

**COMPARATIVE LOCUS OF COURT'S HIERACHY
UNDER NIGERIAN MILITARY RULE AND THE 1999 CONSTITUTION**

BY

**PETER A. AKHIHIERO ESQ. •
LL.B (Hons) Ife, B.L.**

• LL.M. Student in Legislative Drafting in the Nigerian Institute of Advanced Legal Studies, Lagos.

1. INTRODUCTION

The judiciary is the third tier of government and is concerned with the organisation, powers and the working of the courts. It is also concerned with the various personnel, especially the judges, magistrates and other grades of judicial officers.

The judiciary is generally regarded as the bastion of a nation, the watchdog of the rights and civil liberties of the citizenry. It must therefore, not only be strong but also deserving of respect. To be respected, it must be capable and well structured. Once it is capable, well structured and respected, it remains a veritable institution within the state structure. The subject of this paper is a consideration of the comparative position of our hierarchy of courts under the erstwhile military regime and under the present democratic dispensation.

This subject must assume a topical dimension, in view of the pivotal role of the courts in a true democratic setting. Thus it becomes imperative to examine the present judicial hierarchy, vis-à-vis the provisions of the 1999 Nigerian Constitution. Thereafter I shall juxtapose the present hierarchy with the hierarchy under the former military regime. It is not my intention to deal with the past history of the courts, their structure, personnel and jurisdiction. This will be adverted to only in so far as it may be relevant and necessary in consideration of the present organisation of the courts' hierarchy. Nor do I intend to deal extensively with the various facets of the present judiciary. I propose rather, to set out the position generally, and to highlight any radical changes in the structure resulting from the operation of the provisions of the present Constitution.

Until 1954, the organisation of the judiciary in Nigeria was centralised with a single Supreme Court for the whole country. There were, however inferior courts like the

Magistrate, District and Native courts, which dispensed justice at local levels. With the Federal Constitution of 1954, the judicial hierarchy became regionalised. The characteristic feature of this regionalisation was the complete absence of Federal Courts with first instance jurisdiction. All the Federal courts had only appellate jurisdictions. But in 1973, with the promulgation of Decree No.13 of 1973, the Federal Revenue Court was established as a court of first instance. Also in 1976, Decree No.2 established a Federal Court of Appeal for the first time in the constitutional history of this country. These two courts, with the existing Supreme Court, account for the Federal court system as it exists today.

Another characteristic feature of the regionalisation of the judiciary was the employment of regional courts for the purpose of administering Federal Laws. All regional or state High Courts and Magistrate District Courts are authorised to administer Federal laws within the limits of their respective jurisdiction as prescribed by the regional or state laws establishing them. Successive Constitutions since 1954, including the present one, have maintained this system.

2. JUDICIAL HIERACHY UNDER THE 1999 CONSTITUTION

The point must be made at this stage that the provisions of the 1999 Constitution are substantially similar to the provisions of the 1979 constitution. Moreso, as regards the structure of courts, the present constitution has not made much fundamental changes from the position under the previous constitution.

The 1999 Constitution, while affirmatively prescribing in what courts the judicial power may be vested, the limits of their jurisdiction, the appointment of the judicial officers and judicial tenure, also makes provision for the possibility of vesting such

powers in other courts or extending their jurisdiction beyond those limits. However we can only attempt a brief exposition of the court hierarchy in this paper. The courts which are considered in these pages in detail are those specifically identified and mentioned in the Constitution. The others will be considered briefly.

FEDERAL COURTS

(a) The Supreme Court

At the apex of the Nigerian judicial hierarchy is the Supreme Court which exists only at the Federal level and is the final Court of Appeal.¹

The Court is headed by the Chief Justice of Nigeria and supported by such number of justices of the court, not exceeding twenty one, as may be prescribed by an Act of the National Assembly.²

The appointment of the Chief Justice is at the discretion of the President, on the recommendation of the National Judicial Council subject to the confirmation of the Senate.³ The same procedure is stipulated for the appointment of all other justices of the Supreme Court.⁴ The qualifications of the justices of the court, including the Chief Justice is specified as 15 years post qualification as a legal practitioner. It is to be noted that no actual experience in legal practice is required, thus it is possible to appoint a Chief Justice who has actually little or no practical experience at the bar.⁵

The original jurisdiction of the Supreme Court is limited to disputes as to the existence and extent of a legal right between the Federation and a State or between

¹ See section 230(1) of the Constitution of the Federal Republic of Nigeria, 1999.

