Need for constitutional repositioning of military authorities in a democracy

By Robert Omote

THE political scenario of Nigeria since our flag independence has brought to the fore two contrasting groups deeply enmeshed in the struggle for power. The military as a more aggressive group obsessed by their training capture the seat of power, through compulsory seizure of the coercive instruments of the state as opposed to the politician counterparts, who in the brazen craze for political fortunes hobnob with the military or shamelessly manipulate the electoral process in dire quest for the control of state resources.

Of the 49 years of Nigeria's existence as a sovereign nation - state, the military class has unrepentantly bruised the psyche of the average Nigerian and bastardised the institutions needed for the socio-economic development of the country for the past 31 years. Even most of the constitutions till date with the exception of 1960 and 1963 have been creations of military rule. The two distinguishing features of military administrations are the use of decrees to curb civilian excesses and the court martial to checkmate rebellious or revolutionary tendencies of military officers and their civilian collaborators.

The relevance of the court martial has, again been exacerbated by the life jail term slammed on the 27 mutineers who protested against the shortfall in their United Nations peace keeping operations allowances. Section 240 of the 1999 Constitution of the Federal Republic of Nigeria and the Armed Forces Decree No.1 05 of 1993 (as amended) recognised the establishment of court martial. The decree consolidates pre-existing legislation on the subject, that is, Nigerian Army Act, the Air Force Act and the Nary Act. The Armed Forces Decree basically established a general court martial and a special court martial. The courts martial shall have jurisdiction to try a person subject to service law for offences to include misconduct in action, insubordination, absence from duty and drunkenness, among others, as spelt out in the decree. The courts are empanelled to try civil offences as well.

Section 52 (2) of the Armed Forces Act Cap. 20 LFN (2004) for the breach of which the 27 soldiers were charged provide that "a person subject to service law under this Act who, in a case not falling within sub-section (1) of this section takes part in a mutiny, or incites any person subject to service law take part in a mutiny, whether actual or intended, is guilty of an offence under this subsection and liable on conviction by a court martial to life imprisonment.

Section 52 (3) (a) (b) of the same Act amplifies mutiny as a combination between 2 or more persons subject to service law under this Act to overthrow or resist lawful authority in the federation or in any arm or service of the Armed Forces or any force co-operating with the Armed Forces or in any part of those forces, or to disobey the authority as mentioned in (a) above.

Legal contestations over judgments in courts and administrative panels arise over the compositions of such bodies and the circumvention of the rules of evidence.

In the instant case, human rights activist and counsel to the 27 soldiers, Femi Falana, once alleged that the court martial had refused to issue subpoena ad testificandum on a witness called by the accused; another witness was not allowed to testify for the accused; the Certified True Copy of This Day newspaper of September 18, 2008, which reported the extra-judicial threat of the President was rejected; an application made by counsel requesting the President to either deny or confirm the threat on oath was turned down.

It was obvious that the court martial descended into the arena of conflict, thus revealing some glaring elements of bias and preconceived judgment that "awaited the 27 mutineers.

Section 36(4) of the Constitution of the Federal Republic of Nigeria 1999 explained two traditional maxims: (a) audi alteram partem (that is, the other party must be heard) R v The University of Cambridge (1723) and (b) Nemo judex in causa sua (a person shall not be a judge in his own case, in which case, there must be freedom from bias (Garba & Ors v The University of Maiduguri (1986) 2SC.128.

In Lt.-Col. M.F. Komonibo and the Nigerian Army (2002) 6 NWLR Pt 762 R 2 & 8 and supported by 8.137 of the Armed Forces Decree No. 105 of 1993, an accused about to be tried by a court martial shall be entitled to object in any reasonable grounds to any member of the court martial or the awaiting member whether appointed originally or in lieu of another officer.

The court went further to affirm that "for the purpose of enabling the accused to avail himself of the right, the names of the members of the court martial and the waiting members shall be read over in the presence of the accused before they are sworn in and the accused shall be asked whether he objects to any of those officers".

An objection made by an accused to an officer shall be considered by the officers appointed members of the court martial. Not done with the questionable conduct of the court martial, the court gloriously surmised that "where confirming authority provided to have shown bias or given unfair hearing, the decision emanating therefrom is liable to be set aside and the confirmation is a nullity (Gary v The Nigerian Army (unreported) CAlL/276/28. In Onigbede & Ors v Balogun (2002) 6 NWLR pt 762 Ac, 94 Rs 5 & 6, the Supreme Court elegantly made provision for determining real likelihood of bias when it said that "justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking: The judge was bias. The judge is precluded from hearing a case when generally his being a member of the tribunal would not appear to be in the interest of justice as he will not be seen to do justice (Adefulu v Okulaja (1998) 5 NWLR (pt 550) P.26, paras, E-G).

