

SENTENCING PRACTICE IN MILITARY COURTS

by

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SUMMARY

The purpose of this study is to investigate the sentencing practice of the military courts. Since an independent and impartial military judiciary is essential to ensure that justice is done a further aim of this study is to investigate whether the military courts are impartial, independent and affords the accused his fair trial rights. The sentences imposed by military courts are investigated and concerns regarding the imposition of these sentences are identified. Finally the appeal and review procedures followed by the military courts are investigated with specific reference to the military accused's right appeal and review to a higher court as provided for by the Constitution. The sentencing phase of a trial forms an important part of the whole trial process. This is also true for military trials, yet no research has been done on military sentencing practice. Because of the potential influence of the draft Military Discipline Bill and the Law Reform Commission's revision of the defence legislation on sentencing, research in this area is critical in the positive development of sentencing law in the military justice environment. An extensive literature study is undertaken to evaluate current military sentencing practices against civilian practices. The result of this study identifies certain concerns regarding the independence of the military courts, the treatment of military offenders and the appeal and review powers of the military reviewing authority. To a large extent it is also found that many concerns are based on the apparent rather than the existence of any real dangers to the independence of the military courts or the rights of the military accused. This thesis contributes to the accessibility of military law for a civilian audience, creating a platform for the development of future military sentences.

Key words:

Military law; military courts; sentencing; military appeal; military review; judicial independence; fair trial rights; military offenders; defence; SANDF.

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CHAPTER 1

SENTENCING PRACTICE IN THE MILITARY COURTS

1.1 Introduction

South African military law is an area of the law that has shown scant development since the inception of the Union Defence Force in 1912. Court martials were conducted in terms of legislation dating from 1881 with only minor changes effected when the Defence Act 44 of 1957 was adopted.

For a long time South African military law with its unique offences and punishments was focused on maintaining discipline in a force consisting mainly of conscripted members.¹ This was not a situation unique to South Africa. Many armed forces consisted of military conscripts and this was acknowledged at an international level by the European Convention on Human Rights.² Consequently, conscription as such was not regarded as an unacceptable infringement on the human rights of those soldiers subject to compulsory military service. Military discipline could also be harsh in order to instil the required discipline on individuals unwilling to submit to the discipline regime.

Military law is a tool that may properly assist in the enforcement of discipline.³ Yet, in the long run, it will only be effective if it is trusted by the subjects thereof. Therefore, military justice must involve a fair and just system. However, since military law applies only to a relatively small section of the population, namely in-

¹ See *End Conscription Campaign v Minister of Defence* 1989 (2) SA 180 (C) (justification by SADF for conscription and limiting the rights of individuals); *End Conscription Campaign v Minister of Defence* 1993 (1) SA 589 (T); *Council of Review, South African Defence Force v Mönning* 1992 (3) SA 482 (A); *Hutchinson v Grobler NO* 1990 (2) SA 117 (T) (for the application of conscription); *S v Toms*; *S v Bruce* 1990 (2) SA 802 (A); *Binga v Cabinet for South West Africa* 1988 (3) SA 155 (A).

² Rowe P *The Impact of Human Rights Law on Armed Forces* (2006) at 12.

³ Morris L J *Military Justice: A Guide to the Issues* (2010) at 3.

service uniformed members of the South African National Defence Force (SANDF),⁴ it runs the risk of being overlooked. Fohar says that⁵

[t]o a great many lawyers..., the text of laws dealing with military criminal law, the procedure of courts martial, and the system of courts martial generally, represent a 'closed book' which they have never opened, whose contents they have never been interested in, and whose institutions and concepts are unfamiliar to them. Moreover, despite this lack of familiarity (or, perhaps, because of it), there is a tendency to assume towards that system of laws an attitude not free from disdain, and the view is occasionally expressed among lawyers that 'military justice ought not to be considered justice at all'.

It is against the background of this question – whether justice is done in military courts – that the research for this thesis was embarked upon.

1.2 Research problem and purpose of this study

Where the SANDF was in the past mainly perceived as an aggressor, the focus has now shifted to viewing it as a defensive force. The SANDF now consists of an all-volunteer force. Yet the same offences and punishments apply as in the time of conscription. The advent of the Constitution influenced all aspects of the law, including military law. Soldiers were no longer content with the military court system and in 1999 a number of them took the SANDF to the Constitutional Court in a case that would play a pivotal role in the changes to the military court system.⁶ The Court found in *Freedom of Expression Institute v President, Ordinary Court Martial*⁷ that

⁴ For the meaning of "military service" see *Du Preez v Road Accident Fund* 2002 (4) SA 209 (D) at 220D-227B.

⁵ Fohar, M. "Modern Trends in Military Law and Their Influence on Military Justice Law" in *Studies in Law, Scripton Hierosolymitana: Vol V* (1958) as quoted by Smart D "The Revision of South African Defence Legislation – A Personal View" (1994) *African Defence Review* 29 at 35.

⁶ For a specific discussion on the constitutional challenges see *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C).

⁷ 1999 (2) SA 471 (C) para 21.

an ordinary court martial as presently constituted does not conform with the concept of an 'ordinary court' as envisaged in s 35(3)(c) of the Constitution. It is simply a military court *sui generis* which can be presided over by a layman notwithstanding that such court has the power to deprive a convicted accused of his liberty.

Subsequently, in 1999, a new democratic era dawned on the military justice system with the promulgation of the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA). The aims of the MDSMA are to do away with the unfair and unconstitutional practices in the military courts and to provide for a constitutionally sound military court system, independent judges, the right of an accused to appeal and review, as well as access to the High Court of South Africa.

The MDSMA addressed the procedural aspects of the military courts but did very little to address the military offences and punishments.⁸ In fact it only amended the maximum fines that the military courts may impose⁹ and it limited the sentencing jurisdiction of the Commanding Officer's Disciplinary Hearing (CODH).¹⁰ The content and application of the sentences did not change. Therefore, in spite of developments in sentencing in the civilian environment, such as minimum sentencing legislation and correctional supervision, there have been no sentencing developments in the military despite the shift to an all

⁸ As the focus of this study is on sentencing any discussion on offences is limited to the extent it is deemed relevant to the context of sentencing.

⁹ Previously, the maximum fine that could be imposed at a summary trial was R75, extendable under certain circumstances to R250, and the maximum fines that could be imposed by a court martial were R5000 for officers, R1200 for warrant officers and non-commissioned officers and R600 for privates (62 of the MDC). Currently the maximum fines are R600 for the CODH and R6000 for the Court of a Senior Military Judge (CSMJ) and Court of a Military Judge (CMJ), irrespective of the accused's rank (see s 12 of the MDSMA).

¹⁰ Previously (s 62 of the MDC) the presiding officer at the summary trial, as the CODH used to be known, could impose a sentence of a reduction from a temporary to the accused's substantive rank. This sentence was not within the jurisdiction of the court martial. Currently, reduction from a temporary to a substantive rank may only be imposed by a CSMJ and a CMJ (s 12 of the MDSMA). Prior to 1994 the summary trial could also impose a sentence of detention but from June 1994 detention was limited to the jurisdiction of the court martial.

volunteer force, a more defensive mandate and the potential impact of the Bill of Rights.

Sentencing and discussions on the different punishments available to the civilian courts is the subject of noted academic works and a substantial amount of case law.¹¹ The same cannot be said of sentencing practice in military law. To date no study has been done on military punishments. The defence legislation prescribes the same sentences as a century ago, despite changes in the law necessitated by the Bill of Rights. A further aim of this study is therefore to evaluate the different military punishments and determine whether these punishments raise constitutional concerns. There is a lack of academic material on South African military law, hampering research in this field. According to Smart¹²

[a] drawback is the non-existence of accessible military-law precedents or research material...[t]he non-publication of charges, findings, comments by confirming and reviewing authorities prevents a fuller development of military law as well as the realisation of its potential for education and deterrence

Because of this lack of material heavy reliance is placed on the Court of Military Appeal (CMA) judgments. These decisions are not readily available to the civilian environment for purposes of research and hopefully this study makes these resources more readily available for future research in this area.

The discussion so far highlights several issues:

1. The first is whether the sentences that can be imposed by military courts are still relevant to the world in which we live. These sentences date from

¹¹ See Terblanche S S *A Guide to Sentencing in South Africa* 2 ed (2007); Joubert J J (ed) *Criminal Procedure Handbook* 9 ed (2009); Du Toit E *et al Commentary on the Criminal Procedure Act* (1997); Kruger A *Hiemstra's Criminal Procedure* (2008); Krugel W F & Terblanche S S *Praktiese Vonnisoplegging* (1990); Rabie M A & Maré M *Punishment: An Introduction to Principles* 5 ed (1994); Van Zyl Smit D "Sentencing and Punishment" in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002).

¹² Smart at 33.

a previous century; formulated long before our Constitution. An evaluation of current military sentences is long overdue. Sentencing remains an integral part of the trial process, yet experience has shown that very little time is spent on this phase of the trial. The training received by military judges in sentencing within the unique military environment in which they operate is non-existent. This fact is more prominent in the case of the CODH, as the presiding officer has no legal training, apart from the six week military law course presented by the School for Military Justice, yet can still sentence an accused for offences committed in terms of military law. Therefore, the nature of military sentences and the way in which they are enforced raise concerns regarding compliance with the constitutional rights of the offender.

2. The success of any sentence depends on how effectively it is executed, but this efficiency is not always obvious within the SANDF. For example, with respect to detention, the SANDF does have a military correctional facility but it cannot be used to its full potential because of outdated legislation and a lack of support structures.
3. At a broader level, the sentencing court must be independent and impartial, in order to protect the accused's constitutional rights to a fair trial and to ensure that justice will be done. The questions are whether the MDSMA succeed in bringing about a fair and constitutional military court system, and whether the military justice system adequately protects the fair trial rights of an accused?
4. Finally, it is also necessary to investigate the right to appeal and review in the military justice system, in order to determine whether sufficient provision is made for an accused's constitutional rights to appeal and review.

1.3 Assumptions

Certain assumptions are made throughout that will not specifically be researched, although certain aspects of the research may touch on the validity of these assumptions.

One assumption is that there is a clear lack of understanding of military law and procedures. The lack of research results in a belief that military procedures and sentences lack constitutional compliance. Consequently civilians with little understanding of the military environment attempt to address the concerns by advocating the civilianization of the military justice system. A perusal of the available literature shows that individual rights are often overemphasised without considering possible legitimate governmental concerns necessitating the limitation of these rights.

A further assumption is that military judges receive insufficient training with respect to sentencing. The result is a lack of awareness of other sentencing possibilities, complacency in exercising their sentencing discretion and a lack of awareness regarding developments in the law of sentencing. It is further assumed that the judges' perceived inability to formulate appropriate sentences is exacerbated by the lack of the proper publication of military court judgments. The CMA judgments are not published in a user-friendly format; no indexes are provided; and many judgments lack reasons for judgment, making it impossible for the military court to consider the decision in its own deliberations.¹³

¹³ See the High Court's criticism in this regards in *Zulu v Minister of Defence* 2005 (6) SA 446; ch 7 at para 7.5.3.1 below.

1.4 Literature and methodology

The research method utilised for this thesis is a literature study. Very little is published on military law in the South African context. For this reason it is difficult to determine to what extent similarities exist between the civilian and military sentencing practice. The lack of research material in South Africa necessitates extensive use of “civilian” sources on sentencing and criminal procedure to enable the researcher to find comparable systems against which to evaluate the military justice system. Since an extensive search did not uncover recent sources on sentencing and military law, the CMA judgments available since 1999 are used extensively to investigate the military court’s approach to sentencing.

The researcher also makes use of a historical research component to show the development of military law with specific reference to sentencing options through the ages. A historical overview is necessary to understand the context of the current military justice system.

Although the main focus is on South African military law, some comparative research will be done. The extent to which the comparative material is relevant is limited. South Africa is not the only country that has experienced changes to its military law system.¹⁴ The motivation behind the changes differs from country to country. These motivations range from the need to adapt to the development of human rights in the civilian environment, to improving the effectiveness of military justice and the re-organisation of armed forces in post-conflict situations.¹⁵ Consequently, the areas of concern pertaining to a particular military justice system will differ for each country, depending on the reason behind the changes to that military justice system. Foreign development in

¹⁴ See in general Fidell E R “A World-Wide Perspective on Change in Military Justice” (2000) 48 *The Air Force Law Review* 195.

¹⁵ Vashakmadze M *Understanding Military Justice* (2010) at 10; Dahl A W *International Trends in Military Justice* (2011).

military law is therefore only of limited assistance to this research as the motivation for changes to the South African system may differ from that in other jurisdictions, creating concerns unique to South Africa.

The focus in the international context generally relates to the use of torture on terror suspects, fair trial guarantees of terror suspects, jurisdiction over civilians and the prosecution of perpetrators of gross human rights violations by military courts, as well as the treatment of juveniles.¹⁶ The available literature mainly elaborates on these concerns and is therefore generally not relevant to the current study.

Comparative research is further hampered by the divergent systems that are applied in international military law. This issue is particularly complicated by the fact that many European countries no longer have military courts. Development in the military law systems, according to the research done by Dahl,¹⁷ shows that military systems evolved from the traditional fully military court martial system¹⁸ to the standing military court system,¹⁹ followed by specialised civilian courts,²⁰ then the use of general civilian courts in peacetime²¹ to the use of civilian courts in both peacetime and war.²² For the purposes of this thesis comparative material

¹⁶ See in general Rosales L A P “Summary and Recommendations Presented by the Rapporteur of the Seminar” in Johnson A B *Law and Justice: The Case of Parliamentary Scrutiny: Seminar for Members of Parliamentary Human Rights Bodies* (2006) at 18-19; Berne R A *et al* (eds) *International Standard: Principles Governing the Administration of Justice Through Military Tribunals* (2010) at 12-24; Vashakmadze at 15; Rowe at 81-88 (discussion limited to fair trial rights concerns).

¹⁷ Dahl at 2; Vashakmadze at 11.

¹⁸ The United States armed forces are still making use of this model.

¹⁹ The South African military court system is such an example.

²⁰ The Netherlands make use of a specialised court in Arnhem District Court to conduct military trials (for a discussion see Besselink L F M “Military Law in the Netherlands” in Nolte G (ed) *European Military Law Systems* (2003) at 629-635).

²¹ Military courts were abolished in Belgium in times of peace. For the approach in Germany see Nolte G & Krieger H “Military Law in Germany” in Nolte G (ed) in *European Military Law Systems* (2003) at 415-419.

²² The Czech Republic abolished its military court system due to the political and economic changes in the country. All prosecutions of the armed forces are conducted by the civilian courts

is consequently limited to countries with a fully traditional courts martial system and those with a standing military court system.

1.5 The value of the study

Although military law only applies to a relatively small number of individuals, this study is important. South Africa is playing a more and more prominent role within the international peacekeeping environment with soldiers deployed internationally. The military courts are the only courts to have the extra-territorial jurisdiction to try military offenders on deployment. Offences committed by South African soldiers have the potential to create international incidents and an effective military justice system is therefore critical in ensuring that the SANDF remains disciplined in the international arena.

In a local context the study is of importance to researchers involved in the security sector by making previously unavailable information available to a broader community, thereby stimulating research in military law.

Developments within the military and civilian environments are creating an ideal opportunity for this study to contribute to the further development of military law. The proposed Military Discipline Bill²³ is being readied for submission to Parliament. This Bill addresses, inter alia, military offences and proposed punishments. The Law Reform Commission is busy investigating the defence legislation, raising concerns about military sentences.²⁴ The timing is therefore excellent to address aspects regarding sentencing and influence the process towards a positive change in military law.

(see Dahl at 3). Denmark and Sweden also have civilian court jurisdiction over its armed forces (see Vashakmadze at 12).

²³ The draft Military Discipline Bill (2005) has not yet been submitted to the National Assembly although GN 650 of 2008 in GG No 31078 of 23 May 2008 indicated that the Minister of Defence intended to introduce the Bill to the National Assembly during June 2008.

²⁴ South African Law Reform Commission *Discussion Paper 123: Statutory Law Revision: Legislation Administered by the Department of Defence, Project 25* (2011).

1.6 Definition of terms

Although terminology is explained throughout the thesis, certain terms are used and applied throughout the text and need elaboration. An understanding of what military law entails as well as the importance of this discipline in the justice system also serves as a background to the study.

1.6.1 Defining military law

Placing military law within a specific discipline of the law is difficult. It is influenced by various branches of the law. In addition, the historical definition may no longer be sufficient to describe military law. The international theatre of conflict and the nature of these conflicts have played a role in shaping our understanding of military law. The understanding of “military law” may also differ from one country to the next. Although all armed services are subject to “a system of military discipline different armies treat their soldiers differently.”²⁵ For the purposes of this study the terms “military law” and “military justice” are used interchangeably.

A perusal of the definition of military law throughout the earlier development of this branch of the law indicates that “military law” was generally seen as the law that provided for the offences and punishments that were unique to soldiers’ environment.²⁶ This means that the application of military law was basically

²⁵ Rowe (2006) at 6.

²⁶ Morrison C G *Notes on Military Law, Organisation and Interior Economy* (1897) at 1 (“the law relating to and administered by military courts, and concerns itself with the trial and punishment of offences committed by officers, soldiers, and other persons,...., who are from circumstances subjected, for the time being, to the same law as soldiers”); War Office *Manual of Military Law* (1914) at 6; Pratt S C *Military Law* 18 ed (1910) at 1; Brand C E *Roman Military Law* (1968) at vii; Banning S T *Military Law* (1929) at 1 (“the law which governs Officers and Soldiers in peace and war, at home and abroad...it is the law relating to, and administered by, Military Courts, and is

limited to the sphere of criminal law and criminal procedure. As a collection of rules of law that determined the behaviour of individuals subject to it, military law also formed part of the law of sentencing.²⁷

Military law however encompasses much more than criminal law and criminal procedure. Because of the authoritative relationship that exists between the SANDF as an organ of state and the individual soldier, military law can primarily be seen as part of public law, specifically of administrative law.²⁸

The rules of procedure in terms of the MDSMA are generally based on criminal procedure and law of evidence as practised in civilian courts.²⁹ The Bill of Rights now also plays a role in military law resulting in an extensive transformation of military law since 1999 - a process that is still incomplete.³⁰ Many see the role played by the judgment in *Freedom of Expression Institute v President, Ordinary Court Martial*,³¹ in which the court declared the courts martial system to be unconstitutional, as pivotal to the transformation of the military law system. This is however not the full story. Prior to 1999 various other means of constitutional control over the military justice system existed.³² The importance of this decision

chiefly concerned with the trial and punishment of offences against its enactments committed by Officers and Soldiers”).

²⁷ Van der Westhuizen H “An Introduction to the Military Courts in South Africa and Some Recommended Changes” (1994) 14 *African Defence Review* 18 at 18.

²⁸ Van der Westhuizen H at 18. The impact of administrative law is generally felt in aspects of non-judicial punishment, redress of wrongs procedures and Boards of Inquiry. These aspects fall outside the current research.

²⁹ Military courts retained procedures that are unique to the military environment with many ceremonial traditions still practised by the military courts. For a discussion on the ceremonial nature of military trials see Anderson G C *The Legal Classification of Military Tribunals as Courts of Law* (1988) at 104.

³⁰ The transformation of military law started in earnest in 1999 with the finding of unconstitutionality in *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) and is still continuing (see the South African Law Reform Commission *Discussion Paper 123: Statutory Law Revision: Legislation Administered by the Department of Defence, Project 25* (2011)). The changes to the military court system was mainly focused on improving the independence of the military courts and ensuring the fair trial rights of the accused, including the right to appeal and review.

³¹ *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C).

³² See Smart at 29, for a discussion on the existent systems of constitutional control.

lies in it bringing the constitutional weaknesses of the military justice system to the fore. This was the first of many constitutional challenges and, as is discussed throughout this thesis, a number of other concerns related to military justice have served before the Constitutional Court.

A further aspect from outside the domestic environment shapes the definition of “military law”. Since the SANDF deploys internationally in the execution of its tasks, this means that military law includes aspects of international humanitarian law.³³ South Africa is not immune to the influence of the international community. The Constitution requires the SANDF to execute its mandate in accordance with “the principles of International law regulating the use of force.”³⁴ This aspect of military law has not yet received attention in the South African context. Two areas are of concern, namely (1) the jurisdiction of military courts over civilians and (2) the jurisdiction of military courts over perpetrators of mass human rights violations.

In South Africa only uniformed members of the SANDF are generally subject to military law and its jurisdiction. Under certain circumstances civilians accompanying the armed forces may also be subjected to military jurisdiction and military law.³⁵ The prosecution of civilians by military courts are of grave concern within the current military law debate at an international level.³⁶ The Commission on Human Rights formulated certain principles that should govern the

³³ In general see Rowe at 94-113 and 224-246.

³⁴ Section 200(2) of the Constitution.

³⁵ Section 104(5)(a) of the Defence Act 44 of 1957 read with s 3(1)(b) of the MDSMA; van der Westhuizen H at 18. Civilians subject to military law would typically be civilian personnel in the employ of the Department of Defence and Military Veterans (DOD) who are accompanying the defence force on deployment, such as finance personnel responsible for the payments of advances. No examples of the prosecution of such people could be found. The last time the armed forces prosecuted civilians in South Africa was during the Anglo-Boer war and this was done in terms of martial law (see in this regard Snyman J H *Rebelle Verhoor in Kaapland Gedurende die Tweede-Vryheidsoorlog met Spesiale Verwysing na die Militêre Howe, 1899-1902* (1960)).

³⁶ Rosales at 19; Joinet L *Issue of the Administration of Justice Through Military Tribunals* (E/CN.4/Sub.2/2002/4) (2002); Berne R A et al (eds) *International Standard: Principles Governing the Administration of Justice Through Military Tribunals* (2010) at 14; Vashakmadze at 14.

administration of justice through military courts.³⁷ Of particular importance is principle 5, which states that

[m]ilitary courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.

The SANDF has no jurisdiction to try any civilian of any offence either nationally, or outside the borders of the Republic.

Another aspect which raises concern in terms of international law is the jurisdiction of military courts over those members of the armed forces who commit serious human rights violations such as war crimes and crimes against humanity.³⁸ Although the South African military courts do have the jurisdiction to hear offences such as murder, rape and culpable homicide committed outside the borders of the Republic by members of the SANDF, it is submitted that such offences, if committed on a scale qualifying them as war crimes or crimes against humanity, will not be prosecuted in the military courts. In compliance with its obligations as a signatory of the Rome Statute, South Africa promulgated the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. This Act now provides the National Prosecuting Authority with the power to prosecute cases against any person accused of committing genocide, crimes against humanity and war crimes in the High Court of South Africa.³⁹

³⁷ Berne *et al* at 14.

³⁸ Joinet at 4; Johnson at 64.

³⁹ Section 3 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. In the event that South Africa is either unwilling or unable to do so, the International Criminal Court in The Hague may then exercise such jurisdiction (see ss 5(5)-(6) of the Implementation of the Rome Statute of the International Criminal Court Act).

The preceding discussion shows that the historical definition of military law, limiting it to the sphere of the criminal law and criminal procedure, is no longer sufficient. Therefore, the more recent definitions, which provide for a wider application of military law than just to criminal law, are supported. Vashakmadze defines military justice as “a distinct legal system that applies to members of armed forces.”⁴⁰ This definition is a more accurate description of military law or justice as it is wide enough to include all the different legal disciplines that influence the military justice system.

Although military law encompasses a wide field within the law, the focus of this thesis is on the criminal and procedural aspects of military law as it pertains to sentencing and other related aspects of the military courts.

1.6.2 Understanding the purpose of military law: The importance of discipline

The SANDF is governed by the Constitution.⁴¹ It requires the SANDF to be “structured and managed as a disciplined military force.”⁴² The Constitution therefore allows for a system within the SANDF to enforce such discipline as is required in terms of the Constitution.⁴³ A separate system for soldiers can be justified because of the fact that the military environment as well as society have unique expectations of their soldiers, such as expecting soldiers to be willing to risk their life for their country.⁴⁴ It is for this reason that Morris describes military law as “a jurisprudence which exists separate and apart from the law which

⁴⁰ Vashakmadze at 10.

⁴¹ Sections 200-204 of the Constitution.

⁴² Section 200(1) of the Constitution. Smart at 30 defines discipline as “the system of rules, training and punishment used to maintain control” and “the standard of conduct attained by those subjected to that system.”

⁴³ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd and Others v Minister of Defence* 2002 (1) SA 1 (CC) para 31; Smart at 30.

⁴⁴ Morris at 3; Vashakmadze at 10.

governs in our federal judicial establishment.”⁴⁵ To that end military law is governed by statute. The relevant legislation in this regard is the Defence Act 42 of 2002 which largely repealed the Defence Act 44 of 1957. The part of Act 44 of 1957 that has been retained, includes the First Schedule to the Defence Act, known as the Military Discipline Code (MDC). The MDC provides, inter alia, for military offences while the MDSMA as well as the rules of procedure promulgated in terms of the MDSMA creates the military court system and provides for the relevant court procedures.⁴⁶

The primary purpose of military law is seen as maintaining discipline within the defence force.⁴⁷ Discipline is necessary for an effective military force.⁴⁸ Even offences traditionally viewed as criminal within the civilian environment ultimately reflect on the discipline of the offender.⁴⁹ It is safe to say that throughout the history of the armed services this has been the position.⁵⁰ The armed forces possess weapons and are highly trained and it is in the best interests of the state and society if they are highly disciplined.⁵¹ The military demands from its members that they conform to a certain set of rules and regulations.⁵² This is an important requirement for discipline amongst the ranks. For a defence force to function properly, discipline is an essential element. It has been said that it is often only discipline that overcomes an individual’s inherent fight for self-

⁴⁵ Morris at 3.

⁴⁶ See also van der Westhuizen H at 18-21.

⁴⁷ Morris at 3 (“[i]f there is a single reason for a code of military justice, it is the enforcement of discipline to manage the peculiar demands of maintaining an effective fighting force”); Morrison at 1; *Manual of Military Law* (1914) at 6; Vashakmadze at 10; *R v Généreux* [1992] 1 SCR 259; Smart at 30; Heinecken L *et al* “Military Discipline: Where Are We Going Wrong?” (2003) 25 *Strategic Review for Southern Africa* 88 at 90; long title of the MDSMA (the aim of the MDSMA is to “provide for a new system of military courts with a view to improve the enforcement of military discipline”). The importance of military discipline was confirmed by the Constitutional Court in *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) para 28.

⁴⁸ Morris at 3; Smart at 30.

⁴⁹ Rowe at 80 opines that a “criminal offence committed by a soldier within a military context is no less a breach of discipline than a purely military offence.”

⁵⁰ Morris at 1.

⁵¹ Rowe at 60. Smart at 30 states that “[t]he law by itself protects no one. Compliance with the law is what protects.”

⁵² Osiel M J *Obedying Orders: Atrocity, Military Discipline and the Law of War* (2002) at 26-31; Morris at 3; Heinecken *et al* at 89.

preservation and allows a soldier to stand and face the enemy, even in the face of death.⁵³ Smart describes the importance of discipline as follows:⁵⁴

A heap of building material is to a house as a mob is to an army. Structured order and discipline elevate the army above the mob... The significance of discipline lies in the fact that it is the practical touchstone which determines whether or not a defence force will be reliable in its conduct, be it in the field of war or *vis-à-vis* the Constitution of the day.

All soldiers remain subject to all the laws governing the country, but due to the fact that they belong to a particular group certain laws have evolved to tailor to the needs of this group.⁵⁵ It is accepted that some acts and conduct are prohibited in the military that are not punishable in a civilian profession.⁵⁶ Certain offences may also be regarded as more serious in the military than in the civilian environment. It is for this reason that military law is designed to accommodate the strong emphasis on discipline, often resulting in procedures that would not always be considered fair by a civilian.⁵⁷ This does not however mean that soldiers are not entitled to constitutional protection. Although soldiers' rights may be limited when joining the armed forces, they do not waive all their rights.⁵⁸ The effectiveness of the military justice system in enforcing discipline can be dependent on the fairness of the system.⁵⁹ Morris states that⁶⁰

⁵³ Brand at xii (referring to a saying attributed to Napoleon that “[d]iscipline is the first quality of the soldier; valor is only second”); Heinecken *et al* at 89.

⁵⁴ Smart at 30.

⁵⁵ Rowe at 63.

⁵⁶ Rowe at 64; Morris at 4.

⁵⁷ Morris at 4; Vashakmadze at 10.

⁵⁸ Morris at 5.

⁵⁹ Heinecken *et al* at 89.

⁶⁰ Morris at 5.

[i]f soldiers perceive that the system – popular or not – essentially produced just results, then it would be an effective tool for leaders to enforce discipline and produce a fighting force that is more cohesive and effective.

The purpose of a defence force is to protect the territorial integrity of the country and to fight, where necessary, in armed conflicts. All training and actions are concentrated on this purpose. It is therefore to be expected that an individual's needs and rights may be treated as subservient to this purpose. As a volunteer it might be expected that he joined with this possibility in mind.⁶¹

There are many reasons why a separate military justice system is necessary within this particular environment,⁶² but one reason stands out for purposes of punishments in particular. Brand mentions the need for independent self-efficiency of the armed forces where it may become necessary to protect its operations outside the borders of the country where the state does not have territorial jurisdiction.⁶³ This sentiment is echoed by Smart where he opines that due to the fact that war will be waged wherever service in defence of the Republic must be rendered, it is imperative that the armed force has the means to retain order and discipline in the field, irrespective of the nature of the war or geographical environment.⁶⁴ This can only be done if the defence force is in a position to execute justice quickly and efficiently where the offence is committed. This entails that, where the soldier is deployed outside the borders of the Republic, military law will be the only justice system with the jurisdiction to do

⁶¹ Rowe at 6.

⁶² See Brand at x-xv for a more complete discussion on the reasoning for an independent military judicial system; *Minister of Defence v Potsane*; *Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 31; *Steyn v Minister of Defence* [2004] JOL 13059 (T) paras 12-13; *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) 233C-H; *R v Généreux* [1992] 1 SCR 259.

⁶³ Brand at x; *R v Généreux* [1992] 1 SCR 259; Morris at 7. Military courts have personal jurisdiction versus the territorial jurisdiction of civilian courts (see Smart at 34).

⁶⁴ Smart at 35; Rowe at 64.

so.⁶⁵ This also dictates a need for a variety of very specific military punishments to be executed within the area of deployment.⁶⁶

Military law is however not only applied in conflict situations or when on deployment. In South Africa it is mostly applied in peace time. Since it is postulated that military law is an important requirement in the process of instilling discipline, one cannot leave the application of military law only to times of conflict. Training is done in peace time so that the armed forces may be ready in times of war. A breakdown of discipline during a conflict situation may have disastrous consequences for all concerned.⁶⁷ Discipline is therefore instilled in peacetime, supported by military law.

Burroughs⁶⁸ sums it up as follows:

The aim of military law [is] to enforce the discipline deemed essential to military efficiency and victory in battle and to cultivation of high morale and *esprit de corps*... 'the object of military law is not to punish moral delinquencies, in other words to make men virtuous and good, but to produce prompt and entire obedience; hence a military offence may not be crime in its moral sense.'

⁶⁵ Section 47 of the MDC ("[a]ny person who beyond the borders of the Republic commits or omits to do any act in circumstances under which he would, if he has committed or omitted to do that act in the Republic, has been guilty of a civil offence, shall be guilty of an offence under this Code and liable on conviction to any penalty which could under section *twelve* of the Military Discipline Supplementary Measures Act, 1999, be imposed by a military court in respect of such offence: Provided that no such penalty of such a nature that it could, if the offence in question had been committed within the Republic, have been imposed by any competent civil court, shall exceed the maximum penalty that could be imposed in respect of such offence by the civil court"); *S v Madiba* (CMA 202/2001) (referring with approval to *Bishop and Others v Conrath* 1947 (3) SA 800 803 where the court found that a South African statute does not have extra-territorial application unless the intention appears clearly from the provision. *In casu* the accused was tried by a military court for the contravention of the Arms and Ammunition Act 75 of 1969 and found guilty while on deployment in Lesotho. The CMA set the judgment aside and held that the accused should have been charged in terms of s 47 of the MDC for extra-territorial jurisdiction to apply).

⁶⁶ Morris at 7-8.

⁶⁷ Rowe at 65.

⁶⁸ Burroughs P "Crime and Punishment in the British Army, 1815-1870" (1985) 100 *The English Historical Review* 545 at 550.

1.7 Framework and outline

This thesis looks at three main themes: (1) the status of the military judiciary, (2) military sentences and (3) military appeal and review.

To this end it is important to understand the development of military law over the years – why soldiers have always been treated differently and why this should be so. To evaluate whether the changes are merely rehashing age-old concerns or effecting actual change and to understand the specific nature of military law and punishment, it is important to peruse the development of military justice over time.⁶⁹ To this end Chapter 2 gives a brief overview of Roman military law, which can be seen as the biggest influence on military law across the world. This is followed by a short discussion on European military law during the Middle Ages, with specific reference to the Articles of War of the Swedish King, Gustavus Adolphus. Because of its impact on the South African military law the development of British military law is traced. The history of the armed forces in South Africa is examined from the time of the first European occupation of the Cape of Good Hope, the British occupation and the Anglo-Boer war. The Anglo-Boer war had an important influence on the development of the Union defence legislation and the changes are tracked up to the current defence legislation.

Chapter 3 examines the different military courts, their jurisdiction and procedures. The military court structure is introduced, the composition is discussed and a brief overview is given of the court procedures followed in the CMA, the CSMJ, the CMJ and the CODH. This chapter serves as a basis for understanding the difference in approach between the different courts in the subsequent chapters

⁶⁹ See Hagan W R “Overlooked Textbooks Jettison Some Durable Military Law Legends” (1986) 113 *Military Law Review* 163 at 164, where he states that there “is another, more practical reason to learn about our military legal heritage. Legal links to history mean that we will better understand our present system and ensure that progress is progress; that is, improvement, not merely change. In the law too, the “new” may have been tried before and discarded.”

when evaluating the status of the courts, the general principles regarding military punishments and the appeal and review processes.

Chapter 4 looks at the status of the military courts, broadly addressing two aspects: (1) the independence of the military courts, and (2) the fair trial rights of the accused. The independence of the military courts examines the concept of an independent judiciary, both personal and substantive independence, against the background of the rule of law, separation of powers and the meaning of judicial independence and impartiality.

Judicial independence is however not enough. The trial must also be fair and the military courts are evaluated against certain fair trial criteria. Fair trial rights can only attach to an offender where he qualifies as “an accused charged with a criminal offence.” To this end the status of the accused is investigated. A selection of fair trial rights are discussed, examining the accused’s right to be sufficiently informed of the charges, to have sufficient time and facilities to prepare a defence, a public trial before an ordinary court and the right to choose and be represented by a legal practitioner of his choice.

Chapter 5 addresses procedural aspects regarding sentencing in the military courts. These aspects include the legal framework in which the military courts operate, the sentencing discretion of the military judges as well as the factors influencing their determination of an appropriate sentence. Since various academic works on the subject are available, the focus of this discussion is limited to the principles applied by the military courts as can be gleaned from the CMA decisions. The penalty clauses, pre-sentencing procedures and the different forms of punishment are investigated with specific reference to the concern regarding the right to equal treatment of the different ranks by the military justice system. The discussion is concluded with suspended sentences and the post-sentence procedures applicable.

Chapter 6 deals with the different punishments as provided for in section 12 of the MDSMA. Although all punishments are briefly discussed, specific attention is paid to cashiering as a sentence. The mandatory nature of the punishment and its influence on an offender's right to dignity is investigated. Detention as a punishment is discussed with reference to the detention barracks and the application of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as well as the Optional Protocol to CAT (OPCAT). Confinement to barracks is evaluated against the right not to be punished or treated in a cruel, inhuman or degrading manner. This chapter is concluded with a discussion on the various court orders that may be applicable to sentencing.

Chapter 7 addresses appeals and reviews. After a general discussion on the differences between appeal and review a brief overview is given of the review and appeal powers of the civilian courts as well as administrative review and appeal. A historical perspective of the right to appeal a military court decision introduces the discussion on the military review and appeal procedures by Review Counsel and the CMA. Specific attention is paid to concerns regarding non-judicial review of military court proceedings as well as the accused's right to appeal and review by a higher court as provided for by section 35(3)(o) of the Constitution. The discussion is concluded with a comparative overview of the appeal and review processes followed in the British and American military justice systems.

Chapter 8 contains a summary of the findings and recommendations.

Abbreviations and language

Because of the cumbersome nature of the military terminology relevant to military courts, the accepted military abbreviations are used throughout the thesis. As a matter of convenience the male gender is used throughout but unless the contrary intention appears these words include the female gender. Words in the singular include the plural and words in the plural include the singular, where applicable.

List of abbreviations

Commanding Officer's Disciplinary Hearing.....	CODH
Court of a Military Judge.....	CMJ
Court of a Senior Military Judge.....	CSMJ
Court of Military Appeal.....	CMA
Department of Defence and Military Veterans.....	DOD
Department of Defence Instruction.....	DODI
Legal Satellite Office.....	Legsato
Military Discipline Code.....	MDC
Military Discipline Supplementary Measures Act.....	MDSMA
South African National Defence Force.....	SANDF

CHAPTER 2

A BRIEF HISTORICAL OVERVIEW OF MILITARY LAW

2.1 Introduction

Considering the history of South Africa one could be forgiven for assuming that current South African military law is based on British military law, transplanted here after colonisation of South Africa by the British Empire. Oosthuizen, however, is of the opinion that the South African military common law is in fact based on Roman military law as influenced by English military law.¹ He contends² that South African military law originated from Roman law as practised by the inhabitants of Western Europe at the time of the demise of the Roman Empire, which was subsequently transplanted to England by the Normans in 1066, after which it eventually spread to South Africa.

Roman military law would be a logical starting point for the study of military law in general. The Roman army was arguably one of the greatest military powers in antiquity and the Roman Empire conquered and was maintained through military power.³ A disciplined force would have been essential in this context. From a legal historical perspective one need only look at our common law system and

¹ Oosthuizen M M "Die Geskiedkundige Agtergrond van die Militêre Reg" (1990) 53 *THRHR* at 211.

² Oosthuizen at 212.

³ Brand C E *Roman Military Law* (1968) at 3; Oosthuizen at 215; Kagan D *et al The Western Heritage* 5 ed (1995) at 148; Kapp P H *et al Geskiedenis van die Westerse Beskawing Deel 1: Oorsprong tot Intellektuele Rewolusie* (1988) at 69-73; Williamson C *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic* (2005) at ix.

the great works concerning law that derived from this era to understand the need for a short historical overview of Roman military law,⁴ offences and punishments.

2.2 Roman military law

2.2.1 From discipline to military law

Not many written works exist regarding military law in ancient history and the first is found in approximately 174 – 183 AD, written by Tarruntenus Paternus, known as *De Re Militari*.⁵ Fragments of military law are found in various references, but it cannot be said that there was any codified military law in existence. Certain statutes issued by the emperors regarding the army did touch on discipline, but not in the sense as we, in modern times, refer to military codes or statutes.⁶ From these sources the Military Laws of Rufus seem to stand out. Brand mentions that these military laws can be seen as a true code of military law in that it contains sixty-five numbered articles, containing various offences and prescribed punishments that soldiers could be found guilty of.⁷ There are, however, various references to be found regarding customary disciplinary procedures in the enforcement of discipline.⁸

The authority to enforce discipline derives from the concept of the *paterfamilias*, who as head of the household, held absolute power over his household,

⁴ The history of military law literally spans centuries. The focus of this thesis is not on the history of military law and therefore a mere overview is provided in this chapter. For an analysis of the Roman military law and workings of the Roman army see Brand at 3-122.

⁵ Brand at 125.

⁶ Brand at 127; Phang S E *Roman Military Service: Ideologies of Discipline in the Late Republic and Early Principate* (2008) at 26.

⁷ Brand at 141.

⁸ Brand at 44. Phang at 26 mentions that no formal legal code or disciplinary handbook existed. Most of the military discipline existed through custom and tradition and not through a legal code (see also Phang at 135).

including his wife, children (irrespective of their age), slaves and animals.⁹ Although there seems to have been various restrictions on the father regarding his conduct towards his children, the children did not have any legal rights against the father. The authority the *paterfamilias* had over his slaves was subject to even less moral restrictions.¹⁰ It is therefore clear that his rule was absolute. From this it would be a logical conclusion that the Roman kings, as absolute rulers, could be described as the “*super-paterfamilias*”. Brand describes the *imperium* which the kings had as the absolute power over life and death of his subject, the “*patria potestas* of the super-family”.¹¹ The lesser magistrates were then in fact acting upon the authority of the king.

The *imperium* continued in the time of the Republic. The difference was that Rome was ruled by two heads of state (*consules*) who jointly held the absolute authority over life and death over their subjects. The power of the *consules* was held in check by the veto power that each had over his colleague. They were also in office for only one year after which they could be held responsible for any acts committed during their time in office. In times of crisis the *imperium* vested with a dictator, or sole ruler of Rome and he was not subject to any veto.¹²

Discipline in the form of patriarchal authority (*pater potestas*) and the *imperium* of the *consules* and magistrates cannot be seen as law. It was merely the power of coercion. The beginning of the law can only be seen at the time when this power of the magistrates over life and death was limited within the confines of the city after a separation of the city government from the “arbitrary rule of military command in the field.”¹³ Brand sees the advent of the criminal law as the time

⁹ Brand at 34; Kagan at 128; Babington A *The Rule of Law in Britain: From the Roman Occupation to the Present Day: The Only Liberty* 3 ed (1995) at 7; Mousourakis G *The Historical and Institutional Context of Roman Law* (2003) at 2.

¹⁰ Brand at 36.

¹¹ Brand at 36; Robinson O F *The Criminal Law of Ancient Rome* (1995) at 9.

¹² Brand at 36-37; Oosthuizen at 212-213; Kagan at 130; Kapp at 68.

¹³ Brand at 37.

when the citizens got the right to appeal from the *imperium* of the magistrate.¹⁴ This right to appeal did not initially apply to the Roman army. The Roman soldier was subject to the unrestrained, authoritative discipline of the commander (the *imperium militae*), similar to the absolute authority of the *paterfamilias*. No appeal from the commander in the field was possible.¹⁵ At that stage there was no distinction between discipline and the law.

Throughout the history of the Roman Empire many changes were made to the Roman Army,¹⁶ but these changes had little impact on the disciplinary administration of military justice. Although the ultimate authority of the army vested in the emperor, disciplinary control and military justice were exercised by the military commanders. Soldiers were only subject to trial by their military commanders and this judgment was final, except in a few exceptional cases involving officers.¹⁷ During the early Roman Empire military offences were punished summarily, without trial and without appeal. From the examples given by Brand it is also clear that these punishments were in fact extremely brutal and the commander was free to choose any punishment that he deemed appropriate.¹⁸ In general it is clear that soldiers were subjected to harsher punishments than civilians. Voet¹⁹ was of the opinion that soldiers were there to

¹⁴ Brand at 42.

¹⁵ Brand at 43. See Phang at 111 and 151, where it is opined that appeal from the commander's decision would undermine his authority. The *Lex Valera* (509 BC) granted every citizen the legal right to appeal against a capital sentence. Initially soldiers were excluded. They were prohibited from raising the appeal against punishments imposed by military commanders. The *Lex Porcia de provocatione* sponsored by Portius Cato in the 2nd century confirmed the plebeian right to appeal a magistrate's decision. By this time these rights extended to Roman soldiers (see Williamson at 212). This right, called *provocatio ad populum*, gave an individual the right to appeal a decision by the magistrate to the *comitia populi tributa*. Where the magistrate would attempt to sentence the citizen to death or corporal punishment, he would cry out "*provaco ad populum*" for appeal (see also Mousourakis at 145 and 147).

¹⁶ For a detailed discussion see Brand at 110-121; Oosthuizen at 212-215.

¹⁷ Brand at 121-122. See also Robinson at 12 where he mentions that military courts had their own jurisdiction.

¹⁸ Brand at 74. Voet was of the opinion that the harshness of the punishment made the soldier more obedient to his commander (see van der Westhuizen G J. *Voet: Die Militêre Reg uit die Oorspronklike Latyn Vertaal* (1986) at 195). Phang at 289 however contends that the punishments inflicted on soldiers could not be too cruel since "the imperial system depended on keeping the goodwill of the army, not alienating it with *saervitia* (cruelty)."

¹⁹ Van der Westhuizen G at 192.

defend the legal convictions of their country by ensuring peace and order for the state. Those soldiers who were not obedient were forced into obedience on pain of punishment to ensure integrity and obedience. That is the reason why it was the duty of the commander to hand out punishment within the limits of his authority.

2.2.2 Rank and the enforcement of discipline

A detailed explanation on the composition of the Roman army falls outside the scope of this thesis,²⁰ but the following is noteworthy:

In serious cases of ill-discipline the commanding general personally administered justice and in all other less serious cases transgressions were dealt with by his subordinates.²¹ There is mention that during the latter period of the Roman Empire, provision was made for soldiers to be tried by their own military judges, the commanders.²²

The *imperium militae* held by the commanding general was unlimited. It was seen as the natural right of the commander by virtue of his command and therefore he could exercise his powers as he saw fit.²³ He had the power to restrict or broaden the disciplinary powers of his subordinates and modify the disciplinary procedures. This did not mean that the disciplinary procedures

²⁰ For a complete discussion in this regard see Brand at 46-59; Williamson at 210-211.

