

SECRET TRIAL OF TERRORISM SUSPECTS IN NIGERIA*

Abstract

The Chief Judge of the Federal High Court, pursuant to constitutional powers, on 5th April 2022, issued the Federal High Court Practice Directions (On Trial of Terrorism Cases) 2022. The Practice Directions stipulated in camera trials of terrorism suspects. This paper interrogated the constitutionality of secret trials of terrorism suspects. The contextual background analysed constitutional provisions guaranteeing open public trials in all cases in court proceedings and established that constitutionally, open public trials is the default mode for all proceedings before the courts. Thereafter, it examined constitutionally and lawfully permitted exception to the rule of open public trials. It disclosed that upon certain constitutionally enumerated circumstances, a court may conduct a trial out of open public view. It then dealt with the constitutionality of the provisions of the Federal High Court Practice Directions (On Trial of Terrorism Cases) 2022, and established that the specification for mandatory secret trials of terrorism suspects is a violation of constitutionally entrenched rights to fair hearings. This led to our conclusion that the proposal for secret trial of terrorism suspects is not just unconstitutional, but is so to such a magnitude that its mere contemplation is deeply disturbing.

Keywords: *In Camera; Practice Direction; Public Trial; Secret Trials; Terrorism; Unconstitutional*

1. Introduction

The Federal High Court is established under s. 249 of the 1999 Constitution of the Federal Republic of Nigeria. It is a superior court of record, and possesses unlimited nation-wide territorial jurisdiction and limited subject-matter jurisdiction. Its civil jurisdiction is explicitly delimited in s. 251(1)(a) - (r) of the 1999 Constitution. It also possesses such other civil or criminal jurisdiction as may be conferred on it by an Act of the National Assembly.¹ Nigeria's Terrorism (Prevention) (Amendment) Act, 2013, is an Act to amend the Terrorism (Prevention) Act, 2011 by providing for extra-territorial application of the Act and strengthening of terrorist financing offences; and for related matters. Under the Act, the Federal High Court, has jurisdiction to try terrorism offences under the Act or any other related enactment, and hear and determine proceedings arising under the Act.² The Chief Judge of the Federal High Court is authorised, subject to the provisions of any Act of the National Assembly, to make rules for the regulation of the practice and procedure of the Federal High Court.³ Constitutionally, proceedings of a court or any tribunal sitting in the determination of

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¹ s. 251(1)(s) of 1999 Constitution; *see also* s. 251(3) of 1999 Constitution

² s. 32(1)(a)&(b) of the Terrorism (Prevention) (Amendment) Act, 2013 Act

³ s. 254 of 1999 Constitution

the civil rights and obligations of a person are required to be held in public⁴. Furthermore, whenever any person is charged with a criminal offence, he is entitled to a fair hearing in public within a reasonable time by a court or tribunal.⁵ Thus, constitutionally, open public trials is the default mode of proceedings in all courts in respect of all offences. On 5th April 2022, the Chief Judge of the Federal High Court issued the Federal High Court Practice Directions (On Trial of Terrorism Cases) 2022. The deep conceptual problem with the entire jurisprudence of this particular practice direction is its unlawfulness. First, it is patently unlawful by discriminating between terrorism suspects and other criminal suspects with respect to denial of constitutional safeguards to fair hearing and applicable trial procedure. Second, its criminalisation of violation of its provisions is tantamount to exercise of a legislative power that the issuer of the practice direction does not possess. Third, its legislation on forms and types of evidence to be used in trials of terrorism cases is a clear usurpation of the exclusive legislative powers of the National Assembly. Fourth, it is doubtful if the Chief Judge of the Federal High Court had the powers to adopt the procedure he did in issuing the Practice Directions. In this paper, we have limited our scope to the constitutionality of its provision stipulating *in camera* trial of terrorism offences. In the section next we will explore the general constitutional right to open and public trials for all offences. In the section thereafter, we will examine constitutionally and lawfully permitted exceptions to the rule of open public trials. This will lead us to a scrutiny of the inherent powers of a superior court of record to control its proceeding for the purpose of determining whether an exception should be made to the rule of public trial. From the perspective of the foregoing, we analyzed the Federal High Court's Practice Directions (On Trial of Terrorism Cases) 2022 and came to our conclusion that its constitutional provenance is absent.

