



MILITARY JUSTICE SYSTEM IN NIGERIA: THE CHALLENGE OF INDEPENDENCE OF COURTS-MARTIAL AND THE WAY FORWARD

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ABSTRACT

There are various challenges confronting military justice system in Nigeria. They include among others, the challenge of Unlawful Command Influence, multiple roles of the Convening Authority, absence of independence of courts-martial and the challenge of trial of civilians. However, this article considers the challenge of independence of courts-martial in Nigeria. It argues that the convening and operation of courts-martial leaves doubt about the independence of the military courts unlike its civilian judiciary. It further argues particularly for defined rules for the selection and appointment of courts-martial President and other members as part of establishing suitable model for courts-martial independence, and a stronger degree of tenure for the President and Judge Advocate of the court-martial. The paper opines that a lot needs to be done to meet the requirements for courts-martial independence under the Nigerian military justice system as it looks briefly at the way forward to review the military justice system. It concludes that military justice legislation should define legal guarantees to protect the institutional independence of the courts-martial in relation to the executive, legislative and judicial branches of government.

Key words: Challenges, courts-martial, independence, military, military justice

INTRODUCTION

Under military justice system in Nigeria, the Armed Forces Act authorizes military commanders to convene courts-martial on ad hoc basis to try a single case or several cases of service members suspected of breaking the Code. This is done by the convening of courts-martial by the empanelling of appropriate military officers of appropriate rank by an appropriate officer to perform an administrative job of a quasi-judicial nature. Therefore, the President, judge advocates and other members are assigned to the Courts-Martial on ad hoc basis. Their terms expire when the trial comes to an end as they are not on full time basis unlike their counter parts in the civilian judicial system. The President and the judge advocates of the courts-martial are also assigned duties while serving as officers of the courts-martial. Therefore, there has been much debate about whether proceedings before a military court or court-martial can meet the standard of a fair and public hearing by a competent, independent and impartial tribunal established by law, as required by the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties.¹ It should however be noted that sections 134, 169 and 171 of AFA provide for the impartiality and fair hearing in courts-martial. Hence, the accused has the right among others to object on reasonable grounds to the President, any member or waiting member of the court-martial and it shall be considered, and provides against double jeopardy, hence, offences already disposed of cannot be retried.

This article is divided into five parts. In addition to introduction, part one attempts to clarify some concepts for a better understanding of the topic. Part two looked at the challenge of independence confronting martial-courts, The way forward and conclusion are in parts four and five respectively.

For ease of reference, military courts and courts-martial are used interchangeably in this article.

PART 1

Conceptual clarifications

Some key concepts need to be clarified in order to be able to place them in the proper context. They include military, military justice, convening authority, and court-martial.

a. Military

Military is defined as pertaining to or involvement of the Armed Forces in warfare.² It also refers to a body of troops, recruited, trained, equipped, maintained and motivated by the nation to carry on the business of the management of violence in the furtherance of national aspiration. Military

¹ International Covenant on Civil and Political Rights (Dec. 16, 1966) UNTS 171 (ICCPR) Art. 14 (1); cf. Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 4. 1950) 213 UNTS 222 (ECHR) Art. 6 (1); American Convention on Human Rights (Nov. 22 1969) 1144 UNTS 123 (AmCHR), Art. 8 (1); African Charter on Human and Peoples' Rights (June 27 1981) 1520 UNTS 217, Art. 7 (1); Arab Charter on Human Rights (May 22, 2004) (ArabCHR), Art. 13 (1)

² The New Lexicon Webster Dictionary of the English Language [1988 edition] (1) 634

here encompasses the Nigerian Army, the Nigerian Navy and the Nigerian Air Force respectively.³ Hence, Armed Forces Act is applicable to the Armed Forces.⁴

b. Military justice

Military justice is a distinct legal system that applies to members of the armed forces and, in some cases, civilians. The main purpose of military justice is to preserve discipline and good order in the armed forces. The structures, rules and procedures of military justice can be substantially different from their civilian counterparts. Usually, military justice system 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. This may therefore lead to questions on the principle of civilian supremacy or issues of compliance with international standards, such as human rights and fair trial guarantees.

Military justice is defined as the body of laws and procedures governing members of the armed forces. Many countries have separate and distinct bodies of law that govern the conduct of members of their armed forces. Some states use special judicial and other arrangements to enforce those laws, while others use civilian judicial systems. Legal issues unique to military justice include the preservation of good order and discipline, the legality of orders, and appropriate conduct for members of the military. Some countries enable their military justice systems to deal with civil offenses committed by their armed forces in some circumstances. Military justice is distinct from the imposition of military authority on a civilian population as a substitute for civil authority. This condition is generally termed martial law, and is often declared in times of emergency, war, or civil unrest. Most countries restrict when and in what manner martial law may be declared and enforced.

Military and justice appears 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 Yemi Akinseye-George 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.⁵

³ Constitution of the Federal Republic of Nigeria, 1999 s 217 (as amended)

⁴ AFA, LFN, 2004, s 1(1)

⁵ . Akinseye-George, Y, 'Examining the Past, Looking into the Future: The Place of Military Justice in the Nigerian Legal System', [2007] (3) *The Military Lawyer* 26

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.⁶

In Nigeria, the Armed Forces Act of 2004 is the major body of laws enacted by the National Assembly to govern the conduct of service members.

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 Armed Forces Act, 2004 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.⁷ Military justice is a structure of punitive measures designed to foster order, morale and discipline within the military.⁸

According to Akinseye-George⁹, the common features of military justice and its administration include:

- (a) Criminalization of acts or omissions which ordinarily in the civil life would not be punishable under any law. This peculiarity of the military set up mandates the enforcement of unique discipline within its rank and file which is uncommon to the civil life. For instance, offences like Absence from Duty without Leave (AWOL), Malingering, and Disobedience to particular orders or standing orders are offences in the military which have no correspondence in civil life.
- (b) Prevention in war time, acts or omissions capable of impairing the fighting efficiency of troops.
- (c) Provisions for administrative matters for the smooth and effective administration of the military in time of war and peace.