²¹ Brand at 43. The emperor was the commander-in-chief who usually delegated his command to trusted members of the aristocracy. Where soldiers were deployed in remote provinces it would not be feasible to refer all disciplinary matters to the emperor and the commanders in the field had the necessary authority to impose punishments. The emperor did in fact have very little to do with the imposition of punishment on soldiers unless they were commanding the army in person (see Phang at 15, 115–116 and 131). The actual corporal punishment was executed by the centurions and there is also evidence that other officers, below the rank of centurion, could inflict corporal punishment.

²² Van der Westhuizen G at 383.

²³ Brand at 68, Mousourakis at 86; Phang at 115.

changed every time that the commander changed. Brand argues that, due to the Roman character, there was in fact an element of stability and continuity in these disciplinary procedures, although they were not written down.²⁴

The judgment seat of the commanding general was called the *tribunal*, which according to Brand accounts for the origin of the word in our modern language.²⁵ The commanding general did not administer justice alone but, as mentioned, delegated disciplinary authority to his subordinates. The general application of discipline was in the form of immediate action by the commander without the benefit of a trial. In those instances not involving discipline, soldiers could ask for a trial by judges and there were instances where military commanders referred such cases to the judges who, as mentioned, were the subordinates delegated by the commander.²⁶

Next in rank to the Commanding General were the lieutenant generals or *legati* who assisted the supreme commander. They also had certain disciplinary powers, which seem to have been restricted only insofar the supreme commander may have imposed certain limitations on them.²⁷ These commanders usually settled the matter in the camp of the soldiers, known as the *principia*.²⁸

The tribunes of the soldiers had a certain amount of authority to administer discipline amongst the soldiers. Although historians have not elaborated on the

²⁴ Brand at 69. Written records on military law as a code seem to appear in the time around 174-183 AD under the rule of Marcus Aurelius. Prior to that military law seems to have been based mainly on common law and verbal orders (see Brand at 123-124). Other aspects of the Roman military were however done in writing since the size of the Roman army and the need for manpower necessitated proper record keeping (see in this regard Williamson at 208-209).

²⁵ Brand at 70. See also Mousourakis at 129, where he mentions that justice was dispensed by the Praetor from an ivory chair placed on an elevated platform, called the tribunal.

²⁶ Brand at 72. The commanders could choose whether to try the matter themselves or delegate the task to a subordinate (see also van der Westhuizen G at 385).

²⁷ Brand at 75; Phang at 133.

²⁸ Van der Westhuizen G at 386.

disciplinary functions, these functions were exercised in terms of set rules and procedures.²⁹ Voet³⁰ briefly discusses the military tribunes, giving us an idea of how they functioned. They functioned mainly during the period when the Roman Empire was divided into the Western and Eastern Empire. The Western Empire had two such military tribunes, one for cavalry and one for foot soldiers. The Eastern Empire had five of which two were always present.

The work of the military tribune entailed settling disputes amongst soldiers, investigating offences committed by soldiers and pronouncing sentence befitting the seriousness of the crime. It was however not possible for one person to handle all the military cases, resulting in cases being remanded for long periods of time. This was not conducive for military discipline, as cases should be completed as soon as possible. For this reason the tribunes then delegated their powers to the commanders to preside over the military trials. As an example one can mention, as indicated earlier, that in those instances where it is proven that the patrols responsible for the security of the camp during the night watch were derelict in their duty, the tribunes sat with the council to try the offender and if found guilty, to sentence him to death by being beaten with cudgels.³¹ This, according to Brand, is an example of the administration of law in contrast to the purely disciplinary action of the supreme commander. However, this should not be seen in the same context as we understand the administration of law today. Brand sees the administration of law in this context as “little more than custom, with the sanction of the commanding general.”³² For the effective administration

²⁹ Brand at 76. He quotes Polybius (as translated) who said that “[a] tribune,...., has the right of inflicting fines, of demanding sureties, and of punishment by flogging. The bastinado is also inflicted on those who steal anything from the camp, on those who give false evidence, on young men who have abused their person, and finally on anyone who has been punished three times for the same offence.” According to Brand at 77 these councils of tribunes constituted what is known today as the court martial.

³⁰ Van der Westhuizen G at 384.

³¹ Brand at 77.

³² Brand at 77.

of discipline, it was necessary for the commander to give effective and often harsh punishments.³³

Tribunes did have direct disciplinary authority in accordance with the rank they held, but according to Brand their main function was to impose set patterns of conduct or norms, thereby enforcing the rules of conduct as set out by the commander's authority, in effect enforcing the administration of the law.³⁴ In order to enforce these patterns, trials were necessary. It is not clear from the historians what form of trial was required before punishment could be imposed. It also appears as if the soldiers had no right to appeal to higher authority from a decision by the tribunes, but it would be a logical conclusion that no capital punishment would in fact be affected without the knowledge of the general.³⁵

Below the rank of the lieutenant generals were the centurions and their authority was purely disciplinary in nature. They were seen as the permanent career officers in the Roman legions.³⁶ The badge of office of the centurion was the *vitis*, or vine staff, and was used for punishment by the centurion in that he struck the offender with this staff for misconduct.³⁷ The disciplinary authority of the centurion was derived from custom within the Roman army. The centurion, according to Brand,³⁸ was the backbone of Roman military discipline, because of the immediacy of his punishment.

³³ Brand at 78 gives various examples. In the case of mutiny or showing cowardice in the face of battle, the leaders, or other classes of soldiers in exemplary positions, were routinely executed as an example to others. With these harsh examples it was possible to crush any misconduct, especially disobedience, immediately. Disobedience was seen as the highest offence against discipline.

³⁴ Brand at 78.

³⁵ Brand at 79; Phang at 116.

³⁶ Clayton P A E *A Companion to Roman Britain* (1980) at 36; van der Westhuizen G at 385.

³⁷ Brand at 80; Clayton at 36.

³⁸ Brand at 81.

Then followed the *principales*, who as a group can be best described as junior officers or non-commissioned officers. They had certain wide ranging disciplinary authority, depending on their rank and standing and the private soldiers owed them a certain degree of respect. Other than a general description on the fact that they were also responsible for military discipline, not much is known regarding the scope of their authority.³⁹

2.2.3 Offences

Although the discussion below centres on military offences it must be kept in mind that soldiers could also commit civilian offences.

There is general consensus that offences committed by soldiers could be divided into criminal and military offences.⁴⁰ The first category of common offences (civilian offences) was those offences committed by soldiers and civilians alike and punished by means of ordinary criminal punishments. These offences included, *inter alia*, murder and in Roman times, adultery.⁴¹

Nefas, or a contravention of divine law, could also be regarded as a common offence.⁴² A contravention of the divine law would usually be an offence prosecuted by the state in the public interest. The typical sanction would be assigning the offender and his property to a god for purification in order to restore the natural balance. As a result the offender would be deprived of his protection

³⁹ Brand at 82.

⁴⁰ Bauman R A *Crime and Punishment in Ancient Rome* (1996) at 131; Brand at 171 where he states that “[c]riminal offences of soldiers are either specifically military or in common with others; hence their prosecution is either specific or general. An offence is specifically military if it is committed by a person in his capacity as a soldier.” Voet also makes this distinction. He refers to common offences as those that can be committed either by soldiers or civilians as well as distinctive military offences committed by soldiers contrary to military discipline (see in this regard van der Westhuizen G at 192-193). This distinction remains relevant today.

⁴¹ Van der Westhuizen G at 192.

⁴² Brand at 99.

by the law and could be put to death by anyone. His death would then be seen as a sacrifice to the god he was assigned to.⁴³

Within the military offences committed by soldiers in violation of their oaths were offences against divine law. Religion played an important part in the life of the Roman soldier. Every Roman soldier swore an oath known as the *sacramentum militiae* “to be obedient and to execute the orders of his officers to the best of his ability.”⁴⁴ Any violation of this oath was denounced by men and the gods. This formal oath concluded with a formal consignment of the person and his property to the wrath of the gods if he should violate his oath. Any soldier who violated his oath became *sacer* or outside the law and he could be killed by anyone without fear of consequences.⁴⁵ The importance of this oath is that it has remained a serious offence in all modern militaries to disobey a lawful order. It was also not possible to appeal against any punishment imposed for such offences by the *pontifex maximus*⁴⁶.

Other oaths included an oath not to steal, taken soon after arriving at the camp. This included theft from a comrade as well as dividing the loot of conquered armies. All loot was to be divided equally to curb dissention within the ranks and although one could keep loot secret from one’s comrades, one could not keep it secret from the gods.⁴⁷ He could therefore not be pardoned for this perjury against the gods and punishment was death by cudgelling. A certain degree of

⁴³ Mousourkis at 141. Robinson at 95 mentions that offences against religion which had implications for public order were more likely seen as a matter of public discipline rather than a matter of law.

⁴⁴ Brand at 47; Williamson at 208.

⁴⁵ Brand at 91; Van der Westhuizen G at 88-90. See also Phang at 117 where she discusses the fact that during the period of the later Republic, the expiatory nature of the punishment was no longer required and the generals could in fact impose any sentence they saw fit. From the 4th century BC military executions had lost their religious nature.

⁴⁶ Initially there was no real distinction between religion and the law. The office of the pontifex was held in high esteem and as advisor to the king advised him as to the right course of action. This was a highly sought after office because of the distinction and dignity associated with it (see Brand at 86).

⁴⁷ See Brand at 94; Phang at 119 for a description of the contents of the oath.

latitude was allowed for human frailty and theft of an item worth less than a *sesterce* in value was simply seen as a tort and not an offence against the gods.⁴⁸ During the time of the monarchy and early Republic, murder was also punished as an offence against the gods.⁴⁹

The purpose of punishing *nefas* was the restoration of the disrupted harmony between the gods and the community.⁵⁰ For less serious offences against the gods the offender would have to sacrifice an animal to the god that he offended.⁵¹

The violation of a statute was also seen as a common offence. Early legislation did not formulate penalties and therefore the magistrates had a discretion regarding sentence. This discretion was limited in the sense that it was exposed to public opinion in the form of an appeal to the people.⁵² Once these statutes provided for the definitions of offences in advance as well as the appropriate punishments, the right to appeal to the people was seen as superfluous and subsequently abandoned.⁵³ As long as the magistrate acted within the limits of

⁴⁸ Brand at 97. It is of interest to note here that in terms of the MDC, prior to the amendments made by Act 16 of 1999, a similar distinction was drawn with regard to the offence of theft in the SANDF. Theft is seen as a serious offence and could therefore only be tried by a court martial. However, in the instance of theft of an item worth less than R50, the offender could be tried by a summary trial which only had jurisdiction over disciplinary offences.

⁴⁹ Brand at 100. Where a person was killed by accident, the offender had to sacrifice an animal to the family of the deceased (see Mousourakis at 143).

⁵⁰ Mousourakis at 17. This purpose bears a striking resemblance to the theory of retribution. See also Bauman at 96 where it is postulated that where penalties were prescribed, for example live burial of vestal virgins who transgressed, these penalties could not be changed. The penalties were imposed to placate the gods. "Where the gods required purgation in a particular way it was not for the mortals to say otherwise."

⁵¹ Masourakis at 141.

⁵² Bauman at 5.

⁵³ The development of legislation prescribing punishment roughly coincides with the creation of the jury trial. Once the jury court was established it replaced trial before an assembly of the people (see Robinson at 1).

the statute, no-one could interfere.⁵⁴ It was regarded as the magistrate giving effect to the will of the people.⁵⁵

The second category was distinctive offences (military offences) committed by soldiers contrary to military discipline and prescriptions.⁵⁶ These are the offences that are typically referred to when discussing military law.

Voet also mentions a third category, which is a combination of the two mentioned above.⁵⁷ These offences could be committed either by soldiers or civilians but soldiers would normally be punished more harshly than civilians. The reason for their harsher punishment, according to Voet, is twofold.⁵⁸ Firstly, because soldiers were paid with public funds and therefore owed a higher degree of obedience to the state than their civilian counterparts, and secondly, because military discipline required harsh punishments. Soldiers are usually regarded as tougher than civilians and the opinion was held that a light punishment would not keep them in check. The strength of soldiers lay in their weapons and if they

⁵⁴ This view expressed by Brand is not entirely accurate. It is submitted that he is referring to the fact that once an accused was found guilty, the penalty as set out in the legislation had to be implemented. The magistrate had no discretion in this regard. During the period of the principate around 27BC, the *cognitio extraordinaria* replaced the previous court system and allowed for free discretion regarding punishment not found in the jury trials. However, the sentence could be changed by the Emperor, depending on the social class of the offender. A further change in this regard is that sentences were executed immediately, but after the incident in the death sentence of Priscus in 21AD, a period of 10 days was instituted before executing the sentence to allow the emperor to use his veto power regarding the sentence. From this it is clear that interference was possible in certain instances (see Bauman at 50 and 59).

⁵⁵ Brand at 100. It might be more accurate, especially in the latter part of Roman history, to say that the magistrate was in fact giving effect to the will of the emperor.

⁵⁶ Van der Westhuizen G at 192. See the definitions concerning military law discussed earlier in this regard.

⁵⁷ Van der Westhuizen G at 193. According to Robinson at 76 a violation of an imperial statue or likeness was seen as aggravated treason if committed by a soldier. Bauman at 131 refers to soldiers who were at times at a disadvantage during sentencing in that they could be sentenced more harshly than civilians or they could receive punishment in instances where a civilian would in fact receive no punishment. He mentions the example where soldiers were actually sentenced to death for selling themselves into slavery, thereby becoming unfit for military duty and for appearing on stage as actors (see Bauman at 132; Phang at 146).

⁵⁸ As discussed by van der Westhuizen G at 194.

were not suppressed when they were disobedient they could easily overrun others.

Disobeying a magistrate was regarded as *the* primary offence within Roman law because of the premium placed on discipline in Roman society, irrespective of whether the person was a soldier or a civilian. Logically, this offence would be even more serious within the military environment.⁵⁹

Included in this group of offences (which could also include treason) was the offence of *proditio*. It included a number of offences that involved disobedience to orders given by the magistrate in those instances where the magistrate was doing duty as a military commander.⁶⁰

Perduellio, a separate offence included in this group, was the offence of treason, which was considered a very serious crime.⁶¹ Treason included any act that threatened the security of the state, such as assisting the enemy during a time of war or stirring up a rebellion. These offences were typically punishable by death.⁶²

Any citizen could commit this offence but soldiers had a stronger duty of loyalty towards the state than civilians.⁶³ The offence of treason was widely defined and included such actions as leading armies into ambush, taking up arms against the state, unauthorised communications with the enemy and defecting to the

⁵⁹ Brand at 99; Oosthuizen at 217.

⁶⁰ Mousourakis at 144.

⁶¹ Mousourakis at 143; van der Westhuizen G at 201.

⁶² Mousourakis at 143; van der Westhuizen G at 201.

⁶³ Robinson at 76.

enemy.⁶⁴ Such offenders were considered public enemies rather than soldiers and were consequently subjected to torture and other harsh punishments.⁶⁵

2.2.3.1 Specific Roman military offences relevant in modern times

Some military offences from Roman times have remained part of military law and continue to be offences to this day. Although a more comprehensive list exists, the following examples will suffice.⁶⁶

Insubordination against a commander or other superior officer was punishable by death.⁶⁷ The seriousness of the offence depended on the seniority of the superior officer. If the insubordination took place against a commander of the legion it was more serious than, for example, against a centurion.⁶⁸ Insubordination in modern times still remains a serious offence within the military milieu.

⁶⁴ Robinson at 75-76; van der Westhuizen G at 205. Variations of these offences are still punishable with severe punishments in terms of modern military law.

⁶⁵ Brand at 101. Voet (as discussed by van der Westhuizen G at 206) gives examples of the punishments imposed on soldiers for treason. They could be burnt alive, hanged and crucified, before crucifixion was banned by the Christians. Later punishments also included being quartered consisting of each limb fastened to a horse and the limbs then torn from the body. A defector was typically put to death (see van der Westhuizen G at 221-222).

⁶⁶ See Brand at 149-197.

⁶⁷ Brand at 151 states that “[i]f any legionary dare resist his *superior* officer, that is to say a count or tribune, he shall suffer the supreme penalty. For all insubordination of a soldier toward a commanding general or commander-in-chief calls for capital punishment” (see also van der Westhuizen G at 238). Raising a hand against a superior officer was regarded as insubordination, whereas today a soldier will be committing assault. The death penalty might, in light of modern thinking, be seen as too harsh a punishment, but Voet argues that if a commander’s authority is not backed up by harsh punishment, it would be severely detrimental to military discipline and the legal authority of military laws may in fact be diminished.

⁶⁸ Van der Westhuizen G at 239.

Mutiny, as in modern times, was seen as a serious offence and punishable with death. Less serious instances of riotous behaviour were punishable with reduction in rank.⁶⁹

Malingering was punished with flogging and discharge from the service.⁷⁰ In those instances where a father injured his son in order to make him unfit for duty, the father would be banned. Where he cut off the thumbs of his son so that the son was unable to hold a sword, the father would be sold into slavery along with all his possessions.⁷¹

Where a soldier fled from battle or acted cowardly, he was put to death and any loot that he may have taken was divided amongst his comrades because his actions had put their lives at risk.⁷² Even where a soldier was injured in battle and left the battle line without permission from his commander, he would be sentenced to death.⁷³ The death penalty was replaced with shaming punishments and the fear of soldiers of being seen as cowards motivated them in battle.⁷⁴

⁶⁹ Brand at 153: "If a person incites violent insurrection among the soldiers, he shall be punished with death; but if he incites a disorderly gathering of soldiers to loud clamor, and nothing more, or if the disorder excited is merely a complaint against another person, then he shall be reduced in rank. When a number of soldiers conspire together in any outrage, or if a legion defects, they are customarily dismissed from the service. See also Brand at 155 where it is stated that "[i]nstigators of mutiny and those who inflame the populace shall, according to the merits of their station, be put to the sword or banished" (see further Phang at 139).

⁷⁰ Brand at 155 states that "[a]ny person whodeliberately wounds himself, unless he does this to himself to escape bodily suffering, shall be flogged and discharged from the service...If a soldier wounds himself, or in any other way attempts to take his own life: if suffering from physical pain, or he is driven to it by sickness, or...he preferred death to disgrace...he is not put to death, but is dishonourably discharged." In contrast Phang at 138 mentions that malingering in order to avoid combat service incurred the death penalty.

⁷¹ Van der Westhuizen G at 307.

⁷² Brand at 157-159.

⁷³ Van der Westhuizen G at 242.

⁷⁴ Phang at 143.

Absence without leave, which is still very prevalent today, resulted in the dismissal from the service. In times of war any absence from an impending battle could be punishable with death, and where leniency was shown, the offender was flogged and transferred to another branch of service.⁷⁵

Desertion was seen as one of the more serious military offences because one of the most important duties of soldiers was to stay with their units and not leave without permission.⁷⁶ The seriousness of the offence depended to a large extent on the status of the unit, the size of the soldier's remuneration as well as the rank and office of the offender. A further distinction was made between deserting during a time of peace and a time of war.⁷⁷ A similar distinction exists today.

If the desertion took place during peace-time, the foot soldiers were transferred to another unit and those in the cavalry were discharged. If desertion took place during a time of war soldiers would receive the death penalty and could be put to death by anyone without fear of reprisal.⁷⁸

There are other examples of punishments imposed on deserters as well. Voet⁷⁹ refers to soldiers receiving corporal punishment or being publicly sold. There were instances where, during time of war, the soldier's leg tendons were cut and he could walk no further. Certain emperors cut off the hands and feet of deserters, believing that it contributed to better discipline. If a soldier died while

⁷⁵ Brand at 167 states that "[i]f any person dare continue absent beyond the expiration of his furlough, he shall be dismissed from the service...A soldier who goes absent knowing that war is at hand...shall suffer capital punishment; but if granted mercy he shall be flogged and transferred to another branch of the service." It is of interest to note that similarly in a modern context, absence without leave is normally seen as a mere disciplinary offence, but absence during times of war is generally seen as aggravating and receives a much harsher punishment.

⁷⁶ Van der Westhuizen G at 226.

⁷⁷ Van der Westhuizen G at 227; Phang at 147-149.

⁷⁸ Van der Westhuizen G at 227; Phang at 137.

⁷⁹ Van der Westhuizen G at 227-228.

on desertion his property was forfeited to the state and any individual who assisted a deserter could receive the death penalty.

Where a deserter returned to his unit within a period of five years, he would receive a lesser punishment, otherwise, if more than five years elapsed, he would be banished. Where a group of soldiers returned from desertion they were demoted in rank and transferred to other units.⁸⁰

A further distinction was made in that commanders who deserted received a harsher punishment than ordinary soldiers. Desertion in these instances was seen as an offence against the state constituting treason.⁸¹

A distinction is made between desertion and absence without leave.⁸² This distinction remains relevant today. As in modern times, absence was seen as a lesser offence than desertion.⁸³ A deserter forfeited his earnings as a soldier. Soldiers who returned after a period of unauthorised absence forfeited their pay and gratuities for the period absent, unless the emperor determined otherwise.⁸⁴ Those offenders who evaded military service were reduced to slavery because they had betrayed freedom.⁸⁵

Another offence that seems to have its origins in ancient times is the so-called general article of conduct to the prejudice of military discipline. This article in Roman times determined that “every disorder to the prejudice of the common

⁸⁰ Van der Westhuizen G at 229.

⁸¹ Van der Westhuizen G at 230-231 argues that where a commander deserted the state was deprived of a whole cohort or legion and not just one soldier because a legion without a commander was regarded as being less competent.

⁸² Brand at 173. Absence without leave is when a soldier, “having strayed for a long time, returns to camp. A deserter is one who, having strayed for an excessively long time is brought back.”

⁸³ Brand at 179.

⁸⁴ Brand at 187.

⁸⁵ Brand at 179. This offence was actually punishable by death but because the army now consisted of volunteers, the sentence was reduced.

discipline is a military offence, as for example of laziness, of insolence, or of idleness.”⁸⁶ This general offence appears throughout the history of the American Articles of War, later known as the Uniform Code of Military Justice, which provides that “all disorders and neglects to the prejudice of good order and military discipline...shall be taken cognizance of by a ...court-martial...and punished at the discretion of such court.” It is also found in the British Articles of War and in the South African Military Discipline Code, where section 46 states that “[a]ny person who by act or omission causes actual or potential prejudice to good order and military discipline” is guilty of an offence.

2.2.4 Punishments

As mentioned above early statutes did not contain prescribed punishments resulting in very wide punishment jurisdiction in terms of application. It was dependent on the whim of the commander meting out the punishment.⁸⁷

Typical military punishments were death, reprimands, fines, extra duties, transfer to another division, reduction in rank and discharge with ignominy.⁸⁸ Imprisonment was not seen as a punishment.⁸⁹ Certain punishments, however, became customary due to their continued use for specific offences.

A soldier could be deprived of his pay which would include deprivation of retirement remuneration as well as his current remuneration. He could be

⁸⁶ Brand at 183.

⁸⁷ Brand at 103.

⁸⁸ van der Westhuizen G at 193.

⁸⁹ Bauman at 30. Imprisonment was only introduced in the late Principate as a punishment and was not seen as very effective (see Mousourakis at 235). During the time of the Empire condemnation to forced labour became an acceptable punishment for slaves and people from the lower classes. Imprisonment was merely seen as a means to ensure the accused will in fact appear for his trial (see Mousourakis at 315).

sentenced to a reduction of rank (*gradus dejection*) as well as reduction in his branch of service (*militae mutation*).

Dishonourable discharge as a form of disgrace (*ignominia*) was widely used. A dishonourable discharge resulted in a loss of pension. This form of punishment also included other forms of disgrace. Mention is made of a legion or individual soldiers being disgraced by the issue of barley rations instead of wheat. The shame of this punishment lay in the fact that barley was seen as animal rations, not even given to the slaves for consumption.⁹⁰ They could also be required to camp outside the encampment of the army or other marks of disgrace could be inflicted on offenders.⁹¹ Shaming could entail being stripped of his military insignia, sword and sword-belt and in some instances being stripped naked. The soldier was made to stand without his weapons and armour or even naked before the camp, emphasising his shame and humiliation.⁹² It is of interest that even today, as part of certain military punishments, distinguishing marks are given to offenders so that others can see that punishment is being inflicted.⁹³ The ultimate shaming, according to Phang, was the disbandment of an entire legion, losing their status, income and all benefits.⁹⁴

Corporal punishment (*castigatio*) usually took the form of flogging and was given irrespective of the rank or position of the offender. Corporal punishment was usually indicated in instances of less serious offences. However, a beating could be sufficient to leave permanent scars.⁹⁵

⁹⁰ Phang at 142.

⁹¹ Brand at 104.

⁹² Phang at 144. This punishment has a marked resemblance to the modern-day punishment of cashiering.

⁹³ This aspect is discussed in ch 6 at para 6.2.11 below.

⁹⁴ Phang at 144.

⁹⁵ Phang at 129.

An offender could also be sentenced to death. The means of execution was dependent on the seriousness and the type of offence committed. Beheading with an axe after being flogged was customary. Deserters to the enemy and traitors were usually tortured and thrown to the wild animals in the arena and others were crucified. The method of inflicting the death penalty depended on the discretion of the commanding general.⁹⁶ It was believed that the maximum suffering achieved the maximum deterrence.⁹⁷

Other forms of punishment were also available. Brand⁹⁸ mentions reduction to slavery, mutilations and the imposition of various duties. Where a large number of soldiers committed the same offence, for example misconduct in battle, the whole group was decimated. When required, the death penalty could be exacted from each individual, irrespective of the number of soldiers.⁹⁹

The most common punishments found during this era are death, dishonourable discharge and degradation in service.¹⁰⁰ Mention is also made of other, not so common, punishments such as rapists' noses being cut off.¹⁰¹ Voet¹⁰² also

⁹⁶ See Bauman at 26; Brand at 105 for further examples. According to Mousourakis at 123 the number of offences resulting in the death penalty was in fact limited. Capital offences mentioned are libel, bribery, slander and sorcery. After the 3rd century AD death by crucifixion and fighting in the arena were done away with under the influence of Christianity (see in this regard Mousourakis at 378). Bauman at 18-19 refers to various methods of exacting the death penalty such as decapitation, drowning in a sack (being sown in a leather sack with a monkey, a snake, a dog and a rooster and thrown in the sea or river), being hurled from the Tarpeian Rock or being burnt alive.

⁹⁷ Phang at 120-123.

⁹⁸ Brand at 106.

⁹⁹ See Brand at 107 where he mentions the example of 4000 traitors who were captured and on their return to Rome flogged and beheaded. However, decimation usually entailed that one in ten soldiers were selected by lot and then clubbed to death by their comrades. The condemned included both guilty and not guilty individuals, resulting in the whole unit being responsible for the behaviour of the other individuals within the unit (see Phang at 124-129). Decimation fell into disuse after being replaced by other shaming punishments.

¹⁰⁰ Brand at 142. These punishments, except for the death penalty, still remain relevant to this day. The punishments are listed (at 171) as "corporal punishment, pecuniary fines, the imposition of compulsory duties, transfer to another branch of the service, (which implied a change to a lower-ranking service), reduction in rank, and dishonourable discharge..."

¹⁰¹ Brand at 142.

¹⁰² Van der Westhuizen G at 227-228.

mentions soldiers being publicly sold. There were instances where, if found guilty of desertion during time of war, the soldier's leg tendons were cut and he could walk no further. Certain emperors cut off the hands and feet of deserters, believing it contributed to better discipline. A soldier who died while on desertion had his property forfeited to the state. Any individual who assisted a deserter could receive the death penalty.

Roman soldiers were however treated more leniently in some respects when sentenced. Soldiers, unlike civilians, could not be subjected to torture except in instances of treason, nor could they be sentenced to work in the mines.¹⁰³ When sentenced to death they were allowed to transfer their property to their heirs prior to their execution, provided they were convicted of a military crime and not a civilian crime.¹⁰⁴

With the fall of the Roman Empire to the Germanic tribes in about 476 AD, the structured organisation of the Romans gave way to the more individualistic approach held by these Germanic tribes.¹⁰⁵ However, the Roman model of military law influenced the European armies and "is credited by most commentators as the template for later military codes."¹⁰⁶

2.3 European military law in the Middle Ages

Military and civil courts during the Middle Ages were not separate entities. These courts were known as Courts of Chivalry. The knights were judges in the civil

¹⁰³ Bauman at 131; van der Westhuizen G at 374; Phang at 131. Bauman also sees these restrictions as a restriction on the powers of the military commanders.

¹⁰⁴ Bauman at 131.

¹⁰⁵ Oosthuizen at 218.

¹⁰⁶ Schlueter D A "The Court-Martial: An Historical Survey" (1980) 87 *Military Law Review* 129 at 131 for brief examples of the influence of Roman military law on the European military law systems; Oosthuizen at 219.

courts and also commanders in the armies.¹⁰⁷ Some of the nobility were raised in this tradition from a very early age and received training as knights. Their position as knights and their training made them natural judges.¹⁰⁸ In Normandy the power and authority of the Courts of Chivalry was vested in the high military officials. This system of military justice as adjudicated by the knights was later introduced in Britain at the time of the Norman Conquest.¹⁰⁹ Two important contributors to the development of military law during this period were the Age of Chivalry and the *Articles of War* of King Gustavus Adolphus of Sweden.¹¹⁰

2.3.1 Age of Chivalry

During the Middle Ages the military leaders, who were known for their bravery, were appointed by the town councils. The town council was responsible for deciding on all important matters within a town or group. These commanders were chosen for a specific campaign when going to war, but in reality, on their return, they tended to become the future leaders of the town.¹¹¹ During times of peace these military leaders usually surrounded themselves with young men and frequently went out to plunder. These young men then tended to remain loyal to the military commander during times of war and this group was then known as a *comitatus*.¹¹²

Their military law system was consequently based on a system of personal loyalty to the leader of the *comitatus*, who in turn was responsible for their well

¹⁰⁷ See Squibb C G *The High Court of Chivalry: A Study of the Civil Law of England* (1959) at 2-3 where he postulates that the Court of Chivalry should be seen as a "Court of Knighthood" rather than a military court.

¹⁰⁸ Snedeker J *A Brief History of Courts-Martial* (1954) at 6.

¹⁰⁹ Snedeker at 7; Oosthuizen at 220; Command of the Army Council *Manual of Military Law* 7 ed (1929) at 7.

¹¹⁰ Schlueter at 132. Squibb at 4 argues that there is in fact very little evidence "of any judicial procedure for the enforcement of military discipline." Military discipline was more likely enforced by means of summary procedures and only serious offences were subject to judicial proceedings.

¹¹¹ Oosthuizen at 218.

¹¹² Oosthuizen at 218.

being and safety. In turn, each leader of the *comitatus* owed allegiance to a king who only had any real power at times of war.¹¹³ The relationship of personal allegiance was voluntary and could be broken at any time as long as the leader was not in any danger. This consequently resulted in a military force that was not as disciplined as that of the Romans.¹¹⁴

In 1532 Emperor Charles V developed the Carolingian Code, which was seen as the model military law code of Europe.¹¹⁵ This code provided for a “spear” court where the regiment came together to pass judgment over those members of the regiment that committed offences.¹¹⁶ These military law codes were further enhanced by the articles of Maximilian II in 1570, followed by the Articles of War of the Free Netherlands¹¹⁷ (also known as the code of Maurice of Nassau) in 1590.¹¹⁸ These codes resemble an agreement between two contracting parties and not a set of orders as would be reflected by later codes of military law.¹¹⁹

2.3.2 The Articles of War by King Gustavus Adolphus

The most significant contribution to modern military law, however, was made by the *Articles of War*, drafted by King Gustavus Adolphus of Sweden and signed on 15 July 1621.¹²⁰ These articles established a hierarchy of courts-martial. Two types existed. The first was an inferior or regimental court-martial, over which a regimental commander presided. This court-martial had the authority to try

¹¹³ Oosthuizen at 219.

¹¹⁴ Oosthuizen at 219.

¹¹⁵ Snedeker at 7; Rollman R O “Of Crimes, Courts-Martial and Punishment – A Short History of Military Justice” (1969) 11 *United States Air Force JAG Law Review* 212 at 213.

¹¹⁶ Snedeker at 7.

¹¹⁷ Snedeker at 7.

¹¹⁸ Rollman at 213.

¹¹⁹ Rollman at 213.

¹²⁰ Snedeker at 7; Cooper N G “Gustavus Adolphus and Military Justice” (1981) 92 *Military Law Review* 129 at 130. The reason for the promulgation of these Articles of War was to maintain order and discipline in his army. Cooper at 131 refers to King Adolphus as “the father of modern military discipline” (see also Schlueter at 132).

cases of theft, insubordination and other minor offences.¹²¹ The second type of court martial was a superior permanent general court martial presided over by the Royal Marshal of Sweden with the jurisdiction to try cases of treason and other more serious offences.¹²² This court was also authorised to hear civil causes within the army.¹²³ The accused could appeal from the lower regimental court martial to the superior court martial of the Royal Marshal. A final appeal was possible to the king.¹²⁴ The system also provided for special military prosecutors as well as an auditor who supervised the application of the rules.¹²⁵

The punishments in terms of the *Articles of War* were generally extremely harsh, which seems to have been necessary during these times of war. The armies consisted mostly of mercenary armies with looting being the order of the day. The death penalty was prescribed for a large number of offences.¹²⁶ The punishment was affected to some extent by the seriousness of the offence.¹²⁷ Where an accused was found guilty of lesser offences all offenders were punished uniformly, irrespective of their rank. Sentences included forfeiture of goods, decimation by hanging, confinement on diminished rations of bread and water, placement in shackles and riding the wooden horse.¹²⁸

¹²¹ It also provided for assessors elected by the regiment. See Snedeker at 9; Cooper at 135; DeVico A J "Evolution of Military Law" (1966-1967) 21 *JAG Journal* 63 at 65; Schlueter at 133; Rollman at 214. For the complete *Articles of War* see Winthrop W *Military Law and Precedents: Volume II* 2 ed (1896) at 1416-1431. For a contrary view on the importance of the *Articles of War* of King Adolphus see Hagan W R "Overlooked Textbooks Jettison Some Durable Military Law Legends" (1986) 113 *Military Law Review* 163.

¹²² Snedeker at 9; Cooper at 135; DeVico at 65; Rollman at 214.

¹²³ Snedeker at 9; Cooper at 136.

¹²⁴ Snedeker at 9; Cooper at 136.

¹²⁵ Snedeker at 9.

¹²⁶ See Snedeker at 9 (explains the punishments as follows: "A regiment which ran away from a battle was decimated by beheading or hanging....Theft, plunder, violence to women, cowardice, unnecessary surrender of a fortress, and other high crimes were punishable by death"); Cooper at 132 and 135.

¹²⁷ Cooper at 135; Schlueter at 134.

¹²⁸ Schlueter at 134; Winthrop at 1416-1431.

The Articles of War of Sweden were followed throughout Europe, until they were replaced in the process of codification in the 19th century. This process established a similar system throughout Europe, which continues to a large extent until today.¹²⁹

2.4 British military law

2.4.1 Anglo-Saxon Britain¹³⁰

Britain was invaded by Rome in 43BC after Aulus Plautius successfully landed north of the Thames.¹³¹ Occupied by Rome, Britain was exposed to the Roman legal system¹³² and, inevitably, the Roman military law.

Military exposure was limited since only Roman citizens could be part of the Roman legions, although British citizens could join the auxiliary forces. Because of the extended periods of service of 25 years on the frontiers local recruitment became commonplace by the 2nd century AD,¹³³ indicating that British citizens became conversant with the Roman military law.¹³⁴ It would have been impossible not to be exposed to the military law customs of the Romans over such a period of time.

¹²⁹ Snedeker at 9.

¹³⁰ The military history of Britain prior to the Norman Conquest is not very clear (see Hollister C W *Anglo-Saxon Military Institutions on the Eve of the Norman Conquest* (1962) at 2). A very brief discussion follows below. For a more detailed discussion see Fortescue J W *A History of the British Army* (1910); Hollister at 2-5 and the sources referred to there.

¹³¹ Babington at 3-4; Clayton at the preface.

¹³² Babington at 5; Van Zyl D H *Geskiedenis van die Romeins-Hollandse Reg* (1979) at 279.

¹³³ Clayton at 41-43.

¹³⁴ Clayton at 43.

Further influence on military law stems from the Anglo-Saxons who came to control a large part of Britain during the 5th century AD. Roman occupation of Britain ended in 410AD and various barbarian tribes invaded Britain.¹³⁵

The Anglo-Saxons brought their own primitive legal systems, customs and religions. The Romans did not directly influence them. Although most Roman institutions subsequently disappeared and the Anglo-Saxons ruled in terms of their own laws, there is evidence that some traces of Roman law remained.¹³⁶ Britain was divided into various smaller regions which eventually resulted in four independent kingdoms that took turns ruling the Anglo-Saxon settlements.¹³⁷

The Anglo-Saxon legal system was based on the traditions of the Teutonic tribes, subsequently changed and adapted to the conditions influenced by feudalism and Christianity. However, as was the case with the Germanic tribes, the feudal lords in Britain did surround themselves in times of peace with young liegemen in order to train these young men in the art of war so that the feudal lords would be protected during times of war. This allegiance was stronger during times of war, but not so during peacetimes. Ultimately the whole population came under the control of one feudal lord, the king in 941 when Edmund became king of Britain and the whole kingdom swore allegiance to him. As such, the king was now the head of the armed forces.¹³⁸ In spite of following the king, soldiers during this time were nothing more than mercenaries, serving for reward.¹³⁹ Approximately 1016, after the invasion by the Danish, the mercenary element evolved, with professional warriors joining the army. These were men with proven valour who

¹³⁵ Babington at 13; Clayton at 153 and 161; Norman V *The Medieval Soldier* (1971) at 66-69.

¹³⁶ Van Zyl at 279.

¹³⁷ Babington at 17-18.

¹³⁸ Oosthuizen at 221. According to Oosthuizen this had an influence on the application of military law since the king favoured the application of Roman law for various reasons. English military law was consequently influenced by Roman military law. This seems to apply only for the development of the military law in the army and not the navy, which developed a separate military law system.

¹³⁹ Norman at 89. These soldiers were known as housecarles (see also in this regard Fortescue at 5).

dedicated their whole lives to warfare. They were governed by set rules of conduct and formed a guild that lived at court and was paid by the king. They had their own code and decided transgressions against this code in consultation with the king.¹⁴⁰ At this time the army also consisted of soldiers who owed service because of landownership. These soldiers consisted of representative of 'the hides', one person selected for each hide.¹⁴¹

At this time there were no regular prisons in Anglo-Saxon Britain. Criminals were punished by means of fines, flogging, death and mutilation. The method of execution varied from time to time but was mainly done by hanging or beheading. Mutilation also took different forms. It could mean that the offenders' hands or feet were cut off, eyes put out, excision of the nose, ears or upper lip or even scalping.¹⁴²

2.4.2 The Court of Chivalry

William the Conqueror conquered Britain in 1066 at the Battle of Hastings.¹⁴³ The Normans initially governed England by its own laws, trying to preserve its traditions, but this changed in 1069.¹⁴⁴ Feudalism as it existed in France and Normandy at the time was introduced to Britain.¹⁴⁵ Feudalism was very important since it was the essential way to provide an army.¹⁴⁶

¹⁴⁰ Norman at 89-90. These warriors formed a small, disciplined standing army (see Hollister at 12). Punishments included death, banishment and confiscation of property (see Hollister at 14).

¹⁴¹ Norman at 92. Whenever the king sent an army anywhere one soldier went from every five hides. Each hide consisted of a piece of land large enough to support a family. Five hides were the basic unit for military assessment (see Norman at 90). The same person was usually chosen on each occasion, ensuring experienced and better equipped warriors (see Norman at 91). For a detailed discussion of the five-hide unit see Hollister at 38-58.

¹⁴² Babington at 28.

¹⁴³ Babington at 36; Lyon HR *Anglo-Saxon England and the Norman Conquest* (1962) at 316.

¹⁴⁴ Babington at 36; Lyon at 316.

¹⁴⁵ Schlueter at 136; Norman at 10.

¹⁴⁶ Babington at 37; Lyon at 323; *Manual of Military Law* (1929) at 165-170. Each county had a duty to bear arms at the king's summons. One aspect of this duty was to defend the kingdom in

At the time of the Norman conquest Britain did not have a single system of law applicable throughout the country. The Norman kings centralised the administration of justice and laid the first foundations for the English common law.¹⁴⁷

Another important aspect of military law imported by William the Conqueror, was the Court of Chivalry.¹⁴⁸ According to Oosthuizen this Court of Chivalry can be seen as the beginning of the modern military court.¹⁴⁹ The Court of Chivalry functioned as a military court under the auspices of the Constable or Marshal,¹⁵⁰ and had jurisdiction over all soldiers, within or outside the borders of Britain, as well as all civilians during times of rebellion.¹⁵¹ In order to regulate discipline in

civil or foreign war. From 1066 to 1204 the Norman kings regularly called the citizens to arms in this way. The kings however also had a more permanent military force in that they had military dependants who were bound to military duty in exchange for land. Such feudal calls to arms were finally abandoned in 1385 (see Norman at 251).

¹⁴⁷ Babington at 46.

¹⁴⁸ See in this regard *Manual of Military Law* (1914) at 8. For a contrary view see Squibb at 10.

¹⁴⁹ Oosthuizen at 221; Snedeker at 11; Pratt S C *Military Law* 18 ed (1910) at 6; Adye S P A *Treatise on Courts Martial* (1769) at 1-6; *Manual of Military Law* (1929) at 7-8. The Court of Chivalry formed part of the Supreme Court established by William the Conqueror. The Constable, being the Commander-in-Chief of the Army, had all matters pertaining to the army under his jurisdiction. The court held jurisdiction over military matters not provided for in terms of the common law (see Squibb at XXVI).

¹⁵⁰ Oosthuizen at 221; Snedeker at 11; Adye at 1-6; *Manual of Military Law* (1929) at 7-8. These two ranks were the highest officers' ranks in the army and the Constable was the person responsible for the enforcement of discipline within the army (see also Nourse G B "The Court of Chivalry" (1955) *South African Law Review* 151 at 152; Cooper at 133). This court was also known as the Court of the Constable and Marshal and administered martial law from the time of the Norman Conquest until its abolishment in 1521 (see Rogers A P V "The Use of Military Courts to Try Suspects" (2002) 51 *International and Comparative Law Quarterly* 967 at 968; Schlueter at 136; *Manual of Military Law* (1914) at 8. For a discussion on the close relationship between the Constable and the Marshal, who jointly presided over the court see Squibb at 1.

¹⁵¹ The powers of the Court of Chivalry were included in the jurisdiction of the Supreme Court of England (*Aula Regis*) under William the Conqueror. The Supreme Court moved from place to place with the king and this inconvenience was one of the reasons resulting in the division of the court into a different court under the rule of Edward I. This resulted in the Court of Chivalry receiving its own jurisdiction, presided over by the constable or marshal. Although its primary mandate was matters of discipline in the army, it also had jurisdiction over heraldy and slanders on noble men (see Snedeker at 13; *Manual of Military Law* (1914) at 8; Pratt at 6). See Rollman at 213 for punishments during this period such as, when killing another on board a ship, tying the murderer to the body of his victim and throwing him overboard to drown at sea, losing a hand for drawing a knife to strike another person, or a thief having his head shaved, covered with boiling pitch and covered in feathers (see also Winthrop at 1411).

the army, regulations were drawn up and issued at the beginning of each campaign.¹⁵² Offences and punishments included cutting off a person's hand or beheading him when injuring a comrade while carrying a sword in camp when prohibited from doing so. The punishment for wounding a comrade in a fight was mutilation, and if he killed his comrade, the punishment was death.¹⁵³ Where the accused robbed a merchant, he had to pay back double the amount stolen, and for being a rogue his head was shaved and his cheek branded.¹⁵⁴

The Lord High Constable was the commander of the armies of the king. Where required, the constable acted as judge in cases of litigation between soldiers and followers of the army. This court also had jurisdiction over certain criminal matters that were detrimental to discipline over which the civil courts did not have jurisdiction at that stage.¹⁵⁵ The constable was assisted by the marshal whose duties can be compared today to that of the adjutant. They were in turn assisted by three doctors of civil law and a clerk, who acted as prosecutor.¹⁵⁶

After 1521, the office of constable ceased to exist¹⁵⁷ and subsequently all officers were authorised by the king to apply military law. The Court of Chivalry had limited criminal jurisdiction, which was confined to murder and other civil crimes committed outside the borders of Britain during times of peace. During times of war the jurisdiction of the Court of Chivalry expanded, authorising it to try any offence committed by a soldier in contravention of the Articles of War that were in

¹⁵² Norman at 135.

¹⁵³ Norman at 136.

¹⁵⁴ Norman at 136.

¹⁵⁵ Abye at 6; *Manual of Military Law* (1914) at 8. The criminal jurisdiction was limited to murder and civil crimes committed outside the borders of the country in times of peace.

¹⁵⁶ Abye at 6; *Manual of Military Law* (1929) at 8; Schlueter at 136. For the personnel of the court see Squibb at 128-137.

¹⁵⁷ With the decapitation of the last constable of Britain, Edward, Duke of Buckingham, for treason (see in this regard Oosthuizen at 221; Snedeker at 13). The constable was succeeded by the marshal for purposes of adjudicating trials and this evolved in the "marshal's court", later known as the court martial (see *Manual of Military Law* (1914) at 9; Pratt at 7; Schlueter at 137).

force at that particular time.¹⁵⁸ As supreme commander of the army, the king issued Articles of War from time to time containing the military code of conduct.¹⁵⁹

2.4.3 The Council of War

The Court of Chivalry, as presided over by the marshal gradually evolved into a new type of military court, the Council of War.¹⁶⁰ This court became the modern court martial, a term that came into use in 1663 in the regulations.¹⁶¹ These tribunals were convened by and presided over by a general. Its powers were limited to times of war.¹⁶² The abuse of these courts by the expansion of jurisdiction authorised by royal prerogative over civilians and soldiers during peace time resulted in a struggle between the king and parliament.