2. A General Constitutional right to open and Public trials

At common law, a court has no power to conduct a trial *in camera* unless it is strictly necessary for the attainment of justice to do so. In other words, before the public can be excluded, the presiding officer must be satisfied that by nothing short of the exclusion of the public can justice be done.⁶ In accordance with constitutional provisions, the proceedings of a court or any tribunal sitting in the determination of the civil rights and

⁴ s. 36(3) of 1999 Constitution

⁵ s. 36(4) of 1999 Constitution; however, such court or tribunal may exclude from its proceedings persons other than parties thereto or their counsel in the interest of public safety, public order, public morality, welfare of persons who have not attained the age of eighteen years, protection of private lives of the parties or to such extent as is necessary by reason of special circumstances in which publicity would be contrary to the interests of justice. Moreover, if in proceedings before such court or tribunal, a Minister of the Federal Government or a Commissioner of a State Government satisfies the court or tribunal that public disclosure of any matter would not be in the public interest, the court or tribunal would make provisions for evidence relating to that matter to be heard in private and take such other action as may be expedient to prevent the disclosure of the matter

⁶ *Snell v. Haywood* (No. 2), 16 E&ED 149

obligations of a person, must be held in public⁷. Furthermore, whenever any person is charged with a criminal offence, he shall be entitled to a hearing in public by a court or tribunal. This requirement of a public and open hearing is however without prejudice to the competence of the court or such tribunal to exclude from its proceedings, persons other than parties thereto or their Counsel in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice. Besides, if in any proceedings before a court or such tribunal, a Minister of the Federal Government or a State Commissioner satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal may exercise its discretion to make arrangements for evidence relating to that matter to be heard in private and take such other action as may be expedient to prevent the disclosure of the matter.⁸ Within the context of this rule requiring the sittings of the court to be in an open and public place, the term ‘*open court*’ means a court to which the public have a right to be admitted. It does not include a court where the public are excluded, although parties and their representatives are allowed to be present.⁹ From this perspective, a categorical imperative of an ordinary court of justice is that the proceedings must take place in a public place. This is, without prejudice to the powers of the court in certain specific circumstances, to exclude either the general public or certain sections of the general public from obtaining access to the proceedings. However, until this power is exercised, the court is bounden not only to sit in a public place, but to grant the general public access to the observe the proceedings.¹⁰ A Judge of a court of justice, save in a few exceptional cases, has no discretion whether he will sit in private or in a public.¹¹ To justify an order for hearing *in camera* it must be shown that the paramount object of warranting that justice is done would be rendered doubtful of attainment if the order were not made.¹² In this regard, the Judge has no power, even with the consent of the parties, to

⁷ s. 36(3) of 1999 Constitution

⁸ s. 36(4) of 1999 Constitution

⁹ *R. v Lewes Prison (Governor), Ex p. Doyle*, [1917] 2 KB 254

¹⁰ In *Hall (falsely called Castelden) v Castelden*, 164 ER 880, Williams J. in holding that the Court for Divorce and Matrimonial Causes has no power to exclude the public during the hearing of a cause stated as follows, ‘*If the question had arisen now for the first time, I should have thought, as this is a new court, and the Act by which it was constituted does not exempt it from the rules applicable to courts generally, that it must be considered to have all the incidents of an ordinary court of justice, one of which is, that its proceedings must take place in public.*’

¹¹ *Hearts of Oak Assurance Company v A-G.*, [1932] AC 392; in *A-G v Leveller Magazine Ltd.*, [1979] 1 All ER 745, it was held that in the absence of statutory authority, a court has no power to sit in private merely because it believes that to sit in public would prejudice national security.