² Section 230(2)(a) and (b) 1999 Constitution.

³ Section 231(1) 1999 Constitution.

⁴ Section 231(2) supra.

⁵ Chief Justice Taslim O. Elias was appointed Chief Justice in 1971 although most of his life, he was engaged in academics.

States.⁶ In *Governor of Kaduna State v. The President of Nigeria*,⁷ it was held that in all matters involving the exercise of Executive power, any dispute between a State Chief Executive and the President can only be adjudicated upon by the Supreme Court in its original Jurisdiction.

The appellate jurisdiction of the Supreme Court is to hear appeals from the Court of Appeal. There are two methods of appeal, either as of right or by leave of either the Supreme Court or the Court of Appeal. The Constitution specifies all the cases in which appeal will lie as of right and makes others subject to leave.⁸

(b) The Court of Appeal

Next in hierarchy to the Supreme Court is the Court of Appeal which consist of a President and other justices whose number shall not be less than forty-nine of which not less than three shall be learned in Islamic personal law, and not less than three shall be learned in Customary law.⁹

Like the Supreme Court, the appointment of the President and other Justices of the Court of Appeal shall be made by the President on the recommendation of the National Judicial Council subject to the confirmation of the Senate.¹⁰ The qualification for appointment as a justice of the Court of Appeal is stated to be twelve years post qualification as a legal practitioner.

Unlike the position under the 1979 Constitution, the 1999 Constitution has vested the Court of Appeal with original jurisdiction to hear and determine whether any person has been validly elected to the office of President or Vice-President under the

⁶ Section 232(1) supra.

⁷ (1981) 2 N.C.L.R. 786.

⁸ See generally section 233 supra.

⁹ Section 237(2) supra.

Constitution, or the term of office of the President or Vice-President, or the position of the President or Vice-President has become vacant.¹¹

The appellate jurisdiction of the Court of Appeal is to hear and determine appeals from the Federal High Court, the High Court of the Federal Capital Territory, High Court of a State, Sharia Court of Appeal of the F.C.T and the States, Customary Courts of Appeal of the FCT and the States and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly.¹²

The instances of appeals as of right and with leave are clearly set out in the constitution.¹³ This includes appeals as of right from decisions of the Code of Conduct Tribunal and the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals.¹⁴

(c) The Federal High Court

The Federal High Court shall be composed of a Chief Judge and such number of Judges as may be prescribed by an Act of the National Assembly.¹⁵

The appointment of judges shall be by the President on the recommendation of the National Judicial Council subject to the confirmation of the Senate. The qualification for appointment is ten years post qualification as a legal practitioner.¹⁶

The Federal High Court has four categories of jurisdiction namely:

- (a) such other jurisdiction as may be conferred upon it by an Act of the National Assembly; and

¹⁰ Section 238 supra.

¹¹ Section 239 supra.

¹² Section 240 supra.

¹³ See sections 241,242,243,244 and 245 supra.

¹⁴ See section 246 supra.

¹⁵ Section 249 supra.

¹⁶ Section 250.

- (b) a host of items on the Exclusive Legislative List
- (c) Offences of treason, treasonable felony and allied offences
- (d) Criminal causes and matters arising from (a) and (b) above.¹⁷

Thus the jurisdiction of the Federal High Court under the present constitution has been enlarged from the previous scope of matters relating to Federal revenue *per se*, it is now a Federal Court vested with extensive jurisdiction over almost every item on the Exclusive Legislative List.¹⁸ However it will suffice to note that the expansion in the jurisdiction of the Federal High Court is not immediately traceable to the 1999 Constitution but it has its antecedents in the expansionist tendencies of the erstwhile military junta. I shall elucidate further on this in the concluding part of this paper.

(e) The High Court of the Federal Capital Territory, Abuja

There is a High Court of the Federal Capital Territory, Abuja, consisting of a Chief Judge and such number of Judges as may be prescribed by an Act of the National Assembly.¹⁹

The procedure for appointment and the qualification for appointment are the same with that of the Federal High Court.²⁰

The court has original and appellate jurisdiction, subject to the provisions of section 251, to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty,

¹⁷ See section 251 *supra*.

¹⁸ See Second Schedule Part I, 1999 Constitution.

¹⁹ Section 255 *supra*.

