), Low flying ([Section 71](#)), Annoyance by Navigation or flying ([Section 72](#)), Other offences in respect of Ships and Aircrafts ([Section 73 & 74](#)), Prize Offences ([Section 75 & 76](#)),

⁷ Emphasis here is laid on the written aspects of the Constitution of the Federal Republic of Nigeria, 1999(as amended) especially in Section 36(12), which provides that, "Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law."

⁸ CAP A20, Laws of Federation of Nigeria (LFN), 2004 (1993 No.105), which came into force 6th July, 1994, and which is a review of the Nigerian Army Act, 1960, enacted by the legislature of the Federal Republic of Nigeria in 1960.

Sexual Offences ([Section 77-81](#)), Billeting Offences ([Section 82](#)), Offences in relation to requisitioning of vehicles ([Section 83](#)), Offences relating to and by persons in custody ([Section 84-87](#)), Miscellaneous Offences ([Section 88-99](#)), Offences in relation to Court Martial ([Section 100-113](#)), Other civil offences ([Section 114](#)).

The above represent what constitute offences under the Act. It should be noted that in the course of investigating an offence that has been committed, or to prevent the commission of an offence it might become imperative to apprehend and detain the alleged offender. Where arrest becomes necessary it must be done by a person who has legal powers to do so.

2. Civil Offences

UNDER the Act, there is another class of offences called civil offences. The position under the general Law is that if an offence is one for which the punishment is either a fine, or term of imprisonment or both, it is referred to as a crime. Distinctively, if it is an infraction in which the tort-feasor makes reparations to the victim or his estate in form of damages for the injury caused, then it is a civil wrong and not a criminal offence. However, in the Military where a crime is provided for by the civil authorities as contained for instance in the Criminal Code, or other criminal legislations, it is referred to as a Civil Offence. Service personnel are subject to both Military and Civil Laws, and in extension Courts Martial have jurisdiction over both Military and Civil Offences. The Act provides for Civil Offences ([The Armed Force Act, Section 114, Nigeria 2004](#)). In a Court-martial or any military trial, it is important that the appropriate section of the law providing for the civil offence be entered on the charge sheet, and must be explained by quoting the section or the civil enactment contravened, and the act constituting the contravention.

PROCEDURE FOR ENFORCEMENT OF OFFENCES IN THE NIGERIAN MILITARY

ARRESTING the Offender is the first step in the prosecutorial process. A suspected offender may be placed under arrest to prevent him from damaging evidence, escaping, or prevent further illegal acts, or ensure the personal safety of the offender himself. A person subject to service laws under the decree may be arrested if found committing an offence, alleged to have committed an offence, or reasonably suspected of having committed the offence ([The Armed Force Act, Section 121, Nigeria 2004](#)). It is important to note, that an officer may be arrested only by an officer of superior rank, however if he is found

engaging in quarrel or disorder of any kind, he may be arrested by an officer of any rank.⁹

If for any reason, a service personnel under arrest is to remain in custody for a longer period than eight days without release, a special report should be made on the necessity for his continued detention. This report will be made every eight days until a court martial is assembled or the offence is dealt with summarily or the person is released from arrest. An Offender may be detained in the following circumstances – (a) The seriousness of the allegation or accusation, for example murder or treason; (b) The need to establish the identity of the person under arrest; (c) The need to secure or preserve evidence relating to the allegation or accusation; (d) The need to prevent the continuation or repetition of the offence or any other offence; (e) The necessity to secure the safety of the person, other persons or property; (f) The need to forestall the actual or likelihood of interference with investigation, for example threatening, intimidating, incriminating or suborning of witnesses; (g) The need to prevent escape of the accused; (h) The fact that the accused has not surrendered but has been apprehended as an illegal absentee or has habitually absented himself.

Disciplinary Powers of Commanding Officers

AS EARLIER observed, a key objective of Military Law is the maintenance of discipline and good order among troops. Under the Act, a variety of channels have been provided through which military discipline is applied and one is the authority of the commanding officer in the command and law enforcement chain. The Commanding Officers at various levels as executors of military discipline are given extended powers to investigate charges, and deal with offenders summarily, or through the avenue of a court-martial¹⁰ ([The Armed Forces Act, Sections 115-118, Nigeria 2004](#)).