¹² *Scott v Scott*, [1913] AC 417 at 439, Lord Loreburn stated ‘*Again, the court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the just exclusion of all from whom such interruption is*

exclude the public from attending the hearing of a cause, except cases affecting lunatics or wards of the court, or where a public trial will defeat the object of an action.¹³ The reason why the Judge, even with the consent of the parties and their counsel cannot sit in private is because the necessity to hold court in public is a safeguard fundamental to the rights of citizens. As a right that inures to the benefit of the entire public, it cannot be waived. Nobody, not even the State can waive rights entrenched in statutory or constitutional provisions which have been made in favour of the whole country.¹⁴

3. Constitutional and Lawful Exceptions to Open Public trials

While open and public hearings is the default constitutional mode for court proceedings, the Constitution however makes provisions for courts and tribunals to exclude from their proceedings, persons other than parties thereto or their counsel in the interest of public safety, public order, public morality, welfare of persons who have not attained the age of eighteen years, protection of private lives of the parties or to such extent as is necessary by reason of special circumstances in which publicity would be contrary to the interests of justice. In addition, in proceedings before courts and tribunals, if the appropriate official of either the Federal or State Government satisfies the court or tribunal that public disclosure of any matter would not be in the public interest, the court or tribunal would make provisions for evidence relating to that matter to be heard in private and take such other action as may be expedient to prevent the disclosure of the matter.¹⁵ In this regard, in exercising its control over proceedings being heard before it, a court is permitted to derogate from the principle of open justice

expected, and, if discrimination is impracticable, the exclusion of the public in general. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court.'

¹³ *Nagle-Gilman v Christopher*, (1876) 4 Ch D 173; in *Re Martindale*, 10 TLR 670, North, J. stated as follows, 'The general rule is an excellent one, that legal proceedings should be in public, and if it were departed from the great weight which legal decisions carry with them in this country would be deservedly diminished. But to this rule certain exceptions are proper and necessary. Cases relating to lunatics are constantly heard in private and cases as to wards, in order that the lunatic or ward may not be prejudiced.'

¹⁴ *Amaechi v INEC*, [2008] All FWLR Part 407, 1; in *Menakaya v Menakaya*, [2001] 16 NWLR Part 738, 203, it was held that a mandatory statutory provision directing a procedure to be followed in the performance of any duty is not a party's personal right to be waived. Consequently, a waiver cannot be successfully raised in connection with a person discharging a public duty which the law prescribes shall be done in a particular manner. When it is argued that a statutory provision has been waived, it has to be considered whether the statute confers purely private or individual rights which may be waived or whether the statutory provision confers rights of a public nature as a matter of public policy. If it is the latter, the provision of such statute cannot be waived as no one is permitted to contract out of or waive a rule of public or constitutional policy

¹⁵ See s. 36(4) of 1999 Constitution

by sitting in private or permitting a witness not to disclose his name when giving evidence if it was necessary to do so in the due administration of justice.¹⁶ However, the exercise of this power is not at large. Before the court would conduct its proceedings *in camera*, it must first proceed on the assumption that the normal accepted archetype for conduct of its proceedings is the open and public model. Thereafter, it considers whether any aspect of the proceedings renders a private hearing compelling. It then considers the mischief to be averted by a private hearing and the rights of the public to a public hearing. It is after balancing these competing rights and interests, from the perspective of public policy that the Judge exercises his discretion on whether or not to order a hearing *in camera*. Thus, there is inherent jurisdiction in every court, including a field general court-martial to exclude the public from a trial if it is necessary for the administration of justice.¹⁷ The hearing in private wholly or in part of cases in which public decency and morality require it to be done, are familiar, not only in divorce courts, but also in the ordinary criminal and civil courts.¹⁸ Accordingly, the general rule as to publicity must yield to the paramount duty of the court to secure that justice is done; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing *in camera* and even the prohibition of subsequent publication of the proceedings, in exceptional cases. In cases where it is shown that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the court, an order for hearing *in camera* may be made.¹⁹ Yet again, where, for example, in cases of family disputes, both parties consent and request a private hearing, the court may upon a proper consideration of the

¹⁶ *A-G v Leveller Magazine Ltd.*, (n. 11), in this context, an attempt to frustrate the actions of the court by publishing his identity is capable of amounting to contempt of court if it interfered with the due administration of justice, but in the absence of such interference, merely running counter to a direction of the court was not of itself enough to make the publication a contempt of court