⁶ A.S.Mukhtar, 'The Doctrine of Exhausting Military Remedies and Appellate Chain for the Military Justice System under the Democratic Dispensation' [2009] (4) *The Military Lawyer* 20

⁷ A.Q.Abubakar, 'Deconstructing the Basis of Appellate Court Rulings in Court-Martial Decisions and the Way Forward' [2009] (4) *The Military Lawyer* 90-91

⁸ Garner, B.A. *Black's Law Dictionary*, (8th Edition) (St. Paul, Minnesota: West Group Publishing Company 2004)

⁹ Y.Akinseye-George, op cit. 27

Military justice is only one part of military law.¹⁰ Mukhtar has vividly put military justice in the following perspective:

Military justice administration is carried out on a platform modeled to suit its hierarchical command structure which has been adjudged necessary for the effective performance and delivery of its constitutional mandate. An adequate and fair system of military justice has always been essential to the maintenance of discipline and morale in any military command. Military justice system provides safeguards within the framework of established order or command. Those safeguards are unique but at the same time appropriate for the effective discharge of justice. The evolution of military justice has necessarily involved balancing of two basic interests: war fighting and the desire for an efficient, but fair system for maintaining good order and discipline.¹¹

Military justice is distinct from the imposition of military authority on a civilian population as a substitute for civil authority. Hence according to Mukhtar,¹² ‘This condition is generally termed martial law, and is often declared in times of emergency, war, or civil unrest’.

c. **Court-martial.** Bhatia affirms that Court-Martial is a court of army, naval and air force officers....It is a tribunal for the administration of military law.¹³ It is determined by statutes, e.g. Nigeria’s AFA¹⁴ and the United States’ Uniform Code of Military Justice (UCMJ). Also, it handles violations of the statutes. Doherty refers to it as, ‘A specialized court set up to cater for the peculiar disciplinary needs of the Armed Forces’.¹⁵ Section 129 of AFA¹⁶ states that ‘There are two types of court-martial as listed in the order of increasing severity: General Court Martial and Special Court Martial’.¹⁷ Courts –Martial are differentiated by the amount of sanctions they can impose, and by the trial process that apply to each. A court-martial is the trial of an offence in military law parlance.¹⁸ Court-martial is a class of judicial body enacted by the constitution or legislation to try persons under the military law of the state, presided over by a military judge or by a civilian judge sitting as a Judge Advocate¹⁹, in which the triers of fact are military, and

¹⁰ D.M.Jemibewon, *The Military, Law and Society: Reflections of a General*, (Ibadan: Spectrum Books Limited 1988) 274

¹¹ Mukhtar, A.S op. cit 40

¹² Mukhtar, A.S op. cit 20

¹³ Bhatia, H.S, *Martial Law under the Uniform Code of Military Justice* (West Port, Connecticut: Greenwood Press Publishers 1979) 12

¹⁴ AFA, section 291 defined as a court-martial constituted under this Act

¹⁵ Doherty, O *Criminal Procedure in Nigeria, Law and Practice*, (London Black Store Press Ltd 1999) 48

¹⁶ AFA, section 129

¹⁷ Ibid

¹⁸ Bello-Fadile, R.S.B, *An Officer and A Gentleman* (Zaria: Tamaza Publishing Company Ltd 1992) ix

¹⁹ As currently in the United Kingdom, the term ‘Judge Advocate’ historically denoted the legally trained person who presided at a court-martial, who may at various times and places and in different national systems have been either a military or civilian lawyer or judge.

possessing the core attributes of a court. It has global jurisdiction over all service personnel and civilians subject to service discipline and hears all types of criminal cases including murder and serious sexual offences.²⁰

d. Convening Authority

There are none existence of standing or permanent Courts-Martial in Nigeria. What We have are ad hoc courts-martial. Courts-martial are instituted when requested by command of a military convening officer. Under the Rules of Procedure (ARMY), 1972, the convening officer is the commander who ascertains that a case be tried by court-martial (and by which type of court) and who has the power to direct the charges for trial and also nominates the court members.²¹ The convening authority performs the act of referral (i.e. the formal act of sending a specific case to trial). Ordinarily, the convening authority will be identified by the class of court that he is permitted to convoke. Accordingly, Norton stated that a court would be classified as the Summary Court-Martial Convening Authority (SCMCA), the Special Court-Martial Convening Authority (SPCMCA) or the General Court-Martial Convening Authority (GCMCA). The power to assemble a court-martial by the CO is enacted by the statutes, i.e AFA and UCMJ, based usually on the standard of the unit commanded.

Part Two

Courts- Martial: An overview

In Nigeria, trial by Court-Martial is provided for under the Nigerian Army Act of 1960. However, section 217 of the 1999 Constitution of the Federal Republic of Nigeria together with the provisions of the then Armed Forces Act of 1993 amplified the administrative processes and command regulations of the Armed Forces. Section 129 of the then Armed Forces Act 1993 (referred to as the AFD 1993) prescribed the establishment of Courts-martial. However, section 129 of the Armed Forces Act²² makes provision for the establishment of Courts-martial which will be briefly overviewed in this part.

The nature of Court-Martial

Black's Law Dictionary²³ defines a Court-Martial as, 'An ad hoc military court convened under military authority to try someone, particularly a member of the armed forces, accused of violating the UCMJ'.²⁴ Furthermore, Garner has defined it as, 'An *ad hoc* military court, convened under military authority, to try and punish those who violate the UCMJ, particularly

²⁰ Norton, E, *Military Justice: 2nd Rate Justice* (London: Liberty Publications 2019) 32

²¹ Rules of Procedure (ARMY) 1972, rr. 22-25

²² AFA, op.cit

²³ Garner, B.A, *Black's Law Dictionary* (9th ed.)(St. Paul, Minnesota: West Publishing Compaany 2009), p 413

²⁴ Ibid

members of the armed forces'.²⁵ According to the New Zealand Armed Forces Discipline Act, (AFDA) Courts-martial are defined as military courts established by senior military officers to determine the most serious allegations of misconduct by members of the armed forces and, in limited circumstances, non-military persons.²⁶ Courts-Martial are special courts which are established under the Armed Forces Act²⁷. Hambali²⁸ maintained that, 'It is convened when the need arises and stands dissolved once the trial for which it has been conveyed is concluded'.²⁹ It gives binding and enforceable decisions, exclusively of criminal or quasi-criminal nature. Punishment or sentence includes committal to prison for a term of years. Appeals against its decisions lie to the Court of Appeal³⁰.