When an offence has been committed, the allegation shall be reported to the Commanding Officer of the accused in the form of a charge. The Commanding Officer shall investigate the charge in the prescribed manner

⁹ However, a soldier may be arrested by an officer, warrant, or petty officer or a non-commissioned officer subject to service laws. In this case, the person executing the arrest must be of superior rank to the offender. A provost or any officer, warrant, or petty officer, non-commissioned officer, or soldier, rating or air craftsman lawfully exercising authority under a Provost Officer or on his behalf may arrest any person subject to service law. A person authorized to effect arrest may use force as is reasonably necessary. Power of arrest may be exercised either personally or by ordering into arrest the person to be arrested or by giving orders for that person's arrest. Generally, arrest consists of actual seizure or touching a person's body with a view to detaining that person. It is imperative that before a person is arrested, he must be told by the person carrying out the arrest that he is being arrested, and the circumstances, or reason for such arrest be clearly stated.

¹⁰ Exercise of these powers especially in the disposal of charges against accused persons vary according to the instruments of powers they possess. There are instances where a Commanding Officer may be appointed mainly for disciplinary purpose only.

(Rule of Procedure, No.8, Fundamental Rights (Enforcement Procedure) Rules, Nigeria 2009). The accused may be attached to another unit for the purpose of the investigation¹¹. This however applies only in cases where the Commanding Officer is the only material witness. After investigating an offence, its nature and the rank of the accused determines the action to be taken in order to dispose of it. Subject to the provisions of the Act the Commanding Officer shall summarily deal with the charge (The Armed Forces Act, Section 105, Nigeria 2004). Where he is convinced that the charge cannot be summarily dealt with, he has the powers to refer the case to the Appropriate Superior Authority (ASA), or take steps to have the charge tried by a Court-martial. The ASA may deal with a charge referred to him summarily, remand for trial by court-martial, or refer it back to the Commanding officer advising a retrial or dismissal of the charge. Summary dealing with a charge according to the Act refers to the Commanding Officer or Appropriate Superior Authority taking the following actions – (a) Dismissing the charge; (b) Determining whether the accused is guilty; (c) Where the accused is guilty recording a finding of guilty and awarding punishment; (d) Condoning the offence. Note that the Act expressly provides that a Commanding Officer shall not deal summarily with a charge under certain sections of the Act.¹²

PROCEDURE FOR TRIAL AND TYPES OF COURT MARTIAL

1. Classification of Courts-Martial

SENIOR Military officers play an important role in all aspects of Nigeria's military justice system. They are the ones empowered to adjudicate in the court-martial system and in carrying out their duties, they often function in roles similar to that of judges and other judicial authorities in the Civilian criminal justice system. The Court-martial is the military court-system where the accused person makes his/her case for a judicial determination. Under the Act, there are two (2) types of Courts Martial; a General Court Martial and a Special Court Martial (The Armed Forces Act, Section 129, Nigeria 2004). The main differences between the 2 types of court martial are – (a) The level at which they are convened including ranks of the membership; (b) The rank of the accused; (c) The nature of offence including the nature of punishment

¹¹ This is based on the Doctrine of Natural Justice i.e. the Commanding Officer, cannot be a Judge in his own case, as enshrined in the Latin *maxim, nemo judex in causa sua*, meaning, "No one shall be a Judge in his own cause".

¹² These sections include 45, 46, 47, 48, 50, 51, 52, 53, 60, 65, 66, 67, 71, 72, 73, 75, 76, 83, 88, 91, 93, 95 and 98. See Section 124(6)(a) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN)2004.

prescribed for the offence; (d) Their composition especially the size and rank of the membership.