The start of important changes to the application of military law was the Petition of Rights in 1628,¹⁶³ which in turn led to a Council Board of lawyers and judges investigating the legality of the Articles of War of 1639. They held the opinion

¹⁵⁸ Snedeker at 14. In this court the accused was entitled to fight a duel with his accuser to settle the matter (see also the *Manual of Military Law* (1914) at 8; Schlueter 137).

¹⁵⁹ Snedeker at 14. Numerous *Articles of War* were issued between 1190 in the time of Richard I and 1688, the reign of James II (see also Banning at 292).

¹⁶⁰ Snedeker at 15; *Manual of Military Law* (1914) at 9. The Court of Chivalry was never abolished by statute but in all practicality it has ceased to exist. After the Court of Chivalry no longer functioned as a military tribunal, the king granted special commissions for the application of military law (see Cooper at 133; Schlueter at 138). For a description on the functioning of the Councils of War as military courts see Winthrop at 1432-1433.

¹⁶¹ *Manual of Military Law* (1914) at 9.

¹⁶² Schlueter at 139.

¹⁶³ Snedeker at 11 and 15. The Petition of Rights declared, inter alia, that the attempts of the king to enforce military law under the authority of the king in times of peace as well as war were contrary to the law. It was the start of a bid to limit the king's powers in terms of military law. It stated that the king had no authority to proclaim martial law in times of peace (see also Cooper at 133). As a result of the attempted abuse of the use of the courts-martial jurisdiction, King Charles I was forced into assenting to the Petition of Rights (see Schlueter at 139-140).

that military law should only be applied in England when an enemy of the king was “really near an army of the king”.¹⁶⁴

In terms of the Articles of War of 1629 soldiers were subject to various lesser punishments if they neglected their various moral and religious duties.¹⁶⁵ These punishments consisted of branding a soldier with a hot iron for swearing and *strappado* for being drunk on guard duty. The more serious offences such as violence or “uncivil speech” against anyone in a position of authority resulted in the death penalty.¹⁶⁶ Soldiers were handed over to the Marshal’s Court for trial and punishment.

In 1639 the Royal Commission of 1638 authorised the Law and Ordinances of War which provided for the administration of military justice.¹⁶⁷ These laws and ordinances authorised the Council of War and the Advocate of the Army to try soldiers and other persons who offended against the king.¹⁶⁸ The General had no limit placed on his authority and the Laws and Ordinances did not lay down any rules for the composition of the court or any of the court procedures.¹⁶⁹ No appeal was possible. In 1642 Parliament issued the first direct legislation authorising the formation of military courts.¹⁷⁰ The legislation appointed a commanding general and 56 other officers to execute military law.¹⁷¹ At this time discipline was very strict and the punishment severe. Not only did the military code make provision for military offences but also for various moral offences.

¹⁶⁴ Snedeker at 11; Clode C M *The Administration of Justice under Military and Martial Law as Applicable to The Army, Navy, Marines and Auxiliary Forces* 2 ed (1874).

¹⁶⁵ Clode at 9.

¹⁶⁶ Clode at 9. The death penalty could only be executed after confirmation by the General. The General of the Army, in this respect, was very similar to the Roman general, holding the power of life and death over the soldier.

¹⁶⁷ Clode at 11. These ordinances and laws were based on the Articles of War of Gustavus Adolphus: see Cooper at 133-134; Rollman at 213.

¹⁶⁸ Clode at 11. Soldiers were compelled to obey their superiors and offences such as mutiny and sedition were expressly prohibited.

¹⁶⁹ Clode at 11.

¹⁷⁰ Schlueter at 140.

¹⁷¹ These officers were known as “commissioners” (see Schlueter at 141). They could in turn appoint a judge advocate, provost marshal and other officers as required.

When found swearing, the punishment was usually a fine and being drunk was punished with the wooden horse.¹⁷² Other punishments included flogging and public disgrace.¹⁷³

As there was still no standing army in Britain, the articles of war issued only applied during times of war. The king, however, did have guards and garrisons¹⁷⁴ and it became apparent that it would be necessary to address the discipline of these soldiers in times of peace.¹⁷⁵ The king used his prerogative to govern his troops and consequently issued such regulations in 1662. Six of the Orders contained in the regulations concerned military offences. These regulations also authorised the General of the Army to convene courts-martial.¹⁷⁶ According to Snedeker, the lack of serious punishment for offences resulted in discipline among the soldiers remaining lax.¹⁷⁷

¹⁷² Fortescue at 282. He describes the wooden horse as “a triangular block of wood, like a saddle-stand, raised on four legs and finished with a crude representation of a horse’s head. On this the culprit was set astride for one hour a day for so many days, with from one to six muskets tied to his heels; and that degradation might be added to the penalty, drunkards rode the horse in some public place, ..., with cans around their necks” (see also Gilbert A N “The Regimental Courts Martial in the Eighteenth Century British Army” (1976) 8 *Albion: A Quarterly Journal Convened with British Studies* 50 at 54).

¹⁷³ Fortescue at 283.

¹⁷⁴ Clode at 13; Schlueter at 141. The guards were known as “His Majesty’s Guards and Garrisons”. The Parliament of the Restoration in 1660 allowed the king to maintain a force of 8000 men at his own expense. This ultimately developed into the standing army. With the standing army, knight service was abolished (see Morrison C G *Notes on Military Law, Organisation, and Interior Economy* (1897) at 4).

¹⁷⁵ *Manual of Military Law* (1914) at 10; Schlueter at 141.

¹⁷⁶ Clode at 13.

¹⁷⁷ See Snedeker at 17; *Manual of Military Law* (1914) at 10 for the reasons for this lack of discipline. One cannot necessarily agree with Snedeker’s opinion regarding this being the result of a lack of harsh punishment. Clode at 11-12 refers to 34 Articles in the *Articles of War* that prescribed the death penalty. Lesser punishments consisted of fines, imprisonment, burning of a soldier’s tongue with a hot iron, whipping, riding the wooden horse and various other punishments as the courts-martial deemed appropriate. This can hardly be seen as lenient. A further punishment mentioned is reminiscent of the Roman punishment of decimation in that where a Regiment failed in its duty, the officers and every 10th soldier was punished severely.

Subsequent “Orders and Articles of War” were issued in 1666 and 1672 respectively. This led to the development of the Military Code and legal system established in terms of the first Mutiny Act.¹⁷⁸

The Code of 1666 gave rise to the two different types of military courts. It established the General Court-martial consisting of 13 officers of which five must at least hold the rank of Captain. The Judge Advocate attended and this court convened as often as required. It had jurisdiction over serious offences, those requiring punishment of “life or limb”.¹⁷⁹ As serious as the offences and punishment were seen, it was not required that the proceedings of the court-martial be recorded.

The Regimental Court-martial was utilised for lesser offences not quite requiring the punishment mentioned above. They had jurisdiction over soldiers and not officers.¹⁸⁰ According to Gilbert¹⁸¹ most military offences were tried by this forum. The jurisdiction of the Regimental Court-martial was not as clearly defined as the General Court-martial, resulting in severe punishments for relatively less severe offences. Since the Regimental court-martial was easier to convene it seems as if soldiers were routinely charged for lesser offences than their conduct warranted in order for this court to retain jurisdiction. However, punishment was more severe than those imposed by the General Court-martial since the jurisdiction was not adequately defined.¹⁸²

¹⁷⁸ Clode at 13.

¹⁷⁹ Clode at 13.

¹⁸⁰ Clode at 13.

¹⁸¹ Gilbert at 50; Stepler G A “British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century” (1987) 102 *The English Historical Review* 859 at 860.

¹⁸² Gilbert at 51 and 54.

The Code of 1672 continued with the two-court system, providing for a General Court-martial and the Court of the Colonel of the Regiment.¹⁸³ The General Court-martial was recorded and the Judge Advocate General of the Army prosecuted on behalf of the King. The Regimental Court heard cases of disputes between soldiers and officers, or of officers amongst themselves. If the aggrieved party was not satisfied with the outcomes, he had the right to appeal to the General Court-martial, but in the event that he was not successful with his appeal, he had to reimburse the opposing party for the trouble and the expense of the appeal.¹⁸⁴

The day-to-day discipline of the Regiment was the responsibility of the Captains which they exercised under the authority of the Colonel.¹⁸⁵ Commanding officers had the authority to summarily punish soldiers for minor transgressions.¹⁸⁶ Punishment imposed differed from commanding officer to commanding officer

¹⁸³ Clode at 16. The Regimental Court-martial once again tried only the lesser disciplinary offences. Unlike the Code of 1666, the 1672 Code did not prescribe the number of officers required to sit in judgment, all that was required was that every judge had to deliver his vote on finding and in the case of sentencing the sentence was determined by the most votes. In the case of an equality of votes, the President of the court martial had the final say. See Clode at 58-59 for a discussion on the jurisdiction of these courts. Stepler at 866 mentions that this form of Court-martial typically consisted of five officers, or where that number was not available, three officers. A third court-martial was provided for in 1829, ie the District Court and in hierarchy lay between the Regimental Court and the General Court-martial. This court could not try officers, only soldiers, for offences such as mutiny or desertion, or any other disciplinary offence and could not impose the death penalty (see also Burroughs at 560 in this regard).

¹⁸⁴ Clode at 17; Gilbert at 57-58. It would seem as if the soldiers did not have automatic access to this procedure to the General Court-martial. All applications for such appeal had to be addressed to the Commander-in-Chief, who had the authority to allow such appeal or not and it would seem from contemporary writers mentioned by Gilbert that these requests for appeal was routinely denied. He sums up the opinion of the Army as that "[i]f it should once be declared, that an appeal lies in all cases indiscriminately, the Service might be impeded by the frequency of General Courts-Martial, or discipline would suffer much, as soldiers would be tempted to appeal of the Halberts merely for the sake of procrastinating the day of Punishment.."

¹⁸⁵ Clode at 17; Gilbert at 57-58. Over time other military courts also evolved, such as the "Detachment General Court-martial" which punished crimes committed against the inhabitants of foreign countries and the "Drum Head" used to summarily punish offences such as mutiny or insubordination committed while on march (see Clode at 59-60).

¹⁸⁶ Burroughs at 557.

and included confinement to barracks, incarceration in solitary cells of black holes,¹⁸⁷ extra guard duties, forced marched or punishment drills.¹⁸⁸

2.4.4. The Mutiny Act

In 1688, the “Glorious Revolution” took place against the rule of James II and after deposing the king a Bill of Rights was adopted in 1689 which determined that the permission of parliament was required for authorising a standing army.¹⁸⁹ The first Mutiny Act was a direct result of a contingent of troops, under order to deploy to Holland, which committed mutiny and declared their allegiance to King James II who had enlisted them.¹⁹⁰ The First Mutiny Act provided for the death penalty that a court-martial could inflict for an offence of mutiny or desertion.¹⁹¹ Although the death penalty was the only sentence mentioned by this first Mutiny Act, it did provide the Court with the authority to impose any other punishment within the Court’s discretion.¹⁹² Some other forms of punishment that existed at

¹⁸⁷ Black holes were cells without any lights or windows.

¹⁸⁸ Burroughs at 557-559. Variations included parading at the guardroom every hour with full equipment or wearing the jacket inside out, which has a striking resemblance to the punishment drill that can be ordered in modern times. By 1868 fines were added for offences such as drunkenness (see also Stepler 863-864).

¹⁸⁹ Oosthuizen at 222; Squibb at 5.

¹⁹⁰ Oosthuizen at 222; *Manual of Military Law* (1914) at 10; Schlueter at 142; Rollman at 214; Fortescue at 337; Banning at 292.

¹⁹¹ Schlueter at 143; Rollman at 215. The First Mutiny Act did not replace the existing *Articles of War* promulgated by James II. It simply implemented the death penalty for mutiny and desertion. Although it provided no more than that, “it recognized at least that military crime cannot be adequately checked by civil law...” (see Fortescue at 337; Morrison at 4; Pratt at 4-6; Winthrop at 1446-1447).

¹⁹² Section 2 of the Mutiny Act of 1689; Clode at 155 and 208. These punishments were not named. Where the Court awarded the death penalty, it was also left within the discretion of the Court to determine the method of execution. This was usually done by means of hanging. Abye at 121 contends that the method of execution should be determined by the offence committed. Other courts did not interfere with the court-martial’s discretion in sentencing. Civil courts in fact also refused to hear appeals from military courts. However, in the case of the death penalty the prisoner could make exceptions against the proceedings of the Court-martial. He could apply to the King’s Bench for a writ of *habeas corpus* to bring the matter before the civil courts for review (see Clode at 157; Morrison at 4; Winthrop at 1446).

the times were the wooden horse, piqueting and running the gauntlet.¹⁹³ As deterrent all troops had to gather and witness the public punishment.¹⁹⁴ The Act gave the General of the Army the power to grant officers commissions for the purpose of convening courts-martial.¹⁹⁵ The Act also provided that the Mutiny Act would however not exempt any soldier from the ordinary process of civil law.¹⁹⁶

Although the First Mutiny Act was limited to a period of seven months, subsequent Mutiny Acts were issued by parliament annually from 1689 to 1878 in which parliament authorised the king to have a standing army and also authorised the expenditure of such army. These Mutiny Acts also confirmed the king's authority to issue a code of conduct regulating the actions of the soldiers in as far as the Mutiny Acts did not provide for their conduct.¹⁹⁷ Until 1712, these Mutiny Acts did not apply to colonies of Britain abroad and the main offences punishable were mutiny and desertion.¹⁹⁸ Although the British Empire was at war for most of this period, the narrow application of the Mutiny Act did not present great difficulty as the Articles of War issued by the commanders and the king governed the soldiers.¹⁹⁹ During the following century the application of the Act was extended to all colonies of the British Empire.

¹⁹³ Gilbert at 54 gives a brief description of these punishments, stating that “[p]iqueting was the practice of suspending a soldier by the arms over a sharp pointed stake. Sometimes it resulted in permanent lameness”.

¹⁹⁴ Gilbert at 54; Stepler at 872.

¹⁹⁵ Clode at 21; *Manual of Military Law* (1914) at 11. The Act provided that the court martial had to consist of at least 13 officers, field officers in the trial of officers of field rank and Captains in all other instances. At least nine of these officers had to concur on sentence. See s 10 of the Mutiny Act of 1689.

¹⁹⁶ Snedeker at 18. The importance of this Act was that it made certain military offences punishable within the domestic borders of Britain. The death penalty could not be inflicted at home for any military offence, except as provided for in the Mutiny Act.

¹⁹⁷ Snedeker at 18; Stepler at 862; Banning at 293.

¹⁹⁸ Clode at 22; Schlueter at 143. The Mutiny Act only made provisions for a limited number of specific offences. Where lesser offences were committed, or the Army was abroad, the Act did not apply and the Army was punished in terms of the Articles of War issued by the King or the General Officer in Command (see *Manual of Military Law* (1914) at 11; Morrison at 5; Banning at 293).

¹⁹⁹ Snedeker at 18; *Manual of Military Law* (1914) at 11.

Although the death penalty could be awarded for desertion or sedition, it was not always executed. The King or the General had the authority to substitute the death penalty with corporal punishment.²⁰⁰ The death penalty inflicted for desertion eventually gave way to other forms of punishment. By 1766 Courts-martial was given a discretion and where the court was of the opinion that the death penalty would be too severe under the particular circumstances, they could sentence the accused to transportation for a number of years, or even for life, in a regiment abroad.²⁰¹ By 1803 the prescribed punishment for desertion became transportation and the death penalty would only be inflicted if the soldier subsequently returned to his country unlawfully.²⁰² Over time, transportation was replaced by penal servitude as a punishment.

Corporal punishment became prevalent, being inflicted for offences such as immoral behaviour or neglecting of duties. Parliament gave a general statutory sanction to the Articles of War, which consequently no longer remained the exclusive prerogative of the king. By 1812 imprisonment was accepted as an alternative punishment for lesser offences²⁰³ and a limit was placed on the number of lashes allowed during corporal punishment.²⁰⁴

²⁰⁰ Clode at 32; Burroughs at 560. Corporal punishment comprised flogging with a “cat of nine tails” in front of the Regiment.

²⁰¹ Clode at 33; Burroughs at 560. Soldiers were transported to “condemned corps” in unhealthy colonies abroad, such as West Africa. According to Burroughs the diseases and climate resulted in a punishment similar to the death penalty in severity. This punishment was later abandoned on humane grounds. Not all locations were as severe. Locations such as the new settlements in Australia and Bermuda lost its deterrent value since it was seen as “free passages to a land of opportunity...” By 1857 transportation was abolished as a punishment. A dye at 108-109 on the other hand is of the opinion that transportation as military sentence was different from transportation inflicted by civil courts. He did not see it as such a shameful military punishment since those transported to Regiments abroad were no worse off than soldiers in those Regiments who had not committed offences. Courts martial had wide sentencing powers, including discharge, cashiering, corporal punishment, imprisonment or any other punishment (see Winthrop at 1448-1469).

²⁰² Clode at 33; Burroughs at 560. It was during this time that the Mutiny Act and the Articles of War were broadened and found application abroad (see Schlueter at 143).

²⁰³ Clode at 33. In general those who were to return to the Army subsequent to their incarceration were sent to military prisons and those who were discharged to civil prisons. A prisoner could only be subjected to solitary confinement where sentences as such by the Court (see Clode at 171-172). Soldiers were, up to that time, accommodated in civil prisons, but the military saw a need for a uniquely military environment “dispensing severe discipline geared to

Although further offences were added to the Mutiny Act in 1830, the power of the Court-martial was curtailed and they could no longer impose any punishment that was contrary to English law.²⁰⁵ During 1868 Courts-martial no longer had the authority to sentence a soldier to corporal punishment.²⁰⁶

The Mutiny Act of 1873-1874 allowed the General Court-martial to impose as sentence death, penal servitude, imprisonment, forfeiture of pay or pension and any other punishment accepted as practice in the service.²⁰⁷ In lieu of the death sentence, the commanding officer on review could order the offender into penal servitude for a minimum term of five years or imprisonment with or without hard labour and with or without solitary confinement.²⁰⁸ Where an accused was found guilty of theft, fraud or embezzlement, the offender could be sentenced to penal servitude or a fine, imprisonment with or without hard labour, dismissal from service,²⁰⁹ and in the case of a non-commissioned officer or warrant officer, to reduction to the ranks, depending on the seriousness of the offence. Apart from the sentence, the accused also had to compensate the victim from his own

the needs and habits of soldiers, embracing hard labour and sharp drill, and 'never losing sight of the important principle that the object of military punishment consists not only in the repression of Crime, but in effecting that object in the shortest possible space of time'" (see Burroughs at 565).

²⁰⁴ Burroughs at 560-562. Although favoured by the military, corporal punishment came under severe scrutiny from Parliament. By 1829 the court's jurisdiction regarding the number of lashes was reduced to 500 in a district court-martial and 300 in the regimental courts. This was reduced even further in 1833 and offences for which the punishment could be imposed were limited to "mutiny, desertion, insubordination and violence, disgraceful conduct, and stealing army property."

²⁰⁵ Clode at 155; Gilbert at 65.

²⁰⁶ Clode at 35. New offences included malingering, self-mutilation and disgraceful conduct. New sentences included a reprimand and discharge (see Clode at 172).

²⁰⁷ Section 8 of the Mutiny Act of 1873. This included the sentence of cashiering, for officers. Certain restrictions were placed on the sentences in that the death penalty could only be imposed if two-thirds of the officers present at the Court-martial concurred, a minimum of five years penal servitude was prescribed and the maximum term of imprisonment was set at two years (see also Clode at 217).

²⁰⁸ Section 16 of the Mutiny Act of 1873.

²⁰⁹ Burroughs at 570 also briefly discusses discharge with ignominy from the Army. The authorities were wary of allowing this sentence too easily for fear that those who no longer wished to serve would commit offences in order to be discharged from service. Therefore this punishment was only given exceptionally and then coupled with a lengthy sentence of transportation or penal servitude.

expense for such loss or damage as determined by the court.²¹⁰ The District Court-martial had the same sentencing jurisdiction, except death and penal servitude which were excluded.²¹¹

The Regimental Court-martial had authority to impose corporal punishment, imprisonment²¹² and forfeiture of pay.²¹³ Where a soldier was sentenced to corporal punishment, the soldier could, in addition, be sentenced to imprisonment. Where the corporal punishment formed the whole or a part of the sentence, the sentence could be confirmed and then commuted to one of imprisonment to a maximum period of 42 days, with or without hard labour, with or without solitary confinement. Where the sentence of corporal punishment was mitigated, a period of imprisonment to a maximum of 20 days could be imposed with or without hard labour, with or without solitary confinement.²¹⁴

Apart from those offences and punishments prescribed in the Mutiny Act, the Articles of War also made provision for other offences and punishments.²¹⁵ Soldiers were therefore governed by the king in terms of the Articles of War and were subject to civil control in terms of the Mutiny Act of the day.

²¹⁰ Section 17 of the Mutiny Act of 1873.

²¹¹ Section 9 of the Mutiny Act of 1873; Clode at 217.

²¹² To a maximum period of 42 days, with or without hard labour, with or without solitary confinement.

²¹³ Section 10 of the Mutiny Act of 1873; Clode at 218. Since corporal punishment was abolished, section 22 provided that the Court could only impose corporal punishment as sentence while the soldier was on active service and not during times of peace. Corporal punishment could be imposed for offences such as mutiny, insubordination, desertion, drunkenness on duty, disgraceful conduct or any breach of the Articles of War. A maximum of 50 lashes was allowed. Officers and Warrant Officers could not be sentenced to corporal punishment (see in this regard also Burroughs at 564). Corporal punishment was finally abolished in 1881.

²¹⁴ Section 24 of the Mutiny Act of 1873. The period of solitary confinement was restricted to not exceeding seven days at a time with intervals of at least seven days between each period of solitary confinement.

²¹⁵ See Clode at 249-280 for a full discussion. In general, offences ranged from crimes with regard to divine worship, mutiny, insubordination, desertion, absence without leave, offences in the field, drunkenness and disgraceful conduct. Typical punishments prescribed were death, cashiering, fines, penal servitude, imprisonment, dismissal, reduction in rank, loss of seniority, reprimand etc. These Articles of War can be compared to the MDC of today, listing military offences and a prescribed punishment for each.

The Mutiny Act was replaced by the Army Discipline and Regulation Act in 1879 and in 1881 the British Army Act came into operation.²¹⁶ The 1881 British Army Act was a consolidation of the parliamentary prescripts for military discipline as found in the Mutiny Act and the code of conduct issued by the king.²¹⁷ As with the Mutiny Acts, the British Army Act had to be promulgated by parliament every year by means of the Army (Annual) Act.²¹⁸ The Army Act had no force on its own. This principle remains to this day with the current British legislation required to be renewed every five years.²¹⁹

2.5 South African military law history

2.5.1 Introduction

Apart from the influences from ancient civilisations, Europe and England, the history and development of the Armed Forces on South African soil also played a major role in the development of the South African military law. Being a British Colony resulted in the British influence being felt more keenly, but as will be shown below, other influences also had a role to play.

²¹⁶ Oosthuizen at 222; *Manual of Military Law* (1914) at 14; Schlueter at 143, Rollman at 215. The British Army Act of 1881 is of importance to the South African Military Law as it was used for the discipline of the Union soldiers even after the 1912 Zuid-Afrika Verdedigingswet 13 of 1912 came into operation and was only effectively replaced by the Defence Act 44 of 1957, although the principles from the 1881 Act remained entrenched in our modern South African military law as will be indicated below (see van der Westhuizen H "An Introduction to the Military Courts in South Africa and Some Recommended Changes" (1994) 14 *African Defence Review* 18 at 18; Morrison at 5; *Manual of Military Law* (1914) at 6). For a discussion on the various military offences in terms of the Army Act of 1881 see *Manual of Military Law* (1914) at 15-28. Many of the offences are still relevant today.

²¹⁷ Banning at 293 states that one of the reasons for replacing the Mutiny Act was the inconvenience of the army being governed partly by an Act of Parliament and partly by the Articles of War.

²¹⁸ Morrison at 5. The annual re-institution of the Army Act confirmed the constitutional principle of Parliamentary control over the army. This Annual Act states that the keeping of a standing army during peace time without Parliament's approval is illegal (see also in this regard *Manual of Military Law* (1914) at 1; Pratt at 8-9).

²¹⁹ It should be noted that British Naval Law developed separately (see Snedeker at 34-47).

This section discusses the South African history in three broad eras. Firstly, the development of military punishments during South Africa's earliest history will be briefly examined. Although South Africa's history stretches further back than the first Europeans landing at the Cape of Good Hope, this will be regarded as the starting point for the discussion on the development of South African military law. The development within the four provinces differed due to important historical influences of the "Vereenigde Oost-Indische Compagnie" (VOC), British occupation and the Anglo-Boer war. Each province is discussed separately.

The second era referred to is the period of development during the Anglo-Boer war and its influence on the subsequent formulation of the Union defence legislation. This includes the period shortly after the war until the adoption of the first Union Defence Act of 1912.

The third broad category addresses the development of military law and punishment through the various Defence Acts until just prior to the current defence legislation.

2.5.2 The early armed forces of South Africa

2.5.2.1 Cape Colony

The earliest western military history of South Africa can be traced to the "Vereenigde Oost-Indische Compagnie" (VOC) who settled a small stopping

point for their ships in the Cape.²²⁰ Jan van Riebeeck, who was sent by the VOC to build a fort and establish the stopping point, was assisted by a garrison of 70 men on board the *Drommedaris*.²²¹ Discipline on board, while undertaking their voyage to the Cape, was harsh. The provost, who was responsible for keeping order and discipline, had a staff as symbol of his authority, decorated with orange ribbons. He acted as prosecutor in instances of misbehaviour on board.²²²

On arrival the garrison had to assist in building the fort and was to be utilised in the protection of the fort from the indigenous people. The head of the military force was a major-general stationed in Batavia.²²³ The garrison, however, consisted of people from various nationalities. They were mercenaries with little or no loyalty towards the VOC and were therefore not completely trusted by their employers.²²⁴

²²⁰ Tylden G *The Armed Forces of South Africa* (1954) at 2; Nöthling C J *Geskiedenis van die Suid-Afrikaanse Weermag (Deel 1) 1652-1945* (1995) at 6; Grobbelaar P M *Die Ontstaan van 'n Westerse Militêre Tradisie aan die Kaap tot 1795* (1994) at 68.

²²¹ Nöthling at 6. According to Grobbelaar the VOC had extensive administrative, legal, and legislative powers regarding their possessions, but remained subject to the laws of the Netherlands. (see Roux P E *Die Verdedigingstelsel aan die Kaap onder die Hollands-Oosindiese Kompanjie (1652-1795)* (1923) at 29).

²²² Molsbergen E C G *Van Riebeeck en Sy Tyd* (1968) at 46-47. He also mentions an example where soldiers found guilty of gambling on board were tied up and thrown overboard.

²²³ Grobbelaar at 68. Mentzel O F *The Cape in Mid-Eighteenth Century: Being the Biography of Rudolph Siegfried Allemann, Captain of the Military Forces and Commander of the Castle in the Service of the Dutch East India Company at the Cape of Good Hope* (1920) at 3. The Captain of the military force in the Cape of Good Hope was the *de facto* commander of the Cape forces and did not in fact report to the Major-General. The military forces in the Cape were independent from the government in Batavia, although they did follow its laws.

²²⁴ Grobbelaar at 70; Roux at 31. Mercenaries may in fact not be the appropriate term for the soldiers of the VOC. Mercenaries engender an idea of professional soldiers. See Mentzel at 16-25 for a discussion on the recruitment of the soldiers that came to be in the Cape of Good Hope in this period. In contrast Molsbergen at 43-45 discusses the recruitment of soldiers by the “seelenverkäufer” (soul seller). The picture painted by Molsbergen is much harsher than the one by Mentzel. What is however clear is that the “soldiers” recruited by the VOC were more likely to be persons with nowhere else to go and nothing left to lose and they could not be described as professional soldiers by any stretch of the imagination.

Van Riebeeck was very strict on discipline and his first regulations were issued soon after arriving in the Cape.²²⁵ Because the VOC was a trading company and did not want to spend too much money on defence, the regulations written were mainly aimed at prohibiting the soldiers from being abusive towards the native population. The VOC wanted to protect its trading at all costs. Where the indigenous people stole equipment or weapons no-one was allowed to beat them or treat them badly. In fact, the person from whom was stolen had to compensate the VOC and was liable to receive 50 lashes as punishment.²²⁶ Harsh punishment was also inflicted where soldiers slept on duty or traded with the native population.²²⁷

Desertion was not tolerated. Molsbergen²²⁸ gives an example of four individuals who attempted to desert and go to Mozambique. They were not successful and on their return they were officially tried. Two were sentenced to death, although the death sentence was subsequently commuted. They were bound to a pole and a shot was fired over their heads. They were then keelhauled²²⁹, given 150 lashes and further ordered to perform hard labour for two years, bound in chains.²³⁰

²²⁵ Molsbergen at 56. The text of the regulations can be found in Jeffrey M K *Kaapse Plakaatboek 1652–1707*: Deel I (1944). The first Resolution was written on 8 April 1652 giving instructions to all soldiers and sailors aboard the three ships (see Roux at 30). It would seem as if, at first, there was no civil jurisdiction and the regulations were only applicable to soldiers. It was only as late as 1656 that the administrative and judicial functions were separated (see Van Zyl at 428-430).

²²⁶ Jeffrey at 2 further shows that apart from the 50 lashes, the offender also forfeited his wine ration for eight days or could be sentenced to any harsher punishment as deemed appropriate. The punishment was subsequently increased and the Resolution of 14 October 1652 indicates a sentence of 100 lashes for first offenders. Roux at 33 also mentions that where a soldier assaulted one of the native population or acted unlawfully against him in any way, the soldier would be sentenced to 50 lashes, the punishment executed in the presence of the victim so that he could see that the actions of the soldier was in no way approved by the VOC.

²²⁷ Molsbergen at 56; Roux at 32; Jeffrey at 3.

²²⁸ Molsbergen at 57.

²²⁹ This entailed being dragged underneath the ship's keel with a rope, and if not weighted down properly, being injured on the barnacles on the keel, or worst, drowning.

²³⁰ The sentence was subsequently mitigated in that the chains were taken off upon a promise of good behaviour. The sentence seems excessive, but these multiple punishments seem to have been the norm during that period. See also Mentzel at 133 where he describes these multiple

Other typical punishments consisted of torture on the rack where an offender refused to confess, being thrown off the pier into the sea, lashed with the butt of a musket, piece of rope or cane, being forced to stand guard with six muskets, being keelhauled, branded or bound to a pole with the item of the offence, for example a sheepskin if he had stolen a sheep, bound to the pole above the offender's head.²³¹ Despite the harshness of the discipline and the punishment, no-one was sentenced to death in the Cape in Van Riebeeck's time²³² but, as sentence, a shot was sometimes fired over the head of the offender as symbol that he in fact deserved the death penalty. Fines were also given in the form of forfeiture of his salary. Part of the fine was then paid over to the "fiscael".²³³

The garrison force was used from 1652 to 1662, but as the colony grew, the military force had to be expanded to protect the local population.²³⁴ In 1658 a voluntary citizen force was brought into existence to assist the garrison in the protection of the expanding colony. The Cape governor supplied the citizen force with ammunition and weapons.²³⁵ In 1689 a Code was issued, governing the soldiers' behaviour during times of war.²³⁶ As time progressed the voluntary nature of the citizen force ceased to exist and membership became compulsory.²³⁷ The members of the citizen force had to pledge allegiance to the

punishments prior to its reform. See Jeffreys at 90 for a further example of punishment incurred by 20 soldiers who deserted.

²³¹ Molsbergen at 81. For a third offence of desertion, the offender could be sentenced to banishment and hard labour on Robben Island for a year (see Jeffreys at 91).

²³² Serious offences with a possible death sentence were sent to Batavia for trial (see Molsbergen at 82; Mentzel at 133).

²³³ Molsbergen at 82. The "fiscael" was an employee of the VOC whose main function was that of prosecutor. Unfortunately there was no sign of impartiality and offenders were vigorously prosecuted since the "fiscael" was paid a percentage of all fines (see Van Zyl at 431).

²³⁴ Tylden at 2.

²³⁵ Nöthling at 6.

²³⁶ Jeffreys at 255-256. This Code addressed absence without leave and guard duties. Punishments ranged from fines to lashings.

²³⁷ Grobbelaar at 110; Tylden at 2; Boyden P B *et al*, (eds) *'Ashes and Blood' The British Army in South Africa 1795 to 1914* (1999) at 10; Roux at 50.

State-General of Holland, the Prince of Orange, VOC, the Governor and the Political Council.²³⁸

By 1712 the political board became increasingly disturbed by the lack of discipline exhibited by the military forces in the Cape. In a resolution of 1 January 1712 it is mentioned that the lack of order, bad habits and misuse amongst the soldiers were a point of concern and were seen as detrimental to military discipline.²³⁹ It was then determined in this resolution that the same Code as issued by the State-General and published in the Netherlands would be applicable to the soldiers of the Cape garrison.²⁴⁰

Various offences and punishments were described in this Code. In the first three articles of the Code the offences of blasphemy, violent crimes and mutiny were mentioned. The subsequent sections discussed other offences such as absence without leave, sleeping while on duty, desertion, fighting, assault, disobedience of orders and drunkenness, to name a few.²⁴¹

²³⁸ Roux at 53. Roux discussed the content of the pledge (at 54), which consisted, *inter alia*, of following orders and complying with all ordinances. If a member of the citizen militia was called up for duty during a time of war and refused, it was seen as perjury against the oath of allegiance taken on recruitment. In those instances he was liable for punishment of “te lyf en te leeven (see also Roux at 70).”

²³⁹ Grobbelaar at 76.

²⁴⁰ Grobbelaar at 77. This Code, published on 13 August 1590, was the result of certain military reforms brought about by Maurits of Nasau in the Netherlands and applicable to the *Staatse Leger*, the military force of the Netherlands. A very strict code of discipline was followed by the *Staatse Leger* and severe punishments were inflicted on soldiers who misbehaved. This strict discipline gave the *Staatse Leger* a very good name amongst the military forces of Europe (see Grobbelaar at 58). Other European states such as Germany, France and England were of the first to study the reforms in the Netherlands and implement them. The reforms came after renewed interest and study of the classical Greek and Roman military systems by Maurits. It must also be kept in mind that the military authority in the Cape was exercised by the Governor, under the command of the Governor-General of the Board of India. He in turn had to answer in military matters to the Lords XVII, who lent their authority from the State-General (see Grobbelaar at 69).

²⁴¹ Grobbelaar at 77.

Punishment was severe. On a second conviction of blasphemy, for example, the offender could be sentenced to having a hole burnt through his tongue with a hot piece of metal. Violent crimes could be given the death penalty and where an offender was found guilty of mutiny or a similar offence he could be hanged. A person found sleeping on duty could also be sentenced to death, and where an individual left the fort or entered it by any other way than the authorised route, that person would be sentenced to death by hanging.²⁴² Fleeing in the face of the enemy meant being beaten to death by anyone who was there.

Punishment was however only imposed after an official trial. The Captain of the military forces, being the commander of the military forces in the Cape was also the President of the Council of Justice.²⁴³ The Vice-Governor acted as judge. The “fiscael” acted as prosecutor and four merchants acted as assessors. An under-merchant, the head of the Office of Justice, acted as secretary and was responsible for keeping the court minutes.²⁴⁴ A court with higher authority also existed, namely the Council of Policy, where the Governor acted as President and three upper-merchants and four merchants acted as assessors.²⁴⁵

At that time a distinction was made between punishments that only the “fiscael” could execute and those executed by military authorities. If a punishment was to be inflicted by the “fiscael”, it was seen as a serious offence for which the

²⁴² Grobbelaar at 77 who mentions that this severe punishment for using the incorrect access route into the fort can probably be ascribed to the vulnerability of the fort to outside attack. Any person not making use of the authorised entrances could in fact be the enemy.

²⁴³ The Council of Justice was similar to what is known today as the court martial (see Mentzel at 10).

²⁴⁴ Mentzel at 10. The Governor was independent and did not act as judge during the trial. All sentences of the Council of Justice had to be authorised by the Governor before they could be executed. Were the governor was not satisfied with the sentence he could request the Council to modify it. If they did not want to comply he had the authority to change the sentence unilaterally, stating “*Ik neem het op mij*”, but he then also had to answer to any consequences resulting from his amending of the sentence.

²⁴⁵ Mentzel at 10. See also his discussion at 9 on the various ranks coupled to the office of upper-merchant, merchant and under-merchants.

offender had to be sent to Batavia for trial.²⁴⁶ “Fiscael” punishment was seen as involving a measure of disgrace, for example running the gauntlet. In the case of minor military offences, the military authorities tried the accused.²⁴⁷

It was during the late 1700’s that some reform took place regarding punishment and the multiple punishments were replaced by a different system, seemingly one of single punishment. Running the gauntlet was no longer a punishment only given by the fiscal, but became a military punishment, no longer viewed with disgrace.²⁴⁸

The citizen militia stood under the command of their own officers, but the general command remained with the captain of the garrison. Officers were elected annually with their appointment being subject to confirmation by the Political Council. The citizen militia also followed the practices and traditions of the *Staatse Leger*.²⁴⁹

With the expansion of the colony to Graaf-Reinett and Stellenbosch, the Citizen War Council (‘burgerkrygsraad’) came into existence in order to organise the growing militia. By 1768 they had a permanent code, governing their organisation and tasks. Their mandate included handling all cases relevant to the maintenance of good order and discipline of the Colony. Where instances of disobedience to orders occurred or offences were committed, the War Council had the authority to punish the offender to the extent of a fine.²⁵⁰ They did not however have the authority to impose other military punishments. Part of the fine

²⁴⁶ Mentzel at 133.

²⁴⁷ Mentzel at 133. Military offences include sleeping on sentry duty or absence without leave for up to three days. If an accused was absent for more than three days, the military authorities had to refer the matter to Batavia for trial. This was not always in the best interest of the accused as the punishments inflicted in Batavia seem to have been harsher than in the Cape.

²⁴⁸ Mentzel at 133-134.

²⁴⁹ Grobbelaar at 110.

²⁵⁰ Roux at 64

was used to cover the expenses of the War Council, sometimes being their only source of income.²⁵¹

A First Commandant held command over the commando's with a Second Commandant to assist him. It was their duty to ensure that all members in their commandos attended the yearly training sessions and complied with the orders issued by the government in the Cape.²⁵² When reporting to the Citizen War Council in Stellenbosch, the Commandant would then subpoena those individuals who neglected their duty to appear before the War Council. The Commandant then personally acted as prosecutor.²⁵³ If found guilty they were sentenced with an excessive fine.²⁵⁴ According to Roux²⁵⁵, the Cape government was very serious regarding the apprehension and punishment of those refusing to do commando service because of the threat posed by the Khoisan raids that were very prevalent at the time.

It is from this citizen militia that the commando system developed,²⁵⁶ carrying with it the traditions of the *Staatse Leger*. By the 1780's the VOC has strengthened its garrison with released slaves, Khoisan and Africans. Prior to the first British invasion in 1795, the local military force consisted of a permanent force component (the garrison or the "*Nationale Troup*") and citizen force members.

²⁵¹ Roux at 65. It would seem that the more serious offences were tried by the Council of Justice. See Roux at 152 for an example in this regard.

²⁵² Roux at 173-174.

²⁵³ Roux at 173-174.

²⁵⁴ Roux at 178. A distinction was made regarding the severity of the fine, depending on the rank of the offender: "...*en de zulx uiterlijk tot de soma van een hondert ryksds met opzigt tot de veldwachtmeester of te veldcorporaals en van vyftig ryksds met relatie tot de gemeenen.*"

²⁵⁵ Roux at 179.

²⁵⁶ Roux at 179; Tylden at 2; Nöthling at 6. The VOC did not have the capacity to protect the farmers from the Khoisan raids on the farms and the regular soldier in his traditional uniform did not have a hope of catching the much faster Khoisan. Therefore it became apparent that horses were needed and that developed into the commandos.

During the eighteenth century the Dutch power started to decline and England and France became more powerful. When Prince William of Orange was expelled from the Netherlands, England feared the possibility of France taking over the trading routes to the East. In a pre-emptive move against France and acting in the name of the Prince of Orange, British forces occupied the Cape from 1795.²⁵⁷

With the occupation by Britain, the Cape colony surrendered and had to pledge allegiance to the British throne, thereby submitting to the laws and customs of England.²⁵⁸ The British occupation only lasted until 1803 when the Cape was returned to the Batavians in terms of the Treaty of Amiens signed in March 1802.²⁵⁹ After the withdrawal of the British troops in 1803, 3150 Batavian troops were sent to the Cape to take responsibility for its defence and once again the commando system was implemented.²⁶⁰

In 1806 Britain, once again, invaded the Cape. The British invasion force hardly met any resistance. The local military force consisted of Dutch regular troops (the garrison), some European mercenaries and the locally raised militia. The garrison was weak and militarily unreliable, consisting mostly of mercenary troops. The citizen force could not assist much because they were, according to Boyden, harvesting their crops.²⁶¹

With the second occupation of the Cape the British at first took over, but did not do away with the commandos. Up to 1815 regular British officers were placed in

²⁵⁷ Boyden at 10; Roux at 71; van Zyl at 443.

²⁵⁸ Boyden at 34.

²⁵⁹ Boyden at 37.

²⁶⁰ Nöthling at 7.

²⁶¹ Boyden at 10 and 37. This would, however, seem to be a harsh and unfair judgment not entirely rooted in the truth. Roux extensively discusses the various measures that the militia attempted to put in place and fight the English invasion during this time, just to be superseded in decision by the VOC and the Governor of the Cape. Their inability to adequately assist the regular military forces was rather due to political decisions than a lack of interest on their part.

charge of the commandos but after 1825 they served under the command of their own officers.²⁶² It was also this commando system that formed the backbone of the later military forces of the Boer Republics. The commandos were disbanded in 1834 in the Cape after which the defence of the Cape colony was left to British troops. By 1835 they were also making use of volunteer forces. As the borders of the colony expanded, the focus of defence moved away from the Cape to the rest of South Africa.

An extensive discussion on the history of the Voortrekkers, the start of the Boer Republics and the Anglo-Boer wars falls outside the scope of this work. cursory mention will be made of these events as far as they pertain to the perceived development of the military, and with it the military law, of South Africa. A short discussion on the status of the military forces of Natal and the two republics follow as a background illustrating the difficulties encountered in unifying the defence forces of South Africa.

2.5.2.2 Natal

The first organised defence force in Natal came with the advent of the Voortrekker Republic of Natalia.²⁶³ As was the case in the Cape Colony, the people of Natal based their first defence force on the commando system.

They were divided into areas, each under the command of a field cornet ("*veldkornet*"), grouped together in a district under the command of a Commandant with a Commandant-General as the commander-in-chief. This position of Commandant-General was not a permanent position, but only became operative during times of war.

²⁶² Boyden at 3; Nöthling at 7. It was during this time – with the British Settlers – that the existing Roman-Dutch law became Anglicised.

²⁶³ Nöthling at 8.

After a decision of the Republic's government to move a large group of Zulus to the Natal south-coast, the British government decided to intervene. They annexed Natal in 1845 and proclaimed it a district of the Cape Colony. After annexation the defence of Natal became the responsibility of the British troops.²⁶⁴ From 1879 volunteer units also assisted the British troops.²⁶⁵ The volunteer units, known as the Militia, were governed by rules similar to those found for the British armed forces at the time.²⁶⁶ When called on active service, members of the Militia could be sentenced by court martial for military offences.²⁶⁷ Punishments included fines, imprisonment with or without hard labour, reduction to lower grade or to the ranks or in the case of officers, to cashiering, dismissal, loss of seniority or a reprimand.²⁶⁸

From the above it is clear that although the Cape started out with a Dutch military system, which would include a Dutch military law system, with the invasion of Britain the system was changed to an English system. The same can be said for Natal. The system in the two Boer Republics did however differ.

2.5.2.3 The Zuid-Afrikaansche Republiek

The ZAR also made use of the commando system for their defence force.²⁶⁹ The commandos seem to have been governed by the Thirty Three Articles issued by the "Adjunct Raad" in Potchefstroom in 1844. This piece of legislation vaguely

²⁶⁴ Nöthling at 8.

²⁶⁵ Boyden *et al* at 67.

²⁶⁶ See as example Act no 36 of 1903 "To Create a Militia Force" in *Statutes of Natal: Supplement 1900-1906*.

²⁶⁷ Section 48 of Act 36 of 1903 provides that any member on active service who is found guilty of disobeying orders or conduct to the prejudice of good order and discipline may be tried and sentenced by the Commanding Officer of the accused's Corps, an ordinary court martial or a special court martial.

²⁶⁸ Section 50 of Act no 36 of 1903.