¹⁷ *R. v Lewes Prison (Governor), Ex p. Doyle*, (n 9) here a British subject was charged with having taken part in an armed rebellion and in waging war against the King, such act being of such a nature as to be calculated to be prejudicial to the defence of the realm, and being done with the intention and for the purpose of assisting the enemy. He was tried before a field general court-martial and convicted. By the rules of procedure under which the field general court-martial was held, it was provided that the proceedings should be held in open court, in the presence of the accused, except on any deliberation among the members when the court might be closed.

¹⁸ *Druce v Druce, Druce v Druce & Gibb*, 19 TLR 387, here, a suit for judicial separation was instituted by a wife, the particulars of which disclosed allegations of filthy practices, but in which no suggestions were made of sodomy or bestiality. With the wife's suit being consolidated with a suit by the husband for dissolution of the marriage on the grounds of the wife's adultery with the co-respondent, it was held that with the consent of all the parties, the case should be heard *in camera* by a judge sitting with a special jury.

¹⁹ *Scott v Scott*, [1913] AC 417, in *Moosbrugger v Moosbrugger, Moosbrugger v Moosbrugger & Martin*, 29 TLR in cross suits for divorce the case for the wife having been opened in public and the wife on being called as a witness finding it almost impossible to give her evidence by reason of the presence of people in court, the President of the court directed this part of the case to be heard *in camera*.

circumstances, accede to their request, and grant them a private hearing.²⁰ All of the foregoing are however, subject to any provision of the relevant statute prescribing a mandatory requirement for the hearing to be in public.²¹ Mere embarrassment likely to be suffered by a party is not relevant if it does not affect the administration of justice in the matter.²² Furthermore, the Judge has the authority to order the court, or any part of it, to be cleared, if quiet is not preserved.²³

4. Constitutionality of Federal High Court's practice of Secret trials of Terror Suspects

O. 3 r. 1 of the FHC Practice Directions (On Trial of Terrorism Cases) 2022 provides that proceedings of offences of terrorism, shall be held *in camera* or as may be ordered by the Court. The second arm of the rule appears to create an option of open trials if ordered by the Judge. That is however make-believe. O. 2 r. 1 of the FHC Practice Directions (On Trial of Terrorism Cases) 2022 provides that the perimeters of the Court sitting over a terrorism trial are required to be secured for the period of the trial and no person is allowed within the secured perimeters save approved Court officials; parties and a number of pre- registered legal practitioners on either side, witnesses; and any other person as may be directed by the Judge or the most Senior Judge in the given. Where it really gets troubling is o. 2 r. 2 of the FHC Practice Directions (On Trial of Terrorism Cases) 2022 which provides that only the Judges; other essential Court Staff and security agencies involved in the particular case and their vehicles shall have access to the Court premises. Thus, while a Judge may permit a particular designated person to be granted access to the Court perimeters, the general public are denied access to the Court perimeters. Furthermore, even the particular person granted the indulgence of access to the Court perimeters is not permitted access to the Court premises. Consequently, if the hypothetical Judge makes the hypothetical order for open trial, the ordered open trial will remain suppositious and conjectural by the fact and reality that the security model implemented by the court over its premises has denied the public access to the Court's premises. Thus, clearly, the default mode of trials created by this

²⁰ Re Portsmouth (Lord), 35 ER 495; in Cleland v. Cleland, Cleland v. Cleland & McLeod 30 TLR the court being satisfied that to hear evidence in open court would be against the interests for public morality and might prevent real justice being done, granted the application of a wife that the evidence in support of her petition should be taken *in camera*, the husband not opposing the application.

²¹ *Menakaya v Menakaya*, (n. 14)

²² In *Re AB's Petition*, 16 E&ED 148, it was held that a petition filed under the Legitimacy Act for the legitimation of a person who was born illegitimate, but whose parents were married subsequently to his birth, is not a proceeding which entitles the petitioner to a hearing *in camera*.

