

Independence, impartiality and competence of the judiciary, including military courts

Presentation by Arne Willy Dahl¹ at expert consultation organized by the Office
of the UN High Commissioner for Human Rights

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Hosts, ladies and gentlemen, friends and colleagues,

It is an honour to be invited to address this distinguished audience today. I thank our hosts for having invited me, giving me also the opportunity to listen to other presenters.

As you may already know, my homeland is Norway, which has a more or less fully “civilianized” system for administration of military justice. My country has its own challenges, while other countries have theirs. The ambition of this presentation is to give a balanced view of strengths and weaknesses of various systems, from a human rights perspective.

Although this consultation is focusing on military courts, it should not be forgotten that military justice is also about investigation and prosecution. Independence, impartiality and competence of investigation has in recent years been considered in cases before the European Court for Human Rights. I shall not go further into these aspects today, but only remind us that one needs to consider the whole procedural chain from investigation via prosecution to adjudication before drawing conclusions about the qualities of a particular system of military justice.

One should also keep in mind that many, possibly most, countries have systems for dealing with disciplinary offences of a minor nature by summary punishments. These systems may be more or less seamlessly connected to the respective penal military justice system, or be separated from it, for instance by having legal provisions defining which offences are to be handled by penal procedure, and which by summary punishment. Summary punishment is almost

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without exception a matter for the commanding officer, and may pose their specific concerns with regard to the human rights of the accused.

This said, the military courts have the final word in the more serious cases and deserve particular attention. In the following, I shall use the term “military courts” in an extended sense, including any court that decides military penal cases or closely related offenses in the military.

History

In a historical perspective, military justice has its roots in the authority of the commanding officer, and his need to maintain discipline among his troops. When Alexander the great took his army to Persia or Roman legions fought in North Africa it would have been utterly impractical to bring military cases back to a court in Macedonia or in Rome.

The relationship between the warlord and the state was also different from what it is in modern democracies today. Without a successful warlord, there would not be any state. The head of state was, up to Napoleonic times, the supreme warlord.

Although society developed and the army became, at least in principle, servant of the state, represented by civilian authorities, one may say that up to and including the Second World War the practical situation was not very different, at least not in wartime. How could for instance the United States of America have sent offenders home for trial or brought a civilian district court to Normandy in 1944?

In peacetime, however, the situation is different. Usually, a district court can be found not too far from most garrisons. In Norway, this made it possible to abolish military courts in peacetime in 1921. Even in overseas deployments, it is nowadays not impractical to put the alleged offender on a flight home for trial. Somewhat more difficult, but not impossible, it could be to fly a court into a mission area far from the homeland.

In other words: The situation is different today.

Perceptions of the Armed Forces

Although the armed forces are in general perceived differently nowadays than, say, in Napoleonic times, perceptions differ between countries and within countries.

Are the armed forces simply a branch of the executive, like the police, customs, tax, health or education services?

Do they require a particular sort of expertise, which entails that civilians have problems with understanding military affairs?

Are they actual or potential heroes, expected to and ready to make sacrifices for the country that are not demanded by other citizens?

Are they the guardians of the state, which from time to time may suffer under the whims of irresponsible or corrupt politicians, so that the armed forces finds it necessary to take corrective action?

Be that as it may – In the long run the armed forces need the confidence of the population at large. One important factor in this is that they do not abuse their power against other segments of society. Another is that they are seen to treat their own members fairly, giving soldiers that are accused of crimes a fair trial. Neither should they bring their country into disrepute by shielding war criminals or perpetrators of other grave international crimes.

The evident solution seems to be that possible crimes are investigated, prosecuted and judged by independent courts.

But solutions are rarely perfect, although they may be based on good principles. When a principle is pushed into the extreme, it is likely to clash with some other equally valid principle, which means that you have to look for a reasonable compromise. I shall come back to this later.

Trends in development of Military Justice

There have been numerous changes in a large number of national military justice systems in recent years or decades. To identify trends, one has to simplify matters, not drowning in details.