In Nigeria, courts-martial are akin to civilian criminal justice system. Section 143 of AFA states that court-martial have the similarity of a judge, a prosecutor, and are bound by the rules of evidence applicable at civilian criminal trials.³¹ However, courts-martial and civilian courts differ greatly in the method adopted in the selection and appointments of the latter are members. Contrary to what obtains under civilian legal system, neither the prosecutor nor the defence counsel contributes to the selection of members of the court-martial as the selection is done by the convening authority alone. Further, AFA states that although there is presumption of innocence and the prosecution has the burden of proving the charges beyond reasonable doubt, questions of guilt and punishment are determined by simple majority of the court members.³² In addition, AFA provides that determinations are made in private conference with the judge advocate, to the exclusion of the accused and prosecutor and without giving reasons.³³

Court-Martial is a court for the trial of offences against military or naval discipline, or for the administration of martial law³⁴. It is a tribunal that tries violations of military criminal law. It often refers to the entire military justice process, from actual court proceedings to punishment³⁵.

Military court-martial is a mechanism by the military for the control, discipline and punishment of its personnel. It is primarily concerned with the discipline and control of troops. Although it is not yet an independent instrument of justice, court-martial remains to a significant degree, a specialized part of the overall mechanism by which military discipline is preserved³⁶. It is a

²⁵ Ibid, p. 358

²⁶ The New Zealand Armed Forces Discipline Act, 1971 [AFDA]

²⁷ AFA, section 29

²⁸ Hambali, Y.D.U, "An Appraisal of the Jurisdiction of Courts-Martial", in Olusoji Omole(ed) in *Reflections on Nigerian Law: Commemorative Essays in Honour of Professor Jadesola Akande (OFR)*, (Lagos: Feat Nigeria Ltd, 2005), p. 206

²⁹ Ibid

³⁰ Ibid

³¹ AFA, section 143

³² Ibid, section 140

³³ Ibid, section 141

³⁴ Definition of court-martial available at: http://www.1911encyclopedia.org/Offences_The_Person; http://www.1911encyclopedia.org/Martial_Law >accessed 15 July 2020

³⁵ Nature of court-martial, available at: <http://www.legal-dictionary.thefreedictionary.com/criminal+law> >accessed 15 July 2020.

³⁶ *O'Callaghan v. Parker*, 395 US 258, 265 (1969)

military court that is assembled by a commander to try personnel within his command who are alleged to have committed offences³⁷. In *Maclaughry v. Denning*³⁸, the court maintained that it is a creature of statute and as a tribunal, it must be convened and constituted in entire conformity with the provisions of statutes or else, it is without jurisdiction.³⁹ Thus, according to Abubakar, ‘A court-martial is a judicial body and thus all its affairs, from the convening of the court, the jurisdiction of the court, arraignment and calling of witnesses must conform to law otherwise the entire court proceedings could be quashed on appeal’⁴⁰. Courts-martial are generally found in all nations with military judges to try military personnel who commit offences. In addition, courts-martial might be used to try enemy prisoners of war who are on trial for war crimes.

Despite classifying Court-Martial as a judicial body, in Nigeria it is not part of the judiciary. The Court-Martial is empanelling of appropriate military officers of appropriate rank by an appropriate officer to perform an administrative job of a quasi-judicial nature⁴¹. Any attempt therefore to bequeath on it the status of an arm of the judiciary would not only negate the concept of judicialism but would indeed vitiate the concept of separation of powers entrenched in our constitution⁴².

Types of Courts-Martial

By virtue of the provisions of AFA of Nigeria, 2004, there shall be, for the purposes of carrying out the provisions, two types of Courts-Martial, that is-

- (a) A General Court-Martial, consisting of a President and not less than four members, a waiting member, a liaison officer and a judge advocate;
It is the highest level of court-martial and is reserved for the most serious crimes such as rape, robbery, murder, etc. In other words, the GCM is the court-martial with full jurisdiction, empowered to try any offence under the Act and the United States Uniform Code of Military Justice. Also, it awards any punishment authorized by the statutes.
- (b) A Special Court-Martial, consisting of a President and not less than two members, a waiting member, a liaison officer and a judge advocate.⁴³

³⁷ Abubakar, A.Q, ‘Deconstructing the Basis of Appellate Court Rulings in Court-Martial Decisions and the Way Forward’ [2009] (4), *The Military Lawyer*; 60

³⁸ *Maclaughry v. Denning* 186 US 49 (1902)

³⁹ Ibid

⁴⁰ Abubakar, A.Q, ‘Deconstructing the Basis of Appellate Court Rulings in Court-Martial Decisions and the Way Forward’, [2009] (4). 60

⁴¹ Ikponmwen, D.O.I, “Comment” Being a Paper presented in Response to the Lead Paper ‘Deconstructing the Basis of Appellate Court Rulings in Court-Martial decisions and the Way Forward’ presented by Brigadier General Abubakar, A.Q, Chief Legal Adviser (Army) at the Nigerian Army Law Seminar, 2009 ; *The Military Lawyer* ,[2009] (4) 111

⁴² Ibid

⁴³ AFA, Section 129(a) (b) ; It has the equivalent of section 129 AFD, 1993; see also, *Agbiti v. The Nigerian Navy* [2011] 4 NWLR (pt. 1236) 175 at 183

In the United States, Article 16 of UCMJ provides for the three types of courts-martial⁴⁴ in each of the armed forces. They are as follows:

- (1) General Courts-Martial, consisting of-
 - (a) A military judge and not less than five members or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825(a) of this title (article 25a); or
 - (b) Only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defence counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.