²³ *Re Surrey (Sheriff)*, 16 E&ED., 147, here Cockburn, CJ. Stated: '*English courts of justice are open to the public in the fullest sense, and I trust they will ever remain so; but it was going far beyond either law or necessity to avow that there is no power reposed in the presiding Judge to order such modifications of the arrangements of the court as are indispensable to that which it is the office of a judge to carry out, namely, the efficient administration of justice. It is undoubtedly in the power of the judge, in his discretion, to order the court, or any part of it, to be cleared if due quiet is not preserved.*'

Practice Directions is secret trials. An impracticable and unattainable public trial model is created as a fall-back mode. The question now is whether the specification and provision of secret trials of terrorism suspects under the Practice Directions is constitutional and lawful?

As pointed out earlier, the Constitution requires and demands that the proceedings of a court or of any tribunal sitting in the determination of the civil rights and obligations of any person, shall be held in public²⁴. The Constitution emphasises and entrenches this rule by a creating a right to any person charged with a criminal offence, to be entitled to a hearing in public by a court or tribunal.²⁵ This right may in appropriate cases be abridged in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice. The decision to abridge the rights is taken by a particular Judge in respect of each proceeding upon considering the particular circumstance of that proceeding. It is a decision taken in respect of each defendant or accused person, the witnesses, the evidence, the victims, the security implications, and the particular circumstances of each crime. It is a decision taken with respect to the social effects of each crime, public disclosure of the inner workings of security personnel and public disclosure of the operations of terror cells and groups. It is a decision taken with respect to each particular case or proceeding. Since no two cases are alike, it is a decision taken upon the consideration of the facts of each case. It is a decision taken upon exercise of judicial discretion by the particular Judge upon consideration of facts requisite for exercise of the discretion. The constitutional provision excepting public trials in appropriate cases does not permit a blanket administrative exclusion for a category of cases. It requires judicial determination of the necessity and propriety of a closed hearing of a case as a basic prerequisite to an order excepting a particular proceeding from the entrenched and stipulated constitutional model.

A judicial act is an act of the Judge or court in deciding a question of right litigated before him or referred by law to his judgment.²⁶ *Discretion* denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it connotes discretion exercised not arbitrarily or wilfully but with regard to what is right and equitable under the circumstances and law, and directed by the reason and conscience of the judge to a just result.²⁷ Judicial discretion is the option which a judge may exercise between the doing and not doing a thing, the doing of which cannot be demanded as an absolute

²⁴ s. 36(3) of 1999 Constitution

²⁵ s. 36(4) of 1999 Constitution

²⁶ *US v Ward*, 42 FD 359

²⁷ *US v McCarthy*, 17 FPD 2d 189

right of the party asking it to be done.²⁸ The court's discretion must not be arbitrary, vague and fanciful, but must be legal and regular. The important task in the exercise of discretion by the judge is to discern the course prescribed by the law, and to follow it²⁹. Every superior court of record controls the proceedings in the court, being *dominus litis* of all that transpires within the court. This power is inherent to a superior and competent court of record. The control of the order of business and conduct of court proceedings is an exercise of judicial discretion.³⁰ Discretion of a trial court includes the latitude of decisions within which the court or judge decides questions arising in a particular case according to circumstances and according to the judgment of the court or Judge not expressly controlled by fixed rules of law³¹. The exercise of discretion is a matter exclusively for the court after weighing all the circumstances of the case in the interests of justice and the balancing of the interests of the parties involved. It is after the court shall have given consideration to such matters that it can arrive at a decision which must appear reasonable in all circumstances of a particular case³². A court or tribunal must always, at all times and in all odds balance its discretionary power to refuse or allow one form of an act or the other in its duty to endeavour to give to the parties to the case the opportunity of obtaining substantial justice.³³ If there are materials before the court on which it can conclude that it is necessary in the interests of justice to hold proceedings *in camera*, the court has inherent jurisdiction at common law to do so.³⁴ It does not follow that because there is an application for a case to be heard *in camera* that the order should be made as a matter of course. The court should carefully consider whether there is any *prima facie* ground for departing from the ordinary method of administering justice; but if there are materials before the court which lead them to the conclusion that it is necessary for the proper administration of justice that the matter should be heard *in camera*, there is no doubt that the court has power, apart from any particular regulation to that effect, to hear a case *in camera*.³⁵ It is thus clear that by creating an administrative rule of general application with respect to all terrorism cases, the FHC Practice Directions (On Trial of Terrorism Cases) 2022 has denuded the Judges trying the particular cases of their judicial power to exercise their discretion with respect to particular cases. More worrisome still, has isolated defendants in terrorism cases and located them in an impermissible constitutional