2. A General Court Martial

A GENERAL Court Martial may be convened by - (1) The President (as C-In-C); (2) The Chief of Defense Staff; (3) The Respective Service Chiefs; (4) GOCs of Corresponding Commanders; (5) Brigade of Corresponding Commanders (Section 131 (2)). Also, the Composition of a General Court martial consists of at least 8 persons as follows - (1) A President; (2) Four Members (not less, may be more); (3) A waiting Member; (4) A Liaison Officer; (5) A Judge Advocate who must be a lawyer.

3. A Special Court Martial

THE power to convene a Special court martial is defined as follows - (1) A Special court martial may be convened by any of the person who may convene a General court martial; (2) The Commanding Officer of a Battalion or a corresponding unit (Sections 131(3)). Also a CO or corresponding Commander can convene; (3) Commander of detached sub-unit who would otherwise not qualify under paragraph 1 above.

A Special Court Martial when eventually convened is usually composed of (1) A President; (2) Two members (not less, may be more); (3) A waiting member; (4) Liaison Officer; (5) Judge Advocate.

4. Jurisdiction of Court-Martials

THE Act provides as follows:

- (1) A General court-martial shall, subject to the provisions of this Act try a person subject to service law under this Act for an offence which, under this Act is tri-able by a court-martial and award for the offence a punishment authorized by this Act for that offence, except that where the court-martial consists of less than seven members it shall not impose a sentence of death.
- (2) A General court-martial shall also have power to try a person subject to service law under this Act, who by law of war is subject to trial by a military tribunal and may adjudge a punishment authorized by law of war or armed conflict.
- (3) A Special court-martial shall have the powers of a general court-martial, except that where the court-martial consists of only two members, it shall not impose a sentence that exceeds imprisonment for a term of one year or of death ([Sections 130](#)).

5. Constitution of a Court Martial

A COURT-MARTIAL shall be duly constituted if it consists of the President of the court-martial, not less than two other officers, and a waiting member (Section 133 (1)). The President of a court-martial shall be appointed by order of the convening officer and shall not be under the rank of major or corresponding rank, unless in the opinion of the convening officer, a major or an officer of corresponding rank having suitable qualifications is not, with due regard to the public service, available, so however that - (a) The president of a court-martial shall not be under the rank of a captain or a corresponding rank; and (b) Where an officer is to be tried, the President shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall be of the same but not below the rank and seniority of the accused (Section 133 (3)). The Act also states that the members of a court-martial, other than the President, shall be appointed by order of the convening officer or in such other manner as may be prescribed (Section 133 (4)), and that a Judge Advocate shall be a commissioned officer who is qualified as a legal practitioner in Nigeria with at least three years post-call experience, or failing that he shall on request by the convening officer be nominated by the Directorate of Legal Services of the respective services of the Armed Forces (Section 133 (6)).

6. Arraignment of the Accused Person

WHEN a court-martial is sworn, an accused is arraigned on the charge contained in the charge sheet. Arraignment consists of – (a) The reading of the commencement of the charge and the person named, “the accused”; (b) The reading of each charge separately to the accused and called upon him to plead to it. The arraignment is conducted by the President and the Judge Advocate. Where two or more accused persons are being tried jointly, one accused may apply to be tried separately on the grounds that unless so tried, he will be prejudiced in his defense. Where there are several charges in a charge sheet the accused may, before pleading to the charge, apply for separate trial on any charge on the ground that unless so tried he will be prejudiced in his defense. It is instructive to state that Courts Martial are required to observe and apply the rule of admissibility of evidence as is observed in the civil courts. Both the investigation by Commanding Officer (taking of Summary and Abstract of Evidence) and the evidence at the trial must be done in accordance with the rule of evidence (Section 143). In addition, the Council¹³ has the power to hold disciplinary proceedings against an Officer, concurrently with Criminal proceedings in Court on the same matter¹⁴ (Section 1 of the Armed Forces

¹³ The Council in this event would be the Army Council, Naval Council, or Air Force Council.

¹⁴ It provides that, “Notwithstanding anything contrary in any law, the appropriate Council or Board of each force of the Armed Forces of the Federation (in this Act referred to as the Council), may institute, and where instituted, may continue disciplinary proceedings

(Disciplinary Proceedings) (Special Provisions) Act, Nigeria 2004), and even punish after an acquittal¹⁵ (Section 2 of the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act, Nigeria 2004).

