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The Right to a Fair Trial: Sexual Offences in the Military Justice System

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Abstract

The Armed Forces Act 2006 established a single system of Service law and created the Court Martial as a permanent standing court in the United Kingdom that has jurisdiction over cases involving crimes committed between service people, including rape and other serious sexual offences. The status of the Court Martial as an 'independent and impartial tribunal' (Human Rights Act 1998, Article 6) fit to prosecute rape and serious sexual offences has, however, been disputed. In 2020, three servicewomen sought a judicial review of the defence secretary's decision to allow serious sexual crimes to remain under the military court's jurisdiction. The decision was made in disregard of a Ministry of Defence-commissioned review, which encouraged the court martial jurisdiction to exclude rape committed in the UK, except with the consent of the Attorney-General. An assessment will be made as to the feasibility of removing serious sexual offences from the court's marital jurisdiction to ensure fair and effective justice for service members and to uphold their right to a fair trial. This assessment is made in light of the fact that the military court's rape conviction rate is significantly lower than that of the civil system, and in light of findings of case mismanagement and lack of expertise pointing to unjust trial procedures. The article further argues that the Ministry of Defence's recent rollout of educational and awareness programmes and victim support measures are insufficient in addressing the fundamental inadequacies of the military system that can only be solved by reforming the relevant investigatory and judicial processes.

Introduction

The operation of the military justice system is founded on a recognition that personnel of the armed forces should be subject to a different set of rules and expectations than their civilian

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counterparts due to the level of discipline demanded by their occupation and the need, therefore, for a separate legal system to expeditiously administer decisions and maintain order (Legal Information Institute, 2020). When the Armed Forces Act 2006 came into effect in 2009, it created the Court Martial as a standing court and established a single system of Service law governing the British Armed Forces. While separate from the civilian justice system, the Court Martial is a parallel entity to the civilian Crown Court, which it broadly mirrors in practice, procedure and sentencing powers. The Court Martial similarly has jurisdiction to try civilian criminal offences – including murder, manslaughter and rape – committed by servicepeople, in addition to military disciplinary offences (Courts and Tribunals Judiciary, 2022).

In recent years, the Court Martial's jurisdiction over serious sexual offences, namely rape, within the armed forces has come under scrutiny. Against the backdrop of discontent over the court's low rape conviction rate compared to civilian courts, three servicewomen called for serious sexual offences to be tried in the civilian system instead. The women sought a judicial review of the defence secretary's decision to allow serious sexual crimes to remain under military court jurisdiction, a decision made against recommendations that those cases should be handled by the police and Crown Prosecution Service. These recommendations were made following a ministry-commissioned review of the Service justice system, which was published in 2019 (The Guardian, 2020). At the forefront of their case were claims of victim trauma, a lack of expertise among military prosecutors and the mishandling of sexual assault allegations which allegedly undermined the administration of justice (Alford, 2020).

To ascertain whether the Court Martial should be denied jurisdiction to try serious sexual offence cases, an assessment of its fitness to administer justice in this respect must be made. It is crucial thus to consider whether the court complies with human rights standards in the administration of justice, namely the right to an independent and impartial tribunal, enshrined in the Human Rights Act 1998 and the International Covenant on Civil and Political Rights (ICCPR).

This article discusses the Court Martial's inability to uphold the right to a fair trial in cases of serious sexual assault, measured against standards established by the case law of regional and international human rights regimes, and proposes legislative and policy amendments to remedy the deficiencies in the military justice system.

The Right to a Fair Trial

Both domestic and international human rights legislation protect the right to a fair trial, under which everyone is entitled to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' (Human Rights Act 1998). This right is also recognised in Article 14 of the ICCPR and, as emphasised by the United Nations Human Rights Committee, applies to military tribunals just as it does to civilian courts. The ICCPR's interpretive body expressed that the right to a fair trial 'cannot be limited or modified because of the military or special character of the court concerned' (UN Human Rights Committee,

2007, p. 6), demonstrating how military courts are not exempt from the obligation to protect this right.

The right to a fair trial is crucial for upholding the rule of law. A fair trial shields individuals from arbitrary punishment or lack thereof and consequently guarantees that all are equally treated under the law, a key tenet of the rule of law (Trechsel, 2006). Besides securing the protection of fundamental rights and freedoms for accused persons, independent and impartial tribunals also allow judicial office holders to uphold the rule of law without 'fear and interference' (Naluwairo, 2012, p. 451). In light of the armed forces' target to double female recruitment by 2030 (BBC News, 2021), the independence and impartiality of the Court Martial in prosecuting serious sexual offences is increasingly salient given these are offences that disproportionately affect women. Yet, there has been no conclusion to date – the House of Lords concluded in *R v Boyd Etc* [2002] that there was nothing in existing case law to suggest that 'trial by court-martial, whether of civil or purely military offences, necessarily involves a violation' of the right to a fair trial. As such, it is critical to evaluate the extent to which the Court Martial serves its purpose as an independent and impartial tribunal capable of enforcing the rule of law in the administration of justice.