²⁰ Section 256 *supra*.

forfeiture, punishment or other liability in respect of an offence committed by any person.²¹

(f) The Sharia Court of Appeal of the Federal Capital Territory

The Sharia Court of Appeal of the Federal Capital Territory, consists of a Grand Kadi and such number of Kadis as may be prescribed by an Act.²²

The procedure for appointment is identical with that of the Federal High Court and the High Court of the F.C.T. on the qualifications for appointment, in addition to the mandatory ten years post call qualification, there is the additional twelve years qualification in Islamic Law from an institution approved by the National Judicial Council coupled with practical experience and scholarship in Islamic law.²³

In addition to any jurisdiction as may be conferred by the National Assembly, the court is vested with appellate and supervisory jurisdiction in civil proceedings, involving questions of Islamic personal law.²⁴

(g) The Customary Court of Appeal of the Federal Capital Territory

The Customary Court of Appeal of the Federal Capital Territory, consists of a President and such number of Judges as may be prescribed by an Act.²⁵

The Court is vested with jurisdiction as may be conferred by an Act and appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law.²⁶

STATE COURTS

(a) The State High Court

The State High Court consists of the Chief Judge of the state and such number of

²¹ Section 257 supra.

²² Section 260 supra.

²³ Section 261 supra.

²⁴ Section 262 supra.

judges of the court as may be prescribed by law of the State House of Assembly.²⁷ For the purpose of exercising its jurisdiction, a High Court usually consists of a single judge sitting alone.²⁸ Thus it is usual to find several judges sitting in different courts at the same time, each exercising the full powers of the High Court.

The Chief Judge of a state shall be appointed by the Governor on the recommendation of the National Judicial Council (N.J.C.) subject to the confirmation of the House of Assembly of the State. The other judges are appointed by the Governor on the recommendation of the N.J.C.

The qualification for appointment in both cases is ten years post qualification as a legal practitioner.²⁹

As regards jurisdiction, subject to the provision of section 251 of the Constitution, the Court is vested with jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.³⁰

The Court is also vested with appellate and supervisory jurisdiction over the decision of some lower courts.³¹

(b) Sharia Court of Appeal of a State

The establishment of a Sharia Court of Appeal in any State is at the discretion of

²⁵ Section 265 supra.
²⁶ Section 267.
²⁷ Section 270.
²⁸ Section 273.
²⁹ Section 271.
³⁰ Section 272(1).
³¹ Section 272(2).

each State. The Court will consist of a Grand Kadi, and any number of Kadis as may be prescribed by the House of Assembly.³² A Kadi must be a scholar of Islamic Personal Law coupled with a minimum of ten years post qualification as a legal practitioner and qualification in Islamic law from an institution approved by the N.J.C.³³

The jurisdiction of the court is the same with the Sharia Court of Appeal in the F.C.T.³⁴

(c) **Customary Court of Appeal of a State**

The Customary Court of Appeal may be established for any State that requires it. It shall consist of a President and such number of Judges as may be prescribed by the House of Assembly.

The Court is vested with appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.³⁵

(d) **ELECTION TRIBUNALS**

A novel provision was introduced by the 1999 Constitution in the creation of Election Tribunals. "There shall be established for the Federation, one or more election tribunals to be known as the National Assembly Election Tribunals, vested with jurisdiction over election petitions relating to the National assembly.

There shall also be established in each State, one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals to hear and determine

³² Section 275.

³³ Section 276.

³⁴ Section 277.

³⁵ Section 282.

matters relating to the election of the Governor, Deputy Governor or a member of the house of assembly.³⁶

The composition of the Tribunals shall be as set out in the Sixth Schedule to the Constitution.³⁷

(e) **Other State Courts**

Apart from the Courts enumerated for the states in the Constitution, the Constitution itself recognises the existence of some courts created under the laws of the State (see section 6(5)(k)). Such Courts are saved as existing courts under and by virtue of section 316 of the Constitution.

Such Courts include Magistrate Courts, District Courts, Customary Courts, Area Courts, Alkali Courts etc. Their jurisdiction and powers are as contained in their constituent enactment³⁸.

3. JUDICIAL HIERACHY UNDER THE MILITARY

Both the 1979 and the 1999 Constitutions recognised the doctrine of separation of powers. By this arrangement, we have the Legislature, the executive and the judiciary³⁸. Kayode Eso J.S.C. stated the constitutional position of the judiciary under the Military in the case of *Government of Lagos State v. Ojukwu*³⁹ thus: "By virtue of the Constitution (suspension modification) Decree 1984 No.1, a good number of the provision of the constitution were suspended. Section 6 of the Constitution, the most important provision which vests in courts, the judicial powers of the Federation was left extant."