LAW ENFORCEMENT AND THE CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL: THE NIGERIAN EXPERIENCE

OVER the course of history, there has remained an ongoing tension between certain aspects of Military law and the Constitution, particularly as it relates to the Constitutional rights of Service personnel. This is significant because the balance between military discipline and the notion of individual rights was not always so carefully calibrated. In Nigeria, Courts-martial as Military courts derive their validity from the authority of the Act and are therefore 'special' in nature and appear separate from the courts listed under the Constitution (Section 6 Constitution of the Federal Republic of Nigeria, (As amended to 2010), Nigeria 1999), except that they can be classified under the heading of, "*such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws*" (Section 6(5)(j) Nigeria 1999). As their jurisdiction is primarily statutory, the exercise thereof is expressly circumscribed by the Acts creating the courts, except that where the court in its operation conflict with the Constitution, the latter clearly overrides¹⁶ (Section 1(3), Nigeria 1999).

The current understanding within the framework of Military Courts as gatekeepers of law enforcement, is one that is founded on the notion that the entire Military justice system must from the start of the trial proceedings to the end, safeguard the constitutional rights of the accused service personnel. The Nigerian Constitution as the nation's principal legal document under Chapter

against any person subject to military law(hereinafter referred to as an "Officer") whether or not (a) Criminal proceedings have been instituted with respect to such a person in any Court of law in Nigeria or elsewhere or are about to be instituted or are contemplated; or The grounds upon which any criminal charge is based or is to be based is substantially the same as that upon which the disciplinary proceedings were or are to be instituted".

¹⁵ Here the law provides that; An Officer acquitted on a criminal charge for an offence or given a discharge, whether amounting to an acquittal or not, in any court of law may be dismissed or otherwise punished in accordance with any disciplinary provisions on any charge arising out of his conduct in the matter if the Council is satisfied" (a) That his conduct in the matter has been in any respect blameworthy; or that it is in the interest of the force where he is deployed and generally in the interest of the Armed Forces as a whole that he be so punished".

¹⁶ The constitution provides thus, "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of its inconsistency, be void"

IV provides for a long-list of such rights¹⁷. These rights are not only protected, but are deemed enforceable whenever they are violated, have been violated, or likely to be violated¹⁸. While all of these rights remain totally inalienable, and are held in permanence by the Service personnel notwithstanding his/her being subject to service laws, two of these rights critically stand out in terms of their application, protection, and safeguard within military law enforcement framework. These are the Right to personal liberty as guaranteed under Section 35 of the Constitution, and the Right to Fair hearing which is also to be found in Section 36 of the same document. Both rights are essentially key in any trial proceeding involving the Service personnel and must be seen to be upheld at all times.

As regards the right to personal liberty it is a cardinal rule that upon arrest, the accused person may choose not to utter a word or make any statement. In upholding this rule the Constitution clearly provides that, “*Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice*” (Section 35(2) Nigeria 1999). This constitutional guarantee is also further reinforced under the Administration of Criminal Justice Act, 2015¹⁹. This powerful doctrine has remained a long-standing cornerstone in several forward-thinking decisions of Constitutional courts in

¹⁷ The rights includes – Right to Life (Section 33); Right to Dignity of the Human person (Section 34); Right to personal liberty (Section 35); Right to Fair Hearing (Section 36); Right to privacy (Section 37); Right to Freedom of Thought, Conscience and Religion (Section 38); Right to Freedom of Expression and the Press (Section 39); Right to Peaceful Assembly & Association (Section 40); Right to Freedom of Movement (Section 41); Right to Freedom from Discrimination (Section 42); Right to Property and family Life (Section 43 & 44).

¹⁸ Section 46(1) provides that, “Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress”. 46(2) then additionally provides that, “Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled under this Chapter”.