General Court-Martial has jurisdiction over all accused persons that have committed any UCMJ offences referred to by the convening authority. Except the accused foregoes his right, no charge might be directed to a general court-martial unless careful and fair investigation into the circumstance for the charge has been made. This pre-trial proceeding is called an “Article 32” investigation or preliminary hearing and fundamentally serves the similar work of a grand jury hearing in civilian jurisdictions. It comprises a military judge and not less than five members and in non-capital cases, Military judges might try the case alone on the demand of the accused. Usually, a military advocate is directed to defend the accused at no expense.

- (c) Special Courts-Martial, consisting of-
 - (a) Not less than three members; or
 - (b) A military judge and not less than three members; or
 - (c) Only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed as in clause (1) (B) so requests. It is commonly presided over by a military judge. The prosecutor is a military lawyer (Judge Advocate). The maximum punishment a special court-martial may adjudge is: confinement for 12 months, forfeiture of two-thirds pay for 12 months, reduction to the lowest pay grade among other punishments; and
 - (d) Summary Courts-Martial, consisting of one commissioned officer.⁴⁵

However, under the provisions of 2019 MCM⁴⁶, composition of courts-martial depends on non-capital and capital cases in the case of General Court-Martial.⁴⁷ Depending on the severity of the alleged offence, the accused commanding officer enjoys great discretion in the selection of the type of Court-Martial to try the accused.⁴⁸ Also, the Court-Martial provides fundamental and procedural rights to the accused, including, but not limited to, the right to a personal

⁴⁴ UCMJ, Article 16

⁴⁵ UCMJ, Article 816

⁴⁶ Manual For Courts-Martial, United States (2019 Edition)

⁴⁷ Ibid, Rule 501

⁴⁸ Rules of Procedure (ARMY) 1972, rr. 22-25

representative or counsel, the opportunity to confront evidence and witnesses, and the right to have a decision reviewed by a lawyer or a court of appeal.⁴⁹

In United Kingdom, there are three classes of courts-martial. They are:

- (1) a regimental court-martial, usually convoked and confirmed by the CO of the regiment or detachment, presided over by an officer not under the rank of captain, composed of at least three officers of the regiment or detachment with not less than one year's service, and having a maximum power of punishment of forty-two days' detention;
- (2) a District Court-Martial, usually convoked by a general officer having power to do so, comprising not less than three officers, each with not less than two years' service, and having a maximum punishment of two years' imprisonment;
- (3) a General Court-Martial, the only tribunal having power to try a commissioned officer, and with a force of sanction stretching to death or penal servitude, for crimes in which these penalties are permitted by statute; it consists of not less than nine officers.⁵⁰

In addition, there is yet another class of court-martial called Field General Court-Martial. Its nature is described by the UK AFA as follows: 'It is summoned by any officer in command of a detachment when not on active service or by any officer in immediate command of a body of forces on active service where it appears to him on complaint or otherwise that a person subject to military law has committed a crime'.⁵¹ Furthermore, the officer must be satisfied that it is not feasible to try the person by an ordinary court-martial. The quorum of the court is three.⁵² The UK AFA provides in addition that the sanctions which can be authorized by a court-martial vary from imprisonment in a civilian prison (for any period up to life if the offence warrants it), detention at the Military Corrective Training Centre for two years or less, dismissal from the armed services (with or without disgrace), or an unlimited fine, down to those punishments effectual to a CO.⁵³ Anybody who has chosen to have a charge heard by a court-martial rather than summarily by a CO cannot be given a punishment greater than the maximum obtainable to the CO.⁵⁴ Also, appeals from courts-martial are heard by Court-Martial Appeal Court. It is generally made up of judges from the civilian Court of Appeal for England and Wales.⁵⁵

⁴⁹ Ibid, r. 25

⁵⁰ United Kingdom Armed Forces Act, 2006, section 22

⁵¹ Ibid, section 5

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid, sections 164-165

⁵⁵ Rule 33 of the Armed Forces (Court-Martial) 2009 http://www.opsi.gov.uk/si/si2009/uksi_20092041_en_1> Accessed 20 July 2020 (Statutory Instrument 2009/204), Office of Public Sector Information; see more on Military Courts of the United Kingdom from Wikipedia, the free encyclopedia, available at: http://en.wikipedia.org/wiki/Military_Courts_of_the_United_Kingdom> accessed 20 July 2020

Composition of Court-Martial

There is the need for Court-Martial to be constituted in accordance with the law. Thus, in earlier reported case of *Karim v. Nigerian Army*⁵⁶, Galadima, J.C.A, further stated that, ‘A Court-Martial is the creation of statute and as a body or Tribunal, it must be convened and constituted in entire conformity with the provision of the statute or else it is without jurisdiction’.⁵⁷ Accordingly, the Armed Forces Act, Cap.A20, Laws of the Federation of Nigeria dealt extensively with the composition of the Court-Martial. Therefore, section 133 (1) of AFA states that a court-martial shall be properly established if it comprises the President of the court-martial, not less than two officers and a waiting member.⁵⁸ AFA further provides that a person shall not be appointed a member of a Court-Martial unless he is subject to service law under the Armed Forces Act and has been an officer in any of the services of the Armed Forces for a period amounting in aggregate to not less than five years.⁵⁹ Furthermore, AFA provides that 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 available, however, the president of a court-martial shall not be under the rank of a captain.⁶⁰ Again, under the provision of AFA, 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.⁶¹ What is more, under AFA, 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.⁶² Accordingly, convening officer shall appoint a judge advocate for every court-martial.⁶³ Additionally, 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 Director of Legal Services of the respective services of the Armed Forces.⁶⁴

The issue of composition of a court-martial is statutory as it is embodied in AFA, Cap. A20, Laws of the Federation of Nigeria, 2004 and this must be strictly complied with.⁶⁵ Therefore, the composition of members of a court-martial is a condition precedent imposed by statute. Where it is not adhered to, the statute strips the tribunal of compliance. Where the tribunal is not competent, it lacks the jurisdiction to try the accused person. All the proceedings in the trial and verdict automatically become a nullity.⁶⁶ Therefore, in *State v. Olatunji*⁶⁷, the court stated that,

⁵⁶ [2002] 4 NWLR (pt. 758) 716 at 732

⁵⁷ Ibid

⁵⁸ AFA, section 133(1)