My first simplification is to divide military justice systems into two groups. The 2001 survey made by the International Society for Military Law and the Law of War showed that the systems in 35 respondent states could be divided into

“Anglo-American” systems based on courts-martial convened for the individual case, and “European continental” systems based on standing courts.

“Anglo-American” systems were first and foremost found in Great Britain and in her former colonies, while some states with “European continental” systems might have had systems resembling the “Anglo-American” in a more distant past. It should also be noted that several states have dispensed with military courts altogether, having military penal cases heard before civilian courts. In some states this might be a civilian court with some specialization or military element, in other states the court could be a fully civilian non-specialized court. The systems could also be different in peacetime and in wartime.

This leads me to distribute the various military justice systems along an axis – with the traditional fully military courts-martial system at the one end, and the fully “civilianised” system at the other.

Courts-martial convened for the individual case	Standing military courts	Specialized civilian courts	General civilian courts in peacetime	General civilian courts in peace and war
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All changes in military justice systems that are known to me (more than a dozen) have been from the left to the right in this table, with the possible exception of Australia, which went from a traditional system of courts-martial convened for the individual case to a standing deployable court of civilian judges who have military experience or knowledge of military affairs, but soon reversed back for constitutional reasons.

It may also be mentioned that in Germany, criminal cases from missions abroad have recently (2013) been centralized to one specific civilian court, making it possible to build up a certain expertise on military affairs at the court.

Driving forces

The developments seem to have been driven mainly by Human rights influence.

Human rights influence has been seen to be particularly strong in states party to the European Convention on Human Rights and states affiliated to such states, typically Australia, Canada and New Zealand. The reason for this seems to be

the access for aggrieved individuals to obtain binding decisions by the European Court of Human Rights. In such decisions, the Convention is not only applied, but also interpreted in a way that entails a measure of progressive development.

Highly relevant is Article 5 paragraph 1 (a) which lays down:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law; ...

Equally relevant is Article 6 paragraph 1 which lays down:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

These articles impose restrictions on the extent to which punishments can be awarded by summary procedures without due process. They also demand that military courts have to be independent, which means that you can't have a court composed of officers convened by a commander who may have an interest in the outcome. And although the courts may in fact act in a fully impartial manner, justice must not only be done, it must also be seen to be done.

General distrust

From time to time, there are eruptions of general distrust towards military courts on the part of the general public as represented by mass media and politicians. Criticism may be sparked by more or less unfortunate events, and may or may not be well deserved.

For example, UK troops were involved in some nasty incidents in Iraq in 2003 and later. In cases where it has been decided there will be no prosecution the army/military police/government have been accused of politically motivated cover-up. In other cases where there had been prosecution, one could hear voices asking "Why are you prosecuting anybody when they are all just trying to do a difficult and dangerous job on an operation that we should never have embarked on in the first place?"

Similar criticism has occurred in other countries. In countries where the military has a traditionally strong position, such as some Latin American states, jurisdiction of military courts over civilians has been an issue.

In a wider group of countries, an issue has been to limit the jurisdiction of military courts to strictly military offences, thus leaving for instance cases on theft to civilian courts.

These issues have been raised in international human rights fora and will be dealt with later today, so I will pass over them briefly.

Counter-arguments

What may be relevant and pertinent in a national peacetime perspective may, however, prove dysfunctional when troops are deployed abroad.

When soldiers commit crimes against local civilians whom they are supposed to protect, it does not make a good impression to put the accused on an airplane for prosecution at home. The local affected civilians need to see that justice is done, which is best demonstrated by having deployable courts. This does not go well together with a civilian justice system. In this connection it can be mentioned that Status of Forces Agreements typically allow for exercise of jurisdiction by military courts of the sending state, while civilian courts exercising jurisdiction on foreign territory is an anomaly.

Another factor is the increasing use of civilian contractors in conjunction with military forces. If military commanders have no summary punishment jurisdiction over such persons, and military courts that could be deployed have no penal jurisdiction over them, the end result could in practise be impunity. The potential of scandals, or at least complicated and inefficient prosecutions, is evident.