²⁶⁹ Tylden at 17.

addressed disciplinary issues but did not make provision for a structured military law or procedure of military courts (presumably a function undertaken by the Council of War). “Traditional” military offences such as absence without leave are not addressed at all. Offences that are mentioned are treason or attempted treason, knowledge of treason and not reporting it, perjury, assault, defamation, murder, theft and refusal to perform military service.²⁷⁰ Each article also provided for a specific punishment, ranging from a fine, imprisonment or banishment from the Republic. In those instances where the Thirty Three Articles did not make provision for an offence, the laws of Holland would be applicable.²⁷¹

Military service in the commandos was compulsory for all males between the ages of 16 and 60.²⁷² In any instance where one of the officers in command refused to muster the military force under his command, while under orders of the authorities to do so, he was liable to pay a fine or could be sentenced to imprisonment.²⁷³

Officers in the commando were elected by vote and were appointed at first for an indefinite period of time. With changes made to the constitution in 1889, the officers’ appointments became coupled to a period of service of between three and ten years, depending on the rank held.

²⁷⁰ Articles 9 to 23 of the Thirty Three Articles in *Instructions for the Commandants: Also the Thirty-Three Articles, Being General Regulations Relating to the Law Courts, with Four Appendices* (1879).

²⁷¹ Article 31 of the Thirty Three Articles. Appendix no 1 stipulated which laws of Holland would apply in these instances.

²⁷² Nöthling at 9; art 2 of the Instructions in *Instructions for the Commandants*; art 95 of the Grondwet van de Zuid-Afrikaansche Republiek in Ameshoff H A D *De Locale Wetten der Zuid-Afrikaansche Republiek 1888-1889* (1893) at 186.

²⁷³ Nöthling at 9; art 8 of the Thirty Three Articles (De Drie en Dertig Artikelen, Zijnde Algemeene Betalingen en Wetten voor de Teregtzittingen) in Eybers G W *Select Constitutional Documents Illustrating South African History 1795-1910* (1918) at 351.

The field cornets and assistant field cornets were responsible for the maintenance of order and the execution of all sentences issued by the Council of War.²⁷⁴

The Commandant-General could convene the Council of War in the event of any charges being preferred against an officer or any men regarding a transgression or offence for which a provision was made in terms of the law.²⁷⁵ The senior officer of this Council sat as chairman and in the event of a fine being imposed, Article 17 determined that the Commandant-General had to inform the Magistrate of the district who then had to take steps to recover the fine from the accused.

Apart from the commandos, the Republic also started an artillery corps as its permanent force. The mounted artillery was governed by Act no 2 of 1889. This legislation gave the military court as well as the civil courts jurisdiction over members of the artillery and police. The offences were listed in Schedule A of the Act.²⁷⁶ The Act also provided for three types of military courts, namely the “dagelijksch ochtenrapport”²⁷⁷, the “strafrapport”²⁷⁸ and the “krijgsraad”²⁷⁹. The following sentences could be imposed:

²⁷⁴ See art 104 and 105(a) of the Constitution of the ZAR of 1858 in Eybers at 386.

²⁷⁵ Article 13 of the Instructions in *Instructions for the Commandants*; art 112 of the Constitution of the ZAR 1858 in Eybers at 389.

²⁷⁶ Section 2 of Act no 2 of 1889. Offences listed in Schedule A were, inter alia, mutiny, sedition, use of violence or threatening language towards a superior officer, desertion, refusal to do duty, abandoning a weapon in the face of the enemy, drunkenness and absence without leave. For a complete list see Ameshoff at 86-87.

²⁷⁷ Section 5 of Act 2 of 1889. This tribunal consisted of one officer or non-commissioned officer who investigated lesser offences and punished summarily.

²⁷⁸ Section 6 of Act 2 of 1889. This tribunal consisted of the Commandant of the Corps. He had the jurisdiction to investigate more serious offences and also handled all appeals from the “dagelijksch ochtenrapport.”

²⁷⁹ Section 7 of Act 2 of 1889. This Court-martial consisted of three officers from the artillery and police with the Commandant-General presiding. In more serious cases the accused was also allowed to have legal representation.

The “dagelijksch ochtenrapport” could sentence all officers, non-commissioned officers and soldiers to:

- A reprimand;²⁸⁰
- Fine to a maximum of two pounds;²⁸¹
- Camp arrest until ordered otherwise;²⁸²
- “Arrestkamer” to a maximum of 30 days;²⁸³
- Hard labour to a maximum of 30 days;²⁸⁴
- Locked in a block to a maximum period of six hours;²⁸⁵
- Canon punishment to a maximum period of four hours.²⁸⁶

The “strafrapport” could sentence all officers, non-commissioned officers and soldiers to:

- Camp arrest;
- “Arrestkamer” for a maximum period of two months;
- A fine to a maximum of five pounds;
- Hard labour to a maximum of six months;
- Locked in a block for a maximum period of 12 hours;

²⁸⁰ A reprimand could not be given in the presence of a subordinate and was not to be given in any manner that infringed on the accused’s dignity (see s 9 of Act 2 of 1889).

²⁸¹ Fines were deducted from the accused’s salary and paid over to the State.

²⁸² When sentenced to camp arrest the accused was not allowed to leave the camp outside of duty hours.

²⁸³ This punishment can be compared to the modern punishment of confinement to barracks. The accused was confined to a specific room. The sentence could be aggravated by limiting the accused’s food to every second day on which he would only receive a ration of bread and water. He would also not be allowed any tobacco or matches and his salary would be reduced or forfeited for the duration of his sentence.

²⁸⁴ Where sentenced to hard labour by the “dagelijksch ochtenrapport” or “strafrapport” the accused would complete the punishment in his camp. He would not be allowed to leave the camp and would also receive his food there. Where sentenced to hard labour by the Court-martial he would be handed over to the civil authorities to complete his sentence with civilian prisoners sentenced to hard labour.

²⁸⁵ This punishment consisted of locking one or both feet of the accused in a block. This punishment was not to be executed in public and was reserved for those instances where the accused was not a first offender and all other punishments did not have the desired effect.

²⁸⁶ The accused had to sit on a canon for a specified time without his feet touching the ground.

- Reduction to a lower rank.

The Court-martial had the jurisdiction to impose all the above sentences as well as the death penalty. The death penalty could be executed either by means of hanging²⁸⁷ or being shot²⁸⁸.

2.5.2.4 The Republic of the Orange Free State

As was the situation in the ZAR, the Republic of the Orange Free State adopted the commando system as the core of its military force.²⁸⁹ The commander in chief was a Commandant-General appointed from the ranks of the commandos. In times of war he received his orders from the State President. The position was not utilised in times of peace.

All male citizens between the ages of 16 and 60 were compelled to serve in the commando and in 1854 the first Commando Act was published.²⁹⁰

By 1864 the government had founded a mounted artillery and by 1880 the artillery comprised of an adjutant, lieutenant, a sergeant, a teacher, a chapel master and about 12 artillerists.²⁹¹

By 1899 it became clear that there would be a war between the Boer Republics and the English and by September 1899 between 56 and 65 percent of all males

²⁸⁷ If sentenced to death by hanging, the accused was handed over to the civil authorities for execution as if he had been sentenced by the civil court.

²⁸⁸ If sentenced to death by firing squad, the sentence had to be executed within 24 hours after the accused had been informed of the sentence at a place and in the manner as determined by the court martial.

²⁸⁹ Nöthling at 10; Tylden at 17.

²⁹⁰ Van der Merwe P R *Die Militêre Geskiedenis van die Oranje Vrystaat, 1910-1920* (1986) at 6.

²⁹¹ Van der Merwe at 6.

between the ages of 16 and 60 were called up.²⁹² Unlike the British Forces, no formal form of military law governing the discipline of these forces existed. The rules of discipline that did exist at the time were those based on normal acceptable behaviour. The Commando Act did make provision for offences that could be committed in times of war. These offences consisted of treason, sedition, assisting the enemy or any other offence in a similar vein.²⁹³ No mention is made of purely disciplinary offences as it was understood in the military environment. However, a lack of discipline was a problem faced by the Boer commanders.²⁹⁴ They did enforce discipline, but because of the temperament of the Boers this was difficult to achieve.²⁹⁵ A Council of War (“*Krygsraad*”) operated in every commando for the purpose of maintaining order and discipline and consisted of the President, the Commandants and the field cornets.²⁹⁶ These courts had the same authority in sentencing as the civil courts. Appeal to the civil court was limited to those instances where sentences were imposed of more than one month imprisonment, with or without hard labour or fines exceeding 20 pounds. They had the authority to impose the death penalty, provided that the Council of War consisted of more than 12 members, with at least two-thirds concurring. The execution only took place with approval of the President.²⁹⁷

According to Pretorius²⁹⁸ one of the biggest disciplinary problems was absence without leave. Some of the commando members became tired of living in the Commando and returned home without leave, usually returning to the

²⁹² Pretorius F *Die Anglo-Boereoorlog 1899-1902* (1998) at 42.

²⁹³ See s 55 of De Krijgs-en Commandowet of 1854 in *Wetboek van den Oranjevrijstaat 1891* at 286.

²⁹⁴ Van der Merwe at 7-8.

²⁹⁵ Pretorius at 44. According to the author, General Christiaan de Wet declared that no such thing as true discipline existed amongst the commandos. “*Ek will nie te kenne gee dat die burgers onwillig of onregeerbaar was nie. Ek bedoel maar net dat hulle so ongewoond daaraan was om onder iemand se bevel te staan, dat dit vir my ‘n reuse taak was om alles na wense te reël.*”

²⁹⁶ Van Der Merwe at 7; s 54 of De Krijgs-en Commandowet of 1854.

²⁹⁷ Section 56 of De Krijgs-en Commandowet of 1854.

²⁹⁸ Pretorius at 44

Commando after a brief period of time. However, the commanders did not leave a breach of discipline unpunished. Pretorius²⁹⁹ gives some examples. Where a person shot a buck against the orders of the officers, he was punished by having to walk around the laager for hours with a saddle on his head. His weapon and ammunition would be tied to the saddle and he would be teased by his comrades. Another form of punishment was that the offender had to get onto the bloody skin of a recently slaughtered cow. Slits were cut into the sides so that his comrades' hands could get a good grip, after which he would be thrown into the air time and again until his comrades felt that he had had enough.

2.5.3 The Anglo-Boer War (1899-1902)

The Anglo-Boer war was important from a military law perspective for two reasons, namely for the important role the military courts played in the Cape Colony regarding the prosecution of the rebels as well as providing a possible explanation for the adoption of an almost exclusive British military law code when unification took place in 1910.

In 1899 the functioning of the military court, and its procedures and sentences were placed under the spotlight. Probably one of the most important reasons for this being the fact was that for the first time military courts were being used to prosecute civilians.³⁰⁰

²⁹⁹ Pretorius at 44.

³⁰⁰ Snyman J H *Rebelle-Verhoor in Kaapland Gedurende die Tweede-Vryheidsoorlog met Spesiale Verwysing na die Militêre Howe, 1899-1902* (1960) at 108. The reason for the application of martial law in 1899 and again in 1901 was to prevent the rise of rebels supporting the cause of the Boer Republics. In his discussion, Snyman refers to the distinction between military courts, in this context meaning those courts run by military authorities to try civilian rebels and courts-martial, being those courts authorised to try uniform members for disciplinary offences. However, it is clear from the discussion that there was no distinction between these two courts regarding their functioning and sentencing. It is therefore insightful to see how the military courts of Imperial Britain functioned during this period of time.

Prior to the implementation of martial law, Lord Carnarvon issued guidelines to be used by the military courts.³⁰¹ The guidelines determined that all military courts should be convened by the commanding officer of the district falling under martial law or another officer delegated by such commanding officer. The court had to consist of at least three members. The president of the court martial had to keep complete record of the proceedings and contain at least the name, age, sex and occupation of the accused, the charges brought against him or her, important aspects of the defence as well as the decision reached by the court. This record then had to be signed and forwarded to the officer who had convened the court martial. The convening officer then had to confirm the sentence or change it and in turn forward all court records to the commander-in-chief, who forwarded it to the Advocate-General in London.³⁰²

All accused had to be afforded a reasonable opportunity to prepare for their defence, all witnesses to be sworn in and all hearsay evidence had to be excluded.³⁰³

Guidelines were also furnished regarding the sentencing of offenders. The death penalty could only be given where two-thirds of the court martial agreed. The maximum period of imprisonment was only for the duration of martial law. Corporal punishment was permissible but no more than 50 lashes. It was also determined that the court, in determining sentence, should be guided by the circumstances of each case and should not be overly strict.³⁰⁴

³⁰¹ Snyman at 8. Although martial law only became operative in 1899, these guidelines for the military courts had already been issued in 1867.

³⁰² Snyman at 9.

³⁰³ Snyman at 9.

³⁰⁴ Snyman at 9.

Because of the severe objection from various quarters regarding the prosecution of civilians by military courts, further instructions were issued to the military in order to address certain concerns raised.³⁰⁵

It was determined that before any prosecution was instituted against an individual, the officer concerned with the administration of martial law or a magistrate, first had to do a preliminary investigation.³⁰⁶ Where no *prima facie* case existed against an accused, he had to be released immediately. In all instances where the civilian court was still functioning, matters normally falling within its jurisdiction were to be referred to them for trial. In all instances where regulations of martial law were contravened, the matter had to be referred to the military court.³⁰⁷ Where possible, a magistrate had to be one of the members presiding over the court martial.³⁰⁸

All procedures to be followed were the same as those followed in courts martial, except that all the evidence for the defence was to be recorded in full. According to these newer instructions the death penalty could only be imposed in those cases where all the members of the military court were in agreement. The sentence would then have to be confirmed by the commander-in-chief before being carried out. All sentences imposed by the military courts had to be executed within the borders of the district where martial law applied.³⁰⁹ In those

³⁰⁵ Snyman at 19. These further regulations were issued on 7 December 1899. The opinion was held that where the military courts operated against civilians when the civilian courts were still fully functional, all findings and sentences would be illegal. Legislation would then have to be issued in order to validate the sentences imposed by the military courts. This was done in terms of the Indemnity and Special Tribunals Act of 1900, also known as the Treason Act. See also Boyden *et al* at 78 for a short discussion on Lord Kitchener's attempt to standardise the administration of martial law.

³⁰⁶ The practice of completing a preliminary investigation before deciding whether to institute prosecution against an accused is still followed in the modern military law system.

³⁰⁷ A certain amount of criticism was levelled against these regulations since the type of offences referred to were vague. Lord Kitchener attempted to address this by defining the offences. Some of these offences were treason, incitement to commit treason, assisting the enemy and joining the enemy's army (see Snyman at 25).

³⁰⁸ Snyman at 21.

³⁰⁹ Snyman at 21.

instances where the civilian courts were not operational, the military courts were authorised to prosecute lesser offences with the provision that the maximum sentence was a fine of no more than ten pounds or imprisonment of no more than 30 days.³¹⁰

The sentencing jurisdiction of the military courts regarding the prosecution of civilians was the same as that in terms of the Army Act³¹¹ applicable to British soldiers, with the addition of a fine. The court was also authorised to sentence an accused to removal from the proclaimed district. Where an accused was sentenced to a fine, the court also had to impose an alternative sentence of imprisonment. Where the accused could not pay the fine, authority was granted to attach his moveable property and use the proceeds for payment of the fine.³¹²

Because of further pressure applied by the civilian community, provision was made for the trial of alleged rebels by a special court brought into existence for this purpose. A decision was made that all instances of treason and other political offences were to be tried by the special courts. At least two members of the court had to be judges of the High Court of the Cape Colony and the third member had to be a judge, advocate or lawyer with at least ten years experience.³¹³

An important aspect is that the Treason Act determined that for the period that the special courts were in existence, no other court, including military courts had the authority to try offences falling within the jurisdiction of the special courts. These special courts only had jurisdiction over offences committed prior to 12 April 1901 after which rebels had to be tried by civilian courts. The special courts were authorised to try the ringleaders of the rebels and the rest were to be

³¹⁰ Snyman at 26.

³¹¹ Army Act of 1881.

³¹² Snyman at 26.

³¹³ Snyman at 38.

referred to the military courts. The military courts therefore would try the less serious of the offenders. In spite of the legislation, an army order was issued by Lord Kitchener authorising military courts to continue with the trial of civilians suspected of treason, an offence within the jurisdiction of the special courts.³¹⁴

The order authorised any commanding officer to convene a military court without a warrant. It specified that these military courts were instituted to try those individuals not subject to the Army Act and it also stated that the military court was to be conducted in the same manner as the courts martial. The power of these courts was unlimited in the sense that their sentencing jurisdiction was unlimited. Snyman quotes the Army Order in this regard where it stated that “they have the power to sentence a convicted offender to death for any offence, in accordance with the custom of war.”³¹⁵ The death penalty was prescribed, inter alia, for offences such as assassination, plundering, treason and spying.

In spite of the earlier determination that the rebels were to be referred to the civilian courts subsequent to 12 April 1901, the rebellion in the Cape became so serious that all matters were referred to the military court for a speedy trial. On 22 April 1901 a notice was published in the Cape of Good Hope Government Gazette³¹⁶ that any British subject and all persons living in the Cape Colony who took up arms against the Imperial government, or who incited such behaviour, would be subject to immediate arrest and trial by military court. On conviction such person would be subject to “the severest penalties of the law.”³¹⁷

Shortly afterwards a pamphlet was issued regarding the administration of the military courts and they were given unlimited jurisdiction, subject only to the discretion of the members of the military court, to sentence any accused found

³¹⁴ Snyman at 50 where he discusses Army Order no 1 dated 19 November 1900.

³¹⁵ Snyman at 50.

³¹⁶ GG No 384 of 1901.

³¹⁷ Snyman at 77.

guilty of those offences seen as detrimental to the civilized manner of conducting a war, such as assassination.³¹⁸ As with the previous occasion, the courts were authorised to also impose fines, in which case an alternative of imprisonment had to be imposed, as well as removal of the individual from the district.³¹⁹

Unfortunately the military courts were guilty of various malpractices. The military courts did not always follow the regulations issued to them. There is some evidence that at various trials no record was kept of the trial, which of course begs the question how the sentences could be confirmed by higher authority without the record of the proceedings.³²⁰ Rebels were found guilty on evidence that did not prove their guilt beyond reasonable doubt and the courts imposed severe sentences, often sentencing the accused to death. One of the more serious malpractices was certainly the execution of rebels in public.³²¹

Another measure employed by the military courts as a deterrent was that the sentence was not made known to the convicted person directly after conviction. He was only informed of his sentence once it had been confirmed by higher authority. The sentence would then be read out to the convicted person in public where other civilians were compelled to attend the sentencing procedure.³²² It is therefore understandable that the general public feelings towards the military courts were negative.³²³

³¹⁸ Snyman at 78.

³¹⁹ For a detailed discussion on the procedures to be followed by the military courts see Snyman at 79.

³²⁰ Snyman at 102.

³²¹ Snyman at 93. The British parliament was against any public execution but they were assured by Lord Stanley that the public execution was something that had happened only once (this was not true) and had been "due to the necessity which in the opinion of the military authorities existed for showing that the sentences inflicted by the Courts-Martial were really carried out."

³²² Snyman at 99. This was in line with the prevailing practice in all British military courts that no sentence was made known to the accused prior to confirmation.

³²³ Snyman contends that the military courts did not bother with justice as long as they could satisfy the authorities. This is a feeling that remains prevalent to this day regarding military courts.

The British parliament was also not satisfied with the “justice” dispensed by the military courts and they convened a Commission of Inquiry to investigate the trials done by the courts. Many sentences were set aside.³²⁴

This brings an end to one of the most notorious chapters in the history of the military courts in South Africa. The result was a negative feeling towards military courts and the end of the Anglo-Boer war started a new chapter in this history. As will be seen, the Anglo-Boer war played an important part in the difficulties experienced with establishing a Union Defence Force and may also have been a contributing factor to why, in spite of various military forces existing in South Africa at the time, the British military law system was followed.

2.5.4 The South African Military between 1903 and 1910

The end of the Anglo-Boer war and the signing of the peace accord in 1902 brought an end to the traditional defence structures of the two Boer Republics. It also meant an end to the commando system as it was known at the time. Imperial troops were stationed in all four provinces of South Africa. These imperial garrisons resorted under British command and were stationed in Pretoria. The aim of these troops was to stop any possible rebellions subsequent to the end of the war.³²⁵

As a colony of the British Empire, the defence of South Africa was the responsibility of Britain prior to 1910. Consequently they handled all military matters including those of a disciplinary nature. This was the responsibility of the

³²⁴ Snyman at 113. Of the 724 cases investigated by the Commission of Inquiry, 119 rebels were released. The maximum sentence that remained was imprisonment of a period of five years.

³²⁵ Nöthling at 12; Grimbeek C L *Die Totstandkoming van die Unieverdedigingsmag met Spesifieke Verwysing na die Verdedigingswette van 1912 en 1922* (1985) at 1.

Imperial British Command, established to co-ordinate the protection of the British Empire.³²⁶

Due to its various commitments regarding its colonies and the expense associated with keeping a standing army in a colony, it became difficult for Britain to remain solely responsible for the defence of South Africa. Apart from the imperial forces in South Africa, each colony had its own military force, independent from the other. These military forces were mainly made up of volunteer forces. Eventually this enabled a reduction of the Imperial garrisons in South Africa. However, the Orange Free State did not have a volunteer force.³²⁷ With time it became clear that the colonies had to start working together to ensure an effective defence against uprisings within the borders of South Africa. This need influenced the London Colonial Conference held in 1907 where the matter was discussed. It was recommended that better relations between British and colonial military forces should be effected and imperial military uniformity was emphasised.³²⁸

A subsequent conference was held in Durban in 1908 where the differences between the various military forces regarding training, discipline and organisation, amongst others, were discussed. A decision was reached that in

³²⁶ Oosthuizen at 223.

³²⁷ Nöthling at 13; Department of Defence *Conference on South African Forces Held at Durban on 19th October, 1908, and following days* (1908) at 5. Grimbeek at 6 argues that the reason for the Free State not having a volunteer force was due to the fact that the changes in the military systems of the colonies resulted in the Afrikaners being apathetic towards the defence of the country and especially in the Free State, some people were negative towards a system of volunteers (see van der Merwe at 15). The farmers on the Eastern border were issued with weapons and ammunition by the government, but it was only for their own protection and that of their livestock.

³²⁸ Nöthling at 13. At that stage none of the four colonies were dependent on the other and that also resulted in difficulty in working together (see Grimbeek at 7). In a confidential memorandum Lord Methuen argued the need for a unified defence force. According to him the British officers were there to help the colonial officers to affect such a defence force. He stated that there was no longer a division between the British officers and the colonial offices. Such a defence force would, of course, operate within the general framework of the Imperial defence strategy (see Grimbeek at 18).

future the various forces would make use of the same names and divisions, thereby being more uniform.³²⁹ The Committee also discussed the need for a uniform discipline approach.³³⁰ The disciplinary procedure differed in each colony and it was foreseen that some difficulty may be experienced in the event of combined deployments. It was suggested that a combined force should have uniform offences and punishments. This decision must also be seen against the background of the foreseen unification of the colonies and was aimed at restructuring the military forces to save time and money once unification took place.³³¹

Various recommendations were made by the conferences, all of which show a clear British influence. It was even recommended that the British manuals in use at the time be taken over by the Union Defence Force, thereby consolidating the British influence.³³² Various British officers and citizens were involved in formulating the new defence legislation for the Union Defence Force. H.M.R. Bourne, the later Secretary of Defence, oversaw the writing of the Defence Bill. Lord Methuen also had a large influence on the writing of the Defence Bill.³³³

The problem areas identified regarding the various military forces in South Africa were maintenance, training and discipline.³³⁴ In trying to structure a defence force they investigated the military forces of various countries. They investigated the Swiss, Australian and Norwegian defence structures.³³⁵ On

³²⁹ Grimbeek at 20; Nöthling at 13; *Conference on South African Forces* at 3.

³³⁰ *Conference on South African Forces* at 8.

³³¹ Nöthling at 14.

³³² Grimbeek at 24-29.

³³³ Grimbeek at 42, 71 and 106 where he mentions that Smuts only sent copies of the Defence Bill to presidents Steyn and Beyers after finalisation of the Bill. See Nöthling at 14 where he discusses those parties involved. From this it is clear that mainly British officers were involved. The Dutch law as would have applied to the former Boer Republics was not considered.

³³⁴ Grimbeek at 67 and 72 where he discusses the concern raised regarding the lack of discipline amongst the colonies' military forces. The lack of discipline was apparently very clear during the Anglo-Boer war. The opinion was held that discipline could only be addressed by rigorous training during compulsory military service.

³³⁵ Grimbeek at 42-48.

various levels these different models influenced the Union Defence Force, but with regard to discipline, offences and punishments, they followed the British model.³³⁶

Grimbeek³³⁷ discusses two further reasons why the Union Defence Force had such a strong British influence:

1. Due to the requirements for unity between the colonies, South Africa did not immediately have the same urgency in starting a unified defence force as Britain envisioned. Britain felt that a unified defence force was very important for South Africa. As a result Lord Methuen, as commander of the imperial forces, was the driving force behind starting a Union Defence Force.
2. At the time of initiating steps towards a unified defence force, so soon after the Anglo-Boer war, the British and the Boers did not trust each other. This resulted in the Afrikaners feeling negative towards the implementation of the Defence Bill which they felt had been written by the British. They had made little or no contribution towards the writing of the Defence Bill, in turn resulting in a mainly British approach towards the Bill.

Chapter VII of the Defence Bill made provision for offences and punishments that could be implemented. Two Acts were used in compiling this chapter, the Army

³³⁶ Nöthling at 15. Grimbeek at 105 mentioned that one of the objections against the proposed Defence Bill was that the structure of the defence force was based too much on a European model, not taking the situation in South Africa into consideration. The Transvaal Commando Act, the Artillery Act and the Freestate Act were not considered.

³³⁷ Grimbeek in the preface.

Act of Britain and Ireland and the Defence Act of the Cape of Good Hope.³³⁸ With regard to the Army Act the necessary amendments and changes would be made from time to time by means of regulations issued by the Governor-General. Only certain sections of Act 25 of 1898, which would be determined by ordinance at a later stage, would be applicable to the Defence Bill.³³⁹

The Bill made provision for various offences, such as fraud concerning the insurance of horses, unlawfully selling property of the defence force, inciting another to neglect his duties, and giving of false information, to mention a few.³⁴⁰ The punishment proposed was a maximum fine of 100 pounds or one year imprisonment, with or without hard labour. The offender's salary could also be withheld, either in part or as a whole.

With the establishment of the Union, the South African authorities started taking over more and more responsibilities in this regard and in 1921 the Imperial British Command was finally closed down.³⁴¹ The Zuid Afrika Verdedigingswet³⁴² came into operation on 13 June 1912, replacing the British Army Act of 1881.³⁴³ Unlike its British counterpart, there was no requirement of annual renewal of the South African Defence legislation.

As was the situation in Britain, a distinction was made between the navy and the rest of the defence force. The Union Navy was still seen as a part of the British

³³⁸ Act 25 of 1898. Sections 94 and 123 of the Defence Bill, incorporating these two pieces of legislation were published in an extraordinary GG of 30 November 1911, Notice no 1970 of 1911.

³³⁹ Grimbeek at 100.

³⁴⁰ Grimbeek at 100.

³⁴¹ Oosthuizen at 223.

³⁴² Act 13 of 1912.

³⁴³ Section 95 of Act 13 of 1912 however provides that the British Army Act of 1881 would still continue to apply regarding disciplinary matters, which included offences and punishments.

Navy³⁴⁴ and until 1957 a different code of military discipline applied to members of the Navy.³⁴⁵

The 1912 Defence Act remained in force until the promulgation of a new Defence Act³⁴⁶ on 10 June 1957, which determined that there would be a uniform Military Discipline Code, applicable to all arms of service, including the Navy.³⁴⁷ According to Oosthuizen³⁴⁸ the aim of the Defence Act of 1957 was to give the South African military law an independent direction. However, the British military traditions regarding offences and trials remained.

Until South Africa became a Republic in 1961, the British monarch was the supreme commander of the Union Defence Forces. Subsequently, this position was taken over by the State President and he became the commander-in-chief of the South African Defence Force.

2.5.4.1 South African military law in terms of the British Army Act of 1881

Until 1912, when the Union of South Africa promulgated the Defence Act of 1912, the British Army Act of 1881 was applied to all matters of the armed forces since

³⁴⁴ Section 22 of Act 13 of 1912 provides that “[i]n pursuance of the Colonial Naval Defence Acts, 1865 and 1909 (Great Britain and Ireland) and with the approval of His Majesty-in-Council...the Governor-General may ... raise a body of volunteers to be entered on the terms of being bound to general service in the Royal Navy in emergency. That body of volunteers shall form part of the Royal Naval Reserve constituted under the Naval Forces Act, 1903 (Great Britain and Ireland),...”

³⁴⁵ In 1931 the question was raised whether members of the Union Navy fell under the jurisdiction of the Union Forces Discipline Code or remained under the jurisdiction of the British Naval Discipline Code. A legal opinion given on 26 November 1931 stated that “[m]embers of the S.A.N.S. are, notwithstanding the provisions of sections 95 and 96 of Act 13 of 1912, subject under section 22 of that Act to all the enactments and regulations in force for the discipline of the Royal Navy and are not subject to the Military Discipline of the land forces (see Law Advisors *Royal Discipline (Dominion Naval Force) Act 1911 and Union Naval Code: Legal Position of the South African Naval Forces* (1931)).”

³⁴⁶ Defence Act 44 of 1957.

³⁴⁷ Oosthuizen at 223.

³⁴⁸ Oosthuizen at 224.

South Africa was a British Colony under British rule.³⁴⁹ The Army Act was only in force for one year at a time and had to be put in force annually by an Act of British Parliament.

In terms of the Defence Act (Amendment) and Dominion Forces Act³⁵⁰ which amended the Defence Act³⁵¹ the set of rules governing the discipline of the Union Defence Force became known as the Military Discipline Code (known today as the MDC).³⁵²

Part I of the Army Act of 1881 set out the crimes and punishments in terms of military law.³⁵³ The more serious offences could be divided into two categories: (1) offences in relation to the enemy punishable with death³⁵⁴ and (2) offences in relation to the enemy not punishable with death.³⁵⁵ Although death was a

³⁴⁹ For these purposes Part I concerning discipline and Part V concerning the application of military law are of relevance (see Morrison at 5). Section 175 of the Army Act, 1881 provides that all officers, non-commissioned officers and men “belonging to a force raised in a colony to which this Act is, in whole or in part, applied by the law of the colony, at such times and subject to such adaptations, modifications and exceptions as made be specified in such law” will be subject to the military law (see s 177 of the Army Act, 1881). The situation did not change in 1912. Section 95 of Act 13 of 1912 determined that the British Army Act would remain applicable. Section 3 of the Defence Act (Amendment) and Dominion Forces Act 32 of 1932 repealed s 95, but s 2 of Act 32 of 1932 determined that, in effect, the law as applicable at the time of the amendment would remain in force. In effect the British Army Act of 1881 still applied to the Union Defence Force despite various subsequent Union Defence Acts. Section 2 provided that: “(1) Those provisions of the Army Act, 1881 (44 and 45 Vict. C. 58) of the United Kingdom as amended from time to time up to the commencement of this Act, and the rules of procedure made under section *seventy* thereof, as adapted and modified under section *ninety-five* of the principal Act, which by virtue of section *ninety-five* of the principal Act, comprise, at the commencement of this Act, the Union Military Discipline Code, shall, ...subject to the provisions of sub-section (3) of this section, continue to apply in relation to the Defence Forces of the Union and to all members thereof...” In terms of sub-section (3) the navy was specifically excluded from the application of this Union Military Discipline Code (See van der Westhuizen H at 18).

³⁵⁰ Act 32 of 1932.

³⁵¹ Act 13 of 1912.

³⁵² Oosthuizen at 223; s 2 of Act 21 of 1932.

³⁵³ Morrison at 31-40.

³⁵⁴ See s 4 of the Army Act, 1881. These offences are similar to those punishable in our current MDC as contraventions of ss 4 and 5 MDC.

³⁵⁵ Section 5 of the Army Act, 1881.

possible punishment, provision was made for lesser sentences.³⁵⁶ What is also clear is that certain offences were seen as more serious if committed while on active service than at other times, which consequently allowed for more severe punishments.³⁵⁷

Apart from the military offences, military courts had the jurisdiction to try any civil offence, committed by a member of the armed forces, except murder, treason, rape or culpable homicide committed within the borders of the United Kingdom or within the dominions.³⁵⁸ The exception to this rule, where the military court would have jurisdiction, was where the offence was committed while on active service, or the place of the offence was more than one hundred miles, measured in a straight line, from any city or town in which the offender could be tried by a civil court. This did not, however, take away the jurisdiction of civil courts over members of the armed service for military offences.³⁵⁹

A list or scale of punishments was given in section 44 of the Act.³⁶⁰ The following punishments were possible:

In the case of officers:

- death,³⁶¹
- penal servitude;³⁶²

³⁵⁶ Section 44 sets out the various options regarding punishment (see Command of the Army Council *Manual of Military Law* 7 ed (1929) at 28-30).

³⁵⁷ Section 6 of the Army Act, 1881. This is similar to our current situation where certain offences such as desertion is punished more severely during time of service (see also *Manual of Military Law* (1929) at 15).

³⁵⁸ Section 41 of the Army Act, 1881.

³⁵⁹ Section 41A of the Army Act, 1881.

³⁶⁰ *Manual of Military Law* (1929) at 28.

³⁶¹ The death penalty consisted of hanging in the case of civil offences and shooting for military offences (see Furse A D *Tabular Précis of Military Law* (1896) Table XXIV; Pratt at 191-192).

³⁶² The minimum period of penal servitude was set at three years. Sentences were to commence on the day on which the President of the Court-martial signed the proceedings. Where an officer was sentenced to penal servitude, that sentence had to be coupled to a sentence of cashiering.

- imprisonment;³⁶³
- cashiering;
- dismissal;
- forfeiture in the prescribed manner of seniority in rank, either in the army or the corps to which the offender belonged, or both; or where the officer's promotion was dependent on length of service, forfeiture of all or any part of his service for the purposes of promotion;³⁶⁴
- severe reprimand or reprimand;³⁶⁵
- stoppages.³⁶⁶

In the case of soldiers:

- death;
- penal servitude;
- imprisonment;
- detention for a term not exceeding two years;³⁶⁷

A non-commissioned officer had to be sentenced to reduction to the ranks. All soldiers sentenced to penal servitude were also discharged (see Furse Table XXIV; Pratt at 192).

³⁶³ Imprisonment could be imposed with or without hard labour. Where an officer was sentenced to imprisonment, the officer also had to be cashiered. Where a non-commissioned officer was sentenced to imprisonment he also had to be reduced to the ranks. A Regimental court martial could impose a period of a maximum of 42 days and the General court martial, etc, a maximum period of two years. Where the accused had already been sentenced to imprisonment previously, the new sentence of imprisonment had to run concurrently. Where the accused was sentenced to imprisonment for a purely disciplinary offence but was not discharged with ignominy, he was committed to a military prison. Where sentenced for the contravention of certain other offences or discharged with ignominy, the accused was committed to a civil prison (see Furse Table XXIV; Pratt at 192-195; Cox W F *Guide to the Preparation of Cases for District Courts-Martial and the Conduct of the Proceedings* 3 ed (1918) at 87).

³⁶⁴ An officer could not be sentenced to a reduction to a lower rank, only to forfeiture of seniority of rank, either in the Army or in his regiment (see Pratt at 191). The officer could also be sentenced to the forfeiture of any medal and decorations, except for the Victoria Cross or any other Order of which the king was the donor.

³⁶⁵ A reprimand could consist of a public, severe reprimand issued in General Orders or on parade or a private reprimand in front of one or two officers (see Furse Table XXX).

³⁶⁶ Defined by Furse Table XXXVI as "such deductions from the ordinary pay of a Soldier, awarded by a [Court-martial] or [commanding officer], or a Secretary of State, to make good any expenses, loss, damage, or destruction, as will leave to the Soldier, after paying for his Messing and Washing, not less than 1d. a day..." Stoppages were not seen as a punishment but as compensation for losses incurred by the Crown (see Pratt at 198-200).

³⁶⁷ The punishment of detention was introduced in 1906. The aim of this punishment was to prevent soldiers convicted of disciplinary offences and who were not discharged with ignominy,

- discharge with ignominy;³⁶⁸
- in the case of a non-commissioned officer, reduction to the ranks or to a lower grade, or forfeiture, in the prescribed manner, of seniority of rank;³⁶⁹
- in the case of a non-commissioned officer, severe reprimand or reprimand;³⁷⁰
- forfeitures, fines and stoppages;³⁷¹ and
- field punishment not exceeding three months.³⁷²

Every offence mentioned in the Army Act had a prescribed maximum punishment.³⁷³ This means that the Court generally had a discretion to award any lesser punishment provided by section 44 of the Army Act. The maximum punishment would only be given in those instances where the offence was of such a nature, or the criminal record of the offender justified the maximum punishment.

from the stigma attached to imprisonment (*Manual of Military Law* (1929) at 29). Imprisonment was subsequently no longer seen as an appropriate punishment for disciplinary offences.

³⁶⁸ This sentence could be imposed on soldiers sentenced to penal servitude or imprisonment. It was a compulsory sentence where the accused was regarded as a persistent offender or the offence contained an element of disgrace (see Pratt at 195).

³⁶⁹ Reduction to a lower rank or to the ranks could be combined with any other sentence (see Furse Table XXX; Pratt at 195-196).

³⁷⁰ A non-commissioned officer could only be sentenced to a reprimand by his commanding officer and not by court-martial. A soldier could not be sentenced to a reprimand (see Furse Table XXX).

³⁷¹ Forfeitures could include the forfeiture of all or part of his past service towards pension, all or part of deferred pay already earned, all or any of his good conduct badges or any medals or decorations along with any annuities or gratuities attached to such medal or decorations (see Pratt at 196-198). Fines were limited only in terms of the ordinary criminal law of England (see Pratt at 198).

³⁷² Pratt at 200-201.

³⁷³ *Manual of Military Law* (1929) at 28-29. There are two exceptions. In the case where an officer was found guilty of scandalous behaviour, the prescribed punishment was cashiering and in the case of murder, the prescribed punishment was death.

Section 44 of the Army Act also allowed for more than one punishment to be imposed in combination.³⁷⁴ In the case of an officer sentenced to penal servitude or imprisonment, the officer also had to be cashiered.³⁷⁵ Where a non-commissioned officer was sentenced to penal servitude or imprisonment, he would automatically be reduced to the ranks.

Certain provisions were also coupled to these punishments. Of interest, *inter alia*, is the fact that the Army Council could restore all or part of the lost seniority of rank of an officer for good and faithful service, or for any other reason that may in the opinion of the Council warrant restoration of the seniority.³⁷⁶

Where on active service, a soldier could be sentenced to field punishment³⁷⁷ as prescribed from time to time. This field punishment could include personal restraint or any labour or employment which the soldier would be subjected to during a term of imprisonment, as long as the field punishment did not pose any threat to the life or limb of the accused.³⁷⁸

The commanding officer was authorised to decide whether to continue with charges brought against the accused. He decided whether to dismiss the charge, refer the matter for court-martial or summarily try the offender.³⁷⁹ He had

³⁷⁴ *Manual of Military Law* (1929) at 29 mentions examples. Where a soldier was sentenced to reduction of rank, for example, he could also be sentenced to a reprimand. Only one sentence was imposed but it could include more than one punishment (see Cox at 87).

³⁷⁵ In this instance the court had no discretion and had to combine these two sentences.

³⁷⁶ Section 44(2A) of the Army Act 1881.

³⁷⁷ In terms of s 44(5) of the Army Act, 1881, this did not include flogging or attachment to a fixed object. Furse Table XXX refers to two types of field imprisonment. Field imprisonment no 1 meant that the prisoner was kept in irons, handcuffs ropes, allowing him to be secured to prevent his escape. In this case he could be attached to a fixed object for a maximum period not exceeding two hours per day, three out of four consecutive days or more than 21 days. Field imprisonment no 2 meant the prisoner was kept in irons or ropes but not attached to a fixed object. Field punishment could only be imposed on a private on active service when imprisonment was not an option, for the offences of aggravated drunkenness, disgraceful conduct or offences punishable by death or penal servitude (see Pratt at 200-201).

³⁷⁸ See s 44 of the Army Act 1881 for the various court orders to be made by the court-martial.

³⁷⁹ Section 46 of the Army Act 1881.

jurisdiction over soldiers³⁸⁰ to deal with the case summarily and had the following sentencing jurisdiction:

- detention for a period not exceeding 28 days;
- in the case of drunkenness, a fine not exceeding two pounds, in addition to any other punishment;
- in addition to any other punishment, deduction of pay;
- in the case of a soldier not of non-commissioned rank, while on active service, field punishment not exceeding a period of 28 days, forfeiture of pay for a period commencing on the day of sentencing and not exceeding 28 days; and
- in addition to any other punishment, award any minor punishment that he was authorised to award, except where detention for a period exceeding seven days was awarded.³⁸¹

It was also possible to bring officers below the rank of lieutenant colonel and warrant officers to appear for trial by summary trial.³⁸² The presiding officer had to be of the rank of general officer or brigadier, authorised to convene a general court martial, or any officer not below the rank of major general, appointed for the purpose by the Army Council. As in the case of summary trials of non-commissioned officers, the authority had the power to dismiss the charges, with or without hearing evidence, or he could decide to proceed with the charges, either by means of court martial or summary trial. His sentencing jurisdiction was limited to:

In the case of an officer:

³⁸⁰ Read as non-commissioned members of the armed service below the rank of warrant officer.

³⁸¹ Minor punishments in this context included, *inter alia*, confinement to barracks for a period not exceeding 21 days, extra guard duties or an admonition.

³⁸² Section 47 of the Army Act 1881.

- forfeiture of seniority of rank, either in the army or the corps to which the offender belonged, or in both, or reduction in seniority in rank;
- severe reprimand or reprimand;
- any deduction authorised by the Act to be made from his pay.

In the case of a warrant officer:

- forfeiture in the prescribed manner of seniority in rank;
- severe reprimand or reprimand;
- any deduction authorised by the Act to be made from his ordinary pay.

A distinction can be made between two types of courts martial, the general court martial and the district court martial. The general court martial was convened by the King or an officer deriving authority from the King to convene the general court martial.³⁸³ The court consisted of no less than five officers, four of whom could not be of the rank below that of a captain. They were authorised to impose the death penalty, but only after two-thirds of the presiding officers concurred.

The district court-martial was convened by an officer authorised to convene general courts martial or an officer deriving authority to convene a district court martial from an officer authorised to convene general courts-martial. The court consisted of no less than three officers who had held their commission for at least two years. Its jurisdiction did not extend to officers in the armed forces and punishment jurisdiction was further limited. The district court martial could not impose the death penalty, nor imprisonment of a period exceeding two years.

A third instance can also be identified. Where the offence was committed outside the borders of the United Kingdom (or South Africa), or where the body of troops were on active service, a field general court-martial could be convened

³⁸³ Section 48 of the Army Act 1881.

where it was important, in the opinion of the commander of those forces, that a court martial be convened and that it would not be practicable to convene a general court martial.³⁸⁴ This court martial had the jurisdiction to try any member subject to the Act, for any offence prescribed in the Act. It further had the jurisdiction to impose any sentence that a general court-martial was authorised to impose. This field general court martial consisted of at least three officers, but where that was not possible, the sentencing jurisdiction of such court was restricted to field punishment as provided for by the Act or imprisonment for a period not exceeding two years. The death penalty imposed by a field general court martial could only be executed when all the members of the court martial were in agreement.

Specific mention is also made of a sentence of imprisonment and detention.³⁸⁵ Where imprisonment was given as a sentence by a military court, the accused would either complete his sentence in a military prison, detention barracks, in other military custody, in civil prison or partly in the one and partly in the other. Where a sentence of detention was given, the accused would complete his sentence in the detention barracks or in other military custody, but not in a prison.

The King authorised certain officers to convene courts martial by means of a Royal Warrant in order to try persons who were subject to military law.³⁸⁶ Such authorised officers had to hold the rank of field officer of higher, but in exceptional circumstances the King could authorise another officer, not below the rank of captain, to convene such a court martial. The same officer could also be appointed as confirming authority of the finding and sentence of the general court martial.³⁸⁷

³⁸⁴ Section 49 of the Army Act 1881.

³⁸⁵ Section 63 of the Army Act 1881.

³⁸⁶ Section 122 of the Army Act 1881.

³⁸⁷ The same principle was applied in the subsequent South African legislation.

In turn, any officer authorised to convene a general court martial was authorised to convene a district court martial. Such an officer could also authorise another officer under his command, of the rank not below that of captain, to convene such a district court martial.³⁸⁸ He was also authorised to confirm any subsequent finding and sentence by the district court martial.

The rules of evidence applied in the military courts were the same as those rules of evidence followed in the British civil courts.³⁸⁹

Provision was made for the establishment of military prisons and detention barracks.³⁹⁰ Military prisons were governed by rules made by the Secretary of State in terms of the Army Act. These rules had to provide for the management and regulations concerning these prisons. The Act prohibited the use of corporal punishment in military prisons and further provided that any imprisonment or detention in these facilities could not be harsher than it would be in a civilian prison.

The Army Act also addressed the question on the jurisdiction of the military courts. Military courts retained jurisdiction over an individual where a military offence was committed by a person while being subject to military law, even after such individual ceased to be subject to military law. The armed forces retained jurisdiction for a period of three months after he had ceased to be subject, which

³⁸⁸ Section 123 of the Army Act 1881.

³⁸⁹ Section 127 of the Army Act 1881.