⁵⁹ Ibid, section 133 (2)

⁶⁰ Ibid, section 133 (3) (a)

⁶¹ Ibid, section 133 (3) (b)

⁶² Ibid, section 133 (4)

⁶³ Ibid, section 133 (5)

⁶⁴ Ibid, section 133 (6)

⁶⁵ Ibid

⁶⁶ *Agbiti v. The Nigerian Navy* [2011] 4 NWLR (pt. 1236) 175 at 186; See also, *Madukolu v. Nkemdilim* [1962] 2 SCNLR 341; *Sule v. Nigeria Cotton Board* [1985] 2 NWLR (pt. 5) 17; *Atolagbe v. Awuni* [1997] 9 NWLR

‘Any court-martial which is not constituted as required by the provisions of the Armed Forces Act is like a court or a tribunal which is not properly constituted. And if a court is not properly constituted, any process issued or trial conducted by it is a complete nullity *ab initio*’.⁶⁸

The issue may well arise whether a jurisdictional error has been committed as where the accused failed to make an objection to the competency of a member of the court who would have ordinarily been disqualified to sit as a member⁶⁹. Thus, in *Agbiti v. The Nigerian Navy*⁷⁰, the court stated that, ‘Therefore, by virtue of section 137 (1) of the Armed Forces Act, Cap. A20 of the Laws of the Federation of Nigeria, 2004, any accused about to be tried by the court-martial shall be entitled to object on any reasonable grounds to any member of the court-martial or the waiting member of the court-martial whether appointed originally or in lieu of another officer’.⁷¹

Members against whom objections are raised and upheld are excused and substitution made thereafter by the convening authority where no objection is raised, the President and members including waiting member(s) are sworn in by the Judge Advocate.⁷²

Trial by Courts-Martial

After a preliminary inquiry and consideration of administrative, non-punitive and non-judicial actions, the unit commander may determine that the matter is sufficiently serious to warrant trial by court-martial. Preferral of charges that initiates the court process follows. Any person subject to the code might prefer charges. However, the persons who prefer charges must:

- a. sign the charges and specification forms under oath before a commissioned officer of the armed forces who is authorized to administer oaths; and
- b. state that they have personal knowledge or have investigated the matters set forth in the charges and specifications, and that the allegations are in fact true to the best of their knowledge and belief.⁷³

In *Edun v. The Police*⁷⁴, the court stated that, ‘A charge and its specification constitute the formal written allegation of criminal behavior by the accused’.⁷⁵ Under the CFRN, the charge informs the accused of the specific offence under the Armed Forces Act, 2004 alleged to have been

(p. 522) 536; *C.C.B. Nig. PLC v. A.G. Anambra State* [1992] 8 NWLR (pt. 261) 528; *Okereke v. Yar’Adua* (2008) 12 NWLR (pt. 1100) 95

⁶⁷ *State v. Olatunji* [2003]14 NWLR (pt. 839) 138

⁶⁸ *Ibid*

⁶⁹ *Ibid*

⁷⁰ *Agbiti v. The Nigerian Navy* [2011] 4 NWLR (pt. 1236) 175 at 186

⁷¹ *Ibid*

⁷² Onitiju, A.A, ‘Prosecution in the Court-Martial: Proceedings and Procedure’, being a paper presented at the 22nd Advanced Course in Practice and Procedure on 18th July, at the Nigerian Institute of Advanced Legal Studies, Lagos, 2002, p. 10

⁷³ Balancing Order and Justice: The Court-Martial Process, being a paper presented by the Department of Law, US Military Academy at West Point at the ABA Section of Litigation 2012 Session Annual Conference April 18-20, 2012

⁷⁴ See *Edun v. Police* [1966] 1 ALL NLR 17

⁷⁵ *Ibid*

violated.⁷⁶ Section 123 of AFA states that, ‘The specification sets out the specific facts, dates, times, places, and circumstances of the offences to enable the accused prepare his defence to the allegation’.⁷⁷ Ordinarily, charges and specifications alleging every renowned crime by a defendant ought to be preferred at the same time. Therefore, section 14 of ICCPR states that, ‘The immediate commander must inform the accused of the charges and the name of the person who preferred the charges as soon as possible’.⁷⁸

The commander may decide to forward the disciplinary concerning an offence to a superior or subordinate commander for action.⁷⁹ This may be due to where the commander might lack the power to take action, or a higher commander may have withheld power to act on certain crimes. The commander will thus forward the matter through the appropriate channel to the officer who is authorized to summon a court-martial of the appropriate level for the offence charged. He is known as the convening authority.

The last stage is the referral where the power of the convening officer appoints a particular court-martial panel to try the accused. The convening authority may not refer a charge to a court-martial except there are reasonable grounds to accept that the accused committed the offence charged under AFA. Depending on the seriousness of the charges, they might be directed to any of the two levels of courts-martial as provided for under AFA i.e. a General Court-Martial or a Special Court Martial. The trial is then officially scheduled when the convening authority issues an order convening the court-martial.

Confirmation and review of judgments of courts-martial

The AFA provides some safety valves for an accused. Section 149(1) of AFA provides that an accused is encouraged within 90 days after being sentenced by a court-martial and before the sentence is confirmed, to submit to the confirming authority any written matter which may reasonably tend to affect the confirming authority’s decision whether to disapprove a finding of guilty or to approve a sentence. This process does not exist in the regular justice system and further reinforces the necessity to exhaust all administrative redress and appellate chain within the military justice system before seeking other remedies.⁸⁰

Under section 154 of AFA, an accused person may, after confirmation of a finding or sentence of a general court-martial or of a special court-martial, submit a petition for review of the finding or sentence to a reviewing authority. Similarly, the Act states that the reviewing authority for the purposes of the Act shall be the appropriate Service Council or Board or a person so delegated to act for the Service Council or Board.⁸¹

⁷⁶ See Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 36 (12)

⁷⁷ AFA, section 123

⁷⁸ International Covenant on Civil and Political Rights, Article 14 (3) (a)