²⁸ *Alden v Hinton*, 42 FD 359; in *Chapman v Dorsey*, 20 Am Jur 2d, 434, it was stated that judicial discretion is the sound choosing by the court, subject to the guidance of the law, between doing or not doing a thing, the doing of which cannot be demanded as an absolute right.

²⁹ *US v Eisner*, 17 FPD 2d 189

³⁰ *United Agro Ventures Ltd. v. First City Merchant Bank Ltd.* [1998] 4 NWLR Part 547, 546

³¹ *Wolverine Shoe & Tanning Corp. v Aldens, Inc.*, 17 FPD 2d 188

³² *Echaka Cattle Ranch Ltd. v NACB Ltd.* [1998] 4 NWLR Part 547, 526; *SIEC, Ekiti State v NCP*, [2008] 12 NWLR Part 1102, 720

³³ *Eshenake v Gbinije* [2005] All FWLR Part 289, 1270

³⁴ *R. v Neff*, 16 E&ED, 149

³⁵ *Norman v Mathews*, [1916-17] All ER Rep. 696

penumbra. Which brings us to the question of what is the legal status of rules of court and practice directions?

Generally, a court may promulgate rules and interpret them as adjuncts to the dispensation of justice and orderly and expedient administration of its function.³⁶ The purpose of rules of court is basically the regulation of the practice and procedure before the court. Functionally, they delineate times, forms, formats and modes by which the litigant will invoke, continue and conclude the process of obtaining remedy from the court. However, the rule-making power of the court must conform to constitutional and statutory limitations.³⁷ Despite the fact that the function of court rules is to regulate the practice of the court and to facilitate the transaction of its business, no rule can enlarge or restrict jurisdiction or abrogate or modify substantive law. Any rule of court which violates the constitution or otherwise modifies substantive rights may not stand.³⁸ Apart from rules of court, the courts frequently issue practice directions for use and application in processes and the practice before them. Practice Directions as the name implies, direct the practice of the court in a particular area of procedure of the court. Practice directions could be described as a written explanation of how to proceed in a particular area of law in a particular court. The word '*practice*' in its larger sense, like procedure, denotes the mode of proceedings by which a legal right is enforced, as distinct and separate from the law that gives and defines the right. The word '*practice*' is the form, manner and order of conducting and carrying on suits or prosecutions in courts, through their various stages according to the principles of law and the rules laid down by the respective courts. Practice directions have the force of law in the same way as rules of court. Rules of Court include Practice Directions. Practice Directions however lack the force of law if they are in conflict with the Constitution or the statute which enables them. In the hierarchy of our jurisprudence, practice directions come last in terms of authority in the area of conflict, so that the Constitution, enabling or other statutes, and rules of court all take precedence over practice directions and will prevail over it in the event of a conflict.³⁹ Where there is a conflict between a rule of court and

³⁶ *S. Stern & Co. v US*, 84 S Ct 1169, 377 U.S. 909

³⁷ *Berkey Technical Corp. v US*, 17 FPD 2d, 223

³⁸ *Re Oliver*, 17 FPD 2d, 223; in *Washington-Southern Navigation Co. v Baltimore & PSB Co.*, 263 US 629, 44 S Ct 220, it was held that a rule cannot abrogate or modify substantive law. In *S. Stern & Co. v US*, 84 S Ct 1169, 377 U S 909, it was held that the power given to courts to make rules for the orderly and expedient administration of their functions is constrained by a limitation that substantial rights of litigants be not unduly circumscribed. In *Gas Service Co. v Coburn*, 17 FPD 2d 222, it was held that rule-making power does not include a right to create or abrogate substantive law.