³⁹⁰ Section 132 of the Army Act 1881. For a short discussion on the provost prison see Furse at Note 3.

means that the trial had to be completed within a period of three months after he had ceased being subject to military law.³⁹¹

Military courts also lost their jurisdiction to try military offences where those offences had been committed three years or more prior to the date of the trial.³⁹²

Prosecution and punishment of a member of the armed forces by court martial did not bar prosecution by the civilian courts. The Army Act did however make provision that the civilian court was bound to take any sentence imposed by the military court into consideration when imposing a sentence.³⁹³ Where a member had been convicted by a competent civilian court for an offence however, the military court could not try such a member for that offence in terms of military law.

2.5.4.2 South African military law in terms of the Defence Act 13 of 1912

Chapter VII of the South Africa Defence Act 13 of 1912 applied to matters of “discipline, offences and legal procedure”. As mentioned earlier, section 95 determined that the British Army Act (1881) would still apply to disciplinary matters in the Union Defence Force, and although section 95 was subsequently repealed by Act 32 of 1932, section 2 of the said Act determined that the law applicable up to the date of the amendment Act would remain applicable.³⁹⁴

³⁹¹ Section 158 of the Army Act 1881. An exception would be where a member had committed the offence of mutiny, fraudulent enlistment or desertion, in which case the jurisdiction of the court did not prescribe.

³⁹² Section 161 of the Army Act 1881. The offences of mutiny, desertion and fraudulent enlistment being the exception. However, where a soldier had rendered three years exemplary service, he would not be tried for desertion (unless on active service) or fraudulent enlistment committed prior to the commencement of three years. Where the soldier committed fraudulent enlistment, he would however lose recognition of any service rendered prior to the enlistment. The forfeiture could be restored by a decision of the Army Council.

³⁹³ Section 162 of the Army Act 1881.

³⁹⁴ Tshivhase A E “Transformation of Military Courts” (2009) 24 *South African Public Law* 450 at 452. See also Defence Headquarters *Military Discipline Code, Regulations, and Orders and*

The magistrates' court and the superior court had jurisdiction over all members as well as all military offences in terms of the Military Code.³⁹⁵ Their sentencing jurisdiction was prescribed by the Act. The magistrates' court could impose a sentence of imprisonment with or without hard labour for a period not exceeding six months or a maximum fine of 50 pounds. The superior court was authorised to impose any sentence as prescribed by the Military Code for the relevant offence.³⁹⁶

The unique nature of the military court as well as the military offences were taken into consideration in that the Act provided that³⁹⁷

[i]n imposing any punishment for an offence under this Act or the Military Code the court shall take cognizance of the gravity of the offence in relation to its military bearing and have due regard to the maintenance in the Defence Forces of a proper standard of military discipline.

It was further stated that when a non-commissioned officer (NCO) was convicted by a civil court for an offence in terms of the Military Code, that NCO was liable to a further administrative action of reduction to the ranks, or being reduced in grade, in addition to any penalty imposed by the civil court.³⁹⁸

The Act provided for military courts in the form of a court martial and a trial by a commanding officer (which later became known as the summary trial) and their

Instructions (1935) at 54-195 for the complete Military Discipline Code "being the Army Act and Rules of Procedure as adopted and modified under the South Africa Defence Act, 1912."

³⁹⁵ Section 97(1) of Act 13 of 1912.

³⁹⁶ Section 97(1) of Act 13 of 1912.

³⁹⁷ Section 97(2) of Act 13 of 1912.

³⁹⁸ Section 97(3) of Act 13 of 1912. Reduction to the ranks means that his non-commissioned officer's rank was taken away and he had no rank. A reduction in grade would be the equivalent of a modern day reduction in seniority of rank. This situation no longer applies.

penal jurisdiction was limited to that prescribed by the Defence Act or the Military Code.³⁹⁹

Apart from those offences punishable in terms of the Military Code the Defence Act provided for certain special offences. These offences are similar to those provided for through the ages in the history of military law.⁴⁰⁰

Penalties for the contravention of the offences provided for in the Defence Act ranged from a fine not exceeding 100 pounds to, on default of payment of the fine, imprisonment with or without hard labour for a maximum period of one year, to imprisonment with or without the option of a fine.⁴⁰¹ For other offences in terms of the Act, punishment was a fine of a maximum of 25 pounds and or imprisonment of a maximum period of three months. The Defence Act further provided for the imposition of a period of detention in lieu of the fine or imprisonment.⁴⁰² Such detention had to be completed at any prescribed depot, training camp or station of the Defence Force for the purpose of undergoing training or exercises during the period of detention. Escaping from detention and failing to complete the training or exercises were seen as a further offence. If convicted the accused faced a possible sentence of imprisonment with or without hard labour for a maximum period of one month. What is of interest is that the Act determined that the period of detention did not have to be continuous and a limit was also placed on the duration of the detention.⁴⁰³

Where a member of the Defence Force was sentenced to a period of imprisonment or detention, including a sentence not exceeding 14 days, the

³⁹⁹ Section 98 of Act 13 of 1912.

⁴⁰⁰ See ss 100-108 for the various special offences.

⁴⁰¹ Section 109 for the contravention of ss 80, 91, 92 and 94. From the prescribed punishment it can be seen that these offences were seen as serious offences.

⁴⁰² In s 109(2) of Act 13 of 1912. This sentence seems to have been available only upon application to the prescribed authority.

⁴⁰³ Section 132 of the Army Act 1881.

imprisonment did not have to be executed in a civilian prison. The Governor-General was authorised by the Act to appoint any place in lieu of such prison or detention for the execution of the sentence.⁴⁰⁴

A commanding officer was authorised⁴⁰⁵ to sentence a member of the Defence Force found guilty of a Military Code offence to deduction of pay or stoppage of his allowances, as well as place him under deduction of pay or stop allowances to enable restitution to the public or his corps for any damages or loss suffered due to the his negligence of wrongful action.⁴⁰⁶ In the same instance, a magistrates' court and the superior court were also authorised to order a member of the Defence Force to pay restitution to the public or his corps in the event of damage or loss caused by his wrongful action or negligence.⁴⁰⁷

Offences in terms of the Defence Act were seen in a slightly more serious light than those offences prescribed in the Military Code. This can be seen from the penalties allowed. In cases where an accused was found guilty of the contravention of a section in the Defence Act, the maximum penalty possible by a court martial or commanding officer was five pounds and in the case of Military Code offences, the prescribed fine was one pound for those offences under the Code punishable by a fine.

The Defence Act of 1912 was subsequently amended by the Defence Act (Amendment) and Dominion Forces Act, Act no 32 of 1932. This Act, for the first

⁴⁰⁴ In terms of s 112 of Act 13 of 1912. No record was found during the course of the research where such a place was appointed.

⁴⁰⁵ In terms of s 113(1) of Act 13 of 1912.

⁴⁰⁶ The maximum amount allowed in this instance for members of the Coast Garrison Force or Active Citizen Force could not exceed any pay or allowance due to him in respect of one training year.

⁴⁰⁷ Section 113(2) of Act 13 of 1912.

time, referred to the Military Discipline Code which, with certain amendments remains applicable to this day.⁴⁰⁸

This led to the promulgation of the Defence Act 44 of 1957 on 1 November 1958, which, according to Oosthuizen⁴⁰⁹ was seen as a conscious effort by the legislature to return to the Roman-Dutch common law⁴¹⁰. The Defence Act started moving away from the British system and in 1957 the final severance was made by implementation of the Defence Act of 1957⁴¹¹

2.5.4.3 South African military law in terms of the Defence Act 44 of 1957

Discipline and military legal matters were governed by Chapter XI of the Defence Act of 1957. Similar to the 1912 Act, the Military Discipline Code consisted of the First Schedule to the Defence Act as well as the rules promulgated in terms of the Defence Act.⁴¹²

⁴⁰⁸ Section 2 of Act 32 of 1932. At this stage the MDC consisted of the provisions of the Army Act of 1881 of the United Kingdom, as amended there from time to time, up to the commencement of the 1932 Act as well as the Rules of Procedure in terms of the Act. The current MDC is similar in that it consists of the First Schedule of the Defence Act of 1957 as well as the Rules of Procedure in terms of the MDSMA.

⁴⁰⁹ Oosthuizen at 223.

⁴¹⁰ See also De Villiers E L K "Die Suid-Afrikaanse Militêre Regstelsel" (1974) 2 *Codicillus* 9 at 9. To what extent this held any real changes for military law is not clear. Seen against the background of what was happening at the time regarding a return to Roman Dutch law, one might adduce the following: Although Roman-Dutch law never disappeared during the time of colonisation, English law had a great influence on the South African legal system. From the 1920's there was a concerted effort to move away from the English law towards the Roman-Dutch law. For an insightful discussion see Van Zyl at 420–421. The development of Afrikaans law faculties, the abandonment of the appeal process to the Privy Council in England as well as the establishment of the South African Court of Appeal showed a clear application of Roman Dutch law. So although there was a shift of focus to Roman Dutch law, the South African law remained with English influences (see Van Zyl at 481-494). Comparing military law prior to the 1957 legislation and that of post 1957, there is no clear break between the "English" version and the new South African version in terms of so-called Roman-Dutch law. This is probably due to the fact that both the English military law as well as the Dutch military law has its roots in Roman law – as argued above- and that no fundamental difference exists.

⁴¹¹ Oosthuizen at 224.

⁴¹² Section 104 (1) of the Defence Act 44 of 1957.

The Defence Act of 1957 mentioned legal officers in the Defence Force for the first time.⁴¹³ It was also determined that the Defence Act would apply to all members of the Permanent Force as well as members of the Commandos, Citizen Force and the Reserve when on service or under training. Restricted sentence jurisdiction was given to military courts when sentencing members of the Reserve, Commandos and Citizen Force.⁴¹⁴

The Supreme Court and the magistrates' court were given jurisdiction over military offences, authorising the prescribed punishments, and specifically in the case of the magistrates' court, authorising a sentence of detention.⁴¹⁵ Corporal punishment was expressly excluded from possible punishment options.⁴¹⁶

In the event of a "military" prosecution by a civilian court, the Act required the civilian court to consider the seriousness of the offence within a military context when imposing a sentence and enjoined them to take cognisance of the necessity of maintaining military discipline within the military environment.

The civilian court was further authorised to reduce any non-commissioned officer to the ranks or reduce him to any lower rank.⁴¹⁷ The civilian court did not have similar powers of reduction of the rank of officers. Only the prescribed authority, being the Chief of the SADF or the Chief of the Arm of Service had that authority.

⁴¹³ Section 104(3) of Act 44 of 1957.

⁴¹⁴ Section 104(5)(b) of Act 44 of 1957. They were not subject to any other punishment than cashiering, dismissal from the SADF, discharge with ignominy, forfeiture of service or seniority of rank, reduction to the ranks or to a lower rank or grade, detention not extending past the duration of their service or training, fines, forfeitures and stoppages of pay, severe reprimand, reprimand, admonition, confinement to barracks or extra guards and pickets.

⁴¹⁵ Section 105(1) of Act 44 of 1957. The Supreme Court had inherent jurisdiction to impose any sentence but the Magistrate's court is a creature of statute and had therefore to be given jurisdiction to impose detention, a sentence not ordinarily within its sentencing jurisdiction (De Villiers at 9).

⁴¹⁶ It must be kept in mind that this legislation applied during a period when corporal punishment was an authorised form of punishment in civil court.

⁴¹⁷ Section 105(3) of Act 44 of 1957.

Section 107 of Act 44 of 1957 did not provide an accused the right to appeal any finding or sentence of a military court, although it did not derogate from the right to review by the Supreme Court of South Africa.

The Act itself, apart from those offences provided for in the MDC, also created a number of statutory offences punishable by a military court.⁴¹⁸ In general the punishments for the contravention of these sections varied⁴¹⁹ from fines to a maximum of 500 pounds or imprisonment to a maximum of five years to fines not exceeding 100 pounds or imprisonment not exceeding six months.

However, the part of the legislation mainly used for the determination of punishment within the military legal environment at that time was the First Schedule to the Defence Act (MDC). The MDC listed those offences that were applicable to members of the Defence Force who were subject to the Code.⁴²⁰ They varied in seriousness. Each section or offence had a prescribed punishment. These punishments, however, were not to be seen as the punishment that would necessarily be imposed by the court. The punishments as set out in each section of the MDC were mainly used as an indication of the seriousness of the offence.

A distinction was made between military disciplinary offences and military criminal offences. Military disciplinary offences were those offences considered of a less serious nature for which the prescribed punishment was imprisonment for a period not exceeding one year.⁴²¹ They were the offences in the MDC.

⁴¹⁸ See ss 110-126 of the Defence Act 44 of 1957.

⁴¹⁹ See s 127 of Act 44 of 1957.

⁴²⁰ Offences listed in sections 4-50 of the MDC (see De Villiers at 10).

⁴²¹ Offences such as drunkenness (s 33 of the MDC), absence without leave (s 14 of the MDC) and conduct to the prejudice of military discipline (s 46 of the MDC) are but a few of the examples.

These offences could be tried summarily by summary trials which had a limited sentencing jurisdiction.⁴²²

All offences with prescribed punishments exceeding one year were seen as the military criminal offences and fell within the jurisdiction of the court martial which had a higher sentencing jurisdiction.⁴²³

Military courts were also given the jurisdiction to try civil offences⁴²⁴ and could impose any punishment for those offences as long as it did not exceed its jurisdiction.

In terms of the Act the military judicial system allowed for three types of military courts:⁴²⁵ the summary trial, the general court martial and the ordinary court martial. As mentioned earlier, the summary trial, presided over by a commanding officer⁴²⁶, had a limited sentencing jurisdiction⁴²⁷.

⁴²² The sentencing jurisdiction of the summary trial was governed by s 62 of the MDC which determined that the punishments must include, in the case of a non-commissioned officer a fine not exceeding ten pounds; reversion of acting or temporary rank to his substantive rank; or a reprimand and in the case of privates, detention or field punishment for a period not exceeding 21 days; or to a fine not exceeding five pounds; or a reprimand.

⁴²³ These offences included, inter alia, the endangering of forces (s 4 of the MDC), theft of state property (s 20 of the MDC) and scandalous behaviour (s 32 of the MDC).

⁴²⁴ In terms of s 56 of the MDC but this did not include murder, rape, treason and culpable homicide committed within the borders of the Union. Military courts did, however, have jurisdiction over these capital offences if committed by SADF members outside the borders of the Union.

⁴²⁵ Section 1 of the MDC defines military courts as: "any court or officer deriving jurisdiction from this code or from an officer, to try persons charged with offences under this code and to impose punishment." See also De Villiers at 10-14 for a more comprehensive discussion on the jurisdiction of these courts. Tshivhase (2009) at 452 refers to six types of courts martial but the summary trials mentioned cannot be classified as courts martial and therefore there were two types of courts martial and the rest were the various levels of summary trials.

⁴²⁶ Section 62(3) of the MDC defines a commanding officer as "any officer under the command of a convening authority who has been empowered in writing by such convening authority to exercise all or any of the powers conferred upon a commanding officer by that sub-section, and includes any officer to whom powers have been delegated under sub-section (2) (see De Villiers at 10)".

⁴²⁷ Section 62(3) of the MDC.

The ordinary court martial had jurisdiction over all members subject to the MDC, excluding officers⁴²⁸, for any offence committed by such person, except a capital offence or the contravention of section 4 or section 5 of the MDC.⁴²⁹ Sentencing jurisdiction included any sentence which could be imposed in respect thereof by a general court martial, limiting the jurisdiction for imposing imprisonment to a maximum period of two years.⁴³⁰

The general court martial had jurisdiction over all members subject to the MDC for any offence, except treason, rape, murder and culpable homicide committed within the borders of the country.⁴³¹ Sentencing jurisdiction included any penalty as prescribed by section 91 of the MDC and in the case of civil offences, any penalty within the punitive jurisdiction of the court martial, which could be imposed in respect of that offence by the relevant civil court.⁴³²

Punishments provided for in the MDC⁴³³ were the following:

In the case of an officer:

- death;
- imprisonment;
- cashiering;
- dismissal from the SADF;
- reduction to any lower commissioned rank;
- reduction in seniority in rank;

⁴²⁸ Section 71 of the MDC; De Villiers at 12.

⁴²⁹ Section 4 of the MDC, being the endangering of the safety of forces and s 5 of the MDC being offences by a person in command of troops, vessels or aircraft, eg where such a commander fails to engage the enemy.

⁴³⁰ De Villiers at 10.

⁴³¹ Section 70 of the MDC; De Villiers at 14.

⁴³² De Villiers at 14.

⁴³³ See s 91(1) of the MDC. Section 91(2) of the MDC provides that each penalty listed is seen as less severe and less serious in consequences than that provided for in any preceding subparagraph (see De Villiers at 11-12).

- a fine not exceeding 200 pounds; or
- a reprimand.

In the case of a warrant officer or a non-commissioned officer:

- death;
- imprisonment;
- discharge with ignominy from the SADF;
- detention for a period not exceeding two years;
- reduction to any lower rank, to non-commissioned rank or to the ranks;
- discharge from the SADF;
- a fine not exceeding 50 pounds; or
- a reprimand.

In the case of private:

- death;
- imprisonment;
- discharge with ignominy from the SADF;
- detention for a period not exceeding two years;
- field punishment for a period not exceeding three months;
- discharge from the SADF;
- a fine not exceeding 25 pounds; or
- a reprimand.

It was further stated that, unlike a civilian court, the accused who was convicted of more than one offence listed on the same charge sheet, would only be given one sentence in respect of all charges.⁴³⁴ It was further determined that if the

⁴³⁴ Pretorius C J "Regspleging in die Suid-Afrikaanse Weermag" (1973) *De Rebus Procuratoriis* 317 at 319; s 92 of the MDC; De Villiers at 12. It was possible, in certain instances to combine sentences. In other instances it was compulsory to do so. For example where a non-

sentence was seen as a valid sentence for any one charge of which the accused had been convicted, it would be deemed valid in respect of all the charges on the charge sheet of which he had been convicted.⁴³⁵

Apart from fines and imprisonment as a punishment, all sentences imposed by the military court structure were of a uniquely military nature. These sentences could not be found in the civilian court structure. According to Pretorius⁴³⁶ this is due to the fact that the purpose of punishment in the SADF is to enforce discipline within the ranks.⁴³⁷

Sentences of a court-martial, however, could not be enforced before the convening authority confirmed the finding and sentence.⁴³⁸ Only acquittals were not subject to confirmation. Certain offences⁴³⁹ could only be confirmed by the Council of Review before implementation and such sentences were not subject to review by any other reviewing authority. There was no provision for appeal against finding and sentence of a court-martial.⁴⁴⁰

However, in those instances where the death penalty was imposed, such sentence had to be confirmed by the confirming authority, endorsed by the

commissioned officer was sentenced to detention he also had to be sentenced to reduction to the ranks. An officer sentenced to imprisonment also had to be sentenced to cashiering.

⁴³⁵ Pretorius at 319.

⁴³⁶ Pretorius at 318.

⁴³⁷ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) paras 21 and 23 where it was held that “military justice is concerned not so much with the prosecution of crime but with the maintenance of discipline.” See also Morrison at 3 where he argues that although punishment in military law is important “it would be a grave error to imagine that punishment is in itself the chief agent to be relied upon for promoting and maintaining discipline in the army. Discipline cannot be enforced solely by the fear of punishment, and no reliance can in reality be placed upon any system which is not founded upon the good relations existing between military superiors and their inferiors...”

⁴³⁸ Section 96 MDC.

⁴³⁹ Those sentences of cashiering, dismissal of officers from the SADF, discharge with ignominy of warrant officers and non-commissioned officers holding the substantive rank of sergeant or higher, or imprisonment for a period exceeding three months (see s 103 of the MDC).

⁴⁴⁰ De Villiers at 14.

Council of Review as being in accordance with real and substantive justice and then had to be approved by the Governor-General before execution.⁴⁴¹

With the confirmation or review of the finding of the court martial the confirming or reviewing authority could request the court martial to give written reasons for its finding.⁴⁴² The findings of the court-martial were reviewed at various levels, depending on the authority of the convening authority who convened the court martial.⁴⁴³ These powers of review were exercised in terms of the MDC and entailed, inter alia, the authority to endorse the sentence, set aside the sentence or vary the sentence.⁴⁴⁴ In those instances where the review was held on request of the accused, the review council could, at its discretion, increase any sentence given by the court martial.⁴⁴⁵ In those instances where the finding or sentence was confirmed, substituted or changed, it would be deemed to be the finding and sentence of the original court martial who passed the sentence.⁴⁴⁶

The fact that the General Officer Commanding of the SADF had the authority to mitigate, remit or commute any sentence imposed by the military court at his discretion raised serious questions regarding the independence of the military judicial system.⁴⁴⁷ The same question can be raised due to the fact that the person who convened the court-martial in the first place was also the person who had to confirm the findings and sentence of the court.

The Defence Act 44 of 1957 was amended numerous times, but the essence of its content remained the same. From time to time the amounts of the fines were amended but sentences had remained the same since 1958.

⁴⁴¹ Section 104 of the MDC.

⁴⁴² Section 108 of the MDC.

⁴⁴³ See ss 108, 109 and 110 of the MDC.

⁴⁴⁴ Section 115 of the MDC.

⁴⁴⁵ Section 115(4) of the MDC.

⁴⁴⁶ Section 116 of the MDC.

⁴⁴⁷ Section 117 of the MDC; De Villiers 15. A discussion on this question follows in ch 5 below.

With the advent of the Interim Constitution as well as the Constitution of 1996, it became clear that changes had to be made to the defence legislation and specifically the military law environment. Unfortunately the Defence Force did not seem to be in any hurry to make the necessary changes and it was only after a decision by the Cape Town High Court⁴⁴⁸ that compelled the Defence Force to comply with the Constitution that the necessary changes were made to the military justice system.

A moratorium was placed on courts martial, pending new legislation and on 28 May 1999 the MDSMA⁴⁴⁹ came into operation. The 1957 Defence Act was amended and the Rules in terms of the MDSMA were published in the *Government Gazette*⁴⁵⁰ on the 11th of June 1999. The 1957 Defence Act was subsequently replaced by the 2002 Defence Act.⁴⁵¹ Further changes are envisaged in the near future⁴⁵².

Military discipline was enforced through unique punishments by superiors and later by military tribunals throughout the military's history. This is also true in the history of the South African military. Those parts of the Colony under British rule or exposed to the British military show the most similarities to British military law at the time. The only influence of note brought by the Dutch system was the formation of the commando system and its incorporation into the military at that time. The influence of the Boer Republics on the Union Defence Force was negligible.

⁴⁴⁸ *Freedom of Expression Institute v President Ordinary Court Martial* 1999 (4) SA 471 (C); Tshivhase (2009) at 453. The matter subsequently served before the Constitutional Court in *President of the Ordinary Court Martial v Freedom of Expression Institute* 1999 (4) SA 682 (CC) who declined to confirm the order of invalidity because at that time the impugned provisions of the MDC and the Defence Act had been repealed and replaced by the MDSMA and any order of confirmation would be of no effect (see Tshivhase (2009) at 454).

⁴⁴⁹ Act 16 of 1999.

⁴⁵⁰ GG no 20165.

⁴⁵¹ Act 42 of 2002.

⁴⁵² The draft Military Discipline Bill is scheduled to be tabled before parliament during 2011.

For many years after unionisation the British Army Act of 1881 played a critical role in the development of military punishments and courts martial trial procedures. The 1912 and 1957 defence legislation showed little independent development. A perusal of the punishments shows that sentencing in the military remained stagnant.⁴⁵³

The Roman military influences are clear, however, contrary to Oosthuizen's contention,⁴⁵⁴ it would appear as if the South African military law has developed from the English law as it evolved from and was influenced by Roman military law.

⁴⁵³ The discussion on current military punishments in ch 6 below confirms that in essence not much has changed regarding military punishments since the 1881 Army Act.

⁴⁵⁴ Oosthuizen at 212; ch 2 above.

SUMMARY: MILITARY PUNISHMENTS THROUGH THE AGES

It would seem, in perusing the brief history of the development of military law that some offences and punishments have remained strikingly similar or at least have retained some similarities in the punishment. The following list of the various punishments from Roman times until the Defence Act of 1957 serves as an illustration of these similarities.

Roman punishments.

- Deprivation of pay;
- reduction in rank;
- disgrace, which included a dishonourable discharge;
- corporal punishment;
- death;
- reduction to slavery
- mutilations and various forms of torture;
- the imposition of various extra duties; and
- decimation.

Punishment in the Middle Ages

- Forfeiture of goods;
- death;
- decimation;
- confinement, including on bread and water;

- placement in shackles; and
- riding the wooden horse.

British Military punishments

- Confinement to barracks;
- incarceration in solitary cells;
- extra guard duties;
- forced marches;
- punishment drills;
- fines;
- death;
- penal servitude;
- reduction to the ranks;
- riding the wooden horse;
- losing a hand; and
- being tarred and feathered.

Punishment applicable in the Cape Colony from 1652 until the Anglo-Boer War

- Being keelhauled;
- lashes with a whip or butt of a musket;
- hard labour;
- being bound in chains;
- standing guard with six muskets;
- branding;
- being bound to a pole;
- fines;
- having a hole burnt through the tongue with a hot iron;

- death; and
- running the gauntlet.

Punishment applicable in Natal until the Anglo-Boer War

- Fines;
- imprisonment with or without hard labour;
- reduction to a lower grade or reduction to the ranks;
- cashiering of officers;
- dismissal;
- loss of seniority; and
- reprimand.

Punishment applicable in the ZAR until the Anglo-Boer War

- Fine;
- imprisonment;
- banishment from the Republic;
- reprimand;
- camp arrest;
- hard labour;
- being locked in a block;
- canon punishment;
- death; and
- reduction to a lower rank.

Punishment applicable in the Orange Free State until the Anglo-Boer War

- The Council of War could impose any punishment that the civilian courts could impose.

Punishment during the Anglo-Boer War

- Death
- imprisonment
- corporal punishment
- fines; and
- removal for the district.

Punishment applicable during the period of 1903-1910

- Fines
- imprisonment with or without hard labour;
- withholding of the accused's salary;
- cashiering of officers;
- dismissal of officers;
- forfeiture of seniority of rank of officers;
- discharge with ignominy of other ranks;
- detention to a maximum of two years;
- stoppages;
- reduction in rank, reduction to the ranks or reduction of seniority of ranks for other ranks than officers;
- reprimand or severe reprimand; and
- field punishment for soldiers.

Punishment applicable during the Defence Act 13 of 1912

- Fines;
- imprisonment with or without hard labour;
- imprisonment with or without the option of a fine;
- detention;
- deduction of pay; and
- stoppages of allowances.

Punishment applicable during the Defence Act 44 of 1957

- Death;
- imprisonment;
- cashiering for officers;
- dismissal from the SADF for officers;
- discharge with ignominy for other ranks;
- detention for a period to a maximum period of two years;
- reduction to any lower rank;
- reduction to the ranks;
- discharge from the SADF;
- fines;
- reprimand; and
- field punishment to a maximum period of 3 months.

CHAPTER 3

MILITARY COURTS: THEIR JURISDICTION AND PROCEDURES

3.1 Background

Looking at the historical development of the South African military justice system it is clear that the court procedures, offences and punishments have remained all but static for a number of years.¹ Due to significant transformational changes in the SANDF² and domestic legislation, especially in accordance with the Constitution, it became clear that the military justice system did not comply with certain constitutional imperatives.³

Change was long overdue when the Military Discipline Supplementary Measures Act (MDSMA)⁴ came into operation, creating a fundamentally different military court system.⁵ A clean break was made from the past in order to bring the South African military justice system in line with the Constitution.⁶ With the replacement of *ad hoc* military courts, presided over by Presidents, with permanent courts

¹ See in this regard ch 2 above at paras 2.5.4.1-2.5.4.3.

² The SANDF has changed from an offensive force to a defensive force and there has been a large scale integration of previous non-statutory forces members such as MK and APLA and the former SADF to create a new SANDF. The defensive mandate of the SANDF is stated in s 200(2) of the Constitution (“The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force”); s 201(2) (the President may authorise the employment of the SANDF, inter alia in “defence of the Republic”); Woolman S C *et al* “Security Services” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 23B-44.

³ See *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C); Vashakmadze M *Understanding Military Justice* (2010) 10.

⁴ Act 16 of 1999.

⁵ See in this regard Tshivhase A E “Military Courts in a Democratic South Africa: An Assessment of their Independence” (2006) 6 *New Zealand Armed Forces Law Review* 96 at 98; Tshivhase A E “Transformation of Military Courts” (2009) 24 *South African Public Law* 450 at 453-454.

⁶ See *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 31. The clean break, however, only pertained to the military courts and their procedures. Sentencing options remain static, except for some minor changes to the maximum amount of the fine that may be imposed.

presided over by military judges, came questions on the constitutionality, impartiality and independence of the courts. However, before a determination can be made about these concerns, it is necessary to understand the composition and the procedures of the different military courts.

The new military courts⁷ established by the MDSMA are the Court of Military Appeal (CMA),⁸ the Court of a Senior Military Judge (CSMJ),⁹ the Court of a Military Judge (CMJ)¹⁰ and the Commanding Officer's Disciplinary Hearing (CODH).¹¹

Apart from establishing a new court structure in order to maintain military discipline, the object of the MDSMA is to provide for the proper administration of military justice and the maintenance of military discipline and ensuring that the accused receives a fair trial and has access to the High Court of South Africa.¹² The military justice system operates in terms of a different system than that of the civilian justice system because they serve different purposes. Whereas the aim and purpose of the civilian system is to punish offenders for the crimes that they have committed, the main aim of the military justice system is to enforce discipline.¹³

⁷ Section 1 of the MDSMA defines a military court as “[a]ny one of the following courts and the disciplinary hearing referred to in section 6.” Section 6 of the MDSMA names these courts. See also in this regard Stoop B C “Defence” in *Law of South Africa: Vol 7 (LAWSA)* 2 ed (2004) para 397; Carnelley M “The South African Military Court System – Independent, Impartial and Constitutional?” (2005) 33(2) *Scientia Militaria* 55 at 59. The MDSMA not only defines the different courts but also regulate the pre-trial, trial and post-trial procedures (see Berne R A & Doha H N S A (eds) *Military Justice Legislation Model: Republic of South Africa: Military Discipline Supplementary Measures Act, 1999* (2010) at 10).

⁸ Sections 7-8 of the MDSMA; *LAWSA* paras 398-399.

⁹ Section 9 of the MDSMA; *LAWSA* para 400.

¹⁰ Section 10 of the MDSMA; *LAWSA* para 401.

¹¹ Section 11 of the MDSMA; *LAWSA* para 402.

¹² Section 2 of the MDSMA.

¹³ See *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) paras 4, 10, 23 and 38; *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) at 492; Vashakmadze at 10; Morris L J *Military Justice: A Guide to the Issues* (2010) at 3; Ministerial Task Team *Report by the Ministerial Task Team on Transformation of Military Legal System* (2005) at 32; *R v Généraux* [1992] 1 SCR 259 (the “purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military....To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and

A system of military justice can be said to have two purposes:

- a. “[T]o ensure the discipline of its members in a just manner.” In this sense military law is seen as the backbone of military discipline in the armed forces.¹⁴
- b. “[T]o provide an instrument of management.”¹⁵ It assists the military in acting against offenders, enabling prompt action. In this sense, according to Anderson, military law promotes organisational goals¹⁶.

Although the military justice system is a separate system from the civilian environment, it should not be so different that it does not comply with acceptable standards of law as practiced in the civilian courts.¹⁷ The military justice system can, to a large extent, be seen as a merging of military traditions and the criminal procedure followed in the civilian courts.¹⁸ The procedures followed during a

efficiently. Breaches of military discipline must be dealt with speedily and frequently, punished more severely than would be the case if a civilian engaged in such conduct. There is thus a need for separate tribunals to enforce special disciplinary standards in the military”).

¹⁴ Anderson G C *The Legal Classification of Military Tribunals as Courts of Law* (1988) at 98; *O’Callahan v Parker* 395 US 258 (1969). Discipline within the military environment is very important and strict. The Constitution provides in s 200(1) that the “defence force must be structured and managed as a disciplined military force”. According to *LAWSA* para 394 the main purpose of military discipline is to maintain the “operational efficiency of the national defence force” (see also Carnelley at 56; *Vashakmadze* at 10; ch 1 at para 1.6.2). Consequently punishment may be harsh to ensure discipline (see *R v Davids* 1983 (2) SA 807 (SR) at 808; *Woolman et al* at 23B-47; *Minister of Defence v Potsane*; *Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 39.

¹⁵ Anderson at 98.

¹⁶ Anderson at 99; *Vashakmadze* at 10. The ability of the military court to take immediate action enables the restoration of discipline.

¹⁷ See *Vashakmadze* at 21 where the author says that the “military and ordinary civilian systems of justice should apply comparable standards with respect to training, judicial independence and career prospects. The military justice system should not be completely isolated from its civilian counterpart.”

¹⁸ For a short discussion on the ceremonial aspects and military court traditions see Anderson at 104.

military trial are similar to those in civilian trials.¹⁹ However, where any other law is in conflict with the MDSMA, not including the Constitution, the MDSMA will prevail.²⁰

Military courts must act in conformity with the Constitution.²¹ Subsequently the military courts have to comply with fair trial guarantees and international standards as found in the Constitution. The military justice system was challenged inter alia on two important aspects, being (1) the constitutionality of the courts martial system²² and (2) the existence of the military prosecution counsel.²³

The *Freedom of Expression Institute*²⁴ and *Potsane*²⁵ cases compelled the courts to consider the status of the military courts within the wider judiciary. Determining the status of the military courts is important since they are authorised to sentence an accused, which may include a deprivation of freedom. The judicial authority to sentence an individual vests in the courts.²⁶ Terblanche defines “sentencing” as “the action by a formal criminal court of imposing a sentence on a convicted offender.”²⁷ Consequently, to legitimately impose a

¹⁹ Rules 18 and 20 of the MDSMA. See also s 84 of the MDC (“[t]he rules of evidence as applied by the civil courts of the Republic shall be followed in and by military courts...”); s 21 of the MDSMA (enjoining prosecution and defence counsel to “act in conformity with the provisions of this Act and, in relation to the examination, cross-examination and re-examination of witnesses, the practice of the civilian courts in the Republic” should be followed). However, the criminal procedure followed in the civilian courts cannot be used to supplement the powers of the military courts where the defence legislation does not provide for those specific powers (see in this regard r 21 of the MDSMA).

²⁰ Section 4 of the MDSMA. Berne & Doha at 10 postulates that s 4 of the MDSMA interferes with the implementation of civilian legislation in our military courts.

²¹ Section 2 of the Constitution confirms its supremacy. All laws are subject to the Constitution and the Bill of Rights (see Tshivhase (2009) at 454-455).

²² See *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C).

²³ See *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC); Tshivhase (2009) at 461. This aspect falls outside the scope of the current research but for a brief discussion in this regard see Woolman *et al* at 23B-47 to 23B-48.

²⁴ *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C).

²⁵ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

²⁶ Section 165 of the Constitution.

²⁷ Terblanche *S S A Guide to Sentencing in South Africa* (2007) at 2.

sentence on an accused, the court should be regarded as a “criminal” court which has the authority to convict an accused for an offence.²⁸

Military sentences, being unique, are discussed below according to the following framework:

1. The status of the military courts.
2. General principles regarding military punishments.
3. Prescribed military punishments.

3.2 Military courts

3.2.1 Introduction

Each military court has its own penal jurisdiction, depending on the status of the court. There are two courts of the first instance, the CSMJ and the CMJ, as well as a disciplinary forum, the CODH. Their penal jurisdiction is determined by the MDSMA.²⁹ From these courts matters are referred for appeal and review to the CMA. Therefore it is prudent to have a short overview of the various courts' procedures before discussing their status as courts of law.³⁰

3.2.2 The Court of Military Appeal

The CMA is the highest military court and its judgments are binding on all lower military courts.³¹ Unlike the High Courts of South Africa the CMA does not have inherent jurisdiction and its jurisdiction is set out in the legislation.³²

²⁸ See *De Lange v Smuts* 1998 (1) SA 736 (CC) at 740-741.

²⁹ Sections 11-12 of the MDSMA.

³⁰ See ch 4 below.

³¹ Section 6(3) of the MDSMA; Tshivhase (2006) at 108.

The members of the court are appointed by the Minister³³ and consist of three to five members, depending on the offence.³⁴ The Minister may establish more than one CMA³⁵ and the court can sit any place inside or outside the borders of the RSA.³⁶ This court therefore only operates on an *ad hoc* basis. This creates two potential constitutional concerns regarding the independence of the court:

1. Being appointed on an *ad hoc* basis may have implications regarding the requirement that judges must have security of tenure to be seen as independent.³⁷
2. The appointment of the judges by the Minister of Defence is possibly contrary to the procedure that should be followed in the appointment of judges in terms of the Constitution.³⁸

In the case of serious offences such as treason, murder, rape or culpable homicide committed outside the borders of the RSA, or a contravention of sections 4 or 5 of the MDC, the CMA is composed of five judges, an appropriately qualified officer of the permanent force with a law degree and a

³² Section 6(2) of the MDSMA.

³³ Section 7(1) of the MDSMA. The relevant minister referred is the Minister of Defence and Military Veterans.

³⁴ In the case of serious offences such as treason, murder, rape or culpable homicide committed outside the borders of the RSA, or a contravention of ss 4 or 5 of the MDC, the CMA is composed of five judges, an appropriately qualified officer of the permanent force with an appropriate law degree and a person qualified with experience as a commander (see also s 7(1)(a) of the MDSMA). In all other instances the court will consist of three judges and the appropriate officers as mentioned (see s 7(1)(b) of the MDSMA; *LAWSA* para 398; Carnelley at 59; Tshivhase (2006) at 108). An appropriately qualified officer refers to an officer who has completed and passed a departmental course in military law (see s 1 of the MDSMA; Tshivhase (2009) at 456).

³⁵ Section 7(2) of the MDSMA. The Adjutant General must then determine which cases or classes of cases must be heard by which courts.

³⁶ Section 7(4) of the MDSMA. Unlike the civilian courts, military courts are not bound by area regarding their jurisdiction.

³⁷ *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 23; *Findlay v The United Kingdom* (1997) 24 EHRR 221 para 72; *R v Valente* (1985) 24 DLR (4th) 161 (SCC).

³⁸ For a discussion of these concerns, see ch 4 at para 4.2.1.5 *Selection and appointment* below.

person qualified with experience as a commander in the field.³⁹ In all other instances the court consists of three members.⁴⁰ A five-member military appeal court is chaired by an incumbent or retired High Court judge and a three-member military appeal court by an incumbent or retired High Court judge or magistrate with at least ten years' continuous experience.⁴¹

Cases heard by the CSMJ and CMJ will serve before the CMA in one of three instances:

1. Where the accused was sentenced to imprisonment, suspended imprisonment, cashiering, discharge with ignominy and dismissal or discharge from the SANDF.⁴²
2. When the Director: Military Judicial Reviews refers a case to the Court of Military Appeal.⁴³
3. When the offender applies for review to the CMA.⁴⁴

The CMA has full appeal and review competencies regarding any case tried by a military court.⁴⁵

³⁹ See also s 7(1)(a) of the MDSMA.

⁴⁰ See s 7(1)(b) of the MDSMA; *LAWSA* para 398; Carnelley at 59; Tshivhase (2006) at 108.

⁴¹ Sections 7(1)(a)(i) and 7(1)(b)(i) of the MDSMA. The Minister may also appoint an alternative chairperson.

⁴² Sections 7(1)(a) (i)-(iii) and 34(2) of the MDSMA read with rr 71(1) and (3)(a) of the MDSMA.

⁴³ Section 34(3) of the MDSMA read with rr 71(4) and 73 of the MDSMA.

⁴⁴ Section 34(5) of the MDSMA read with rr 71(3)(b) and 72 of the MDSMA. The offender may apply for review by the CMA within six months of his conviction. The CMA may allow late submission of the application if good cause is shown, but may not allow the review if the late application is done later than two years after conviction (see further ch 7 at para 7.4.6 below).

⁴⁵ Section 8(1) of the MDSMA; *LAWSA* para 399; Carnelley at 73-74 (the powers of the CMA is in line with s 35(3)(o) of the Constitutional requirement of an accused's right to appeal and review); ch 7 at para 7.4.8 below.

3.2.3 The Court of a Senior Military Judge

The CSMJ is the highest military court of first instance and consists of an officer of at least the rank of Colonel,⁴⁶ with a minimum of five years experience as a practicing advocate or attorney or five years experience in the administration of criminal or military justice.⁴⁷

The CSMJ has the jurisdiction to try any person, irrespective of their rank, who is subject to the MDC for any offence, except murder, rape, treason or culpable homicide committed within the borders of the RSA. Upon conviction the court may impose any sentence referred to in section 12 of the MDSMA.⁴⁸ Where serious offences are tried, the CSMJ will consist of three judges under the presidency of the most senior of the judges.⁴⁹

The court also consists of two military assessors.⁵⁰ Assessors are appointed by the Director: Military Judges or a military judge authorised by the Director.⁵¹ Where military assessors are appointed, they will start their duty after the plea of

⁴⁶ Or Navy equivalent of captain. See also LAWSA para 400.

⁴⁷ Section 9(1) of the MDSMA. The person must also be assigned by the Minister to act as a senior judge (see s 14(1)(b) of the MDSMA). Section 13(1)(2) of the MDSMA provides that all military judges must hold an appropriate degree in law. According to *the Personnel Management Code (PMC): Department of Defence Occupational Category: Military Law Practitioner (MLP) PMC Code: 00911 (2007)* para 9(c) an appropriate degree in law refers to an LLB or BProc degree.

⁴⁸ Section 9(2) of the MDSMA. There is no limitation on the sentencing jurisdiction of this court.

⁴⁹ Section 9(3) of the MDSMA. The offences referred to are murder, rape, treason and culpable homicide committed outside the borders of the RSA, as well as contraventions of ss 4 and 5 of the MDC.

⁵⁰ Sections 20 and 30(24) of the MDSMA. A military assessor is an officer or warrant officer who assists the military judge in deciding the facts of the case. Assessors only assist a military judge when requested to so by the accused. The accused has the right to elect to be tried by a judge with two assessors and he may elect that one of the assessors must be a warrant officer. In *S v Kunene* (CMA 38/2000) the CMA held that where an accused does not exercise his choice regarding the election of a warrant officer both assessors appointed by the judge will be officers. Military assessors play an important role in assisting the court to ensure that justice is seen to be done in those instances where the accused feels that because of differences in cultures and beliefs that he will not receive a fair trial.

⁵¹ Section 20(1) of the MDSMA. Assessors are appointed from a register of military assessors held by the legal satellite offices (legsatos). The factors considered when choosing an assessor include, inter alia, the military, social and cultural environment of the accused as well as his educational background (for the complete criteria in choosing as assessor see ss 20(2)–(4) of the MDSMA).

the accused.⁵² If a question of law arises, the judge will decide the matter without the assistance of the assessors,⁵³ and a finding by the court will be by a majority of the court.⁵⁴

When conducting a trial, the military judge must exercise his authority,⁵⁵ *inter alia*:

1. independently and only subject to the Constitution and the law;
2. by applying the Constitution and the law impartially and without fear, favour or prejudice;
3. the court must ensure that the accused does not suffer any disadvantage due to his position as an accused, irrespective of whether the accused is represented or not.⁵⁶

In exercising their authority all judges must perform their duties in a manner that is consistent with the policy directives issued by the Director: Military Judges, but otherwise free of any command or executive interference.⁵⁷

⁵² Section 20(5) of the MDSMA.

⁵³ Section 20(6) of the MDSMA.

⁵⁴ Judges must indicate clearly whether the findings of the court are unanimous and if not, the reasons for the dissenting finding must be clearly set out (see s 20(8) of the MDSMA).

⁵⁵ See s 19 of the MDSMA; *LAWSA* para 405.

⁵⁶ Anecdotal evidence indicates that a military court ensures that an accused does not appear in court unrepresented. Where the accused refuses legal representation the military judge will instruct military defence counsel to attend the trial and be available if the accused needs assistance. However, in *S v Hoffman* (CMA 058/2005) the accused before the military court in Oudtshoorn was instructed to obtain legal counsel in October 2002. On 5 February 2005, a half hour before commencement of the trial, the accused fired his defence counsel. The judge gave him until that afternoon to either obtain new counsel or make alternative arrangements regarding his defence. The accused failed to appear before the court and a final remand was given until the following morning. On the morning of 6 February the prosecution submitted a letter from an attorney in Malmesbury requesting a postponement in order to take instructions from his client, the accused. The judge refused a further postponement and ordered the trial of the undefended accused. Military defence counsel was made available to the accused and sat in for the duration of the trial, although the accused refused to make use of him. The CMA found this to be a gross irregularity since the accused did not have sufficient time to prepare and set the finding and sentence aside.

3.2.3.1 Trial procedure: General comments

When a date and time have been set for the trial by the Court of a Senior Military Judge, the members will assemble behind closed doors where the presiding judge will satisfy himself that the other military judges, if applicable, as well as the assessors are present and qualified to serve at the proceedings.⁵⁸ Once the judge is satisfied that the court is properly constituted, the court is opened and the proceedings are subsequently conducted in open court.⁵⁹

The following people are present during the trial:⁶⁰

1. The accused.
2. The prosecutor.
3. Defence counsel, where applicable.
4. An interpreter, where required.
5. Such members of the public who wish to attend, subject to the seating availability of the venue.