⁷⁹ AFA, section 127

⁸⁰ Mukhtar, A.S, ‘The Doctrine of Exhausting Military Remedies and the Appellate Chain for the Military Justice System under the Democratic Dispensation’ (2009) (4) , *The Military Lawyer* 34

⁸¹ AFA, section 154 (3)

PART THREE

The Challenges Confronting the independence of Courts-Martial

(i) Appointment and selection process of the courts-martial members

The way in which the President and Judge Advocates of courts-martial are appointed is a good indicator of the independence of military courts. The selection of serving military officers with little or no knowledge of law, as members of the courts-martial is in contravention of the basic principles of the independence of judges. However, International law is not explicit on how the President or judge advocates ought to be appointed. Also, the Basic Principles are neutral regarding the appointment or election of courts-martial members. . Hence, Principle 10 of the Basic Principle states that:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of a country concerned, shall not be considered discriminately.⁸²

This Principle signifies that, in appointing judges, professional qualifications and personal integrity are among the criteria to be considered. This principle is equally applicable to selection and appointment of courts-martial members in Nigeria. Nevertheless, in Nigeria, the legislation on military courts, the Armed Forces Act, 2004 does not define rules for the appointment of the President and judge advocates of the courts-martial. The procedure for appointing them exclusively depends on the person authorized by law to convene a Court-martial and is not based on formal criteria defined by law. Therefore, the problem that brings the institutional independence of Nigeria's military courts into serious doubt is the appointing authority of the key players in the country's military justice system, namely, the President, the judge advocates and other members of courts-martial owe their allegiance to the Commanding Officer that appoints or selects them. It is obvious analyzing Nigeria's military justice legal framework, panel members of military courts are selected by a single authority. Therefore, section 131, sub sections (1)(a-e), (2) (a-e), (3) (a-b) and (4) of the Armed Forces Act (AFA)⁸³ empowers the following persons and command holders to convey General Court-Martial and a Special Court-Martial:

⁸² Basic Principles on the Independence of the Judiciary, Para 10, HRC, General Comment No. 32, Para 19

⁸³ AFA section 131 (1)

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- i. the President; or
 - ii the Chief of Defence Staff; or
 - iii. Service Chiefs; or
 - iv. A general officer commanding, a brigadier, colonel or lieutenant colonel or their corresponding ranks having command of a body. of troops or establishments
 - v. The senior officer of a detached unit, establishment or squadron may be authorized by the appropriate superior authority to order a court-martial in special circumstances.⁸⁴

Going by the decision of the Supreme Court of Nigeria in the case of *The Nigerian Air Force v Wing Commander James*⁸⁵, the authority to convene a court-martial might be delegated in view of section 131(3) of the Armed Forces Act. This is contrary to the provisions of Section 131(20) of the Armed Forces Decree No. 105 of 1993 where it was stated that authority to convey a court-martial under this provision could not be delegated. Thus, in special circumstances, the senior officer of a detached unit, establishment or squadron might be empowered authorized by the Appropriate Superior Authority to convene a court-martial. What the above portends is that the Convening Authority, under section 131 of AFA that selects panel members of military courts, might also convene military courts at any time.⁸⁶ It also can delegate the power to convene a court-martial. The convening officer can therefore appoint the officers of the military court from within his command.⁸⁷ This practice infringes on the constitutional requirement of independence and impartiality of judicial officers as provided under section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Since the role of some of the officials, especially, the President and the Judge Advocate is central to the dispensation of justice in a court-martial, they need not only to be independent and impartial, but ought to be manifestly seen to be. It would not augur well for the perception of independence and impartiality of courts-martial members if reasonable persons view them to be under the ‘command influence’ of the Convening Officer.⁸⁸ For example, according to Naluwairo, ‘the law does not protect judge advocates and members of military courts against redeployment or transfer to non-judicial military duties during their term of office’.⁸⁹ Going by section 136 of the Armed Forces Act, 2004, Courts-martial are convened on ad hoc basis as they stand dissolved by the convening officer where it is expedient in the interest of the administration of justice.⁹⁰ Hence, the appointment of the courts-martial members is on part-time basis. This is contrary to what obtains under the judiciary in the 1999 Constitution where sections 231, 238, 250 271, etc, provide for the appointment of the Chief Justice of Nigeria and Justices of the Supreme Court, appointment of the President and Justices of the Court of Appeal, appointment of the Chief Judge and Judges of the High Court of the Federal Capital Territory and Chief Judge and Judges of the

⁸⁴ Ibid

⁸⁵ [2003] L.C.R.N. 104

⁸⁶ AFA section 131

⁸⁷ Ibid

⁸⁸ Badewole, B.M, ‘Imperative for the Amendment of the Armed Forces Act : Nigerian Army Projection for Military Law Reform’ [2009] (4) *The Military Lawyer* 50

⁸⁹ Naluwairo, R, op. cit

⁹⁰ AFA section 136

High Court of a State respectively. Accordingly, courts-martial appointment should be done only with proper safeguards.⁹¹ It is International Bar Association's further contemplation that, 'The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition'.⁹²

Under the UN Basic Principles, it is provided that, 'Judges, whether appointed or elected, must have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists'.⁹³ According to the IBA Minimum Standards, 'Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment'.⁹⁴ In essence, this principle should be applicable to courts-martial to make them more independent.

In addition to the above, other areas of controversy are the practice under the military law where the convening officer of a court martial decides which charges should be brought against the military personnel, the type of court-martial that is most appropriate, appointment of members who are subordinate in rank to him and directly or ultimately under his command, appointment of the prosecuting and defending officers, are all contrary to the well established principle that an accused must be tried by an independent and impartial court-martial.⁹⁵

The European Convention on Human Rights, the European Court of Human Rights has repeatedly stated in *Incal v Turkey*⁹⁶ as follows:

In order to establish whether a tribunal can be considered 'independent' for the purposes of article 6 (1), regard must be heard, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence. In *Martin v The United Kingdom*⁹⁷, the European Court of Human Rights held that in order to establish whether a tribunal can be considered independent, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question of whether the body presents an appearance of independence.