Assessing the Independence and Impartiality of the Court Martial

It is tempting to draw conclusions about the independence and impartiality of the Court Martial based solely on its sexual assault conviction rates given that between 2015 and 2020, 16% of rape cases resulted in convictions compared to 34% in civilian courts (House of Commons Defence Committee, 2021). Nevertheless, these figures alone are insufficient in making a comprehensive assessment since they come from 'a small database' and are 'unlikely to be sufficiently accurate for any firm conclusions to be drawn' (Lyons, 2018, p. 43). It is thus necessary to look to the benchmark for assessing the independence and impartiality of a tribunal, as set out by the European Court of Human Rights in *Findlay v United Kingdom* [1997]. To establish whether a tribunal is 'independent', attention must be paid to the appointment of its members, their terms of office, the presence of guarantees against external pressures and whether the court appears to be independent. As for 'impartiality', the tribunal is firstly held to a subjective requirement to be 'free of personal prejudice or bias' (*Findlay v United Kingdom* [1997]). Secondly, there is an objective requirement of judges to offer 'sufficient guarantees to exclude any legitimate doubt' (Ibid) regarding their personal convictions. Given the close link between independence and objective impartiality, the two elements are often considered together (European Court of Human Rights, 2021). The UK's commitment to the European Convention on Human Rights, having incorporated it domestically through the Human Rights Act 1998, creates an expectation that the Court Martial should adhere to the standards articulated in *Findlay*.

I. Independence

The broad demands of judicial independence are that a court must be free from undue influences – external or internal to the judiciary – and that sufficient safeguards are in place to secure this. In doing so, a court must demonstrate independence with respect to the following criteria: (i) the manner of appointment of its members and (ii) the duration of their term of office; (iii) the existence of guarantees against outside pressures; and (iv) whether the body presents an appearance of independence (*Findlay v United Kingdom* [1997]). It is noteworthy that these principles are equally applicable to professional judges, lay judges and jurors of a tribunal (*Holm v Sweden* [1993]).

The main controversy surrounding the Court Martial relates to the final two criteria, particularly as its jury comprises commissioned officers and warrant officers, who by nature of being servicemembers are susceptible to a lack of independence as compared to judges of the Court Martial. This is because the judges, all of whom are civilians, are isolated from the military hierarchical command that members of the jury find themselves entwined in. It is this connection to the military hierarchy that might cause interference with the judicial roles of officers serving in the Court Martial (Naluwairo, 2012), especially as some sexual abuse cases involve senior officers as the wrongdoers.

Signs of undue influence have been hinted at following servicewomen's allegations of procedural failures in the management of sexual assault cases. This includes the disclosure of sensitive details by the Service police to the chain of command, and the chain of command's reluctance to report cases to the Service police (Thompson, 2021). The Defence Committee Inquiry (2021) further revealed instances of pressure to underreport rape within military units, repercussions for victims reporting rape and individuals being discouraged from reporting at all. This is problematic as officers with vested interests in maintaining their unit's image and even high-ranking perpetrators themselves can impede a victim's access to justice. While complaints have largely been made concerning the case handling and reporting process before it is heard at the Court Martial, it can still be said that the involvement of such personnel as members of the jury has the potential to undermine the independence of the court due to their inherent biases which may impact decisions. This has been acknowledged by the Government, which agreed to the Defence Committee's recommendation for 'all Service Complaints of a sexual nature will be required to be fully dealt with outside of the direct Chain of Command,' having identified the chain of command as the 'single point of failure' in the complaints process (UK Parliament, 2021). Yet, not many safeguards have been established to prevent these pressures from reappearing in the later stages of criminal proceedings at trial, indicating the issue of the Court Martial's status as a tribunal free from outside pressures with respect to the jury is very much still questionable.

Another factor to consider is the Court Martial's appearance of independence in the view of an objective observer (*Incal v Turkey* [2000]). A helpful point of reference here is whether military judges are required to undergo the same professional legal training as their civilian counterparts, which would lend a quality of certainty as to the tribunal's independence and ability to uphold the rule of law (Naluwairo, 2012). In this regard, the Court Martial does well

to remain independent. Its judges, known as Judge Advocates, are all civilians who concurrently sit in the Crown Court. Judge Advocates are appointed by merit 'from the ranks of experienced barristers or solicitors' in the same way that judges in the civilian justice system are, namely by an independent body – the Judicial Appointments Commission (Courts and Tribunals Judiciary, 2022). There seems not to be any meaningful distinction between judges sitting in civilian courts and the Court Martial, despite a general sentiment of distrust of the Service justice system. Therefore, with respect to its judges, the Court Martial appears to retain a degree of independence.