³⁶ Section 285(1) and (2).

³⁷ See sections 4,5 and 6 of the 1979 and 1999 Constitution respectively.

³⁸ See sections 4,5 and 6 of the 1979 and 1999 Constitution respectively.

³⁹ (1986) 1 NWLR (pt.18) p.621.

Notwithstanding the observations of Kayode Eso J.S.C. above, it is a notorious fact that the Military has exercised power in this country for not less than twenty years of Nigeria's nationhood. In the course of their rule the successive military regimes have persistently breached the doctrine of the rule of law by the promulgation of enactments not only ousting the jurisdiction of the regular courts; but also establishing special tribunals with rather extraordinary powers over and above the country's legal system.

It is now proposed, to deal briefly with the exclusionary enactments employed by the military regimes in ousting the jurisdiction of the regular courts, as well as the various special tribunals established by them to disrupt the normal hierarchy of our court system.

(a) **Ouster of Jurisdiction of Regular Courts**

During the period of military rule, the courts which were supposed to guide against the breach of the rule of law were usually incapacitated by ouster clauses.

We are all too familiar with the classical case of *Lakanmi v. Attorney-General (Western State)*⁴⁰ in which the Supreme Court declared null and void the provisions of both a Decree and an Edict, ousting the jurisdiction of the court. Unfortunately, the Federal Military Government took the sting out of the judgement by promulgating the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 of 1970 which effectively nullified the judgement.

One of the most notorious Decrees that flagrantly ousted the jurisdiction of the courts was the State Security (Detention of Persons) Decree No.2 of 1984. In the case of *Chin – Yao and Ors. V. Chief of Staff, Supreme Headquarters and Ors. Unreported Suit. No.CA/L/25/85*, the Court of Appeal sitting in Lagos held that "The combined effect of

⁴⁰ (1971) U.I.L.R. (Pt.1) p.201.

Decree No.2 and Decree No.13, 1984 is that on the question of Civil Liberties, the Law Courts of Nigeria must as of now blow a muted trumpet.ö

It must be observed that the dictum of the Court of Appeal in the above case portrayed the timidity and cowardice of the panel that tried the case.

In some other instances, the courts displayed rare courage propelled by a determination to do justice. The decision in the *Lakanmi case supra* is one of such cases. Also in *Re Mohammed Olayori and Ors.*,⁴¹ Taylor C.J. maintained that òí í í .if we are to live by the rule of lawí í í .then whatever status, whatever post you hold, we must succumb to the rule of law, the alternative is anarchy and chaos.ö

See also *Government of Lagos State V Ojukwu*.⁴²

*Eleso v. Government of Ogun State;*⁴³ and *Abaye v. Ofili and Attorney-General of Rivers*.⁴⁴

(b) Special Tribunals Established Outside the Hierarchy of Regular Courts

Successive Military regimes have formed the habit of establishing special tribunals at the Federal and State levels, outside the normal hierarchy of the regular judicial system.

The point must be made that these special Tribunals have remained a common feature with Military regimes in Nigeria. The natural question to be asked is: What is a Tribunal? -Blacks Law Dictionaryødefines a -tribunaløas the seat of a judge or the physical place of administering justice. Under Roman Law, a tribunal was said to mean an elevated seat occupied by the Praetor when he acted as a judge. Today the meaning of

⁴¹ Suit No.M/196/69 of 17/8/69.

⁴² (1986) 1 N.W.L.R. (Pt.18) p.621.

⁴³ (1990) 2 N.W.L.R. (Pt.133) p.420.

⁴⁴ (1988) 1 N.W.L.R. (Pt.15) p.134.

the term has not changed much. Tribunals are special adjudicatory or fact-finding bodies set up outside the normal hierarchy of courts.⁴⁵

The following are some of the special tribunals established by the military from 1966 to 1999:

- (i) Robbery and Firearms Tribunal under Decree No.47 of 1970;
- (ii) Treason and other offences Tribunal under Decree No.8 of 1976;
- (iii) Exchange Control (Anti Sabotage) Tribunal under Decree No.57 of 1977
- (iv) Recovery of Public Property Tribunal under Decree No.3 of 1984
- (v) Robbery and Firearms Tribunal under Decree No.5 of 1984
- (vi) Miscellaneous offences Tribunal under Decree No.20 of 1984
- (vii) Failed Banks Tribunal under Decree of 1994

It is my view that special tribunals have not been established as part of our Judicial and legal systems. For one thing most of their decisions were not subject to appeal. Moreover, their decisions do not rank as precedents, either binding or persuasive, contributing towards legal and judicial developments in the country. In his Keynote address on the N.B.A. Conference at Ibadan, Oyo State in August 1987, Hon. Justice A.O. Obaseki J.S.C. stated that:

“The tribunals are not part of the judiciary and the decisions of the tribunals are of no value as precedents in our jurisprudence. If one considers the legal work that all the various tribunals are doing, the loss to legal development in Nigeria and the judiciary must be enormous.”