⁹¹ IBA Minimum Standards, Para 25

⁹² Ibid, Para 23 (b)

⁹³ Ibid, Para 12; HRC, General Comment No. 32, Para 19

⁹⁴ IBA Minimum Standards, Para 22

⁹⁵ Ibid

⁹⁶ [2000] Judgment of June, 1998

⁹⁷ Application No. 4042/98, Judgment of 24 October 2006, paras. 41 and 45

A distinguishing structure of military courts, which makes them distinct from civilian courts, is that they embrace entirely or in component, active duty military officers. Therefore, the officers are best situated to enforce military discipline than the civilians. The issue of the composition of military court, comprising the selection of the President and other members raises questions on the independence and impartiality of the members. The question is, how feasible is it for the members of a court-martial to take a decision in favour of an accused person if such a decision is considered to be unfavourable by the military hierarchy to which they all are subject to?

The commander selects persons as panel members that will try the accused. The selection process influence of the commander may be abused by hand picking members that will decide the case in his favour and not on the merit. Thus, Hansen⁹⁸ said that, ‘because this is the same commander who determines that a service member should face a court-martial, the concern is that the commander will select the members who will reach the outcome that the commander desires, regardless of the facts presented at trial and additionally, there has been some concern that the commander will assert undue influence over the members of the court-martial’.⁹⁹

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 sabotage his responsibility as a commander. Therefore, there is certainly a justification for removing this authority from the commander and putting it in a neutral bureau.

In view of the authority of the convening officer in influencing the selection of the members of the courts-martial, there should be local law that identifies agreed criteria for the choosing of the courts-martial panel. Selection of the President and judge advocate of the courts-martial ought to be based on their integrity, ability, qualifications and training. Nigeria ought to consider enacting an independent body entrusted with the selection of courts-martial panel members. Changes might be introduced to increase courts-martial independence which will include setting apart the functions of convening courts-martial, appointing panel members and taking a random procedure for electing them.

(ii) Lack of security of tenure of the President and members of courts-martial

While many of the institutional issues surrounding the military justice system have been resolved or ameliorated, a structure of military justice that has demonstrated to be change-resistant is the failure to afford military trial members the basic protection of a fixed term of office.¹⁰⁰ The issue of lack of security of tenure for the President and the Judge Advocate of courts-martial has become problematic that made Hudson¹⁰¹ to comment that, ‘The issue has been commented on repeatedly and remains a matter of concern because a judge who does not know with precision when his or her term will expire is a sitting duck for improper influence’.¹⁰² At the very least, the

⁹⁸ Hansen, V, ‘The Impact of the Military Justice Reforms on the Law of Armed Conflict: How to avoid Unintended Consequences, [2013] *Michigan State International Review* 232

⁹⁹ Ibid

¹⁰⁰ The judges in question are those who preside over General and Special Courts-Martial

¹⁰¹ Hudson, K..J, Military Justice: Abolish or Change? [1973] (11) *Kansas L. Rev.*, 31, 33

¹⁰² Ibid

arrangement conveys an appearance of a lack of judicial independence.¹⁰³ In comparison to what obtains under the civilian judiciary, Ziskind¹⁰⁴ captured it thus:

The military judiciary is unique. Civilian judges in the United States are either elected or appointed. Once named to the bench, they are not subject to the direction of any other person and, absent removal proceedings; they remain on the bench until death, resignation, or completion of the term. Judicial independence is one of the defining elements of the civilian judiciary. The military judge on the other hand, is appointed by the Judge Advocate (TJAG) of the appropriate armed service, serves without a fixed term at the pleasure of the Judge Advocate General, and is evaluated at least annually by senior officers. Subsequent promotion and reassignment are dependent upon the judge's annual officer evaluation and the personal knowledge and desires of those senior officers responsible for assignments.

In providing more insight into lack of the independence of the courts-martial, Lederer¹⁰⁵ opined that:

The potential or actual, judicial independence problem which has manifested in the military legal system generally, and particularly in the naval services, an inherent consequence of a system that is historically and statutorily based upon "command control", control by military commanders. The concept of Judges as officers responsible to other officers who are, in turn, at least pragmatically responsible to still other officers is a natural consequences of the military paradigm...It is only appropriate that it is now time to review the very nature of the judiciary itself.

Under international norms, judges shall have guaranteed tenure until a mandatory retirement age or the expiration of their term of office, where such exists.¹⁰⁶ Hence, the Special Report on the Independence of Judges and Lawyers pointed out that, 'It is believed that a period of less than ten years in office does not satisfy the condition of independence'.¹⁰⁷ Accordingly, the UN Basic Principles on the Independence of Judiciary states that, 'In order to safeguard the independence

¹⁰³ Fidell, E.R., 'Military Judges and Military Justice: The Path to Judicial Independence', [1990] (74) *Judicature* 14-20

¹⁰⁴ Ziskind, M.A., Judicial Tenure in the American Constitution: English and American Precedents, [1969] *Sup. CT Rev.* 135, 136

¹⁰⁵ Lederer, F.I., Needed: An Independent Military Judiciary-A Proposal to Amend the Uniform Code of Military Justice [1994] (3) *William & Mary Bill of Rights Journal* 632, at <http://scholarship.law.wm.edu/wmbor> assessed 20 August 2020

¹⁰⁶ UN Basic Principles on the Independence of the Judiciary, Principle no. 12

¹⁰⁷ Special Report on the independence of Judges and Lawyers, document UN E/CN.4/2000/61/Add. 1, *Report on the Mission to Guatemala*, paragraph 169, letter c

of judges, their term of office, their independence, and security, adequate remuneration, condition of service, pensions and the age of retirement must be adequately secured by law'.¹⁰⁸

Except judges are tenure secured, there is a problem regarding their independence, as they might be longer exposed to unsuitable manipulation in their judgments. Principle 11 of the Basic Principles therefore provides that, 'The term of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by law'. As stated here, the principles can also be attributed to courts-martial.

Principle 12 of the Basic Principle further specifies that, 'Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term in office, where such exists'. Security of tenure guarantees that judges may not be dismissed, unless in particular instances, till the expiration of their term of office.¹⁰⁹ This guards judge from summary dismissal by executives, legislatures, or even a judicial council not satisfied with specific judges' decisions. This should also be applicable to the panel members of the military courts.