Need for expertise

In criminal cases, the court needs to know both the law and the factual aspects. Expert witnesses are often called upon to explain forensic details that may shed slight upon what the accused may or may not have done or intended to do. In economic cases, accountants may be called in to explain what the accounts show with regard to possible tax fraud or whatever the case is about.

In some sectors, many countries have concluded that specialized courts are needed to deal effectively with particular cases.

One may ask whether this could also be relevant for military cases. In my country, where the system is fully civilianized in peacetime, the specialized

prosecutors have told me that they often have to explain important aspects of the case to the court – aspects that would have been known to the court if its members had some basic military experience. If the defence counsel, too, has to rely on the explanations of the prosecutor, one may ask whether the trial is really fair and balanced.

The issue of independence

Independence of courts is a key issue in the European Convention for Human Rights and in our discussion today. Are the members of the court independent of someone who might have an interest in the outcome?

The importance of independence was demonstrated in a recent case in Norway. Although about summary punishment and not penal sanctions, strictly speaking, it shows how the principle works. A lieutenant had been awarded a summary punishment for having ordered a female soldier to wash herself in the nude in a river against her will during a field exercise. Male soldiers were present, but had their backs turned to the girls in the river.

The case had a high media profile when it became known shortly after the event in the fall of 2011. The media profile became even higher when the officer presented new evidence which led the complaints board to reconsider their previous decision and quash the summary punishment this fall. The armed forces wanted to have the punishment upheld, the Ministry was clearly on the same side, and the mass media was strongly supporting the young woman against the officer.

But the complaints board, led by a professional judge, came to the opposite conclusion after having reviewed all the evidence about exactly what had been said or done, in which sequence, and taking into consideration that official guidance was lacking about how to adapt general practise of washing oneself in the field to the fact that both genders nowadays are represented in the armed forces of Norway.

After having followed the debate, I must say that I understand Pilate better, who was told that if he did not condemn Jesus to being crucified, he would not be the Emperor's friend any more.

How can the independence of judges be assured?

Courts-martial that are convened for the individual case have a certain semblance to the jury system which is well known particularly in countries with an Anglo-American legal tradition. If the members are appointed, one should ask: By whom? If they are drawn by lot from a list, one must still ask: Under whose command will they be after they have performed their duty at the court. Might their careers suffer if they deliver a verdict which is not viewed favourably by their superiors? Some degree of anonymity might mitigate the problem, like when a Norwegian jury answers: “Guilty, by more than six votes”, thus concealing which member gave which vote.

For standing military courts, an important question is who decides the career of the judges? Will they serve for a limited number of years, after which a military commander will decide their next posting or promotion? Or will they have security of job and pension, independent of whether their decisions are viewed with favour by those in power, or not?

Although the judge may be independent, he may feel the pressure. The Finnish Military Judge Paavo Alkio writes in his memoirs from the Second World War about a number of instances when the division commander disapproved of his judgements. The caseload ranged from theft and absence without leave to mutiny and espionage. The division commander wanted more capital punishments in the more severe cases in order to set an example, while the judge focused on the guilt of the individual accused. Although he had the security of his peacetime position of a tenured judge to fall back upon, the pressure could be felt by Judge Alkio in matters of whether his applications for leave were granted or how medals of honourable service were awarded among military judges.

Suggested conclusions

There are clear trends in the development of military justice to be seen on the international scene with regard to the rights of the accused with reference to human rights standards. Important elements are:

- More independence to judges,
- Standing courts,
- Increased right to elect trial instead of summary procedures,
- Increased right to legal representation.

There are, furthermore, trends with regard to shifting from military to civilian jurisdiction, particularly in peacetime, by:

- Reducing the competence of military courts,
- Abolishing military courts,
- Abolishing military prosecution.

The important question which many countries struggle with, is whether military commanders should give up their control of the military justice in order to have a system that is perceived as fair by the general public. Equally important is, however, whether a process as indicated by current trends should run to the other extreme, separating the investigators, prosecutors and courts totally from the military structure, or whether one should seek some compromise solution, like the “golden middle way” indicated by Aristotle.

Thank you for your attention.