The prosecutor calls the case for trial and the court orderly calls the accused into court.⁶¹ The accused, accompanied by an escort, is marched in by the court orderly. The escort will then show the necessary salute and compliments to the court.⁶² Once the accused is before the court, he identifies himself by stating

⁵⁷ Section 14(4) of the MDSMA. The policy directive issued to the military judges must be in line with the Constitution and the law in order to comply with s 19 of the MDSMA. If there is a conflict between the requirements of the law and policy directives, the law will trump the policy directive.

⁵⁸ Rule 30(1) of the MDSMA.

⁵⁹ Rule 30(3) of the MDSMA; s 33(3) of the MDSMA.

⁶⁰ Rule 31(1) of the MDSMA.

⁶¹ Rule 32(1) of the MDSMA.

⁶² Traditionally the escort takes responsibility for the accused during and after the trial. The escort must see to it that the accused is in court and in the event that the accused is ordered into detention by the court at the end of the trial, it is the escort's responsibility to ensure that the accused does not escape custody. The escort of the accused will be of the same or higher rank than the accused.

aloud his force number, rank, full names and unit.⁶³ The presiding judge in turn identifies himself and introduces the other judges (if any) and assessors to the accused.⁶⁴

Where applicable, the prosecutor or the accused may now request that the trial be held *in camera*. The court will only grant such an application in those instances where they are of opinion that it would be in the “interest of justice, public safety, the administration of justice, national security, or to protect the identity of juveniles or the privacy of any party other than the accused...”⁶⁵ The application will be considered in closed proceedings where the prosecutor and the accused will be afforded the opportunity to address the court or, if required, lead evidence. If the application is successful all attending members of the public are required to leave the court.

The presiding judge or the assessors must recuse themselves if:

1. They are related to the accused or the complainant by “affinity or consanguinity in the first or second degree”.⁶⁶
2. They have, or during the trial gain any knowledge of the facts of the case outside the proceedings that may or is likely to prejudice them in their decision.⁶⁷
3. They bear the accused such animosity that it is likely to prejudice their decision.⁶⁸
4. They have a personal interest in the proceedings.

⁶³ Rule 32(2) of the MDSMA.

⁶⁴ Rules 33(1)-(2) of the MDSMA.

⁶⁵ Section 33(3)(c) of the MDSMA.

⁶⁶ Rule 35(1)(a) of the MDSMA.

⁶⁷ Rule 35(1)(b) of the MDSMA.

⁶⁸ Rule 35(1)(c) of the MDSMA.

5. Any of them have signed as a witness on the accused's election to be heard at the CODH.⁶⁹

If there is no recusal, the accused is given the opportunity by the presiding judge to object to being tried by any of the judges or the assessors.⁷⁰ The accused can object on the grounds that the assessor has a personal interest in the case, that there is likely to be a conflict of interest because of his participation in the case or that he might be biased.⁷¹

In the instance where the accused objects, the functionary against whom the objection was raised will leave the proceedings and the remaining members will hear the objection and any argument or evidence relating to the objection. In the case where only one military judge is presiding, that military judge will hear the objection and make the determination.⁷² Where the objection is upheld or where there is an equality of the votes, the presiding judge will report the determination to the local representative of the Adjutant General who will then replace the judge with a relief judge.⁷³ Where an objection is upheld against one of the assessors the relevant assessor will withdraw. The assessor will not be replaced by another assessor.⁷⁴

The judge proceeds to administer the oath⁷⁵ to all the assessors, court functionaries and members under instruction where it may be applicable.

⁶⁹ Rule 35(1)(d) of the MDSMA. The fact that they were involved in the administrative process prior to the matter serving before the court, such as being a witness during the election stage, may imply prior knowledge of the facts by the presiding officer.

⁷⁰ Rule 36(1) of the MDSMA.

⁷¹ See s 20(9) of the MDSMA. Although s 20(9) of the MDSMA only provides for the recusal of assessors, r 36(2) of the MDSMA provides that the grounds for objections by the accused apply to both the military judge and the assessor.

⁷² Rule 36(3) of the MDSMA.

⁷³ Rule 36(5) of the MDSMA. The accused may also object to be tried by the relief judge and the process followed will be the same as with the first objection (see r 36(9) of the MDSMA).

⁷⁴ *S v Kunene* (CMA 38/2000).

⁷⁵ The various oaths and affirmations are found in Chapter 15 of the rules to the MDSMA and each court functionary or witness has a specific oath (see rr 80–88 of the MDSMA).

Where the prosecution counsel intends to amend the charge sheet or withdraw one or more of the charges it must be done before the charge sheet is read to the accused. The prosecution counsel now reads the charge sheet to the accused. Before pleading to any of the charges the court explains to the accused his right to object⁷⁶ to the trial (on the grounds that the military court has no jurisdiction over him or the offence)⁷⁷ or to any charge, on the ground that it does not disclose any offence.

The court will hear evidence from both parties regarding the objection, make a finding and announce the finding in open court. Where the objection is upheld, the prosecution counsel will take the appropriate steps to have the accused tried before a court with the appropriate jurisdiction.⁷⁸

Where there is a defect in the charge, the court can allow the prosecution counsel to amend the charge sheet where it would not be prejudicial to the accused and the court will postpone the matter to allow the accused to prepare properly for his defence on the amended charge. Where the charge cannot be amended without prejudice to the accused, the court will allow the objection and strike the charge from the charge sheet.⁷⁹

⁷⁶ Rule 38 MDSMA.

⁷⁷ Military law, which includes the MDC, the MDSMA and the Defence Act applies to all uniform members of the SANDF (see s 104(5) of the Defence Act 44 of 1957; s 3(1)(a) of the Defence Act 42 of 2002; s 3(2) of the MDSMA). Since the CSMJ has jurisdiction over all ranks and all offences except murder, rape, treason and culpable homicide committed inside the borders of the Republic, the only possible successful objection might be in terms of the prescription periods in ss 58 and 59 of the MDC. In terms of s 58 of the MDC, the military court will only have jurisdiction over an offence, subject to certain exceptions, where the case is brought to trial within three years after the date of the commission of the offence. After three years, the military courts lose jurisdiction. The civil courts however retain jurisdiction and the matter may be heard in civil court. Section 59 of the MDC holds that the military court will only have jurisdiction over members who are subject to the MDC. This is also subject to certain exceptions as found in ss 59(1)(a)–(c) of the MDC. The military court will retain jurisdiction over a person who is no longer subject to the MDC if the offence for which he is being tried was committed while he was subject to the MDC and the accused is tried within three months of him no longer being subject to the MDC.

⁷⁸ Rules 39(1)-(2) of the MDSMA.

⁷⁹ Rule 39(3) of the MDSMA.

Where the objection is not upheld, the trial will continue. The accused is then required to plea to each charge separately.⁸⁰

Where the accused pleads guilty, he can be convicted of that charge.⁸¹ However, where an accused pleads guilty to the offences of murder, rape or culpable homicide committed outside the borders of the country or to a contravention of sections 4 or 5 of the MDC, the court will record a plea of 'not guilty'.⁸² It is also possible for an accused to change any plea of 'guilty' or 'not guilty' any time before a finding is made by the court on a charge.⁸³ Where the plea is changed to one of "not guilty", the trial will continue as if the accused pleaded "not guilty" from the outset and the prosecution counsel will call all witnesses not previously called or re-call witnesses if required.

The trial procedure to be followed from here depend the accused's plea. The trial procedure differs depending whether the accused pleads "not guilty"⁸⁴ or "guilty."⁸⁵

3.2.3.2 Trial when the accused pleads "not guilty"

The prosecutor may start the trial with an opening address. This is not compulsory, unless ordered by the court to do so. During this opening address the prosecution counsel will outline the evidence to be adduced.⁸⁶ Although it is not required, it is advisable that the prosecution give an opening address in those

⁸⁰ In terms of r 41 of the MDSMA, the accused can, apart from pleas of "guilty" or "not guilty" raise a number of special pleas. Any two of the pleas provided in r 41(1) of the MDSMA may be pleaded together. The plea must be tendered by the accused and not by his legal representative.

⁸¹ Rule 42(1)(b) of the MDSMA. See also in this regard s 88 of the MDC which allows for alternative charges to both military as well as civilian offences.

⁸² Rules 42(9)(b)(i)-(ii) of the MDSMA.

⁸³ Rules 43 and 44 of the MDSMA. It is also the duty of the court to change an accused's plea of "guilty" to "not guilty" where it appears to the court that the accused did not intend to plead guilty, has a valid defence or incorrectly made any admissions (see in this regard r 44(1)(b)(i)-(iii) of the MDSMA.

⁸⁴ See Chapter 7 of the rules to the MDSMA.

⁸⁵ See Chapter 8 of the rules to the MDSMA.

⁸⁶ Rule 45(a) of the MDSMA.

instances where the accused is charged with multiple charges. It makes it easier for the court to follow the evidence.

The accused, or his defence counsel on his behalf, may also choose to give an opening address, however, in instances where acting on authority or an alibi is raised as defence, the defence is compelled to give an opening address.⁸⁷

The accused may then make any admission regarding any disputed fact before the court and the prosecution is afforded the same opportunity. Where such admissions are made, it is considered sufficient proof of the matter and no further evidence needs to be adduced regarding such fact.⁸⁸

After the opening addresses, the prosecution counsel leads the evidence on behalf of the state. In those instances where a preliminary investigation⁸⁹ was held, all the witnesses who testified at the preliminary investigation, or whose statements were submitted, are called by the prosecution counsel. In the event

⁸⁷ Rule 45(b) of the MDSMA.

⁸⁸ Rule 46 of the MDSMA.

⁸⁹ The purpose of a preliminary investigation is to investigate allegations that an accused, who is subject to the MDC, has committed an offence and with the intention to then bring that accused before a military court for trial. Preliminary investigations are ordered during the appearance (the arraignment) of an accused in terms of s 29 of the MDSMA where the judge or commanding officer appoints a recording officer to complete the preliminary investigation. A preliminary investigation may be ordered for any offence committed by a person of any rank group, but is usually not done in those instances where the offence and rank of the accused results in the offence falling within the jurisdiction of the CODH, ie where the accused is below the rank of warrant officer and where he committed a disciplinary offence. Preliminary investigations are compulsory, irrespective of rank, where the accused committed treason, murder, rape or culpable homicide outside the borders of the Republic, any contravention of ss 4 or 5 of the MDC or any offence where the prescribed punishment exceeds ten years imprisonment. See s 30 of the MDSMA for an explanation of the process of preliminary investigations. Following the correct procedures in completing the preliminary investigations are extremely important. In *S v Maluleke* (CMA 31/2009) the CMA held that where the seriousness of the offence requires that a preliminary investigation be held, an irregular preliminary investigation not done in accordance with the prescripts of s 30(8) of the MDSMA would result in any subsequent trial being *ultra vires*. "The (invalid) preliminary investigation(s) lead to the lack of jurisdiction of a military court to try the accused. In fact, no military court would have jurisdiction without a valid preliminary investigation from which these serious charges followed." The military courts however failed to enforce the direction provided by the CMA in *Maluleke* and subsequently most of the CMA decisions for 2011 resulted in the setting aside of the findings on serious offences because the correct preliminary investigation had not been followed (see also in this regard *S v Goliath* (CMA 078/2004); *S v Dippenaar* (CMA 038/2004)).

that the prosecution counsel wishes to call witnesses whose statements are not contained in the preliminary investigation, the accused must be afforded sufficient opportunity to prepare and the prosecution counsel has to furnish the accused with a copy of the statement to allow the accused to prepare.⁹⁰ Where the prosecution does not furnish the accused with a copy prior to the trial, the witness may be allowed to testify and the court will then grant a reasonable postponement before cross-examination to allow the defence to prepare for cross-examination.⁹¹

After the prosecution counsel has adduced all the evidence required to prove its case, the case is closed. Where the prosecution counsel did not call all the witnesses who testified in the preliminary investigation, the court must be informed and the witness made available to the defence and the court.⁹²

After closing of the state's case the court must inform the accused of his rights in terms of rule 48 of the MDSMA. The accused will now have the opportunity to apply for acquittal of the charges on the grounds that the prosecution counsel did not establish a *prima facie* case against him. He may also choose to close his case without leading any evidence for the defence.⁹³ The court will close to consider any such application brought by the accused. If the court finds that the prosecution counsel did not establish a *prima facie* case, it will return a verdict of "not guilty."⁹⁴ Where the court finds that a *prima facie* case was established, the application for acquittal is refused and the trial continues. The accused may then choose to close his case without leading any evidence.⁹⁵

Where the accused is not discharged at the close of the state's case, the court has to inform the accused that he has the right to remain silent and that no

⁹⁰ Rule 47(2) of the MDSMA.

⁹¹ Rule 47(3) of the MDSMA.

⁹² Rule 47(6) of the MDSMA.

⁹³ Rule 48(1) of the MDSMA.

⁹⁴ Rule 48(3) of the MDSMA.

⁹⁵ Rule 48(4) of the MDSMA.

negative inference may be drawn if he should choose to exercise that right.⁹⁶ In addition the court must ask the accused whether he intends to adduce any evidence. The accused is then also given the opportunity to address the court regarding any evidence that he may adduce.⁹⁷

Where the accused indicates to the court that he will be adducing evidence and indicates that he will be testifying or making an unsworn statement on his own behalf, the accused must testify before calling any other witnesses.⁹⁸ If, during the presentation of the defence's case, the accused decides to testify, this will affect the weight of the evidence and the court may draw any inference it may deem reasonable from the accused's actions.⁹⁹ After adducing all evidence, the accused will close his case.

The prosecutor is now compelled to make a closing address to the court and the accused may make a closing address. Where the accused makes such an address, the prosecutor may reply on any point of law raised during the accused's closing address.¹⁰⁰

The military court will now close to consider its finding on all the charges levelled against the accused. The burden of proof for conviction of any charge, or alternative charge, is "beyond reasonable doubt."¹⁰¹

3.2.3.3 Trial when the accused pleads "guilty"

Where an accused pleads guilty on the charges, it "constitutes the unambiguous admission of all the elements of that charge, the accused's intention to

⁹⁶ Rule 49(1)(a) of the MDSMA.

⁹⁷ Rule 49(1)(b) of the MDSMA.

⁹⁸ Rule 49(2)(a) of the MDSMA. Where the accused chooses to make an unsworn statement, the accused cannot be cross-examined, but the court may ask questions to elucidate any matter (see r 49(5) of the MDSMA in this regard).

⁹⁹ Rule 49(2)(b) of the MDSMA.

¹⁰⁰ Rule 50 of the MDSMA.

¹⁰¹ Rule 51 of the MDSMA.

acknowledge his or her guilt on that charge...”¹⁰² The exact procedure depends on whether, prior to the trial, a preliminary investigation was held or not.¹⁰³

If a preliminary investigation was held¹⁰⁴ the court, after hearing and recording the plea of the accused, closes to peruse the evidence recorded at the preliminary investigation.¹⁰⁵ If the court is satisfied that this record proves that the offences mentioned in the charge sheet were actually committed, the court may convict the accused.¹⁰⁶ Prior to reading the evidence recorded at the preliminary investigation, the court may allow the accused to make any admissions relevant to the charges and also allow the prosecution to lead relevant evidence.¹⁰⁷ If after perusing all this evidential material the court is not satisfied that the charges are proven, it must record a plea of “not guilty.” Then the trial will continue as if the accused pleaded “not guilty” from the start.¹⁰⁸

If an accused pleads “guilty” but no preliminary investigation was held, there is no evidence of the offence before the court. The court may, however, convict the accused on his plea of “guilty” alone.¹⁰⁹ In these instances, the court may, in its discretion, question the accused in order to ensure that the offence was in fact

¹⁰² Rule 53(1) of the MDSMA. It also includes a concession that the court has jurisdiction over the accused and the charge.

¹⁰³ During the preliminary investigation the prosecution counsel gathers all the evidence, either by means of oral evidence under oath or by means of affidavits, to ensure that the state has a *prima facie* case against the accused. The prosecution then reads all the evidence over to the accused. Where a *prima facie* case is established a preliminary charge sheet is read and the accused is given the opportunity to present his side of the case. He may however exercise his right to remain silent. Upon completion, copies of the preliminary investigation are handed over to the prosecution counsel for prosecution and the accused is provided with a copy in order to prepare for his defence. For the complete procedures see s 30 of the MDSMA.

¹⁰⁴ Rule 54 of the MDSMA.

¹⁰⁵ If the accused pleads guilty to an alternative to the main charge, the prosecution counsel may only accept the guilty plea with the permission of the senior prosecution counsel.

¹⁰⁶ Rule 54(1) of the MDSMA. In *S v Ngubane* (CMA 08/99) the CMA held that where an accused pleads guilty the court may accept that plea and convict the accused if it is satisfied after reading the preliminary investigation that there is sufficient evidence to show that the accused did commit the offence and that he intended to acknowledge his guilt. *In casu* the evidence before the court showed that the accused suffered from mental illness and the conviction and sentence was set aside.

¹⁰⁷ Rule 54(2) of the MDSMA.

¹⁰⁸ Rule 54(3) of the MDSMA.

¹⁰⁹ The procedure is provided for in r 55(1) of the MDSMA.

committed, or to elucidate any aspect.¹¹⁰ All questions put to the accused and answers must be recorded.¹¹¹ If the accused is represented and defence counsel answers on behalf of the accused, the court must confirm with the accused that such answers are in accordance with his instructions.¹¹²

The prosecutor may be given the opportunity to adduce evidence and the accused will be given the opportunity to make admissions regarding the charges.¹¹³

Where the judge is assisted by assessors the court must close when considering the finding. If the military judge sits alone the court need not close to consider its finding, but the judge must still apply his mind when considering the finding. Where the court, taking into account any evidence adduced or any admissions made by the accused, is satisfied that the accused is guilty, the accused will be convicted.

3.2.3.4 Pleas of “guilty” and “not guilty” on different charges

Where the accused pleads “guilty” to some of the charges and “not guilty” to others the different pleas are recorded accordingly. The “not guilty” pleas are dealt with first in the same manner as discussed above.¹¹⁴ Once the court has

¹¹⁰ Rule 55(2) of the MDSMA. The CMA has found that military courts should ask questions when the accused pleads guilty and no preliminary investigation was held. See *S v Ngozi* (CMA 136/2000), where the CMA held that “a court should ascertain whether the accused admits all the elements of the offence. This may be done by directing questions at the accused or by way of a statement by the accused explaining his plea(s) of guilty, whether in writing or orally.” This may be in the best interest of an unrepresented accused, but one could question the necessity of the court’s decision when the accused is legally represented.

¹¹¹ Rule 55(3) of the MDSMA.

¹¹² Rule 55(5) of the MDSMA.

¹¹³ Rule 55(6) of the MDSMA. The court should confirm any admissions that the accused makes. See *S v Mushapi* (CMA 073/2007) where the CMA held that where defence counsel had tendered certain admissions during the trial and the judge subsequently failed to confirm the admissions with the accused, military judges “should always make sure that they confirm the admission with the accused. In the present case the omission was cured by evidence and no prejudice ensued.”

¹¹⁴ Rule 57(1) of the MDSMA.

made a finding on the “not guilty” pleas then only will the court consider the “guilty” pleas in accordance with the procedures discussed above.

Any evidence led during the trial in judging the “not guilty” plea can be taken into consideration when deciding on the guilty pleas, insofar as that evidence is relevant.¹¹⁵ Any admission made relating to any of the charges can further be taken into consideration regarding any of the other charges where the admissions may be relevant to such charges.¹¹⁶

3.2.3.5 Post-finding and sentencing procedures

The finding on every charge will be announced in open court.¹¹⁷ The prosecution counsel will then read and submit the accused’s record of service.¹¹⁸ The record of service is mainly a summary of previous convictions, both civilian and military, indicating the type of offence, date of conviction as well as the sentence imposed for those offences.¹¹⁹

The accused must confirm that the particulars contained in the record are accurate. In those instances where there is a dispute regarding the accuracy of the record of service, evidence will be led by the prosecutor and the accused after which the presiding judge will make a ruling.¹²⁰

At this stage the prosecution counsel and the defence may agree on any facts that may be relevant regarding the determination of sentence. The court will be

¹¹⁵ Rule 57(2) of the MDSMA.

¹¹⁶ Rule 57(3) of the MDSMA.

¹¹⁷ Rule 58 of the MDSMA.

¹¹⁸ Known as the DD28 (see r 59(1) of the MDSMA). It contains information regarding the accused which will be taken into consideration in determining sentence (see the discussion in ch 5 at para 5.6.1 below).

¹¹⁹ Previous convictions of 10 years or more are not taken into account for purposes of sentencing.

¹²⁰ Rule 59(2) of the MDSMA.

informed that these facts are not in dispute.¹²¹ The prosecution counsel is then given the opportunity to lead evidence regarding the prevalence of the offence of which the accused has been found guilty as well as any other evidence relevant to the consideration of the sentence.¹²² The accused is also given the opportunity to adduce evidence in mitigation of sentence.¹²³

In instances where the military court foresees that specific orders may be made,¹²⁴ the court will give the prosecution counsel and the accused the opportunity to call witnesses or address the court in this regard. The court may also call witnesses.¹²⁵ After hearing all evidence the court will close to determine the facts relevant to sentencing. Once these proceedings have been concluded, the assessors will withdraw and the court will once again close for the presiding judge to take time to consider the sentence.¹²⁶

A military judge may only impose one sentence, irrespective of the number of charges brought against the accused.¹²⁷ Where the sentence is a valid sentence on any of the charges preferred on the charge sheet, that sentence is deemed to be a valid sentence in respect of all of the charges of which the accused was found guilty.¹²⁸ The presiding judge will record the sentence in the record of proceedings and announce the sentence in open court.¹²⁹ At this stage the court also informs the accused of his rights of appeal and review.¹³⁰

¹²¹ Rule 59(3) of the MDSMA. Where both parties agree to the facts that are not disputed, the parties are bound by that agreement (see *S v Malengi* (CMA 075/2001) where the prosecution argued contrary to the agreed facts the CMA held that “[i]t is a generally accepted principle that a party who agreed on certain facts is bound by that agreement”).

¹²² Rule 59(4) of the MDSMA.

¹²³ Rule 59(5) of the MDSMA.

¹²⁴ See ss 128, 129, 130 and 148 of the MDC for the relevant court orders. These orders are discussed in ch 6 at paras 6.2.10.1 and 6.3 below.

¹²⁵ Rule 59(6) of the MDSMA. In *S v Titus* (CMA 59/2000) the CMA held that “during sentencing the trial court can no longer play a passive role...the trial court could have investigated the defence’s assertion that the accused acted in the manner he did because of his condition.” For the position in the civilian court see *S v Siebert* 1998 (1) SACR 554 (A) 559a-b.

¹²⁶ Rule 59(7)-(9) of the MDSMA.

¹²⁷ See ch 5 at 5.7.2 below.

¹²⁸ Rule 59(10) of the MDSMA; s 92 of the MDC.

¹²⁹ Rule 59(11) of the MDSMA.

¹³⁰ See ch 7 below.

The court then closes and the accused is marched out by the court orderly. The accused's escort remains responsible for the custody of the accused. An accused will remain in custody pending the review of his case.¹³¹ However, an accused will be released from custody when sentenced by the military court to one of the following sentences:¹³²

1. A reprimand.
2. Extra duties.
3. Corrective punishment.
4. Confinement to barracks.
5. A fine.¹³³
6. Reversion from acting or temporary rank to substantive rank.
7. Reduction to any lower rank or to the ranks.
8. Reduction in seniority in rank.
9. Imprisonment or detention which is entirely suspended.

For any other sentence, such as imprisonment, the local representative of the Adjutant General may release the accused from custody on such conditions as may be determined by the local representative. Upon such release, the accused will be compelled to attend the subsequent promulgation of the finding and sentence once it has been confirmed by the Court of Military Appeal and failure to do so will result in the re-arrest of the accused.¹³⁴

Where the accused is released while awaiting the decision of the CMA, the Chief of the South African National Defence Force (CSANDF) may order that the

¹³¹ Section 34(9) of the MDSMA.

¹³² Section 34(10) of the MDSMA.

¹³³ Where a sentenced accused is no longer subject to the MDC, eg where he has resigned within three months prior to his trial, the accused will only be released once the fine has been paid (see s 34(10)(b) of the MDSMA).

¹³⁴ Section 34(11) of the MDSMA. This is usually done because confirmation by the Court of Military Appeal can take up to 18 months to complete and it would not be in the interest of justice to keep the accused in custody for the duration of the time pending confirmation (see the discussion in this regard in ch 7 at para 7.5.3.1 below).

accused be suspended for the period awaiting the decision where it would be in “the interest of the good governance or reputation of the South African National Defence Force, or in the interest of justice...”¹³⁵ The CSANDF must inform the accused in writing of his intention to exercise his powers in this regard and the accused will have 24 hours, or longer if permitted by the CSANDF, to make representations.

All findings and sentences must be promulgated in the prescribed manner subsequent to the trial.¹³⁶

3.2.4 The Court of a Military Judge

The court procedures, regardless of whether they involve a plea of “guilty” or “not guilty” are exactly the same during a trial by a court of a military judge as with the court of a senior military judge.¹³⁷ The differences between the two courts lie in their jurisdiction over offences, the seniority of the military judges, the rank of the accused and the court’s sentencing jurisdiction.

The CMJ consists of an officer of at least field rank¹³⁸ with a minimum of three years’ experience as an advocate or attorney, or three years’ experience in a criminal or military justice system,¹³⁹ as well as two military assessors.¹⁴⁰

This court has jurisdiction over any person subject to the MDC, except officers of field rank or higher. The court may try an accused for any offence except

¹³⁵ Section 42 of the MDSMA. As example one can mention the case against a chaplain of Air Force Base Langebaanweg who was found guilty of indecent assault of a female subordinate. He was sentenced to imprisonment of 12 months and cashiering. Since the sentence required automatic review by the CMA, the chaplain was suspended for the duration pending review since it would not have been in the interest of justice to allow him to continue with his ministry in view of the nature and the seriousness of the charges (see *S v Siwali* (CMA 34/2006)).

¹³⁶ Section 35 of the MDSMA; ch 5 para 5.9.1 below.

¹³⁷ See para 3.2.3 above.

¹³⁸ Field rank, as defined in s 1 of the MDC, is a rank of at least a major, being a senior officer’s rank.

¹³⁹ Section 10(1) of the MDSMA; Carnelley at 60; *LAWSA* para 401.

¹⁴⁰ Section 10(2) of the MDSMA.

murder, rape, culpable homicide and contraventions of sections 4 and 5 of the MDC, in other words, those offences which involve endangering the safety of the forces or a failure of a commander in command of troops to engage the enemy during a battle. Its sentencing jurisdiction includes all those punishments as set out in section 12 of the MDSMA, but the sentence of imprisonment is limited to a maximum period of two years.¹⁴¹

3.2.5 The Commanding Officer's Disciplinary Hearing

So far this forum has not received much attention in legal literature. The question is whether it qualifies as a court of law, as explained in Chapter 4 below. The answer requires a full discussion.

The disciplinary hearing is ideally suited for promoting military discipline in that it is a summary hearing, able to enforce swift justice in instances of relatively minor military disciplinary transgressions, imposing relatively light sentences.¹⁴²

Of the courts listed, the CODH has the lowest jurisdiction. The court is presided over by a commanding officer¹⁴³ or a subordinate of at least field rank.¹⁴⁴ The commanding officer does not need a written appointment or delegation since he derives his authority directly from the MDSMA, except in the case of a subordinate officer, who will necessarily require a written appointment.¹⁴⁵ There

¹⁴¹ Section 10(2) of the MDSMA.

¹⁴² Rant J W *Courts-Martial Handbook, Practice and Procedure* (1998) at 6 and 80. Since it is so conducive for military discipline this forum, according to the Ministerial Task Team, is recognised as part of the principle of a disciplined force in terms of s 200(1) of the Constitution (see also *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 40).

¹⁴³ In a general military context a commanding officer is the officer in charge of a military unit or formation. For the purpose of the CODH a commanding officer is defined in s 1 of the MDC as "an officer who has been appointed to command any unit or formation of the South African National Defence Force and also an officer subordinate in rank to and authorised by such commanding officer to conduct disciplinary hearings".

¹⁴⁴ In this context a subordinate officer is any officer subordinate in rank to the commanding officer of the unit, as long as such subordinate officer holds at least the rank of major.

¹⁴⁵ Such authorisation must be given in writing and is signed by the relevant commanding officer of the unit (see s 11(1) of the MDSMA; *LAWSA* para 402). Where a delegated subordinate officer

is also no appointment as judicial officer by the Minister as is the case with the other levels of military courts. It is not a requirement that an accused can only be tried by a commanding officer of his own unit as long as that presiding officer is a commanding officer or has been duly appointed as a trial officer by the commanding officer.¹⁴⁶ It may happen, for example, that an accused is on deployment and will then fall under the command and control of the officer commanding of that particular deployment.

The commanding officer has jurisdiction over any person, except officers and warrant officers, as long as the accused is of or below the rank of staff sergeant and has elected to be tried by a CODH.¹⁴⁷ The choice to be tried by CODH is done by means of an election certificate.¹⁴⁸ The election certificate must be witnessed by an officer, other than the commanding officer who is to preside over the trial.¹⁴⁹ This is done in order to prevent undue influence by the commanding officer acting as presiding officer at the trial. The accused also has the right to seek legal advice before exercising his choice.¹⁵⁰ The accused must indicate on the election certificate whether he had in fact taken legal advice or whether he has waived his right to legal representation prior to making his choice. The accused must also indicate the following in the presence of the witness:

1. That he elects to be tried by a disciplinary hearing.

does in fact act as trial officer without being duly appointed, such disciplinary hearing will be seen as null and void. In terms of s 11(1) of the MDSMA only commanding officers and subordinates "authorised thereto in writing" have the jurisdiction to preside over a CODH.

¹⁴⁶ Section 11(2) of the MDSMA states that a commanding officer (which includes a duly delegated subordinate) may conduct a CODH of *any* person subject to the MDC and is not restricted to members of their own units over whom they exercise command and control.

¹⁴⁷ Section 11(2) of the MDSMA. Officers and warrant officers cannot be tried by means of a disciplinary hearing even in those instances where they commit purely disciplinary offences. Depending on their rank, they will appear before the CSMJ or a CMJ.

¹⁴⁸ See s 29(5) of the MDSMA; r 60(2) of the MDSMA; Annexure 5 of the rules to the MDSMA. In terms of s 29(5) of the MDSMA an accused with the rank of staff sergeant and below who has been charged with a disciplinary offence has the right to elect to be tried by CODH if he intends to plead guilty and waives his right to legal representation. Disciplinary offences are those offences for which the prescribed punishment in terms of the MDC does not exceed one year imprisonment (see s 1(xviii) of the MDSMA).

¹⁴⁹ Section 29(6) of the MDSMA.

¹⁵⁰ Section 29(6) of the MDSMA.

2. That he intends to tender a plea of “guilty.”¹⁵¹
3. That he understands that the prosecutor can arraign him before any military court other than a disciplinary hearing.

The election certificate further contains the charge sheet in order for the accused to make an informed decision before exercising his choice of opting for a “guilty” plea at a disciplinary hearing.

The commanding officer will therefore only have jurisdiction over an accused if:

1. the accused is of the rank below that of a warrant officer;
2. the accused pleads “guilty”,¹⁵² and
3. the accused waives his right to legal representation during the trial.

It should also be noted that although the choice of electing a CODH is given to the accused, the final decision on whether the accused will be tried at that particular forum is dependent on the military prosecution counsel. Certain offences have been removed from the jurisdiction of the CODH in terms of policy decisions even though it may be allowed in terms of the Act and the accused will have to appear before a CMJ. These offences include:

1. The contravention of section 24(1)(a) of the MDC, which entails the negligent loss of fire-arms or ammunition.¹⁵³

¹⁵¹ This by no means prevents an accused from changing his plea to one of ‘not guilty’ at any stage prior to him being asked to plead during the disciplinary hearing.

¹⁵² It is not possible for an accused to be found “not guilty” by a CODH. If, at any stage during the trial, the presiding officer is of the opinion that the accused did not intend to plead guilty, or, after questioning of the accused, the presiding officer is of the opinion that the accused indeed has a potential defence, the trial is stopped and referred to a CMJ.

¹⁵³ In such instances the accused will be charged in terms of the Firearms Control Act 60 of 2000. Where a member of the SANDF is found guilty of the negligent handling or loss of a firearm and is declared incompetent to possess a firearm by the court, it may have severe consequences for

2. Section 25 of the MDC, the willful or negligent damage or destruction of public property.
3. The contravention of section 26 of the MDC, which entails deficiencies in stores.
4. The contravention of section 27 of the MDC, which usually entails the unauthorised use of military vehicles or equipment.
5. The contravention of section 28 of the MDC, which includes negligent driving of military vehicles and driving under the influence of alcohol, as well as reckless flying of an aircraft.
6. All cases of inappropriate sexual conduct in the work place or sexual harassment.¹⁵⁴
7. Cases of intimidation.¹⁵⁵

Where the accused has multiple previous convictions of the same or similar nature, the prosecution counsel may foresee the imposition of a sentence of more than R600, thereby falling outside the jurisdiction of the CODH. In this case the matter will be referred to the CMJ from the outset. This will also be the case where the accused has a suspended sentence for the same offence and there may be a possibility that the suspended sentence may be imposed. Where the accused elects to plead guilty but wants to make use of legal representation, the matter will also be referred to the CMJ. Since the presiding officer at the

his further utilisation in the SANDF. The SANDF cannot employ soldiers who are not allowed to own or handle firearms.

¹⁵⁴ These matters may not be handled administratively at the units. They must first be brought to the attention of the relevant legato where a decision will be made on how to proceed.

¹⁵⁵ Instances of intimidation are viewed in a serious light and the handling thereof is determined by *Department of Defence Instruction 1/2000: Instruction to Counter Intimidation Amongst Members of the DoD* (2000).

CODH is not in possession of a legal degree it would be unfair towards the accused and the presiding officer if he had to preside over a matter where he or she had to decide complicated legal issues raised by defence counsel. In the interest of justice and a fair trial such matters are to be referred to the CMJ.

3.2.5.1 Trial procedure

Every hearing is conducted in an open court in the presence of the accused, the prosecutor,¹⁵⁶ any members of the public who wish to attend,¹⁵⁷ a member from the accused's department or section¹⁵⁸ on request of the accused or a representative from the military union¹⁵⁹ as well as an interpreter, if required.¹⁶⁰ The trial starts when the accused is marched in by a court orderly, together with an appointed escort.¹⁶¹ The accused identifies himself to the commanding officer and the commanding officer will in turn identify himself.¹⁶² The accused is then asked to confirm the election to appear before the disciplinary hearing.

At this stage the commanding officer must recuse himself if there is a likelihood that he may be biased against the accused, he has signed the election certificate as a witness or he is related to the accused in any way.¹⁶³ If there are no grounds for a recusal the commanding officer informs the accused that he has the opportunity to object to the commanding officer conducting the hearing. The grounds for objection are the same as for a recusal, including possible prior knowledge of the case. All objections and arguments must be recorded in writing

¹⁵⁶ In this context the prosecutor is usually the Adjutant of the particular unit who has completed the Advanced Military Law Course for Officers presented by the School of Military Justice (see also r 61(9) of the MDSMA).

¹⁵⁷ Depending on the available space, which is usually limited since disciplinary hearings are generally conducted in the office of the presiding officer.

¹⁵⁸ Who is senior in rank to the accused

¹⁵⁹ This representative will act strictly in an observer capacity and cannot act or speak on behalf of the accused.

¹⁶⁰ Rule 61(c) of the MDSMA also makes provision for the disciplinary hearing of prisoners of war in which case the accused would be entitled to have a fellow prisoner of war present at the trial.

¹⁶¹ Rule 62(1) of the MDSMA.

¹⁶² Rule 62(2) of the MDSMA.

¹⁶³ Rule 63 of the MDSMA.

and attached to the record of proceeding. All evidence will likewise be recorded and attached. In the event that the commanding officer recuses himself, he withdraws and the case is referred back to the commanding officer of the unit who will then assign the case to another commanding officer who is competent to complete the hearing. Where the commanding officer does not recuse himself, the hearing will continue. The accused is also given the opportunity to object to being tried by the “new” commanding officer. Arguments will be heard in this regard and the trial officer will make the decision whether to continue with the trial.¹⁶⁴

The prosecutor reads out the charge sheet and hands it in to the trial officer.¹⁶⁵ The accused is asked to plead to each charge separately and each plea is then recorded in the record of proceedings. In the event that the accused enters any other plea than one of guilty the proceedings are stopped, the case remanded and referred to a court of a military judge.¹⁶⁶ After plea, the presiding officer may ask any questions for clarification purposes if required.¹⁶⁷ If, from the accused’s answers, it appears that the accused may in fact have a defence, the trial is stopped and the matter referred to a court of a military judge.¹⁶⁸ Presiding officers in practice seldom ask questions and can then find the accused guilty on his plea alone.¹⁶⁹ No evidence as to his guilt is led. The guilty finding on each separate charge is announced in open court.¹⁷⁰

¹⁶⁴ Rule 64 of the MDSMA.

¹⁶⁵ This is the charge sheet as contained in the election certificate of which the accused has taken cognisance. The prosecutor and the accused sign the charge sheet prior to the start of the CODH.

¹⁶⁶ Rule 65 of the MDSMA. The referral is indicated on the record of proceedings, the documents are handed back to the prosecutor and the court adjourns.

¹⁶⁷ Rule 66(2) of the MDSMA. It is within the discretion of the presiding officer to put questions to the accused. The questions can be directed at confirming whether the accused understands that his actions constituted an offence and that he indeed intended to plead guilty. All questions and answers must be recorded on the record of proceedings.

¹⁶⁸ The fact that the presiding officer is not legally qualified often results in him not identifying such possible defences and then continuing with the trial.

¹⁶⁹ Rule 66 of the MDSMA.

¹⁷⁰ Rule 67 of the MDSMA.

3.2.5.2 Procedure after conviction

After conviction, the accused's record of service is read.¹⁷¹ The record of service is then handed in by the prosecutor. The prosecutor and the accused may lead evidence regarding any orders that can be made by the court.¹⁷² As is the case during the CMJ, the prosecutor and the accused may agree on facts that are relevant for sentencing and will then inform the court that those facts are not in dispute. The prosecutor may lead evidence as to the prevalence of the offence as well as any other evidence that may be relevant regarding the sentencing of the accused.¹⁷³ Then the accused is given the opportunity to bring evidence in mitigation of sentence.¹⁷⁴ Any evidence given must be recorded and attached to the record of proceedings. The court may also call its own witnesses in the process of determining an appropriate sentence.

Once the evidence has been recorded, the prosecutor and the accused may address the court on any additional orders that the court might make and must address the court with regard to sentencing.¹⁷⁵ The court will then close to consider sentence. The sentence and relevant court orders are recorded in writing and announced in open court in the presence of the accused.¹⁷⁶

The accused is then informed that the sentence is of immediate effect but will be reviewed by the review counsel of the relevant legal satellite office (Legsato) under whose jurisdiction the unit is. He is also informed that he has the right to apply that his case be reviewed by the CMA. The accused can as soon as possible but no later than 14 days after the trial make written representations to the reviewing authority regarding facts of law or the validity of the finding,

¹⁷¹ The process regarding the record of service followed at the CODH is the same as discussed above regarding the CSMJ (see r 68 of the MDSMA). An example of the *pro forma* document is set out in Annexure 6 of the rules to the MDSMA.

¹⁷² See ss 29(1) and (3) of the MDC; r 68(6) of the MDSMA.

¹⁷³ Rule 68(3)-(4) of the MDSMA.

¹⁷⁴ Rule 68(5) of the MDSMA.

¹⁷⁵ Rule 68(6) of the MDSMA; see ch 6 at paras 6.2.10.1 and 6.3 below regarding court orders.

¹⁷⁶ Rule 68(7) of the MDSMA.

sentence or court order which will then be taken into consideration during the review of the trial. He is also informed of his right to approach the High Court for relief at his own cost.¹⁷⁷ In the rare case that the review counsel does not uphold the disciplinary hearing, the matter is referred to the Director: Military Judicial Reviews.¹⁷⁸

3.3 Conclusion

As can be seen from these discussions, the procedures in military courts closely resemble those followed in civilian courts. This does not automatically qualify military courts as ordinary courts. Their jurisdiction and procedures do not answer the question regarding the status of military courts. In the next chapter the question on whether military courts qualify as ordinary courts within the South African criminal justice system is investigated.

¹⁷⁷ Rule 68(9) of the MDSMA.

¹⁷⁸ Experience has shown that the review counsel will very rarely interfere with a finding of the disciplinary hearing. Where an accused has pleaded guilty, no evidence is led during the hearing and no questions asked by the presiding officer (as is often the case) that may show a possible defence; there are really no grounds for the review counsel to change the guilty finding by the disciplinary hearing. Informal discussions with the review counsel show that grounds for the setting aside of findings in the CODH are limited to instances of duplication or splitting of charges or incorrectly completed charge sheets, such as instances of procedural irregularities. They are however more likely to change a sentence in the instance where they are of the opinion that the sentence is shockingly inappropriate.

CHAPTER 4

THE STATUS OF MILITARY COURTS: ARE THEY ORDINARY COURTS?

4.1 Introduction

The aim and function of the judiciary is to see that justice is done.¹ The courts and the administration of justice are governed by the Constitution.² The independence of the judiciary is guaranteed by the Constitution,³ which also lists the various courts that constitute the South African judicial system.⁴ In addition to the well-known civilian courts it also provides for “any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrate’s Courts.”⁵ The constitutional provisions governing the composition, jurisdiction and functioning of the courts are rather vague.⁶ These provisions do however create the framework in which all courts must operate. All courts are required to be independent, subject only to the Constitution and the law. No person or organ of the state may interfere with the functioning of the courts.⁷ This framework clearly emphasises that all courts must function independently to ensure that justice is done. This raises the question whether the military courts are to be considered as “courts” for the purposes of the Constitution and whether they would, therefore, be able to function independently to ensure that justice is done in the military context.

¹ Nel S S *Aspekte van die Onafhanklikheid van die Strafhowe – ‘n Regsvergelykende Ondersoek* (2000) at 12.

² Chapter 8 of the Constitution.

³ Section 165 of the Constitution.

⁴ Section 166 of the Constitution. These courts are the Constitutional Court, the High Courts, the Magistrate’s Courts and any other court recognised in terms of an Act of Parliament.

⁵ Section 166(e) of the Constitution.

⁶ The Constitution merely requires that “[a]ll courts function in terms of national legislation, and their rules and procedures must be provided for in national legislation” (see s 171 of the Constitution; Tshivhase A E “Transformation of Military Courts” (2009) 24 *SAPL* 450 at 464).

⁷ Section 165 of the Constitution.

As discussed above⁸ the aim of the military justice system is different from that of the civilian justice system – it is to enforce discipline. However, in the attainment of discipline justice must also be done. To attain justice two components are of importance – procedural justice and substantive justice.⁹ In this context justice not only means that a fair decision must be reached on the facts, but also that the trial must be conducted in accordance with a fair procedure.¹⁰

Procedural justice refers to a fair decision and includes the principles of the rule of law, separation of powers and the independence of the judiciary. Fair trial procedures refer to those rights enshrined in section 35 of the Constitution, also known as fair trial rights,¹¹ including the right to a public hearing before an ordinary court.

In determining the status of the military courts as independent courts, the principle of the rule of law and the doctrine of separation of powers are briefly examined before evaluating military courts against the criteria required for an independent court.

The South African literature currently available on the independence of the military courts generally only discusses the Court of a Senior Military Judge (CSMJ) and the Court of a Military Judge (CMJ). The Commanding Officer's Disciplinary Hearing (CODH) is not discussed.¹² An assumption is made by the Ministerial Task Team that the CODH is not a court of law and that an accused appearing before the disciplinary hearing cannot be classified as an accused facing criminal charges, therefore one need not comply with the strict

⁸ See ch 3 at para 3.1 above.

⁹ Mahomed I "The Role of the Judiciary in a Constitutional State: Address at the First Orientation Course for New Judges" (1998) *SALJ* 111 at 115; Nel at 82.

¹⁰ Nel at 82.

¹¹ Nel at 82; Mahomed at 113-114.

¹² See in this regard Carnelley M "The South African Military Court System – Independent, Impartial and Constitutional?" (2005) 33(2) *Scientia Militaria* 55; Tshivhase A E "Military Courts in a Democratic South Africa: An Assessment of Their Independence" (2006) 6 *New Zealand Armed Forces Law Review* 96.

requirements set out in the Constitution regarding fair trials. This assumption is investigated below.

In the determination whether the military court affords an accused the right to a fair trial in terms of the Constitution, it is necessary to first establish whether the military offender can be regarded as an “accused” before a criminal court before the section 35(3) rights attach to him.¹³ Once again the military courts are evaluated to see whether they comply with the requirement.

The procedures followed in the military courts are generally similar to those followed in the civilian court.¹⁴ However, merely following the processes of the civilian criminal courts does not automatically qualify a military court as an ordinary criminal court. One would have to evaluate military courts against the criteria set in terms of the common law, the Constitution and other relevant legislation to determine whether it can be classified as a criminal court.

4.2 The status of the military courts

The status of military courts is discussed with specific reference to judicial independence and fair trial rights.

¹³ Section 35(3) of the Constitution holds that “[e]very *accused* person has a right to a fair trial, which includes the right – (c) to a public trial before an *ordinary* court, ...” (emphasis added). See also *Nel v Le Roux* 1996 (3) SA 562 (CC) para 11.