II. Impartiality

The impartiality of a court typically denotes the absence of prejudice, personal bias or preconceptions concerning the case heard before it (Naluwairo, 2012). In determining this, the European Court of Human Rights has distinguished between (i) a subjective approach to ascertain the convictions and interests of a particular judge in a particular case, and (ii) an objective approach to ascertain whether the judge has provided sufficient guarantees such that there is no legitimate doubt as to their impartiality (European Court of Human Rights, 2021). International law also requires the appearance of impartiality to the reasonable observer. This was articulated by the UN Human Rights Committee (2007) in its general comment on Article 14 of the ICCPR, which protects the right to a fair trial. Such a requirement embodies the principle that 'justice must… be seen to be done' to inspire public confidence in the tribunal's ability to administer justice with neutrality (*R v Sussex Justices ex parte McCarthy* [1924]), a crucial foundation for any democracy (*Daktaras v Lithuania* [2000]).

Nevertheless, the threshold set by this test is a high one. In applying the subjective requirement, it has been consistently held that a judge must be presumed impartial until there is proof of the contrary (*Kyprianou v Cyprus* [2005]). The objective requirement also concerns only hierarchical or other links between the judge and others involved in the trial (*Micallef v Malta* [GC] [2009]). This means that despite evidence of a culture in the armed forces associated with toxic masculinity and 'unquestioning submission' (Alford, 2020) to authority that undermines the effective prosecution of sexual offences (Victims' Commissioner, 2021), the impartiality assessment is confined to apply only to an individual judge in a particular case, upon which the general dynamic and structure of the military do not bear. Since the analysis ignores peripheral issues and is focussed solely on judges of the Court Martial, the status of Judge Advocates as civilian judges bolsters the impartiality of the tribunal.

Parliament's Intentions in Passing the Armed Forces Act 2006

Beyond questions of the Court Martial's independence and impartiality, it is helpful to understand the historical context of the court having been granted jurisdiction over serious sexual offences. The Armed Forces Act 2006 instituted the Service justice system in which

the Court Martial now operates, and the concerns articulated in Parliament around the time of its passage outline the arguments for and against the Court Martial trying such cases. Analysing the motivations behind the Act will therefore allow for a well-rounded evaluation of whether serious sexual offences should remain under Court Martial jurisdiction.

Prior to the Act, serious criminal offences committed by servicepeople, including rape, were not within the jurisdiction of the Court Martial. When the 2006 Act was passed into legislation, it radically widened the court's jurisdiction and was done on the basis that the Court Martial's jurisdiction in these trials would only be exercised in 'very rare circumstances' (Lyons, 2018, p. 39). This is partly attributable to the belief that the Armed Forces Act was to provide an avenue to manage offences committed overseas, which Major General Howell, head of the Army Prosecution Authority, admitted would be 'very rare' (Lyons, 2018, p. 39). Meanwhile, civilian law would continue to take precedence for offences taking place in the UK (Alford, 2020). It is therefore evident that at the time of its passage, the Act had not been envisaged to substantially alter the Crown Court's position as the primary forum for these trials.

This view was echoed in Parliament by Lord Drayson when the Armed Forces Bill was debated in the House of Lords. In articulating the Government's position, he said:

> **"I have already told the House that we do not propose that, under the Bill, murder, rape or treason alleged to have been committed by a serviceman in the United Kingdom will normally be investigated and tried within the service system" (HL Deb 6 November 2006).**

In conducting the Service justice system review, Lyons refrains from suggesting whether the Act gives effect to the Government's intentions as expressed by Lord Drayson but labels it still as 'a matter of concern' (Lyons, 2018, p. 41). It is, evidently, undoubtedly difficult to reconcile the position of the Minister in Parliament with the current practice of rape within the armed forces being normally tried by Court Martial.

Conclusion and Recommendations

Given the Court Martial's tenuous status as an 'independent and impartial' tribunal, there is significant doubt as to its ability to uphold the right to a fair trial for servicepeople. In this section, it will be principally argued that instead of trying most cases of serious sexual assault in the Court Martial, these offences should only be tried in exceptional circumstances, in congruence with the motivations behind the Armed Forces Act. Attention will also be paid to the less serious sexual offences that continue to remain under Court Martial jurisdiction, and recommendations to improve the investigatory and judicial processes for these offences will be considered.