³⁹ *Buhari v. INEC*, [2009] All FWLR Part 459, 419 at 547G - 548A, per Justice Tobi, JSC '*In the hierarchy of our jurisprudence, Practice Directions come last in terms of authority in the area of conflict. I do not think I sound clear. Let me make myself clearer. If there is a conflict between the Constitution and Practice Directions, the former will prevail. This is too obvious to be mentioned. If there is a conflict between an enabling statute and Practice Directions, the former will also prevail. This is also an obvious one. Perhaps the less obvious one is where there is a conflict between enabling rules*

a Practice Direction, the rule of Court must prevail.⁴⁰ Where a strict adherence to Practice Directions, like rule of court, would conflict with that of fundamental principles of justice, the courts would lean on the side of doing justice⁴¹. Without doubt, the Chief Judge of the Federal High Court possesses constitutional powers to make issue practice directions. However, under the law, a constitutional power cannot be used by way of condition to attain an unconstitutional result.⁴² Open public trials of all cases before all courts is both a constitutional rule and a constitutional purpose. The Constitutional supremacy clause renders the provisions of the Constitution binding on all persons and authorities throughout the country.⁴³ Flowing from this, if any other law is inconsistent with the provisions of the Constitution, the Constitution prevails and that law is voided to the extent of its inconsistency.⁴⁴ From all of the forgoing, clearly, the Federal High Court Practice Directions (On Trial of Terrorism Cases) 2022 suffers two gravely debilitating constitutional vices. In the first place, its provisions are openly contrary to a specific constitutional rule. In the second place, it is purposed to achieve the unlawful result denying certain categories of defendants of their constitutional rights. Either of these is sufficient to void the Practice Direction for unconstitutionality. Taken together, they render Federal High Court Practice Directions (On Trial of Terrorism Cases) 2022, unconstitutional.

5. Conclusion

Every suitor before a court, whether in a civil or criminal case is entitled to enjoy the full panoply of constitutional rights to a fair hearing. This includes an open public trial of his cause. Before he may be denied of a right to open public hearing, the court must first make a determination that the facts and circumstances of his case demand or require a closed hearing. It is a case-by-case exercise of judicial discretion by the Judge trying each particular case. What the Federal High Court Practice Directions (On Trial of Terrorism Cases) 2022 seeks to achieve is to completely do away with a case-by-case exercise of judicial discretion. The bald stipulation for *in camera* trials of a

of court and Practice Directions. In my view, even here, the enabling rules of court will prevail. This is because, in certain cases, the enabling rules of court empower the head of Court to make Practice Directions.'

⁴⁰ *University of Lagos v Aigoro*, [1985] 1 NWLR Part 1, 143; in *Haruna v. Modibbo*, [2004] 16 NWLR Part 900, 487, it was stated that rules of court are to regulate matters in court and help parties in the presentation of their case within a procedure made for the purpose of a fair and quick trial. On the other hand, a Practice Direction is a direction given by an appropriate authority stating the way and manner a particular rule of court shall be complied with, observed and obeyed. Practice directions do not have the authority of rules of court although they are instructions in aid of the practice in court. They cannot by themselves overrule court decisions. A practice direction is less efficacious than rules of court.

⁴¹ *Olafemi v Ayo*, [2009] All FWLR Part 452, 1111

⁴² *A-G, Bendel State v. A-G, Federation*, (1981) 10 SC 1; see also *Okhae v. Governor, Bendel State*, [1990] NWLR Part 144, 327

⁴³ s. 1(1) of 1999 Constitution

⁴⁴ s. 1(3) of 1999 Constitution

particular category cases, amounts to outsourcing of judicial discretion to administrative fiat. Even if that may be countenanced, the egregious unconstitutionality of segregating criminal defendants and prescribing an across-the-board denial of constitutional liberties for certain categories of defendants renders its rational justification impossible. The administration of justice is better off without this Practice Direction.