¹⁹ Section 6 of the ACJA provides that, “(1) Except when the suspect is in the actual course of the commission of an offence or is pursued immediately after the commission of an offence or has escaped from lawful custody, the police officer or other persons making the arrest shall inform the suspect immediately of the reason for the arrest. (2) The police officer or the person making the arrest or the police officer in charge of a police station shall inform the suspect of his rights to: (a) remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice; (b) consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest; and Notification of cause of arrest and rights of suspect. (c) free legal representation by the Legal Aid Council of Nigeria where applicable: Provided the authority having custody of the suspect shall have the responsibility of notifying the next of kin or relative of the suspect of the arrest at no cost to the suspect”.

leading jurisdictions seeking to re-affirm the fundamental protections a suspect under interrogation is guaranteed within the fullness of his/her rights. The historical origin of this doctrine remains an ongoing contest²⁰ (Langbein, Hemholz et al (eds) 1997), however its modern application was laid in the groundbreaking decision of the US Supreme Court in *Miranda v. Arizona*²¹, where the court established the right of the accused person to remain silent at all times²². Of course, the basis of *Miranda* is to be found under US

²⁰ Scholars remain divided on the origin of the right to silent doctrine. A leading position however is that which subscribes to the view that the foundations of 21st century privileges as it relates to the right to remain silent is connected to the rivalry between the Common law courts preferred independently gathered evidence as valid, and the ecclesiastical courts which tilted more toward the use of confessional statements. Both courts where of the old English order.

²¹ 384 U.S. 436 (1966). In this case, Ernesto Arturo Miranda was in 1963 arrested by the Phoenix Police Department and charged with the crime of kidnapping and raping an eighteen-year-old lady. In the course of his interrogation, he was made to sign a confession in which he owned up to the rape charge, however at the commencement of trial, when prosecutors tried to tender Miranda's confession in evidence, his attorney objected saying the confession was in no way voluntary and should be rejected. The court disagreed with the position of Miranda's lawyer and he was subsequently convicted and sentenced to 20years on each of the charges. On appeal to the Arizona Supreme Court, the Court affirmed Miranda's conviction saying it saw no involuntariness in Miranda's confession particularly give hat Miranda did not specifically request an attorney at the time of making his confessional statement. Miranda finally appealed to the US Supreme Court, where the apex court reversed the two courts below.

The Court held that in light of the manner and type of coercion by which Miranda's purported confession to the Phoenix Police department had been procured, it could not be said to be voluntary and was therefore inadmissible under the fifth amendment to the US Constitution which provides for the right against self-incrimination, as well as the sixth amendment which entitles all accused person a right to an attorney. Delivering the opinion of the Court, Chief Justice Earl Warren went ahead to establish the landmark right that is now a major cornerstone of constitutional law i.e. 'The Right to remain silent'. He doing so he powerfully opined as follows; "The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he/she is indigent, an attorney will be provided at no cost to represent him/her". The Warren court further went on to say that: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning".

Following this landmark judgement, Miranda's conviction was accordingly overturned. Miranda is today a fundamental doctrine particularly as it relates to a judicial determination of guilt and has been applied meritoriously in a plethora of cases. See *Berkemer v. McCarty*, 468 U.S. 420 (1984). See also *Berghuis v. Thompkins*, 560 U.S. 370 (2010), where a suspect decides not to either invoke or waive his Miranda rights.

²² This rule is today the most important pillar of the interrogation process as a prelude to criminal prosecution. The ratio of the Court's decision is captured in the popular Miranda Rights which is mandated to be read to every person upon arrest, with the words, "You

Constitutional framework, where the privilege against self-incrimination as a product of the Fifth Amendment²³, allows a person to refuse to testify against himself in a criminal proceeding, as well as to answer official questions, particularly “*where the answers might incriminate him in future criminal proceedings*” (Hapner 2015).

In addition to the right to remain silent, the Nigerian Constitution provides for other rights such as the right to be informed promptly in the language that one understands as well as the details/nature of the offence in question, the right to defend oneself in person or by a legal practitioner of one’s choice, the right to be given adequate time to prepare one’s defense, the right to have an interpreter free of charge, the right to be presumed innocent until one is proven guilty, the right not to be charged for an unwritten offence or a retroactive offence, the right to have record of the proceeding kept, and the right to have copies of this within seven days of the conclusion of the case (Section 35 & 36, The Constitution, Nigeria 1999).