¹⁴ See ch 3 at para 3.1 above. See further s 21(d) of the MDSMA which provides that the examination and cross-examination of witnesses must be conducted the same way as in civilian courts. Rule 20 of the MDSMA states that the general principles of national law with regard to criminal liability must be applied to military courts and in terms of s 84 of the MDC military courts must follow the rules of evidence as applied by civil courts. However, r 21 of the MDSMA determines that the law of criminal procedure as applied by civilian courts does not supplement the powers of the military courts or the rules of procedure.

4.2.1 Judicial independence

Judicial independence can be described as¹⁵

the right and the duty of judges to perform the function of judicial adjudication, through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution.

As mentioned before, the Constitution guarantees the independence of all courts by holding that “the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”¹⁶ This principle is not unique to South Africa. In terms of international law it is a well established right that an individual should be tried by an “independent, impartial and ordinary court or tribunal.”¹⁷ A tribunal is defined as a “body whose function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.”¹⁸ A tribunal may consist exclusively of judges although participation by laymen is seen as acceptable in terms of international law. Four characteristics of a tribunal are identified, namely the “power of binding decisions, defined

¹⁵ See Mahomed at 112; Kelly J F B “An Independent Judiciary: The Core of the Rule of Law” (1997) International Centre for Criminal Justice Reform and Criminal Justice Policy at 2; Laue R E “The Independence of the Judiciary in the Lower Courts” (1995) *De Rebus* 519.

¹⁶ Section 165(2) of the Constitution; Nel at 13; Mahomed at 111; Seedorf S & Sibanda S “Separation of Powers” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 12-25.

¹⁷ Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 257; Cachalia J A “Administrative Independence as a Guarantee of Judicial Independence: Experiences from South Africa” (2010) *De Rebus* 57 at 57. The United Nations (UN) also confirmed the importance of the judicial independence by adopting the *Basic Principles on the Independence of the Judiciary* in 1985. The UN expects that the laws of its member states must guarantee the independence of its judiciary (see Kelly at 1). Article 10 of the *Universal Declaration of Human Rights* states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” See also Bangamwabo F X “The Right to an Independent and Impartial Tribunal: A Comparative Study of the Namibian Judiciary and International Judges” in Horn N & Bosl A (eds) *Human Rights and the Rule of Law in Namibia* (2008) at 243.

¹⁸ Stavros S *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (2003) at 124.

competence, resolution of disputes in accordance with rules of law and clear procedural rules”.¹⁹ It is further required that cases should be heard by courts “established by law.”²⁰ This requirement is seen as a guarantee against the “*ad hoc* creation of tribunals to try specific cases.”²¹ But what about military courts?²² It has been argued that military tribunals are by definition extraordinary courts which “tend to be politically motivated and therefore the potential for lack of independence and impartiality is very high.”²³ Does this statement hold true for South African military courts?

Military courts are not exempt from the requirement of judicial independence.²⁴ The view expressed above on the lack of independence of the military court is in contrast with the opinion expressed by the African Commission that²⁵

military tribunal[s] *per se* [are] not offensive to the rights in the Charter nor does it imply an unfair or unjust process....[but] must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process.

The right to be tried by an independent and impartial tribunal is an absolute right without any exceptions and military courts must therefore comply with these

¹⁹ Stavros at 125.

²⁰ See Van Dijk P & van Hoof G J H *Theory and Practice of the European Convention on Human Rights* 2 ed (1990) at 339 (the “prescription that the tribunal must be “established by law” implies the guarantee that the organization of the judiciary in a democratic society is not left to the discretion of the executive, but constitutes the subject of a legal regulation by parliament”).

²¹ Steytler (1998) at 258.

²² Although no human rights treaties exist that specifically address military courts, a number of international documents addresses certain aspects relating to military courts (see Andreu-Guzman F in Johnson A B (ed) *Law and Justice: The Case for Parliamentary Scrutiny* (2006) at 64; Danilet C *Independence and Impartiality of Justice – International Standards* (2000) at 2-3; Tshivhase (2006) at 98–99; Autherman V & Elena S in Henderson K (ed) *Global Best Practices: Judicial Integrity, Standards and Consensus Principles* (2004) at 2 for a list of applicable international documents).

²³ Steytler (1998) at 258.

²⁴ Tshivhase (2006) at 99.

²⁵ Tshivhase (2006) at 102.

standards.²⁶ The United Nations Human Rights Committee further regards the right to be tried by an independent court a non-derogable.²⁷

In evaluating the independence of the judiciary two aspects are of importance - the substantive independence of the judiciary as well as the personal independence of the judicial officer.²⁸ The substantive independence of the judiciary means that the judicial officers are only subject to the law in the execution of their duties.²⁹ Interwoven with the important principle of substantive independence is the principle of the rule of law and the doctrine of separation of powers which requires the one branch of government to be independent from the other. In this context it requires the judiciary to be independent from the executive.³⁰

4.2.1.1 The rule of law

The “rule of law” is generally the term used for the set of principles to be followed by organs of the state or the executive when limiting the rights of individuals.³¹ These principles include, inter alia, legality, the doctrine of separation of powers and human rights. The rule of law means³²

²⁶ Danilet at 5; Johnson at 65.

²⁷ Joinet L *Issue of the Administration of Justice Through Military Tribunals* (2002) at 2-3.

²⁸ Nel at 18-19.

²⁹ Nel at 18; s 165(2) of the Constitution.

³⁰ Tshivhase (2006) at 98; Currie I & De Waal J *The Bill of Rights Handbook* (2005) at 18; Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One: Constitutional Law* (2001) at 269; Okpaluba C “Institutional Independence and the Constitutionality of Legislation Establishing Lower Courts and Tribunals” (2003) 28 *Journal for Juridical Science* 109 at 110 (“the independence of the judiciary is a *sine qua non* of a democratic state”). This is confirmed by the Office of the High Commissioner for Human Rights which identified, inter alia, respect for human rights, the exercise of power in terms of the rule of law, the separation of powers and the independence of the judiciary as essential elements of democracy (see Arbour L in Johnson at 15).

³¹ Nel at 24.

³² Raz J “The Rule of Law and its Virtue” (1977) 93 *The Law Quarterly Review* 195 at 196.

in its broadest sense...that people should obey the law and be ruled by it [b]ut in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and [be] subject to it.

In a historical overview in Currie and De Waal three main principles of the rule of law are identified.³³ Brief mention is made of the two deemed relevant in the context of this discussion.

The first principle refers to the supremacy of the law rather than arbitrary power. This principle means that no-one can be punished without a contravention of the law. The second principle refers to the concept of equality before the law which implies that every person, including state officials, is subject to the jurisdiction of the ordinary courts.³⁴

Although Raz argues that the doctrine of the rule of law is “not of overriding importance”³⁵ and “is just one of the virtues which a legal system may possess...[i]t is not to be confused with democracy, justice...[or] human rights of any kind...”³⁶ this does not hold true for South Africa. In South Africa the rule of law has been elevated to a constitutional value.³⁷ The Constitution provides that the³⁸

Republic of South Africa is one, sovereign, democratic state founded on the following values: ...supremacy of the constitution and the rule of law.

³³ Currie & De Waal (2001) at 75; Currie & De Waal (2005) at 10; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 46; Meyerson D “The Rule of Law and the Separation of Powers” (2004) *Macquarie Law Journal* 1 at 1.

³⁴ Currie & De Waal (2001) at 75; Nel at 25; Currie & De Waal (2005) at 11.

³⁵ Raz at 195.

³⁶ Raz at 196.

³⁷ Michelman I “The Rule of Law, Legality and the Supremacy of the Constitution” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 11-2 (“[a]mong the founding values of the Republic – alongside democracy, human dignity and the achievement of equality, non-racialism and non-sexism – the Final Constitution lists ‘supremacy of the constitution and the rule of law’. As might have been foreseen from this text the rule of law like dignity, is today invoked in South African constitutional jurisprudence as a pervasive value that ‘informs the interpretation of many, possibly all, other rights’); Currie & De Waal (2005) at 10.

³⁸ Section 1(c) of the Constitution; Currie & De Waal (2005) at 10.

The rule of law “imposes an obligation on the state and other individuals to resolve their disputes through the application of law”. One would not be allowed to take the law into your own hands.³⁹ The rule of law further prohibits arbitrary decision making in that it prohibits the executive from being a judge in its own case, thereby limiting subjective decisions and protecting individuals.⁴⁰ Where someone other than from the judiciary is given the jurisdiction to detain an individual, it would violate the rule of law. Arbitrary decision making may result from a lack of independence by the court or tribunal.⁴¹ The independence of the judiciary is therefore an important aspect of the principle of the rule of law.⁴²

Another important aspect of procedural justice is the doctrine of separation of powers.⁴³

4.2.1.2 Separation of powers

The doctrine of separation of powers requires the three functions of government, namely the executive, the legislative and the judicial functions to be performed by separate branches of the government.⁴⁴ Although the Constitution does not expressly provide for the doctrine, Constitutional Principle VI provides that⁴⁵

³⁹ Currie & De Waal (2001) at 78; *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) para 11.

⁴⁰ See Nel at 27; Currie & De Waal (2005) at 12; *Pharmaceutical Manufacturers Association of SA: In Re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85; Raz at 206 (the “law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimise the danger created by the law itself”).

⁴¹ Currie & De Waal (2001) at 79–81; Currie & De Waal (2005) at 13; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 59; Raz at 201 (the “rules concerning the independence of the judiciary...are, therefore, essential for the preservation of the rule of law”).

⁴² Currie & De Waal (2005) at 13.

⁴³ For a complete discussion of the doctrine see Seedorf & Sibanda at 12-1; Currie & De Waal (2001) at 91-119; Meyerson at 2.

⁴⁴ Currie & De Waal (2005) at 18.

⁴⁵ See Seedorf & Sibanda at 12-18, 12-20; Currie & De Waal (2005) at 18; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

[t]here shall be a separation of powers between the legislature, executive and judiciary⁴⁶, with appropriate checks and balances to ensure accountability, responsiveness and openness.

The purpose of the doctrine is to “prevent the excessive concentration of power in a single person or body.”⁴⁷ However, such separation cannot be a complete separation. Certain checks and balances are applicable which means that one branch of government will exercise some influence and control over another branch of government.⁴⁸ The independence and impartiality of the judiciary is linked to this doctrine and is guaranteed by the Constitution.⁴⁹

4.2.1.3 Judicial independence and impartiality

Judicial independence means that judges must apply the law impartially, without pressure from outside and should function independently from the other branches of government.⁵⁰ It is clearly essential for a fair trial and is considered a cornerstone of democracy.⁵¹

⁴⁶ Currie & De Waal (2001) at 268 define ‘judicial authority’ as “the organ of government not forming part of the executive or the legislative, which is not subject to personal, subjective and collective controls and which performs the primary function of adjudication.”

⁴⁷ Currie & De Waal (2005) at 18; Meyerson at 1.

⁴⁸ Currie & De Waal (2005) at 18; Meyerson at 1; Seedorf & Sibanda at 12-19; *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) (*First Certification Judgment*) para 108.

⁴⁹ Section 165(1)-(2) of the Constitution; Seedorf & Sibanda at 12-28; the *First Certification Judgment* 1996 (10) BCLR 1253 (CC) para 123 (“[a]n essential part of the separation of powers is that there be an independent judiciary... What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive”); *South African Association of Personal Injury Lawyers v Heath* para 25; Currie & De Waal (2001) at 108, 268; Steytler (1998) at 260.

⁵⁰ Currie & De Waal (2001) at 299; s 165(2)-(3) of the Constitution; Govindjee A & Vrancken P (eds) *Introduction to Human Rights Law* (2009) at 215; Seedorf & Sibanda at 12-28. Taitz J L “The Right to Reasonable and Adequate Notice of Criminal Proceedings – An Essential Aspect of Procedural Justice” (1992) 2 SACJ 132 at 138 refers to the impartiality of the judge as one of the “twin pillars of justice.” It is not only judges but also judicial officers that need to be independent. Judges are seen as those judicial officers that act in the superior courts while other officers performing judicial functions are seen as judicial officers (see in this regard Currie & De Waal (2001) at 268.

⁵¹ Nel at 15.

It is further required that judges must be “independent” and “impartial”.⁵² Both the concept of “independence” and “impartiality” form an integral part of the way in which courts must exercise their judicial functions. Although they are separate concepts, the court cannot be perceived as impartial if it is not perceived as independent.⁵³ “Impartiality” as a concept denotes the state of mind of the judicial officer and “independence” refers to the relationship between the judiciary and the other branches of government.⁵⁴

Impartiality means that the judicial officer must be free of personal bias⁵⁵ and should not allow himself to be influenced by any factors outside the courtroom.⁵⁶ It was found that the test to determine the impartiality of the judicial officer includes a “reasonable suspicion of bias” and where that is the case, the judicial officer has to recuse himself⁵⁷ even if “there is no concrete indication of partiality of the person.”⁵⁸ The MDSMA clearly provides for the recusal of the military judge in any instance of bias.⁵⁹

When considering the independence of the judiciary a distinction is made between substantive (or institutional) independence and personal independence. Judges must have both before they can be regarded as being independent.⁶⁰

⁵² Nel at 17; Kelly at 4; United Nations (UN) *Basic Principles on the Independence of the Judiciary* (1985) principle 2 (“[t]he judiciary shall decide matters before them impartially on the basis of facts and in accordance with the law, without and restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”).

⁵³ Okpaluba at 128. For an international perspective on “impartiality” see Danilet at 18-24.

⁵⁴ Currie & De Waal (2001) at 299; Okpaluba at 125; Nel at 17.

⁵⁵ *Findlay v United Kingdom* (1997) 24 EHRR 221 para 78.

⁵⁶ Van Dijk & van Hoof at 336.

⁵⁷ *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) at 491; *Findlay v United Kingdom* (1997) 24 EHRR 221 para 76 (the appearance of impartiality may be important for the maintenance of confidence in the military justice system); *Sramek v Austria* (1984) 7 EHRR 351 para 42; Lord Bingham of Cornhill “A New Supreme Court for the United Kingdom” (2002) *The Constitution Unit Spring Lecture 2002* at 4-5.

⁵⁸ Van Dijk & van Hoof at 338-339.

⁵⁹ Rule 35 of the MDSMA. The discussion regarding the recusal of military judges in ch 3 at para 3.2.3.1 above has reference.

⁶⁰ Nel at 16-17; Seedorf & Sibanda at 12-18; *R v Valente* (1985) 24 DLR (4th) 161 (SCC) at 171; Kelly at 4; Cachalia at 57.

4.2.1.4 Institutional or substantive independence

Judicial officers are only subject to the law in the execution of their duties and not to precepts from an organ of state.⁶¹ The collective independence of the judiciary as a whole depends on this principle.⁶² This means that the administrative duties of the judiciary and the findings of the court must not be subject to any influence by any organ of state.⁶³ Institutional independence therefore refers to the independence of the judiciary from the executive and the legislature⁶⁴ when the judiciary has “control over the administrative decisions that bear directly and immediately on the exercise of the judicial functions.”⁶⁵ Whether the court will have the necessary institutional independence will depend, inter alia, on the specific function of the court and its place in the judicial hierarchy.⁶⁶ The Constitutional Court is prepared to accept a lower standard of independence for the lower courts compared to the standard set for the High Courts.⁶⁷

⁶¹ Nel at 18-19 and 21.

⁶² McNairn D “Does Canada Need a Permanent Military Court?” (2006) 18 *National Journal of Constitutional Law* 205 at 226. It is opined that institutional independence only attaches to the court as an institution.

⁶³ Nel at 18-19.

⁶⁴ Okpaluba at 117; Tshivhase (2006) at 118; the earlier discussion on the separation of powers doctrine at para 4.2.1.2 above; UN *Basic Principles on the Independence of the Judiciary* principle 1 (“[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. *It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary*”) (emphasis added).

⁶⁵ *R v Valente* (1985) 24 DLR (4th) 161 (SCC) at 190; Steytler (1998) at 265 (the appointment of judges and court lists); Nel at 20 (judicial matters should resort exclusively with the judiciary and the allocation of cases should also rest with the judiciary).

⁶⁶ Okpaluba at 119; Seedorf & Sibanda at 12-30; McNairn (2006) at 228; *R v Généreux* [1992] 1 SCR 259 para 3 where the court found that the right to be tried by an independent and impartial tribunal must be interpreted in light of the purpose of the system of military justice, being the enforcement of discipline, which may result in a difference between the military context of the Constitutional right and that of a regular criminal trial.

⁶⁷ Franco J & Powell C “The Meaning of Constitutional Independence in *Van Rooyen v The State*” (2004) 121 *SALJ* 562 at 574; *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) paras 27-28 (“[j]udicial independence can be achieved in a variety of ways; the most rigorous and elaborate conditions of judicial independence need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system”).

The test for determining whether the court is in fact independent is an objective one where not only the factual independence is considered, but also the perceived independence.⁶⁸ Such perception of a lack of independence, must be a reasonable one,⁶⁹

based on a balanced view of all the material information....[t]he well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of court.

To avoid the appearance of outside influence the judiciary should not have contact with either political parties or organs of state.⁷⁰ Kelly opines that in criminal cases the individual who is prosecuted should not be tried by a judiciary that is part of the "official state structure which is, in effect, prosecuting that individual."⁷¹ However, the military as an organ of state cannot help but become involved when soldiers are prosecuted in military courts. Does this result in military courts not being recognised as independent and impartial?

⁶⁸ *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 32 ("[i]t is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception"); *Findlay v United Kingdom* (1997) 24 EHRR 221; Rant J W "Findlay, The Consequences: Remarks Given at the Judge Advocate General School, November 1997" (1998) 25 *Reporter* 3-7 at 6; *De Lange v Smuts* 1998 (3) SA 785 (CC); *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 25; *Financial Services Board v Pepkor Pension Fund* 1998 (11) BCLR 1425 (C) at 1432; Tshivhase (2009) at 476-477; Nel at 70, 72 (public trust in the independence of the judiciary increases its legitimacy in the eyes of the public). Public perceptions and opinion play a large role in the legitimacy of the judiciary (see Kelly at 4 where it is stated that "a court can only be truly accepted as a just one if it has the confidence of the public that it is just and fair"). It is a well known adage that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (see Nel at 68 quoting Lord Heward in *R v Sussex Justices: Ex Parte McCarthy* (1924) 1 KB 256); Danilet at 17. For a contrary view see Essex T & Pickle L T "A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission"" (2002) 52 *Air Force Law Review* 233 at 265 where, in commenting on the Uniform Code of Military Justice (UCMJ), it is stated that the UCMJ should not be changed due to perceptions. The authors opine that a perception of a lack of independence does not result in the military judiciary actually lacking independence. Changing the law to make the military judiciary more independent is therefore unnecessary and one should rather "campaign to educate the public and military members, but we do not need to change the law because of perceptions."

⁶⁹ *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 34; Okpaluba at 130.

⁷⁰ Kelly at 5.

⁷¹ Kelly at 5.

Separation of powers does not mean a complete separation and it is inevitable that the judiciary will have some contact with the executive branch in terms of financial and administrative issues.⁷² The important aspect however, in terms of international standards, is to “limit the formal interaction between these two branches of government to only the extent necessary to provide security and the necessary financial and administrative support to the courts.”⁷³

The requirement of independence of the judiciary applies to all military courts.⁷⁴ After the invalidation of the courts martial system⁷⁵ the MDSMA created a new military court system, bringing it in line with the constitutional requirements.⁷⁶ It is submitted that military courts should now be regarded as courts established in terms of the Constitution.⁷⁷ This has subsequently been confirmed by the civilian courts concerning trials in terms of military law. Although the court held in *S v Tsotsi*⁷⁸ that military courts do not form part of the ordinary courts structure, subsequent decisions accepted military courts as inferior courts, possibly with the same status as magistrate’s courts.⁷⁹ The question, however, is whether these courts have institutional independence.

⁷² Kelly at 5.

⁷³ Kelly at 6.

⁷⁴ Section 165 of the Constitution refers throughout to “the courts”, referring by implications to all courts. No exceptions are mentioned in the Constitution. Institutional independence in the context of the military justice system not only refers to the independence of the military justice system but also to an independent prosecution body. The independence of military prosecution however falls outside the scope of this research. See the discussion in *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) on the constitutionality of having a separate prosecution body for the military. The independence of the military prosecution body *per se* was however not addressed.

⁷⁵ See *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C).

⁷⁶ *Minister of Defence v Potsane; Legal Soldiers (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 31; s 2 of the MDSMA regarding the aim of the Act being, inter alia, to create military courts. The military court system is further established by s 6 MDSMA.

⁷⁷ Section 166(e) of the Constitution (“*any other court established or recognized in terms of an Act of Parliament.*”) (emphasis added); Tshivhase (2009) at 464.

⁷⁸ *S v Tsotsi* 2004 (2) SACR 273 (E) para 12.

⁷⁹ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 233A (“military courts of first instance are inferior courts”); *Tsoaeli v Minister of Defence; Kholomba v Minister of Defence* [2006] JOL 17034 (T) at 6-7; *Steyn v Minister of Defence* [2004] JOL 13059 (T) at 12.

The legislation governing military justice makes provision for the independence of the CSMJ and the CMJ.⁸⁰ It is required from every military and senior military judge to exercise their judicial function independently and subject only to the Constitution and the law,⁸¹ that the Constitution and the law be applied impartially and without fear, favour or prejudice⁸² and that all proceedings before the military court should be conducted in a manner befitting a court of justice.⁸³ It is notable that these requirements, of institutional independence, are not extended to the CODH. Section 19 of the MDSMA applies expressly to military judges and senior military judges, but not to commanding officers presiding over disciplinary hearings. Functionaries appointed by the Adjutant General are further required to perform their functions “free from executive or command interference” but remain subject to policy directives.⁸⁴ This would indicate a sufficient level of factual institutional independence.⁸⁵

However, as mentioned above, the perception of independence must also exist. It is therefore necessary to consider concerns influencing the perception of institutional independence of the military courts. Two such concerns are particularly notable, namely the fact that serving members of the SANDF are appointed as military judges, and the role of the Adjutant General.

The MDSMA provides that officers are assigned to the post of senior military or military judge.⁸⁶ This creates an institutional link between military judges and the SANDF. As serving officers they form part of the public service and it was found

⁸⁰ Section 19 of the MDSMA. The oaths of the various functionaries of the military courts as mentioned in Chapter 4 above should also be kept in mind.

⁸¹ Section 19(a) of the MDSMA.

⁸² Section 19(b) of the MDSMA.

⁸³ Section 19(c) of the MDSMA, implying the same level of independence and impartiality as is expected from a civilian court.

⁸⁴ Section 14(4) of the MDSMA. This particular section of the MDSMA does not however include the commanding officer at the CODH.

⁸⁵ Tshivhase (2006) at 118.

⁸⁶ Sections 9(1)(a), 10(1)(a) and 13(2) of the MDSMA. The term “officer” is defined in s 1 of the Defence Act 42 of 2002 (“a person on whom permanent or temporary commission has been conferred by or under this Act and who has been appointed to the rank of officer”); Tshivhase (2009) at 466.

that such officers do not in fact enjoy judicial independence.⁸⁷ The state is a party in all cases serving before the military courts. The executive may therefore conceivably have a stake in the outcome of the trial. Where the judicial officer is seen as part of the executive by virtue of his employment as a public official, this may create a reasonable concern regarding the independence of that court.

This perception may not necessarily apply to all military courts in equal measure. The CMA does not exclusively consist of serving members. The chairperson of the CMA is a serving or retired judge of the High Court or a serving or retired magistrate, although the other members of the courts are serving members of the SANDF.⁸⁸ The appointment of a civilian as member of the CMA may enhance the perception that the court is independent.⁸⁹ This alone may on the other hand not be sufficient to guarantee independence. The fact that serving members are appointed was a matter of concern for the Ministerial Task Team. Although they recognise the importance of military experience in trying offences of a military nature and imposing specific sentences, they are of the opinion that it would be preferable if retired individuals with the required knowledge were appointed, in order to counter the perception of bias.⁹⁰ In general, the Ministerial Task Team was however satisfied that the CMA complies with the requirements of an independent and impartial tribunal.⁹¹

⁸⁷ *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 23; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 73 and 75. For a contrary opinion see *Morris v The United Kingdom* [2002] 34 ECHR 52 para 103 where the court found that the appointment of members of the court martial within the military system was not reason enough to doubt the impartiality of the court.

⁸⁸ Section 7(1) of the MDSMA. The other members consist of a law officer, usually a senior military judge and an officer with experience of command in the field.

⁸⁹ According to the Ministerial Task Team *Report by the Ministerial Task Team on the Transformation of the Military Legal System* (2005) at 40 serving or retired judges appointed to the CMA have a “background and culture of institutional independence.”

⁹⁰ See *Cooper v The United Kingdom and Grieves v The United Kingdom* (2004) 39 EHRR 8 para 117 (the fact that the Judge Advocate was a civilian appointed by a civilian can be seen as one of “the most significant guarantees of judicial independence of the proceedings”); Carnelley at 65. This view is also supported by the Ministerial Task Team at 15.

⁹¹ A view supported by Carnelley at 77; *Steyn v Minister of Defence* [2004] JOL 13059 (T) para 11 (the court held that “there could be no merit in the argument that the CMA or...the military justice system is not independent and impartial as the civilian courts are”).

As mentioned, judges in the CMJ and CSMJ will always be serving members of senior rank since only officers can be assigned to the function of military judge by the Minister. The Ministerial Task Team argued that appointing civilian or retired judges to these courts may guarantee institutional independence since they come from a background of independence and there would be no institutional link between the members of the court and the executive.⁹² The Ministerial Task Team recommended that retired or serving regional magistrates should be appointed as the chairperson of the CSMJ in order to promote the credibility and legitimacy of the military judicial system. Where such a magistrate does not have the required expertise and knowledge of the Defence Force, retired members of the SANDF or members with the required knowledge should be appointed as members of the court.⁹³

This approach is followed in the British military court system. The British military judiciary consists of eight full-time judges, consisting of a Vice-Judge Advocate General and seven Assistant Judge Advocates General. There are also ten part-time Judge Advocates available if necessary. All military judges are civilians, appointed from experienced barristers or solicitors from the civilian courts.⁹⁴ They are appointed in the same manner as District and Circuit Judges. Military judges may also serve in the Crown Court. In very serious or unprecedented cases a High Court Judge may also preside over a court martial.⁹⁵

Many other jurisdictions, however, appoint military members as military judges. Canada appoints military lawyers to the independent Office of the Chief Military Judge. They are appointed by a Judicial Selection Committee for a renewable

⁹² See in this regard *Cooper v The United Kingdom and Grieves v The United Kingdom* (2004) 39 EHRR 8; Carnelley at 65. The Ministerial Task Team at 17 recommends that retired or serving regional magistrates should be appointed as the chairperson of the CSMJ in order to promote the credibility and legitimacy of the military judicial system. Where such a magistrate does not have the required expertise and knowledge of the Defence Force, retired members of the SANDF or members with the required knowledge should be appointed as members of the court.

⁹³ Ministerial Task Team at 17.

⁹⁴ See Joinet at 15.

⁹⁵ Judiciary of England and Wales *Military* (2011) at 1.

period of five years.⁹⁶ As is the case in South Africa, the requirement for the appointment of officers prevents civilians from appointment as military judges.⁹⁷ In the United States the Judge Advocate General also appoints military members as military judges.⁹⁸ They do however report through a different chain of command.⁹⁹ The convening authority who convenes the court martial does not appoint the specific judge for a particular case and is also not responsible for the judge's annual performance report.¹⁰⁰

It is submitted that the appointment of civilians to the function of military judge may not necessarily be the best solution. The aim of military courts is "to maintain military discipline."¹⁰¹ This would be very difficult to achieve if the judicial officer has no military experience or understanding of the uniqueness of military discipline.¹⁰² The Constitutional Court found that there is a difference between civilian life and military life that necessitates a military justice system that makes provision for these differences.¹⁰³ It was found that¹⁰⁴

⁹⁶ Madden M "First Principles and Last Resorts: Complications of Civilian Influences on the Military Justice System" (2009) 9 *Canadian Military Journal* 49 at 51.

⁹⁷ McNairn D "A Military Justice Primer, Part 1" (2000) 43 *Criminal Law Quarterly* 243 at 253.

⁹⁸ Lederer F I & Hundley B S "Needed: An Independent Military Judiciary – A Proposal to Amend the Uniform Code of Military Justice" (1994) 3 *William & Mary Bill of Rights Journal* 629 at 644.

⁹⁹ Essex & Pickle at 237; Roan J B & Buxton C "The American Military Justice System in the New Millennium" (2002) 52 *Air Force Law Review* 185 at 208.

¹⁰⁰ Roan & Buxton at 208; art 26(c) of the Uniform Code of Military Justice (UCMJ).

¹⁰¹ Section 2 of the MDSMA; see the discussion in ch 1 at para 1.6.2; ch 3 at para 3.1 above.

¹⁰² See *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 233F-G where the court held that "military courts are better able to ensure that the SANDF's constitutional obligation to maintain discipline is fulfilled. In particular, military courts are better suited to judge the seriousness of offences in military context."

¹⁰³ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) 2002 (1) SA 1 (CC) (although the decision related to the function of military prosecutions, it is submitted that the reasoning by Kriegler J may equally apply to military judges); *Financial Services Board v Pepkor Pension Fund* 1998 (11) BCLR 1425 (C) at 1432 (Conradie J, in determining the independence of Financial Services Appeal Board, found the Appeal Board was designed to combine persons with expert knowledge in complex financial matters and it would not be inappropriate to appoint a person who may be sensitive to policy concerns of the Appeal Board. It can therefore be argued that it would not be inappropriate to appoint serving members to the military court, being a specialised area of law).

¹⁰⁴ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 31; Fidell E R "The Culture of Change in Military Law" (1989) 126 *Military Law Review* 125 at 125.

[s]oldiers live and work in a subculture of their own. This is recognised and accepted by acknowledging the constitutional validity of a separate military justice system with its own unique rules, offences and punishments... [A]lthough the Bill of Rights is not excluded, the relationship between the SANDF and its members has certain unique features. For instance, what would be acceptable in another employment relationship is not only impermissible for a soldier but may be visited by punishment...

Considering the uniqueness of the military environment the court further asked “[w]hy should military prosecutions be conducted by civilians? Why should decisions regarding military discipline be taken by outsiders?”¹⁰⁵

It is submitted that the conclusion by Fay, quoted with approval by Carnelley, should be supported:¹⁰⁶

In a military organization ... there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests on the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence can only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.

Since the aim of military law is the maintenance of discipline, the use of serving members as military judges can be justified. Tshivhase, after perusing international jurisdictions, notably Australia, comes to the conclusion that military

¹⁰⁵ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 32.

¹⁰⁶ Fay J B “Canadian Military Criminal Law: An Examination of Military Justice – Part IV” (1975) 23 *Chitty’s Law Journal* 228 at 248; Carnelley at 68.

law development shows a “disapproval of the civilianisation of military courts.”¹⁰⁷ This would indicate support for the use of serving members as military judges. However, a large number of jurisdictions are in fact moving in the opposite direction towards the civilianisation of military courts. More countries are now under pressure to conform to international standards of human rights, aligning with reforms taking place in the civilian courts. There is in fact growing international consensus to limit the role of military courts or to abolish them completely.¹⁰⁸ Findings by an international study on military jurisdictions showed that several countries have done away with military courts.¹⁰⁹ Military cases are then heard in civilian courts, either in courts formed as a specialised element of the civilian court or before a purely civilian court. Examples mentioned in the study are Finland, where military prosecutions were taken over by civilian public prosecutors; and the Netherlands, where military personnel are prosecuted before a civilian court. Where military courts are not abolished completely, countries are limiting the jurisdiction of military tribunals to times of war – such as Germany, Greece, Austria, France, Norway and Sweden. Review of these military trials is then done by the civilian supreme courts.¹¹⁰

The emphasis on discipline in the military in the context of the perceived independence of the military courts may raise a further concern. Military judges, as serving members, are also subject to the same military discipline: they have to act on orders given by higher authority.¹¹¹ This argument can be countered by the legal principle that soldiers, including military judges, are only required to

¹⁰⁷ Tshivhase (2009) at 480; Lederer & Hundley at 673 (the armed forces need judges who are familiar with the unique nature of military life. It would be fairer to try and sentence an individual if the judge understands the “special stresses of military duty”).

¹⁰⁸ See in this regard Open Society Institute *Judicial Independence in the EU Accession Process* (2001) at 35-36. Military courts have been abolished in countries such as the Czech Republic, Lithuania and Slovenia. In Hungary military judges sit within the civilian court system, as is the case in Britain.

¹⁰⁹ Dahl A W *International Trends in Military Justice* (2008) at 1-4.

¹¹⁰ Joinet at 3, 15.

¹¹¹ *Incal v Turkey* (1998) 29 EHRR 449 at 1571-1572 and 1567 as cited in *Morris v United Kingdom* (2002) 34 ECHR 52 para 65. This may lead to a “closer connection to the military hierarchy” (see Open Society Institute at 36).

obey manifestly legal orders.¹¹² An order by the executive interfering with the independence of the military judiciary would clearly constitute an illegal order and can therefore legally be disobeyed. It should also be noted that military judges fall under the command and control of the Director: Military Judges, thereby forming a separate division within the Military Legal Services Division. Military judges would therefore conceivably receive orders mainly from the Director: Military Judges.

Certain safeguards could counter the perception of a lack of independence. Such safeguards may include the fact that all judges are required to hold a degree in law. All judges are required to take an oath or make an affirmation that they will apply the law without fear, favour or prejudice.¹¹³ Although military judges are compelled to perform their functions free from executive or command interference, they are still required to remain within policy guidelines.¹¹⁴

This proviso raises the following interpretation question: Since the MDSMA trumps all other legislation, except for the Constitution,¹¹⁵ does this mean that the policy considerations, referred to in section 14(4) of the MDSMA, could result in the *de facto* interference by the executive in the application of the law and the decisions by the court? It is submitted that policy directives breaching the independence of the military judiciary would be *contra bonos mores* and would constitute a “manifestly illegal order”, allowing military judges not to follow such directives. The importance of policy considerations in the decision to prosecute in a military court has already received some attention in the courts.¹¹⁶ Military

¹¹² For a discussion on obedience to orders see Snyman C R *Criminal Law* 5 ed (2008) at 138-140; Burchell J *Principles of Criminal Law* rev 3 ed (2010) at 284-290; *R v Smith* (1900) 17 SC 561; *S v Banda* 1990 (3) SA 466 (B).

¹¹³ Section 19 of the MDSMA.

¹¹⁴ Section 14(4) of the MDSMA.

¹¹⁵ Section 4(1) of the MDSMA

¹¹⁶ See *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 40 where Kriegler J held that “[i]n the case of military prosecutions much more than in the case of civilian prosecutions, such decisions must take into account policy considerations, interpersonal relationships, *esprit de corps*, morale, efficiency and possibly many other considerations. For a civilian prosecutor, even one attached to the particular military unit but not forming part of the command structure, to have to take such decisions would be unfair to both the

judges come from the same environment as the executive and it is therefore conceivable that military judges and the executive who appoint them may have a similar mindset, resulting in possible institutional bias to the detriment of the accused when appointing “military minded” judges.

In the *Van Rooyen*¹¹⁷ judgment the court found that the magistrate’s court as an institution had little protection from political interference, but still found that it was sufficiently independent as long as there was a third body which could be called upon to remedy any undue influence, such as a court of appeal.¹¹⁸ It is submitted that military courts should now be viewed in the same light since provision is made for the review and appeal of military cases to the CMA and the High Court of South Africa.¹¹⁹

The role of the Adjutant General

Institutional independence includes the view that the judiciary must be responsible for its own administrative processes.¹²⁰ This also applies to the allocation of cases within the judiciary – the responsibility should rest with the judiciary.¹²¹ The MDSMA, governing the functions of the CMJ¹²² and the CSMJ,¹²³ does not provide the military judiciary with the authority to control their own administrative processes. Instead, the administration of the military judiciary

prosecutor and the accused ... the effect on military lines of authority and command would be potentially disastrous.”

¹¹⁷ *Van Rooyen v The State* 2002 (9) BCLR 810 (CC).

¹¹⁸ Franco & Powell at 575.

¹¹⁹ The military appeal and review procedures are discussed in ch 7 in para 7.4 below.

¹²⁰ Seedorf & Sibanda at 12-29; Nel at 20. The standards set by the International Bar Association require the judiciary to have exclusive responsibility for judicial administrative matters (see Danilet at 6). This includes a decision on the allocation of cases before specific judges.

¹²¹ See Nel at 21, where she quotes the *Universal Declaration of the Independence of Justice* (1983) 2.43 which states that the “judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of the court.”

¹²² Section 10 of the MDSMA.

¹²³ Section 9 of the MDSMA. The general duties of military judges are provided for in s 19 of the MDSMA. No provision is made for any exceptions.

lies with the Adjutant General.¹²⁴ This situation might create a further area of possible executive interference due to the wide powers held by the Adjutant General of the Military Legal Services Division.

The Adjutant General is an officer in the SANDF who is admitted as or is qualified for admission as an attorney or advocate and who has at least seven years of experience in the administration of criminal or military law. The Adjutant General is appointed by the Minister.¹²⁵ He is¹²⁶

responsible for the overall management, promotion, facilitation and co-ordination of activities in order to ensure the effective administration of military justice and the military legal services....

As a senior officer in the SANDF his managerial function forms part of the executive and he is required to report on his judicial functions to the executive.¹²⁷ All assignments of functionaries by the Minister are done on the recommendation of the Adjutant General. Notice should be taken of the peremptory language used, namely that the “Minister *shall* assign officers...on the recommendation of the Adjutant General...”¹²⁸ It would therefore seem as if no individual can be

¹²⁴ See also Tshivhase (2009) at 475.

¹²⁵ Section 27 of the MDSMA.

¹²⁶ Sections 28(1)(a)-(b) of the MDSMA. The local representative of the Adjutant General, who as the administrative head of the Legal Satellite Office (Legsato), is the Officer in Charge of the Legsato and is authorised in writing by the Adjutant General to “manage, facilitate and co-ordinate activities ensuring the effective administration of military justice and military legal services.”

¹²⁷ Section 28(1)(b) of the MDSMA.

¹²⁸ Section 14 of the MDSMA (emphasis added). The importance of the Adjutant General in the assignment process is confirmed in s 14(2) of the MDSMA where it is provided that the Adjutant General must be convinced that the officer to be assigned is “a fit and proper person of sound character...” The Judge Advocate General (JAG) of the US armed forces (a post equivalent to that of the Adjutant General in South Africa) selects the military judges for appointment. The JAG is also the principal legal advisor for the armed forces. This may lead to a conflict of interest (see Lederer & Hundley at 651). The US Supreme Court however held in *Weiss v United States* 114 SCt 752 (1994) that this state of affairs did not influence the independence of the judiciary. In Spain the members of the military courts are appointed by the Minister of Defence (see Joinet at 14).

assigned to the post of military judge without the recommendation of the Adjutant General.¹²⁹

The local representative of the Adjutant General must, in consultation with the Director: Military Judges or the military judge directly, plan and schedule the availability of the military judges for trial.¹³⁰

The influence of the Adjutant General is also felt in the highest military court, the CMA. The MDSMA makes provision for more than one CMA.¹³¹ Where more than one CMA is established, the Adjutant General is authorised to determine which cases or classes of cases will be brought before which court.¹³² In these instances the executive (in the guise of the Adjutant General) is effectively exercising control over which cases are heard before which judge.

Although the influence of the Adjutant General is confined to the administrative functions of the military courts and should not influence the way in which the trials are conducted or the decisions taken by the military judges, the perception created is one where cases can be assigned to judges sympathetic to the cause of the executive. It does, however, seem to be generally accepted, within the limited debate on the independence of the military judiciary, that the military justice system is essentially independent.¹³³ The reason put forward is that the concerns regarding judicial independence do not affect the judicial decision-making process. However, a clear distinction is not made between the institutional independence of the individual judge, in terms of which the judge is allowed to reach a finding without outside influence, and the collective

¹²⁹ Likewise, the removal of an individual from his assignment as military judge can only be done by the Minister on recommendation by the Adjutant General (see s 17 of the MDSMA).

¹³⁰ Section 32 of the MDSMA; Tshivhase (2006) at 118. The local representative will issue the required Notice of Enrolment, thereby placing the accused's case on the court roll.

¹³¹ Section 7(2) of the MDSMA.

¹³² Section 7(2) of the MDSMA; Tshivhase (2006) at 118.

¹³³ Carnelley at 69; Tshivhase (2006) at 118 (despite the powers exercised by the Adjutant General, the judiciary "seem to enjoy reasonably sufficient guarantees for institutional independence with respect to pure judicial decision-making").

institutional independence of the military judiciary as a whole.¹³⁴ As mentioned earlier, the individual independence of the judge is dependent on the collective independence of the judiciary.¹³⁵ Both these aspects must be complied with. It is submitted that the concerns raised do not interfere with the individual independence of the military judges, but raise real concerns regarding the collective institutional independence of the military judiciary.

The administrative procedures for which the Adjutant General is responsible should resort under the authority of the Director: Military Judges. However, as seen previously, the South African model of separation of powers does not provide for a complete severance between the various branches of government. Dealings between the courts and the executive regarding administrative matters are inevitable. This is not necessarily contrary to the international standards as long as the “interaction between these two branches of government is [limited] only to the extent necessary to provide security and the necessary...administrative support.”¹³⁶ As long as the Adjutant General’s involvement in the judicial administration of the military courts is limited to administrative support, the institutional independence of the military judiciary might withstand constitutional scrutiny.

A possible solution for this problem, according to the Ministerial Task Team, might be to place a civilian in a post similar to that of the Registrar of the High Court, to take over this administrative function from the Adjutant General, thereby ensuring independence.¹³⁷

The Canadian military justice system utilises a Court Martial Administrator who convenes the courts martial, issues the convening orders and appoints the

¹³⁴ Nel at 16-17; Danilet at 4.

¹³⁵ Nel at 18-19.

¹³⁶ Kelly at 6.

¹³⁷ See Ministerial Task Team at 30.

members of the courts martial.¹³⁸ The Court Martial Administrator is a uniformed member but works under the supervision of the Chief Military Judge.¹³⁹

4.2.1.5 Personal independence

In determining whether the courts are truly independent, it is not sufficient that a court has the required institutional independence. The judicial officer must also have personal independence.¹⁴⁰ This means that the employment conditions of the judicial officer must be sufficient to ensure that the individual judge is not subject to executive influence.¹⁴¹ There are various criteria to consider when evaluating the personal independence of the judiciary, such as¹⁴² (1) selection and appointment, (2) security of tenure, and (3) financial independence. Although these three criteria are acceptable for determining the independence of the courts, the application of the criteria could differ depending on the level of the court.¹⁴³ In what follows the CMA, CSMJ and CMJ are evaluated against the general requirements set for civilian courts. A short evaluation of the CODH is also included.¹⁴⁴

Personal independence of judicial officers is an internationally recognised requirement.¹⁴⁵ The level of independence required for the various types of courts depends on the level of the court. The lower courts are not necessarily entitled to the protection of their independence in the same way as is provided for

¹³⁸ McNairn (2006) at 218-219; ss 165.18-165.2 of the National Defence Act, R.S.C., 1985, c.N-5.

¹³⁹ McNairn (2000) at 254-255.

¹⁴⁰ Nel at 15-16. Personal independence should not be seen as a privilege of the judge. The principle of personal independence is to protect people from abuses of power. It is “a benefit for the public” (see Danilet at 9).

¹⁴¹ Nel at 18.

¹⁴² Currie & De Waal (2001) at 300; Steytler (1998) at 261; Okpaluba at 127–128; Tshivhase (2006) at 99; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 70; *Findlay v United Kingdom* (1997) 24 EHRR 221 para 73; *R v Généreux* [1992] 1 SCR 259 at 3-6.

¹⁴³ Okpaluba at 113; *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 27.

¹⁴⁴ See para 4.3.3.3 below.

¹⁴⁵ See UN *Basic Principles on the Independence of the Judiciary* principle 10 regarding the standards set for the judicial appointment process, principle 11 for the term of office and remuneration of the judicial officer and principles 12, 17 and 18 regarding the standards for removal of office.

the higher courts.¹⁴⁶ The Constitutional Court, in a comprehensive discussion, differentiates between the jurisdiction of the high courts and the magistrates' courts, the appointment of the judges and the governing of their salaries and benefits against those of the magistrates as well as the removal from office of these judges and judicial officers.¹⁴⁷ When considering the method of appointment of military judges, the regulation of their salaries and benefits, to name a few examples, it is submitted that the CSMJ and CMJ can be favourably compared to the magistrates' court when considering its inclusion as a lower court.

The concerns surrounding the appointment of military judges, their security of tenure and their financial independence are briefly addressed.

Selection and appointment

The *Basic Principles on the Independence of the Judiciary* provides that¹⁴⁸

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

These principles are reflected in the constitutional prescripts set out for the appointment of judicial officers.¹⁴⁹ The Constitution sets, inter alia, the following requirements:

¹⁴⁶ Steytler (1998) at 261; Okpaluba at 113; *Financial Services Board v Pepkor Pension Fund* 1998 (11) BCLR 1425 (C) at 1431.

¹⁴⁷ For a fuller discussion see *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 28; Seedorf & Sibanda at 12-30.

¹⁴⁸ UN *Basic Principles on the Independence of the Judiciary* principle 10.