The question to be examined here is whether Nigeria's courts-martial President and other panel members enjoy adequate secured tenure warranting their independence, specifically and military courts in general? The obvious answer is no. The reasons are:

1. The courts-martial President and other members are appointed by the Appropriate Convening Authority.
2. They serve without a fixed term at the pleasure of the convening authority and are evaluated at least annually by senior officers.
3. Subsequent promotion and reassignment are dependent upon the President's and the Judge Advocate's annual officer's evaluation and the personal knowledge and desires of these senior officers responsible for assignment.

The position in Nigeria is contrary to what obtains in other jurisdictions. For example, under the Egyptian Constitution of 2014, it is provided thus: 'members of the Military Judiciary are autonomous and cannot be dismissed. They share the securities, rights and duties stipulated for members of other judiciaries'.¹¹⁰ Also, United Kingdom institutionalized military judicial office some decades ago where the officers are appointed by the Lord Chancellor (a civilian), and hold judicial offices until they retire at the age of 70 years.¹¹¹ New Zealand has recently done away with the concept of judge advocates and fully institutionalized a military judicial office.¹¹² The system now boasts of a Chief Judge, Deputy Chief Judges, and other judges who preside over the courts-martial, all of whom are appointed to a judicial office by the Governor-General by

¹⁰⁸ UN Basic Principles on the Independence of Judiciary, Para 11, HRC, General Comment No. 32, Para 19

¹⁰⁹ See UN Basic Principles on the Independence of the Judiciary.

¹¹⁰ Article 204

¹¹¹ Sections 29 and 30 of the Courts Martial (Appeals) Act, 1951 (c 46)

¹¹² Griggs C, 'A New Military Justice System for New Zealand' [2006] (6) *New Zealand Armed Forces Law Review* 62

warrant.¹¹³ Canada led the way in the institutionalization of military judicial office as far back as 1998 following a successful challenge against the independence of its General Court-Martial in the case of *R v Genereux*.¹¹⁴

Consequently, the American Judges Association has opined that:

The perception is that without tenure, a military judge is subject to transfer from the service judiciary should he or she renders unpopular evidentiary rulings, findings, or sentences. There is no protection from retaliatory action by dissatisfied superiors in the chain of command.” Similarly, the perception exists that judges who make rulings unpopular with the military hierarchy are endangering their possibilities of promotion because that same hierarchy is the system which makes selection for promotion.¹¹⁵

The South African Constitution¹¹⁶ provides under section 174 (7) that, ‘Other judicial officers must be appointed in terms of an Act of Parliament...’ The other judicial officers also include military judges. Also, in South Africa, its Supplementary Measures Discipline Act (MDSMA or Military Discipline Act)¹¹⁷ provides that, ‘Appropriately qualified officers must be assigned to the function of military judge or senior military judge’.¹¹⁸ The assignment must be for a fixed period.¹¹⁹ Military judicial office in South Africa is therefore institutionalized. However, it is to be noted that the Armed Forces Act, 2004 of Nigeria and its regulations are silent on the tenure of the Courts-martial President and the Judge Advocate. The silence of the law on that crucial interrogation prima facie, means the members of the courts-martial cannot be said to be independent.

V. The way forward to ensure the Independence of Courts-Martial

The implementation of the Armed Forces Act, 2004 as well as the Nigerian military justice compliance with changing societal environments and international requirements should be monitored on a regular basis. There should be an assessment of existing legislation to determine whether or not it has achieved its intended aim. A regular review mechanism should seek to determine the most pressing needs of the military justice system and offer recommendations for further improvements. The obligation to regularly review legislation on military justice can be enshrined in domestic law, i.e. the Armed Forces Act, Laws of the Federation, 2004. This will make it easier for the reviewing authority to take into consideration changing circumstances on a regular basis.

¹¹³ Sections 12, 13, and 14 of the Court-Martial Act No. 101 of 2007

¹¹⁴ [1992] 1 SC 259

¹¹⁵ Letter from the American Judges Association to the President of United States, July 21, 1992

¹¹⁶ The Constitution of the Republic of South Africa, 1996

¹¹⁷ Military Discipline Supplementary Measures Act 16 of 1999

¹¹⁸ MDSMA 1999 s 13 (2)

¹¹⁹ Ibid s 15

There is the need, for military to ensure quarterly review of its legal system to afford it the opportunity to update as well as embark on corrective and innovative measures. All military lawyers, irrespective of formation especially those in the Directorate of Legal Services should undertake compulsory continuing legal education courses in relevant institutions.

Nigeria should provide adequate financial resources to allow for the effective administration of justice and take measures to protect the President and Judge Advocate

Civil Society ought to be involved in the drafting of amended AFA in order to meet democratic and human rights needs. 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 as amended. Another way forward is that the National Assembly should consider proposals for the review of the Armed Forces Act 2004, specifically, it should examine whether the Act meets the needs of the Nigerian military to ensure good order and discipline in a fair and efficient way.

The review has become necessary even though court-martial not being an arm of the judiciary but machinery for maintenance of discipline among men subject to military law, should be independent.

VI. CONCLUSION

The President and other members of courts-martial are not appointed to judicial offices. The assignment is not for any fixed period. Hence, what is missing under the military justice system in Nigeria is the absence of the independence of courts-martial unlike the civilian judiciary that has been fully institutionalized under section 6 of the 1999 Constitution (as amended). This has equivocally affected the independence of military justice system in Nigeria. Hence, the way forward is to review the Armed Forces Act, 2004 to make for an independent court-martial..

Section 6 (5) (1) of the 1999 Constitution (as amended) specified the superior courts of records in Nigeria. Therefore, courts-martial not being one of the listed courts under section 5 of the 1999 Constitution is an inferior court, hence, amenable to the jurisdiction of the superior courts in Nigeria. Being an ad hoc system of court, courts-martial are not part of the nation's judiciary where strict separation of powers is a major hallmark in Nigeria. Despite this assertion, courts-martial in Nigeria should be independent.