It is however a sad commentary that notwithstanding this explicit guarantee of the Nigerian serviceman’s constitutional right to remain silent, often times in the interrogation process preceding Court martial proceedings, service personnel alleged to have committed one offence or the other are coerced into making statements, usually with the goal that such can be used as confessional tool forming part of the prosecution’s basket of proof of evidence. Such acts are clearly in violation of the Service personnel’s constitutional rights and are certain to render the entire proceeding a complete nullity, whether at the trial court or upon appeal. It clearly delegitimizes whatever the entire outcome of the court-martial proceeding may be and reflects more of military illegality as against military justice.

Quite instructively also the *Miranda decision* dealt extensively with the military’s practice of providing the accused person with lawyers as free defense counsel. This requirement is firstly a part of the right to personal liberty under Section 35 and the right to fair hearing under Section 36. The clause, “*until after consultation with a legal practitioner or any other person of his own choice*” clearly lends credence to the accused person’s right of have a legal practitioner organize his defense to the charge. Not only is the Service personnel entitled to a Legal Practitioner, it must be free so as to excuse him of the financial burden of a criminal defense and it must be one that he consents to.

The first reasoning behind the rule that the legal practitioner be free of charge rest on the need to manifestly secure the course of justice, which is a course itself rooted in the principle of fair hearing. The Constitution clearly takes the issue of fair hearing very seriously, hence it provides that:

have the right to remain silent, as anything you say can and would be used against you in a Court of law”.

²³ The Fifth Amendment provides that, “no person shall be compelled in any criminal case to be a witness against himself”.

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality (Section 36(1), The Constitution, Nigeria 1999).

The principle that in determining the guilt or otherwise of any individual, such must be accorded fair hearing is as old as the common law. This principle is espoused in the twin maxim “*audi alteram partem*”²⁴ and “*nemo judex in causa sua*”²⁵, and clearly underpins the pivotal nature of this right. Therefore, in line with the *audi alpartem* rule, the logic of justice is that both sides in a matter have an opportunity to be heard without any impediment. In this regard the boundaries of this rule is quite elastic, and all matters tilts more towards affording the accused person every opportunity of being heard. Where there is a prevailing financial encumbrance on the accused service personnel depriving him/her of legal representation, this clearly does not paint a picture of both sides been heard.

The second reasoning is based on the fact that it is the State that has instituted criminal proceeding against the accused service personnel, and not the other way round. Again, the Constitution is clear in this regard and it provides, “*Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty*” (Section 36(5), The Constitution, Nigeria 1999). Part of the demonstration that the accused person is innocent, is founded on the rule that he is not duty bound to prove his commission of the offence. This is a cardinal principle of law expressed in the Latin maxim, “*Affirmati Non Neganti Incumbit Probatio*”²⁶. The accused is therefore entitled to simply do nothing all through the trial proceeding, except when called upon to enter his defense after the prosecution may have closed its case. In line with this position, it would therefore be akin to double jeopardy, to impose the twin burden of not only putting in an appearance, but one of financing an expensive defense on the accused, all for a charge which he may eventually be pronounced innocent. Thus, the right of the accused service personnel to have a counsel freely provided for him by the State remains cast in stone. The Nigerian Military justice system must therefore rise to this task. It is important that the provisions of the Act and other military regulations and court martial procedure rules, be made to reflect this all-important right.

²⁴ This is translated to mean, “Listen to the other side”.

²⁵ This also means, “No one should be a Judge in his own cause”

²⁶ This is translated to mean, “The burden of proof is upon him who affirms and not on him who denies”.

THE DEVELOPMENT OF SERVICE PERSONNEL CONSTITUTIONAL RIGHTS UNDER THE AMERICAN MILITARY JUSTICE SYSTEM: ANY LESSONS FOR NIGERIA?