I. Serious Sexual Offences

The recommendation that serious sexual offences be removed from Court Martial jurisdiction apart from in exceptional circumstances is supported by the Service justice system review, which proposed that the Court Martial only try rape 'when the consent of the attorney general is given' (Lyons, 2018, p. 43). There are several justifications for such a proposal. Firstly, the Court Martial can do more to provide substantial safeguards to ensure the independence of its jury and guarantee a fair trial specifically for serious sexual offences. Secondly, in permitting the Court Martial to hear cases of serious sexual offences, the decision of Parliament was evidently made on the implied basis that it would not be the main forum for such cases. Lastly, the Court Martial should not main its status as the primary court for trying serious sexual offence cases in the interest of public confidence. Particularly as criticism of the military justice system in this regard is mounting, Lyons argues that 'public confidence may be better served' if servicepeople are tried in the civilian system, especially since service personnel are still citizens who have the available option of being tried in civil courts (Lyons, 2018, p. 39).

There is an argument typically held by military lawyers and officials that Service law should be distinguished as a separate body of law from civilian law, but this is unconvincing in the current circumstance. This view, held by military law theorists Colonel William Winthrop and General George Davis, was additionally mentioned in *R v Boyd Etc.* [2002] by Lord Thomas. He first acknowledged the 'problems of independence and impartiality' inherent in military tribunals, by nature of 'members of the military serv[ing] on the tribunals' (*R v Boyd Etc.* [2002]). Nevertheless, Lord Thomas cites the practical rationale of instilling military discipline that might underpin a decision for the Court Martial to retain its universal jurisdiction. In his estimation, the military nature of the Court Martial positively affects its approach to cases in that its members are attuned to the standards of discipline, obedience and efficiency in the military (Ibid). However compelling this reason may be, it should not compromise one's right to free trial. In fact, this is likely to create outcomes where perpetrators are under-criminalised, contradicting the notion of holding military personnel to higher standards of discipline. Thus, as the fundamental rights of victims are vulnerable under the Court Martial system, serious sexual offences committed in the UK should only be tried in civilian courts.

Amendments to the Armed Forces Act can help to give effect to such a posture, namely, the insertion of a 'caveated clause' into the primary legislation to specify the exceptionality of serious sexual offences being tried by the Court Martial. This is currently the case in New Zealand, whose Armed Forces Discipline Act 1971 section 74 reads: 'Except with the consent of the Attorney-General, a person subject to this Act may not be tried by the Court Martial for an offence against this section which is alleged to have been committed in New Zealand if the corresponding civil offence is treason, murder, manslaughter, sexual violation' (Armed Forces Discipline Act, 1971). Including a similar clause in the Armed Forces Act would easily achieve the desired outcome. However, the feasibility of this recommendation is yet to be seen, as the Ministry of Defence has repeatedly rejected claims that the military justice system is unjust and in need of reform. In response to the Service justice system review, it declared that it would not adopt the proposal as the military system was 'capable of dealing with' even the

most serious offences (Wallace, 2020). Nevertheless, it is maintained that retracting Court Martial jurisdiction over serious sexual offences that take place domestically would achieve the most just outcomes.

II. Other Sexual Offences

Serious sexual offences include rape and sexual assault by penetration, which are offences under sections 1 and 2 of the Sexual Offences Act 2003. Given that current discourse is centred around serious sexual offences, the status of 'less-serious' sexual offences, namely sexual assault without penetration, is uncertain. The Ministry of Defence's reluctance to alter the jurisdiction of the Court Martial, however, indicates that it is unlikely that assault without penetration would be easily removed from the court's purview. This is especially since the Court Martial's ability to hear such cases has largely remained unquestioned. Therefore, it is necessary to consider the implications this will have on victims of these other sexual offences.

Having established the doubtful state of the Court Martial's independence, it is recommended that the case management and reporting processes within the armed forces should see some reform. Current efforts by the Ministry of Defence have been directed towards education and victim support as part of a cultural shift. Its 2023 strategy, 'No Defence for Abuse', includes compulsory diversity and inclusion training, a harassment survey and educating the chain of command on how to deal with incidents of assault (Alford, 2020). While these should not go unacknowledged, there is still more to be done to complement these measures. In particular, systemic problems in the investigatory processes and working environment for women should be addressed. As articulated by Rustico (2016, p. 2073), what is most needed is 'systematic reform, rather than… shallow, quick fixes.' In the same vein, the ministry should continue to enact progressive and fundamental changes to the system in addition to its educational efforts that merely target individuals. Incentives of military officers to underreport sexual assault must be removed, and the investigatory process should be insulated from potential abuse of discretion. One way this could be achieved is by encouraging 'civilianisation' (Rubin, 2002, p. 44), or the introduction of civilian input at the administrative, judicial and policy levels such that military law can be aligned with civilian norms. This, in addition to the defence ministry's current attempts to improve the military culture, will better protect defendants' and victims' fundamental rights.

Beyond preventing miscarriages of justice, these recommendations will bring about necessary change to disprove the widely held view that it is 'difficult to thrive' (House of Commons Defence Committee, 2021) as a woman in the military. If they seek to become more diverse and representative of society, the armed forces must actively protect the rights and interests of servicewomen to enable them to lead fulfilling careers in a traditionally male-dominated environment.

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