The legal duties of a presiding judge restrain him from having a befogged vision of a case. A judge sitting over a criminal case should always appreciate the fact that he is an umpire and should never enter into the arena of conflict. The law allows a judge guided

by Section 138 (1) of the Evidence Act to put questions to the witnesses or even call witnesses for the just determination of the case; moreso, as the accused is presumed innocent until provided guilty subject only to permitted circumstances Section 36 (5) 1999 Constitution; Section 141 (1) (3) (c) Evidence Act.

The cumulative effect of the foregoing is that a judge must not take over the prosecution of the case, must not become a "Hippy Harliet", must not talk too much. In Uso v The Police (1972) 11 SC. 37, Okoruwa v The State (1975) ANLR 262, the trial magistrate and judge respectively talked too much; took over the prosecution of the cases; asked damaging questions from the accused and relied on the evidence therefrom in convicting the accused persons.

The Supreme Court held that those convictions could not stand because the judges became inquisitors, they did not allow the prosecutions to prove the guilt of the accused beyond reasonable doubt. By inference, when the positions of the president of a court martial and that of a judge are juxtaposed, Brig.-Gen. Ishaya Bauka could be adjudged a "Hippy Harliet."

Section 143 of the Armed Forces Act provides that the conduct of proceedings of court martial shall be regulated by the Evidence Act. Section 143 (1) provides thus "except as otherwise provided in the Act, the rules as to evidence to be observed in proceedings before a court martial shall be the same, as those observed in criminal courts in Nigeria and no person shall be required in a proceeding before a court martial to answer a question or to produce a document, which he could not be required to answer or produce in a similar proceeding before a civil court in Nigeria.

From the disillusionment of counsel to the accused persons, they had an avalanche of evidence to debunk the charge of mutiny, a request objected to by the court martial. In Agunbiade V Saseybon (1968) NMLR 223 at P.226 Per Coker, J.5.C, the Supreme Court stated that "admissible evidence under the Act is evidence, which is relevant and it should be borne in mind that what is not relevant is not admissible".

Similarly, in R v Agwuna (1949) 12 WACA 456, Lana v University of Ibadan (1987) 4 NWLR (pt. 64) 245 and SS 7 - 18 Evidence Act generally declared that "no fact can be regarded as inadmissible, not even the Supreme Court can, unless the Evidence Act provides that it is so.

The rejection of the piece of evidence which defence counsel sought to tender was an outright violation of the Rules of Evidence applicable to the conduct of proceedings in a court martial. In the Nigerian Army v Mohammed (2002) .15 NWLR (pt 789) 42, the 'civil' court maintained that court martial is bound by the rule of evidence.

The military and other para-military establishments have over the years built the culture of intimidation on the Nigerian society. At the slightest provocation, Army trucks are rolled out of the barracks to unleash mayhem on defenseless citizens at the instance or

whims and caprices of a superior, or in solidarity with a colleague who felt embarrassed, harassed or assaulted by a bloody civilian.

Occasions abound where they had even taken their para-military brothers captives. Civilians are worse of this despicable conduct as both the mighty and the villains have fallen prey of their jungle booths and horsewhip. The Speaker of Kogi State House of Assembly and a young lady brutalised in Lagos by some war-hungry Naval ratings are few instances.

It is incumbent, therefore, on the members of the National Assembly to enact laws capable of checkmating or making relevant military and paramilitary authorities subordinate to the constitution. Such an exercise should commence with a comprehensive review of Section 240 of the extant constitution, which legally and structurally place the court martial, the High Court and the Federal High Court on the same judicial pedestal as such delineation were made under military dispensation.

A proviso, which empowers the president of a court martial, a man presumed to be "unlearned" but clothed with judicial flavour to hand over life imprisonment to officers and men arraigned before a court martial is an aberration, an albatross to judicial activism and a mockery of the fundamental principles of the rule of law.

We demand for a legislation that will prohibit and curb the unruling conduct of military men and non-compliance shall give them a dismissal beginning with the top echelon. Outside the court martial, the military just like the Police Orderly Room, should evolve a more democratic and an in-built mechanism for curbing any misconduct.

Our parliamentarians have so much tasks before them, but so little to offer. The military authorities should be properly re-positioned to serve the country better. This is another challenge before the National Assembly.

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