IN THE United States, the civil and constitutional rights of the serviceman and the civilian in the context of criminal prosecutions are implemented in two distinct legal settings, i.e. a civil system of state and federal courts including the United States Supreme Court, and a military system composed of courts martial, boards of review, and the United States Court of Military Appeals (Ulmer 2015). Under American law, service personnel generally are issued a honorable discharge from Military service upon a satisfaction of acceptable military conduct and performance of duty. Notwithstanding this position, a member of the force cannot be denied a honorable discharge without due process of the law.²⁷ The former position under US Military law was that Servicemen generally enjoyed a level of constitutional protection that was inferior to that of Civilians (Hirschhorn 1984). For years, there remained an intense debate among scholars on the full applicability of Constitutional right to the service personnel in the United States Armed Forces (Henderson 1957; Wiener 1985a; Wiener 1985b). However following developments through statutes and judicial decisions, the constitutional divide on matters of right to due process for civilians and for service personnel has been significantly reduced such that today, any serviceman accused of an offence, enjoys nearly all constitutional due process rights accorded to civilians (McCoy 1969). A relevant example is the decision in *United States v. Stuckey* (10 M.J. (347) 1981), where the U.S. Court of Appeals for the Armed Forces held that, “the bill of rights applies with full force to men and women in military service”²⁸. This jurisprudence was later significantly advanced by the

²⁷ The United States ex rel. Roberson v. Keating, 121 F. Supp. 477 (N.D. Ill. 1949). See also the Fourteenth Amendment to the US Constitution, Section 1 which provides that, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

²⁸ There are however few exceptions. Key amongst them include the right to indictment by US Grand Jury and trial by petty jury, the right to be confronted in certain cases with adverse witnesses and right to bail. A reference to the US Constitution reveals that the Fifth Amendment clearly states that the grand jury provision does not apply to, “cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger.” In this respect also, the US Supreme Court has held that the Sixth Amendment’s right to trial by jury is similarly inapplicable to courts-martial. The Court has advanced the current jurisprudence by reaffirming the fact that some portions of the Bill of Rights is applicable to the military justice system, except that such application must be viewed differently against that of the Civilians.

same court in *United States v. Easton* (71 M.J. 168, 174-75, C.A.A.F. 2012), which now recognizes the general application of Constitutional rights to the military justice system.²⁹

In addition, under the American system the concept of military justice is not foreign to the Constitution. Rather, just like every other aspect of public life that comes within the purview of Congressional powers, the Constitution provides that the US Congress shall have the power, “to make Rules for the Government and Regulation of the land and naval Forces” ([The US Constitution, Art. 1, Sec. 8](#)). One way in which the US Congress has brilliantly deployed its powers above, is as regards its enactment of the Uniform Code of Military Justice (UCMJ) in 1950, which immediately revolutionized the notion of Military Justice in the United States³⁰. Following its first draft, the UCMJ has since been amended several times to bring it up to speed with complex matters of American military life. It is however instructive to say that one of the landmark achievements of the UCMJ has been in the area of giving further expression to matters of constitutional rights as it applies to servicemen, such that today the Code amongst other things provides for the right to counsel, right to a speedy trial, the right to a trial of the facts, the right to protection against double jeopardy, and the right against self-incrimination. This is certainly a framework that seeks to ensure that all matters regarding the Military are not conducted outside the supreme authority of the Constitution.

Interestingly, the Nigerian Constitution has a provision very similar to its American counterpart where it says, “The National Assembly shall have power to make laws for the regulation of - (a) the powers exercisable by the President as Commander-in-Chief of the Armed Forces of the Federation; and (b) the appointment, promotion and disciplinary control of members of the armed forces of the Federation” ([Section 218 \(4\), The Constitution, Nigeria 1999](#)). Sadly, as it has become self-evident this constitutional provision has operated as nothing more than a paper tiger, as the proper custodian of this all-important power i.e. the National Assembly has failed abysmally in deploying it to good use, carrying on in total indifference, and preferring to

²⁹ The opinion of the court in re-entrenching this rule is quite instructive. It stated as follows; “Constitutional rights identified by the Supreme Court generally apply to members of the military, unless by text or scope they are plainly inapplicable. In general, the Bill of Rights applies to members of the military absent a specific exemption or certain overriding demands of discipline and duty. Though we have consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite, these constitutional rights may apply differently to members of the armed forces than they do to civilians. The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule”.