⁴⁵ See Article by Prince Bola Ajibola SAN on “Military Tribunals and the Concept of Justice” in *The Lawyer* Vol.18, 1988.

Incidentally, before the Military took their exit in May 1999, they promulgated the *Tribunals (Certain Consequential Amendments, Etc) Decree No.62 of 1999* by which they dissolved the special Tribunals and transferred their jurisdiction to the Federal High Court and the High Court of the States in respect of certain matters.

They also passed another Decree, the *Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No.63 of 1999* by which they repealed several obnoxious decrees which were incompatible with the emerging democratic system.

4. CONCLUSION

On the whole it is to be observed that the judicial hierarchy under the present Constitution is by and large wholly consistent with the democratic dispensation in which the cardinal doctrine of the rule of Law has become paramount. This is in contradistinction to the hierarchy under the military where the courts were constrained to blow muted trumpets. Moreover there were some structural irregularities in the old hierarchy, as a result of the establishment of the obnoxious Special Tribunals.

As regards the ordinary courts, there is not much difference in the hierarchy under the military regime when juxtaposed with the present position. The regular courts remain the same under the two systems. Even the jurisdiction of the courts are not much different under the two systems.

As regards the controversial jurisdiction of the Federal High Court, the genesis can be traced to the protracted struggle for jurisdiction between the Federal High Court and the State High Court. This struggle was a direct fall-out of the period of military misrule. In an obvious attempt to obtain a firm hold on the judiciary, the erstwhile military junta systematically expanded the jurisdiction of the Federal High Court, beyond the initial

policy rationale for the establishment of the Court as a revenue court.⁴⁶ Under the Military, the *Constitution (Suspension and Modification Decree No.107 of 1993)* was enacted to enlarge the jurisdiction of the Federal High Court to cover almost all the items on the Exclusive Legislative List.

Incidentally, while the jurisdiction of the Federal High Court was expanded by the Military, they systematically curtailed the hitherto unlimited jurisdiction of the State High Courts. It is quite unfortunate that the reversed jurisdiction foisted on us by the Military, vis-à-vis the two courts, has equally been foisted on us by the provisions of the 1999 Constitution.⁴⁷

There is the need to streamline the present unwieldy and incongruous jurisdiction of the Federal High Court to reflect its true position as a Commercial Court. The matters to be entertained by the court should be few and strictly related to Federal Revenue. It must be noted that there are very few Federal High Courts presently, so they cannot be saddled with the burden of such an elastic jurisdiction.

Furthermore, the jurisdiction to try the offences of treason, treasonable felony and allied offences vested in the court by section 251(2) should be repealed. There is no basis for this jurisdiction. Granted that they are Federal offences, the same Constitution has vested the State High Courts with co-ordinate jurisdiction in respect of Federal offences, see section 286(1)(b) of the Constitution. Moreover, the offences of treason and allied offences are not offences related to the original civil jurisdiction of the Federal High Court.

⁴⁶ See Federal Revenue Court Act, 1973.

⁴⁷ It will be observed that the jurisdiction conferred on the Federal High Court under section 251 of the Constitution is a verbatim repetition of the jurisdiction conferred by Decree No.107 of 1993.

On a final note, it is my view that subject to the salient observations highlighted in this paper, the present hierarchy of our courts are quite in tune with the democratic dispensation under the 1999 Constitution.

REFERENCES

1. Federal Revenue Court Decree No.13 of 1973
2. Federal Court of Appeal Decree No.2 of 1976
3. Constitution of the Federal Republic of Nigeria, 1999
4. "Military Tribunals and the Concept of Justice" by Prince Bola Ajibola S.A.N. published in *The Lawyer* Vol.18, 1988
5. Tribunals (Certain Consequential Amendments, Etc) Decree No.62 of 1999
6. Constitution of the Federal Republic of Nigeria (certain consequential repeals) Decree No.65 of 1999
7. Constitution (Suspension and Modification) Decree No.107 of 1993.