³⁰ The UCMJ made up of about 150 statutory sections also provides for a system of court martial and other parts of the adjudicatory process such as pre-trial conferences, trial proceedings and post-trial procedures. The Code also provided for the establishment of the Court of Military Appeals which is now known as the Court of Appeals for the Armed Forces.

dump the matter on the laps of the Executive branch. It is suggested therefore that now is time to reverse this unsavory trend. In addition to the provisions of Chapter IV, the National Assembly is called upon to proceed without favor or ill will towards anyone and give the needed teeth to the serviceman's rights and begin a new order of mandating the Military to be constitutionally guided in its law enforcement procedures. With this sort of framework, matters of law enforcement and military discipline necessarily become subject to overriding constitutional provisions, as it is the case under the American Military justice system, which is one that Nigeria can gain a bit of insight from.

CONCLUSION

THE MILITARY is one Institution that takes the question of enforcement of its laws very seriously. That accounts for why it is about the most disciplined institution to be found anywhere in the world. The sustenance of this tradition of enforcement is what has made discipline the hallmark of the Military. However, the current understanding is one that leans in one direction only i.e. that every Constitution contains components of a moral imperative demanding that every member of the society be treated as human, having an intrinsic value in themselves, and that the principal duty of a constitutional society is to protect this idea of humanity (Hirschhorn 1984), with courts positioned as the beacon to translate these rights³¹. Under the prevailing understanding, it is now the norm that servicemen do not abandon their rights when enlisting into the Military³².

There is no gainsaying that the recognition of Constitutional rights within the framework of Military law enforcement is still a developing area of the law in Nigeria, and it is on this basis that a case is being made to ensure that a similar framework as what obtains in other jurisdictions is not only adopted here, but consistently improved upon. One must commend some stakeholders in this sector such as the Nigerian Army and the National Human Rights Commission, who have already seized the gauntlet and are

³¹ Major pillars of this doctrine is the same that upholds the standards of "compelling interest", and "strict scrutiny" which the US Supreme Court's current approach to is assessing questions surrounding Citizen's Constitutional rights.

³² Weiss v. United States, 510 U.S. 163 (1994), where a current Justice of the US Supreme Court, Justice Ruth Bader Ginsburg spoke saying, "Men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. 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...". Justice Ginsburg's position is in consonance with an earlier dictum of Justice Douglas who said, "A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander, but as written in the Constitution..." See Winters v. United States, 89 S.Ct. 57, 59-60, 21 L.Ed.2d 80, 84 (1968).

leading the way³³ ([Fapohunda 2016](#)). We ask that they do not rest on their oars, even as others are called upon to toe the same line. More than ever before, it is now vitally of utmost necessity that every criminal proceeding under Nigeria's Military's law enforcement mechanism, is not just a satisfactory vehicle of constitutional rights of the accused servicemen, but more manifestly one which is so programmed to resolve constitutional rights grey areas, whenever such arises, in favor of such personnel. Though the desired destination may appear a long way from where we are at the moment, but if we continue with the current measured steps, it is certain that in a few years from now, there would be no trace between our Military justice system and where it used to be.

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³³ In a major move in this regard, there was of recent a special session of the Nigerian Military Human Rights Dialogue held on 27th September 2016, with the support of the Chief of Army Staff and the National Human Rights Commission (NHRC), where far-reaching consensus on safeguarding the Constitutional rights of Nigerian Service personnel consensus was reached.

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Law Quote

“On the battlefield, the military pledges to leave no soldier behind. As a nation, let it be our pledge that when they return home, we leave no veteran behind”.

—

Dan Lipinski

Source: <https://www.brainyquote.com/topics/military>.