1. Only appropriately qualified fit and proper people may be appointed as judicial officers.¹⁵⁰
2. The judiciary needs to broadly reflect the racial and gender composition of the country.¹⁵¹
3. All other judicial officers must be appointed in terms of an Act of Parliament which will provide for the promotion, salaries and dismissal of the judges without favour or prejudice.¹⁵²
4. Judicial officers are required to “take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution”.¹⁵³

Military judges are not regulated by the general South African legislation that regulates the judiciary.¹⁵⁴ Military courts are regulated by the MDSMA.¹⁵⁵ Having accepted that military courts can be regarded as “other courts” as

¹⁴⁹ Section 174 of the Constitution. In terms of the international standards there is no specific manner of appointment that is deemed most acceptable. The only criteria set is an objective one that “assesses the integrity, training and competence of recruited person” (see Danilet at 10). What is required is that the appointment of judges is not left exclusively to the discretion of either the executive or legislature.

¹⁵⁰ The MDSMA complies in this regard where s 14(2) of the MDSMA provides that the Adjutant General can only appoint an officer to the function of military judge if “upon due and diligent enquiry, the Adjutant General is convinced that the officer is a fit and proper person of sound character who meets the requirements prescribed in this Act for such assignment.”

¹⁵¹ This matter is addressed by the transformation policy of the SANDF and military judges would therefore comply with this requirement.

¹⁵² All military judges are appointed in terms of the MDSMA (see in this regard ss 14–16 of the MDSMA).

¹⁵³ Section 174(8) of the Constitution. All military law practitioners, including judges are required to take an oath of office on appointment (see r 80 of the MDSMA). The oath, as set out in r 83 of the MDSMA is in line with the guidelines set out in s 6(3) of Schedule 2 of the Constitution.

¹⁵⁴ Tshivhase (2006) at 105. The Constitutional Court is governed by s 167 of the Constitution, the Supreme Court of Appeal and the High Court by the Supreme Court Act 59 of 1959 and the Magistrate’s Court by the Magistrate’s Court Act 32 of 1944.

¹⁵⁵ Chapter 3 of the MDSMA.

provided for in the Constitution¹⁵⁶, military judges must be regarded as judicial officers and as such must comply with the constitutional requirement that¹⁵⁷

[o]ther judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

The method of appointment of military judges depends on the level of the military court to which the judge is appointed. The appointment of judicial officers is not left to the judiciary.¹⁵⁸ The members of the CMA, being the most senior in status, are appointed by the Minister of Defence in terms of the MDSMA and not by the President, as in the case of civilian judges.¹⁵⁹ The chairperson of the CMA is a retired or serving judge of the High Court or a retired or serving magistrate. The appropriately qualified law officer is usually a senior military judge. No provision is made in terms of the MDSMA on whose recommendation the chairperson or the senior military judge as a member of the CMA is appointed. By implication such appointments are therefore made by the Minister alone, acting on her sole discretion. The Ministerial Task Team is of the opinion that the ministerial appointment of the members of the CMA need not be seen as executive interference with the independence and impartiality of the Court.¹⁶⁰

Military judges and senior military judges are also not appointed by the President,¹⁶¹ but are assigned to the post of military judge by the Minister on

¹⁵⁶ Section 166(e) of the Constitution.

¹⁵⁷ Section 174(7) of the Constitution; *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 120.

¹⁵⁸ Nel at 92.

¹⁵⁹ Section 7(1) of the MDSMA. The Minister may also appoint alternatives for any member of the CMA (see s 7(3) of the MDSMA). Members of the Reserve Force may also be appointed (s 7(8) of the MDSMA).

¹⁶⁰ Ministerial Task Team at 16.

¹⁶¹ One could argue that is in fact not correct since all officers in the SANDF are appointed by the President, and therefore all judges, being officers, are ultimately appointed by the President. However, they are not appointed by the President specifically as judges.

recommendation of the Adjutant General.¹⁶² The Adjutant General is a person of a high senior rank within the structures of the SANDF. As such he is, by law, responsible for the administration and management of the whole legal division. As he is a senior member of the executive, he should not play such a significant role in the appointment of the military judges. His influence is felt in the fact that, within his sole discretion, the Adjutant General will only recommend a person for assignment as military judge if he is convinced that the particular officer is a “fit and proper person of sound character.”¹⁶³ This raises a concern regarding the perceived independence of the military courts.¹⁶⁴

In this regard it has been suggested that all military judges be appointed by the Minister without the recommendation of the Adjutant General and where such recommendation is required, that a body independent from the SANDF be structured to make such recommendations to the Minister.¹⁶⁵ However, leaving the appointment of military judges within the sole discretion of the Minister may not be enough to dispel the perception of lack of independence. The fact that the executive is appointing the judge is not the concern,¹⁶⁶ as long as some independent body plays a significant role in the appointment process.

It is submitted that, in order to provide the necessary independence, a committee should be appointed to recommend those officers for appointment as military

¹⁶² Section 14(1) of the MDSMA; Tshivhase (2009) at 466.

¹⁶³ Section 14(2) of the MDSMA.

¹⁶⁴ Ministerial Task Team at 11; also the discussion at para 4.2.1.4 *The Role of the Adjutant General* above.

¹⁶⁵ Ministerial Task Team at 11. The Director: Military Judges is also appointed in a similar manner. Apart from being responsible for all administrative functions of the military judges, the Director, Military Judges must also perform the judicial function of a senior military judge. This may lead to a blurring of the executive and judicial function of this office. Once again, the Ministerial Task Team recommends the appointment of a civilian similar to a clerk of the court to perform these administrative tasks.

¹⁶⁶ This is supported by Chaskalson CJ in *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 108 where he agrees with *Ex Parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR at 1253 that “[t]he mere fact...that the Executive makes or participates in the appointment of Judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VIII.” Since this is the situation regarding judges in the high court, a stricter principle cannot be required for a lower court such as the military court (see also *R v Généraux* [1992] 1 SCR 259 paras 107, 182).

judges.¹⁶⁷ Such a process has been successfully introduced in Canada, where similar concerns regarding the independence of the judiciary were raised.¹⁶⁸ Canadian military judges are appointed by a military judicial selection committee, consisting of civilian as well as military personnel. Most of the members sitting on the committee also do not hold any position within the Judge Advocate General Corps.¹⁶⁹ A judge's appointment can be renewed after five years and the recommendation for such renewal must be done by a renewal committee.¹⁷⁰ The process followed for appointment of military judges is similar to those followed for civilian judges.¹⁷¹ Their qualifications required for appointment as military judges were brought in line with the requirements set for civilian judges. They must therefore have at least ten years experience as a member of the Canadian Bar.¹⁷²

The recommendation by the Ministerial Task Team regarding the appointment of an independent body for recommendation of military judges is supported. Such an independent body may go a long way in dispelling the perception of a lack of independence.¹⁷³

¹⁶⁷ It is required in terms of international standards that an independent mechanism is used in the appointment and disciplining of judges (see Danilet at 10).

¹⁶⁸ In 1998 Bill C-25 replaced the post of Judge Advocate with that of military judge.

¹⁶⁹ Madden at 51.

¹⁷⁰ McNairn D "An Update on Military Law Reform in Canada" (2004) *New Zealand Armed Forces Law Review* 36 at 40

¹⁷¹ When an individual is interested in an appointment as military judge, he submits his application to the military judicial selection committee. The application is then considered by the committee in a non-partisan manner. One of two recommendations can be made – the candidate is either "recommended" for appointment or a decision is made indicating "unable to recommend". A list of the candidates that have been recommended is then submitted to the Minister of National Defence and he chooses a candidate from this list. His choice is presented to the Governor in Council (the federal government) who then approves the choice. The process is also overseen by the Office of the Commissioner for Federal Judicial Affairs Canada. For a complete discussion on the selection process see Canadian Bar Association *Submission on the Operation of Canadian Military Law – National Defence Act and Bill C-25* (2003) at 12-15. Since 2000 six military judges have been appointed in this manner.

¹⁷² McNairn (2000) at 252

¹⁷³ Such a body would conceivably have similar powers as the Magistrate's Commission. The Minister of Justice appoints magistrates in consultation with the Commission (see also Steytler (1998) at 262).

Security of tenure

The *Basic Principles on the Independence of the Judiciary* provides that:¹⁷⁴

[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law;
and¹⁷⁵

[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office where such exist.

As mentioned earlier, it is a constitutional requirement that judicial officers must be appointed in terms of an Act of Parliament which must provide, inter alia, for the dismissal of judges.¹⁷⁶ Security of tenure means that a judge or judicial officer is appointed for a fixed period or until retirement and cannot be removed from office without proper cause.¹⁷⁷ The MDSMA, creating military courts, should therefore provide for the tenure of military judges.

The CMA functions on an *ad hoc* basis and is not a permanent court. The chairperson and the two other members convene when required. When the CMA is not sitting as a court, the chairperson performs his normal functions as a High Court judge and the other members of the CMA continue with their line functions within the SANDF.¹⁷⁸ The danger regarding perceived executive interference is

¹⁷⁴ UN *Basic Principles on the Independence of the Judiciary* principle 11.

¹⁷⁵ UN *Basic Principles on the Independence of the Judiciary* principle 12. Regarding the removal of judges on disciplinary grounds, see principles 17-20; Danilet at 11.

¹⁷⁶ See also s 176(2) of the Constitution.

¹⁷⁷ Okpaluba at 116; Steytler (1998) at 261; Carnelley at 67; Tshivhase (2006) at 116.

¹⁷⁸ The current legally qualified member of the CMA is used as an example. Although the particular officer was assigned as a senior military judge during a previous assignment, he is currently the chief legal advisor of the Chief of the Air Force (CSAAF). His membership to the CMA is an *ad hoc* task and when not sitting on the CMA he is advising the CSAAF, being part of the executive, regarding legal matters. A previous Officer Commanding (Commandant) of the Military Academy can be used as an example of a member with command experience. His line function was Officer Commanding of a military unit, and as such was as member of the executive.

clear. Two of the three members of the CMA are in fact members of the executive and this may influence perceptions regarding the independence of the CMA.

There is no provision in the MDSMA providing for a fixed period of appointment of the members of the CMA. The only provision in this regard is that a member of the CMA may be employed on a part-time basis¹⁷⁹ and that members of the Reserve Force may be appointed.¹⁸⁰ Although temporary appointments of judges may be necessary for the proper functioning of the court, Steytler argues that the temporary appointment of judicial officers may create the perception of lack of independence because it may appear that temporary employees would execute their duties in such a way to keep their employers satisfied.¹⁸¹ The *First Certification Judgment*¹⁸² however found that an acting appointed judge is sufficiently protected by the Constitution.¹⁸³

Senior military judges and military judges are not appointed as judicial officers. They are appointed as officers in the SANDF within the Military Legal Services Division as military legal practitioners.¹⁸⁴ Then, if appropriately qualified, they may be *assigned* to the function of senior military judge or military judge.¹⁸⁵ Such an assignment is for a fixed period or a specific deployment or operation.¹⁸⁶ The appointment of military judges need not be permanent and can consist of part-

He was also appointed as member to the CMA and was required to sit as member when the CMA convened to review cases. As can be seen from these examples, there is a blurring of the separation between the judiciary and the executive even at this level.

¹⁷⁹ Section 7(5) of the MDSMA.

¹⁸⁰ Section 7(8) of the MDSMA.

¹⁸¹ Steytler (1998) at 132; Carnelley at 67.

¹⁸² *First Certification Judgment* 1996 (10) BCLR 1253 (CC).

¹⁸³ *First Certification Judgment* 1996 (10) BCLR 1253 (CC) para 132; Carnelley at 67.

¹⁸⁴ Appointments are made in terms of the Defence Act 42 of 2002 and the General Regulations for the South African National Defence Force. All military law practitioners, irrespective of whether they are appointed as prosecution counsel, defence counsel or military judges, are appointed in terms of the *Personnel Management Code (PMC): Department of Defence, Occupational Category: Military Law Practitioner (MLP) PMC Code: 0091* (2007) at 3.

¹⁸⁵ Section 13 of the MDSMA; Tshivhase (2006) at 114.

¹⁸⁶ Section 15 of the MDSMA; Tshivhase (2006) at 114; Carnelley at 67.

time appointments and members of the reserve force.¹⁸⁷ Although the fixed period of judicial appointment is not *per se* inconsistent with the concept of security of tenure, it would seem that the fixed period should be for a more extended period of time.¹⁸⁸ A term of office of between five and ten years seems to be acceptable to ensure compliance with this requirement.¹⁸⁹

The MDSMA does not prescribe the duration of the assignment. The practice in the military law environment, until as recently as approximately 2008, was an assignment as military judge for a period of two years, renewable by the Minister of Defence.¹⁹⁰ The situation has subsequently been changed and military judges are currently assigned for a fixed period of only one year. This may negate any argument supporting the independence of the military judiciary. As stated by Tshivhase:¹⁹¹

The problem with short-term assignments is that they can compromise judicial independence. The possibility of a judicial officer working for the renewal of his or her term instead of administering justice cannot be ruled out.

Another important consideration in the determination of the current issue is the following: All military judges are firstly *appointed* as military legal practitioners. To “appoint” someone means to officially choose someone for a position or

¹⁸⁷ Section 16 of the MDSMA. Support functionaries, who are not utilised as full-time judges in the CSMJ or CMJ may also be appointed by the Minister of Defence. Their term of appointment is the same as full-time military judges although they are only utilised on an *ad hoc* basis (see s 14(3) of the MDSMA).

¹⁸⁸ Tshivhase (2006) of the 115; *Cooper v The United Kingdom and Grieves v The United Kingdom* (2004) 39 EHRR 8 paras 119-126.

¹⁸⁹ Tshivhase (2006) at 115; Fidell E R “A World-Wide Perspective on Change in Military Justice” (2000) 48 *The Air Force Law Review* 195 at 203; Tshivhase (2009) at 468; *Incal v Turkey* (1998) 29 EHRR 449 (the European Court for Human Rights (ECHR) held that a four-year fixed period was not sufficient to guarantee the independence of the judiciary); Danilet at 11 (a fixed period of anything less than ten years does not satisfy the requirement of independence). The UN Human Rights Commission is further of the opinion that the “evaluation or re-certification of judges on a regular basis” is a contravention of the International Covenant on Civil and Political Rights (see Danilet at 11).

¹⁹⁰ Tshivhase (2006) at 114; informal discussions with military judges.

¹⁹¹ Tshivhase (2006) at 115; *R v Généreux* [1992] 1 SCR 259 at 317.

responsibility.¹⁹² Military legal practitioners are appointed in the Core Service System on an initial contract of which the duration is determined by policy.¹⁹³ In practice the contracts are usually for a term of five or ten years and are routinely renewed.

After appointment, when appropriately qualified, the legal practitioners are assigned to their respective functions, *in casu* to the post of military judge.¹⁹⁴ To “assign” someone means to select a person or appoint in a specific post.¹⁹⁵ On first reading, there does not seem to be a significant difference between the concept of “appointment” and “assignment”. However, in the context of the military, a further meaning can be attributed to the concept “assign”. In the military it means to “allocate (men or materials) on a permanent basis”¹⁹⁶ or “to serve more or less permanently as a member of a particular organization.”¹⁹⁷ Since the extended meaning of “assign” connotes a more permanent situation, it is submitted that the assignment as military judge cannot easily be revoked before expiry of the assignment period. The military judge would therefore have security of tenure for the duration of that specific assignment.¹⁹⁸

Before deciding whether the relatively short period of fixed appointment of military judges results in a lack of independence, it is necessary also to consider the international perspective. In the USA the Court Martial Appeal Court (now known as the United States Court of Appeals for the Armed Forces) held that

¹⁹² *Collins English Dictionary* 3 ed (1991) 73 or to “place in an office or post” - see *Webster’s Third New International Dictionary of the English Language Unabridged with Seven Language Dictionary: Volume 1 A-G* (1981) at 105.

¹⁹³ *Personnel Management Code* at 5.

¹⁹⁴ Section 13(2) of the MDSMA.

¹⁹⁵ *Collins English Dictionary* at 91; *Webster’s* at 132.

¹⁹⁶ *Collins English Dictionary* at 91.

¹⁹⁷ *Webster’s* at 132.

¹⁹⁸ See *King v Sekoati and Others* 2000 (12) BCLR 1373 (LesCn) where the court found that requiring security of tenure as a requirement for judicial independence in military cases is based on a misconception. In Lesotho trial officers were not judges or judicial officers but commissioned officers appointed on an *ad hoc* basis to carry out a judicial function. All officers have tenure since they are permanently appointed until the age of retirement. This is not completely the same for the SANDF where most officers are appointed on a renewable medium-term contract. They will have security of tenure for the duration of their contract. This argument may also be relevant for the trial officers at the CODH.

although judicial independence was necessary for a fair trial, fixed terms of office were not required of military judges to comply with the constitutional provision of due process.¹⁹⁹ The court held that there were sufficient safeguards present to protect the independence of judges. Such safeguards include the “administrative method of complaint” available to the judge to protect him against command interference, the prosecution of any member, irrespective of rank, where such a member attempts to interfere with a judge’s finding or sentence and the fact that the judge can appeal to the Court Martial Appeal Court.²⁰⁰ The independence of the military judiciary was again challenged in *Weiss v United States*²⁰¹ where it was alleged that the appointment of military judges without a fixed term violated due process.²⁰² The Supreme Court confirmed the judgment of the Court Martial Appeal Court in *US v Graf*²⁰³ and held that the appointment process did not violate the due process provision. The Supreme Court held that “[a]lthough a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition”.²⁰⁴ The difficulty facing military judges without fixed term appointments is exacerbated by the fact that the USA does not have permanent military courts. Courts martial are convened on an *ad hoc* basis as required.

A similar challenge is faced by the Canadian military justice system. Since 2003, when former Chief Justice Lamer first recommended permanent Canadian military courts, various other recommendations have been made in this regard. The government of Canada have since then introduced three Bills regarding changes in the military justice system, but to date have failed to implement the

¹⁹⁹ *United States v Graf*, 35 M.J. 450 (C.M.A. 1992) at 462-464.

²⁰⁰ Dell’Orto D J *Appendix D: Independent Judiciary Report of the Joint Service Committee on Military Justice* (2001) at 7; *United States v Graf*, 35 M.J. 450 (C.M.A. 1992) at 462-464; Cox W T “The Twenty-Seventh Annual Kenneth J. Hodson Lecture: Echoes and Expectations: One Judge’s View” (1999) 159 *Military Law Review* 183 at 200; Lederer & Hundley at 645.

²⁰¹ 510 US 163 (1994) at 666.

²⁰² Lederer & Hundley at 658.

²⁰³ *United States v Graf* 35 M.J. 450 (C.M.A. 1992).

²⁰⁴ *Weiss v United States* 510 US 163 (1994) at 666.

recommendation.²⁰⁵ Canadian military judges are appointed for fixed periods of five years. Recommendations have however been made that their period of appointment should be extended.²⁰⁶

Security of tenure is also affected by the ease or otherwise with which military judges can be removed from office. Section 177 of the Constitution provides that a judge may only be removed by the Judicial Service Commission (JSC) where the judge is found to be incapacitated, grossly incompetent or guilty of gross misconduct. Requiring the JSC to remove a judge limits the influence of the executive over the judiciary.²⁰⁷ The grounds for the removal of civilian judges are however more limited than those set out in section 17 of the MDSMA. A military judge may be removed from his assignment as judge for reasons of the judge's incapacity, incompetence, misconduct or at the written request of the judge.²⁰⁸ Where the Constitution requires "gross" incompetence or misconduct, section 17 of the MDSMA requires mere incompetence or misconduct. It is however submitted that section 17 of the MDSMA in essence complies with the constitutional requirement for the removal of judges.

Protection against arbitrary removal is critical to the concept of judicial independence.²⁰⁹ Limiting the executive's ability for the arbitrary removal of a military judge alone may however not be sufficient to comply with the constitutional requirement. Of concern is the fact that the MDSMA does not prescribe a procedure for the removal of military judges. The UN *Basic Principles on the Independence of the Judiciary* requires that any complaint against a judicial officer should be "processed expeditiously and fairly under an

²⁰⁵ For a full discussion on the issues and recommendations see Canadian Bar Association at 10-11; McNairn (2006) at 18.

²⁰⁶ Hawn L *Laurie Hawn on Strengthening Military Justice in the Defence of Canada Act* (2010) at 3.

²⁰⁷ See also Seedorf & Sibanda at 12-27 □ 12-18.

²⁰⁸ Section 17 of the MDSMA. This is in line with the UN *Basic Principles on the Independence of the Judiciary* principles 17-20.

²⁰⁹ *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 161; Tshivhase (2006) at 167; Tshivhase (2009) at 469; Johnson at 19; Danilet at 11 (this should also not be seen as a privilege of the judge but as "a safeguard for justice-seekers").

appropriate procedure. The judge shall have the right to a fair hearing.”²¹⁰ Currently the MDSMA does not comply with this prescript.

A further concern regarding the removal of military judges relates to the individuals involved in the removal of the judge. The Minister may remove the judge on the recommendation of the Adjutant General alone.²¹¹ The concerns regarding the Adjutant General’s involvement in the administrative processes of the military judiciary discussed above remains relevant. The Constitutional Court held that²¹²

[t]he Minister, a member of the government, should not have the power to exercise discipline over judicial officers and to punish them for misconduct. That would place the judicial officers concerned in a subordinate position in relation to the government which is inconsistent with judicial independence.

An independent body, as recommended by the Ministerial Task Team regarding the appointment of judicial officers may have an important role to play in the legitimate removal of military judges as well. Such a body should act as a buffer between the military judiciary and the executive to limit the executive’s influence over them.

Despite the *lacuna* regarding procedures for the removal of military judges, the following bears consideration. If a judge’s or magistrate’s appointment as judicial officer is not renewed, that judge or magistrate would no longer have employment. However, if an individual’s assignment as military judge is not renewed after expiration of the period of assignment, he will still have employment as legal practitioner and will merely be assigned to another function, such as review counsel or legal advice. If however it is accepted that the period of one year is too short for security of tenure, it is submitted that the security of

²¹⁰ UN *Basic Principles on the Independence of the Judiciary* principle 17; Tshivhase (2006) at 116; Tshivhase (2009) at 469.

²¹¹ Section 17 of the MDSMA.

²¹² *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 179; Tshivhase (2009) at 470.

tenure of military judges does not lie in their assignment as military judge, but rather in their appointment as military legal practitioner and would therefore comply with the requirement of security of tenure.

The importance of fixed terms for judges should also not be over-emphasised. Lederer and Hundley raise an interesting point of view.²¹³ They argue that once a judge's fixed term has ended, that judge is once again in competition with the other candidates and therefore a judge's decision may still be influenced by his interest in future assignments. They come to the conclusion that the "degree of protection afforded a judge by fixed tenure is *de minimus*."

Financial independence

The Constitution holds that "salaries, allowances and benefits of judges may not be reduced."²¹⁴ All judges and judicial officers should have financial security.²¹⁵ Financial independence means that the executive cannot "influence salaries or pension schemes on a discretionary or arbitrary basis. Determining salaries and pensions through legislation is the highest form of security."²¹⁶ Adequate remuneration forms part of judicial independence and a lack of financial security may be detrimental to judicial independence.²¹⁷ In evaluating the financial independence of the judiciary, the Constitutional Court held that it entails adequate remuneration, a prohibition on the arbitrary reduction of salaries and mechanisms aimed at eliminating the need for judicial officers to have to negotiate with the executive on matters relating to their remuneration.²¹⁸

²¹³ Lederer & Hundley at 666.

²¹⁴ Section 176(3) of the Constitution.

²¹⁵ *Smuts v De Lange* 1998 (3) SA 785 (CC) para 70; Tshivhase (2009) at 470; Danilet at 12.

²¹⁶ Steytler (1998) at 265. Financial independence may also refer to the budget allocated to the judiciary. In this regard the UN *Basic Principles on the Independence of the Judiciary* principle 7 requires member states to provide adequate resources to the judiciary to properly perform its functions (see Danilet at 7; Johnson at 60).

²¹⁷ *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 138.

²¹⁸ *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) paras 138, 139 and 149; Tshivhase (2006) at 112; Tshivhase (2009) at 471.

However, the MDSMA does not make separate provision for the conditions of service of military judges. All salary scales and allowances are determined in terms of section 55 of the Defence Act 42 of 2002.²¹⁹ Salary packages are also predetermined in terms of SANDF policy documents.²²⁰ The salaries of military judges are governed by the *Personnel Management Code (PMC)* of Military Law Practitioners,²²¹ except for members of the CMA who are not in the full-time employ of the state or an organ of state.²²² Pay and grade progression within salary levels are clearly set out in the *PMC* and rank progression is subject to the policy requirements as provided by the Chief SANDF and the various arms of service.²²³ Military judges are not treated differently from other functionaries in the military justice system, for example, a military judge and a prosecutor with a similar period of service in the SANDF will receive the same salary and benefits.²²⁴ Tshivhase argues that this arrangement is not appropriate for military judges since it does not recognise their status as judicial officers.²²⁵ He states that²²⁶

[w]hile one acknowledges the uniqueness of the relationship between the military and its members, there is no military imperative which would justify the disregard

²¹⁹ See *Personnel Management Code* para 12. Section 55 of the Defence Act 42 of 2002 states that the salaries of all members of the SANDF must be paid as agreed upon in the Military Bargaining Council, and where such an agreement cannot be reached, by the Minister on recommendation of the Military Arbitration Board with the approval of the Minister of Finance.

²²⁰ See the principles as set out in the DODI POL & PLAN 00098/2005: Policy on the Middle Management Service Remuneration in the Department of Defence (2008); DODI POL & PLAN 00065/2002: Senior Management Service in the Department of Defence (2006).

²²¹ *Personnel Management Code* at 5–6. The *PMC* also governs all other military law practitioners and all salaries within the military legal division are governed in the same manner, irrespective of an individual's assignment. The salary and allowances of part-time members of the CMA are governed by ss 7(6)-(7) of the MDSMA.

²²² Sections 7(6)-(7) of the MDSMA which provide that their remuneration and allowances will be determined by the Minister of Defence in consultation with the Minister responsible for State expenditure.

²²³ *Personnel Management Code* at 8.

²²⁴ This is also the situation in the US armed forces. US military judges are paid the same salary as other members of the same rank and seniority (see *Essex & Pickle* at 240).

²²⁵ Tshivhase (2006) at 113.

²²⁶ Tshivhase (2006) at 113-114 for a discussion on the situation in Canada and Australia. In Canada a special committee was appointed to investigate the remuneration of judges and it was recommended that the military judges' remuneration should be in line with those of their civilian counterparts. In Australia the remuneration of judges is to be determined by a Remuneration Tribunal (see Tshivhase (2009) at 472).

of basic financial security for military judicial officers. Special measures must be adopted to address their financial security.

However, it is submitted that despite the concerns raised by Tshivhase, generally the salaries and benefits of military judges are sufficiently protected and governed by legislation and policy documents, which means that the executive cannot arbitrarily interfere with these salaries and benefits. As mentioned above, in the event of a military judge's assignment not being renewed, it would not affect the financial security of the military judge since he or she is being remunerated as a military law practitioner and not as a judicial officer. This of itself acts as a guarantee of judicial independence. Military judges have no financial reason to try and placate the executive in order to have their assignment as judge extended. As long as the assignment periods are inadequate in promoting security of tenure, the fact that the judge has no pecuniary interest in advancing the agenda of the executive may serve as a powerful check on perceived executive interference in the independence of the military judiciary. It must also be mentioned that the occupational specific dispensation for military legal officers resulted in the officers within the legal division generally being in a better position regarding salary and benefits compared to other officers within the SANDF on the same rank level. This was done in order to recruit and retain personnel with appropriate competencies and experience.²²⁷

It is submitted that although no specific provision is made for a separate remuneration dispensation for military judges, the fact that their salaries are governed by various policy documents along with other military court functionaries, thereby limiting the executive's ability to interfere with their salaries specifically, provides sufficient financial security for the purpose of their independence.

²²⁷ *Personnel Management Code* para 11.

4.2.2 Fair trial criteria and the military courts

Once it has been determined that the judge acted independently and impartially in reaching a fair decision on the facts, justice requires further that the trial must be conducted in a fair manner, following fair procedures.²²⁸ In this context the military courts will be evaluated against the fair trial criteria as provided for by the Constitution. In terms of the Constitution each accused person has the right to a fair trial which include the following:²²⁹

1. to be informed of the charges in enough detail to enable the accused to answer the charges;
2. to have sufficient time and facilities to prepare a defence;
3. to a public hearing before an ordinary court;
4. to choose and be represented by a legal practitioner of his choice; and
5. to have the right to review and appeal by a high court.²³⁰

The rights listed are merely a minimum set of guarantees to protect the rights of an accused.²³¹ Fair trial rights do not only include those rights listed in section

²²⁸ Nel at 82; see also para 4.1 above.

²²⁹ Section 35(3) of the Constitution. Only those rights considered relevant to this discussion are discussed here.

²³⁰ See ch 7 at para 7.5.3 below.

²³¹ Steytler (1998) at 205.

35(3) but also include substantive fairness.²³² The Constitutional Court found that the list of rights in the Interim Constitution²³³

is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.

In general it can be said that a trial will be fair where there is adequate protection against innocent people being convicted, where there is a presumption of innocence, right to legal representation, a trial in public that has not been delayed²³⁴ unreasonably and one that is “open, impartial and equitable”²³⁵. In determining whether an accused received a fair trial, one must take into account the trial as a whole and not only each of these individual aspects in isolation. Where one aspect may fall short of the constitutional requirement it may not necessarily compromise the fairness of the whole trial. The “cumulative impact of a series of procedural shortfalls” should be taken into consideration.²³⁶

In evaluating whether military courts comply with the constitutional requirements of a fair trial as envisaged by section 35(3) it must be kept in mind that the courts do not require that the proceedings must duplicate “all the requirements and safeguards embodied in s 25(3) of the [Interim] Constitution [in all circumstances]. In most cases it will require the interposition of an *impartial* entity, independent of the Executive and the Legislature to act as arbiter between

²³² *S v Legoa* 2003 (1) SACR 13 (SCA) para 20 (the “Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights”); Snyckers F & Le Roux J “Criminal Procedure: Rights of Arrested, Detained and Accused Persons” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 51-29; Schwikkard P J “Evidence” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 52-2; *S v Mazingane* 2002 (6) BCLR 268 (V) at 272.

²³³ *S v Zuma* 1995 4 BCLR 401 (CC) para 16; Steytler (1998) at 214-215; Schwikkard (2007) at 52-2 □ 52-3, (referring to *S v Dzukuda*, *S v Tshilo* 2000 (4) SA 1078 (CC) at 1091).

²³⁴ *S v Dzukuda*; *S v Tshilo* 2000 (4) SA 1078 (CC) at 1092.

²³⁵ *S v Ngwenya* 1998 (2) SACR 503 (W) at 503.

²³⁶ Stavros at 43; *Van Niekerk v Attorney-General, Transvaal* 1990 (4) 806 (A).

the individual and the State.”²³⁷ The Constitution provides the general norm of what a “fair trial” should be but each case will have to be judged individually to determine whether the legislature in fact conforms to this norm.²³⁸

The right to a fair trial however only applies to an accused person.²³⁹ The accused must further be someone who is an accused before criminal proceedings.²⁴⁰ One must therefore first establish whether an individual before a military court can in fact qualify as an accused in criminal proceedings. Only once this has been established will a selection of fair trial rights be discussed in more detail.

Although the trial procedures followed in the military courts resemble those followed by civilian courts,²⁴¹ the question remains whether the person being tried could be considered an accused for purposes of the Constitution. No specific mention is made in the legislation regarding an individual appearing before the CSMJ or the CMJ, but the Ministerial Task Team contends that the rights afforded to an accused to a fair trial are not applicable to an accused before a CODH. This is based on *Nel v Le Roux*,²⁴² where it was held that an accused’s rights in terms of section 25(3) of the Interim Constitution are only available to an “accused” before a criminal trial. No further reason is given by the Task Team why an accused before a CODH cannot be seen as an accused for the purposes of section 35(3) of the Constitution. It is assumed that the

²³⁷ *Nel v Le Roux* 1996 (3) SA 562 (CC) at 572 (emphasis added); *S v Dzukuda, S v Tshilo* 2000 (4) SA 1078 (CC) para 10 (a fair trial as required by s 35(3) can be achieved by means of more than one system of criminal procedure, “provided the Legislature devises a system which effectively secures such right, it cannot be faulted merely because it settles for a system which departs from past procedure”).

²³⁸ *S v Dzukuda, S v Tshilo* 2000 (4) SA 1078 (CC) at 1091; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 24 (“it is implicit that the trial must be a ‘fair’ trial, but not that such trial must necessarily comply with all the requirements of s 35(3)”).

²³⁹ Schwikkard (2002) at 52-3; Snyckers & Le Roux at 51-40; Steytler (1998) at 205; *Omar v Government Republic of South Africa* 2006 (2) BCLR 253 (CC) para 51; *Sibiya v Director of Public Prosecutions, Johannesburg* 2005 (8) BCLR (CC) para 31.

²⁴⁰ Currie & De Waal (2005) at 705 (“it is s 35...that is intended to govern the manner in which criminal proceedings are conducted”); Schwikkard (2002) at 52-4; Snyckers & Le Roux at 52-42; *Nel v Le Roux* 1996 (3) SA 562 (CC) para 11.

²⁴¹ See ch 3 at para 3.2.3.1 above.

²⁴² *Nel v Le Roux* 1996 (3) SA 562 (CC) para 11.

Ministerial Task Team's reasoning is due to the fact that the CODH could possibly not be regarded as a "criminal trial." However, reliance on the *Nel*-judgment alone is not sufficient to contend that an accused before a CODH is not an accused before a criminal trial. The individual in the *Nel*-judgment was clearly not charged with an offence.²⁴³ It is therefore different from an accused before a CODH, who is charged with an offence.

The status of an accused before a military court, which would include the CODH, is investigated below. The question is: Can a military accused be regarded as an accused charged in criminal proceedings?

4.2.3 An accused charged with a criminal offence

4.2.3.1 The accused

The right to a fair trial applies to an accused person involved in criminal proceedings.²⁴⁴ Steytler identifies two tests for determining whether an individual could be regarded as an "accused", namely the "ordinary meaning test" and the "extended meaning test."²⁴⁵

4.2.3.2 The ordinary meaning test

With the ordinary meaning test the accused is seen as a person facing criminal charges before a court.²⁴⁶ A person becomes an accused once he is charged in

²⁴³ *Nel v Le Roux* 1996 (3) SA 562 (CC) at 572. Penalising a witness who refuses to testify is clearly not criminal proceedings. A custodial sentence under the circumstances would also not result in the witness being convicted of an offence (see also Steytler (1998) at 212).

²⁴⁴ *Nel v Le Roux* 1996 (3) SA 562 (CC); Schwikkard (2002) at 52-6□52-7. Every person accused of a criminal offence, irrespective of the seriousness of the offence or the court where he is arraigned is entitled to protection in terms of the right to a fair trial (see Steytler (1998) at 209; *Engel et al v The Netherlands* (1976) 1 EHRR 647).

²⁴⁵ Steytler (1998) at 209-211.

²⁴⁶ See *Prinsloo v van der Linde* 1997 (6) BCLR 759 (CC) para 10 (for s 25(3)(c) to apply, the defendant must be an accused in a criminal trial); para 45 (Didcott J, in a separate judgment, held that the right to a fair trial as entrenched in s 25(3)(c) of the Interim Constitution is concerned only with criminal prosecutions where the person is accused of a crime).

criminal proceedings.²⁴⁷ To be considered charged he must be “advised by a competent authority that a decision has been taken to prosecute him.”²⁴⁸

In *Sanderson v Attorney-General, Eastern Cape*²⁴⁹ the court discussed three possible interpretations for the word “charged”, namely (1) the generic definition as found in section 1 of the Criminal Procedure Act 51 of 1977 where it is seen as a “formulated allegation against an accused”, (2) a narrow definition, referring to formal arraignment, and (3) a broad definition, meaning “some or other intimation to the accused of the crime(s) alleged to have been committed”. It is submitted that the court’s conclusion that the meaning of the word “charged” is vague and dependent on the context of each case is the correct one.²⁵⁰

In the military justice system being charged would refer to the instance where the individual is either arrested or warned that charges will be preferred against him.²⁵¹ Notification of the charge must be official but need not be formal.²⁵² Military members need therefore not wait for the written DD1 (Account of

²⁴⁷ *Ferreira v Levin; Vryenhoek v Powel* 1996 (1) SA 984 (CC); art 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (the Convention).

²⁴⁸ Steytler (1998) at 276; Schwikkard P J “Arrested, Detained and Accused Persons” in Currie & De Waal (2005) at 745; van Dijk & van Hoof at 309; *Du Preez v Attorney General of the Eastern Cape* 1997 3 BCLR 329 (E) at 342.

²⁴⁹ *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC).

²⁵⁰ *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) paras 18-19. For a broad definition of the term “charged” see *S v Mlambo* 1992 (2) SACR 245 (ZC); *Moeketsi v Attorney General, Bophuthatswana* 1996 (7) BCLR 947 (B); *Bate v Regional Magistrate, Randburg* 1996 (7) BCLR 974 (W); *Snyckers & Le Roux* at 51-40 (such a broad definition should not be followed because it erodes the distinction between accused and arrested persons); *Prokureur-Generaal, Vrystaat v Ramokhosi* 1996 (11) BCLR 1514 (O) at 1532 (the term “charged” should be given a narrow interpretation where required in the context of the specific case).

²⁵¹ The arrest or warning of an individual initiates the military legal process. A military arrest is usually carried out with an authorised warrant but in certain instances the MDC allows the arrest of persons subject to the MDC without a warrant (see ss 52(1)-(2) of the MDC). A warning is governed by r 3 of the MDSMA and is used in all instances where an arrest is not justified. The legal requirements to affect a warning are less than those prescribed for an arrest. A person is warned *in lieu* of an arrest. Any person who is authorised to arrest or order into arrest another person is authorised to warn an accused. A warning is affected by verbally informing the person of the charges against him. The charges must be specified and the person must know what he is charged with in relation to which incident.

²⁵² Steytler (1998) at 276. This would include a situation where the individual is in no doubt that he is going to be prosecuted (see *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E) at 342D *Moeketsi v Attorney-General, Bophuthatswana* 1996 (7) BCLR 947 (B)).

Offence) that is issued within two days of the verbal warning or 24 hours after arrest. Once the verbal warning has been issued, or the arrest effected, the individual is considered charged. This in effect means that any person accused of an offence in criminal proceedings, irrespective of the seriousness of the offence, is entitled to the full protection of their fair trial rights.²⁵³

All persons before military courts can therefore be classified as individuals charged with an offence. To qualify as an accused as required by the Constitution however, he must be charged in *criminal proceedings*. Consequently, if a military member is charged *in criminal proceedings* before a military court, that member would be entitled to the protection in terms of section 35(3). From the previous discussion it is clear that the CSMJ and the CMJ can be regarded as courts for the purposes of section 166 of the Constitution. Can a person appearing before these courts consequently be regarded as an accused in criminal proceedings? What is the situation regarding the CODH?

Applying the ordinary meaning of the term “accused” can create certain difficulties in terms of a military accused and his constitutional rights. To understand this difficulty it is necessary to briefly refer to the jurisdiction regarding offences applicable to the various military courts.²⁵⁴ The highest military court of the first instance, the CSMJ, has jurisdiction over any offence committed by military personnel, except for murder, treason, rape and culpable homicide committed inside the borders of the Republic. Outside the borders the CSMJ has the necessary jurisdiction. These military courts also have jurisdiction over purely disciplinary offences. The CMJ has jurisdiction over most offences, excluding murder, treason, rape and culpable homicide (whether committed inside or outside the borders of the Republic) and contraventions of sections 4 and 5 of the MDC. They also have jurisdiction over all disciplinary offences. The CODH only has jurisdiction over disciplinary offences and although it is referred

²⁵³ Steytler (1998) at 209; *Engel et al v The Netherlands* (1976) 1 EHRR 647.

²⁵⁴ For a full discussion see ch 3 paras 3.2.3, 3.2.4 and 3.2.5 above.

to a military court, it should rather be classified as a disciplinary forum.²⁵⁵ Being limited to disciplinary matters it is submitted that hearings before the CODH cannot be regarded as criminal proceedings.

The situation in military courts is therefore that the CSMJ and the CMJ hear criminal as well as disciplinary matters. Would this mean that the application of a military accused's fair trial rights depend on whether the trial constitutes criminal or disciplinary proceedings? The CODH on the other hand only consider disciplinary matters. Would this mean that an accused before this forum may never rely on their fair trial rights?

An evaluation of what Steytler refers to as the "extended meaning" test might be of some assistance in answering these questions.

4.2.3.3 The extended meaning test

According to the extended meaning test an "accused" person is someone who is not facing criminal charges, but who should still be entitled to protection of the fair trial rights because of the nature of the proceedings,²⁵⁶ or the punitive sanction attached to the charges.²⁵⁷ In terms of this test a substantive definition of an accused person is emphasised, rather than a formal one. The extended meaning is usually considered when evaluating state institutions such as the armed forces.²⁵⁸

²⁵⁵ See also the Military Task Team at 46 ("a disciplinary enquiry of a commanding officer is not a criminal trial").

²⁵⁶ *Engel v The Netherlands* (1976) 1 EHRR 647 para 82. In ascertaining the nature of the proceedings, the content and overall objective of the proceedings should be taken into consideration (see *Campbell and Fell v United Kingdom* (1984) 4 EHRR 293 para 37).

²⁵⁷ Steytler (1998) at 211; *Legal Aid Board v Msila* 1997 (2) BCLR 229 (E) (the court followed a proximity test). The court did not restrict the application of fair trial rights to purely criminal proceedings. It may also be extended to proceedings necessarily linked to criminal proceedings. This is the extended definition that Steytler states should be applied to military authorities (see also *R v Wigglesworth* [1987] 2 SCR 541 para 21).

²⁵⁸ Steytler (1998) at 211.

The nature of the offence

If the proceedings are not clearly criminal in nature, Steytler contends that fair trial rights could attach if the offence is criminal in nature. Conduct can be regarded as criminal when “it is aimed at protecting and promoting public welfare as opposed to regulating conduct within a private sphere of activity.”²⁵⁹ When assessing whether a military person accused of committing an offence in contravention of the conduct pertaining to the armed force is an accused facing criminal proceedings the nature of the offence plays an important role.²⁶⁰ In the military environment criminal and disciplinary offences are distinguished.²⁶¹ Although most offences created in the civilian environment are also punishable in terms of military law, certain offences are created in the military context which is unique to the military. Many of these offences only qualify as offences because the person committing them is in the military and therefore subject to military law.²⁶² The European Commission and Court for Human Rights recognised this distinction in that²⁶³

there is in all the Convention countries a distinction recognized between acts that are punishable offences subject to a criminal charge and proceedings in the ordinary courts of law, and acts that constitute offences against the discipline, internal order and proper conduct of the armed services of civil administration.

²⁵⁹ Steytler (1998) at 211.

²⁶⁰ *Engel v The Netherlands* (1976) 1 EHRR 647 para 82.

²⁶¹ In terms of international law states are, within reason, allowed to make their own distinction between criminal and disciplinary offences (*Engel v The Netherlands* (1976) 1 EHRR 647 para 81). It is however not always easy to distinguish between purely criminal and disciplinary offences due to the way in which the offences are formulated. The following example illustrates this difficulty. Section 14(a) of the MDC is a purely disciplinary offence and states that “[a]ny person who absents himself without leave...shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding one year.” However, malingering is considered a criminal offence in terms of military law and s 18(a) of the MDC states that “[a]ny person who malingers or feigns or produces disease or infirmity...shall be guilty of an offence and liable on conviction to imprisonment of a period not exceeding five years.” The framing of disciplinary and criminal charges is exactly the same.

²⁶² Morris L J *Military Justice: A Guide to the Issues* (2010) at 63-64.

²⁶³ See also Stavros at 4.

In *R v Wigglesworth*²⁶⁴ the court explained the distinction as follows:

If a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter falls within s. 11.²⁶⁵ This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity.

In determining the scope of disciplinary offences it is suggested that the court also take cognisance of whether the “norm had legitimately earned its place among the rules governing the armed forces, in other words whether it had any relevance to their proper functioning”.²⁶⁶ Determining the military interests that are protected by the rule may in fact give a clearer picture to the vague criteria found in establishing the nature of the offence, thereby qualifying the test and allowing for a more accurate distinction between criminal and disciplinary offences.²⁶⁷

The CSMJ and the CMJ have jurisdiction over both criminal and disciplinary offences. Certain offences committed in the military environment would be deemed criminal offences if committed in the public sphere and would therefore be seen as criminal offences even if they form part of military law.²⁶⁸ The South African distinction between military and disciplinary offences is not based purely

²⁶⁴ *R v Wigglesworth* [1987] 2 SCR 541 at 251; *Van Dijk & van Hoof* at 310 (the distinction between criminal and disciplinary offences is whether the violated provision only applies to a specific group or is generally binding); *Herbert Eggs v Switzerland* (1976) 15 ECHR DR 51 at 170

²⁶⁵ Section 11 of the *Canadian Charter of Rights and Freedoms* is similar to s 35 of the South African Constitution, providing, inter alia, that any person charged with an offence has the right to be informed of the specific charges without undue delay, to be tried within a reasonable time and not to be denied bail without just cause.

²⁶⁶ *Stavros* at 11.

²⁶⁷ *Stavros* at 12.

²⁶⁸ *Steytler* (1998) at 212; *Morris* at 63; *Campbell and Fell v United Kingdom* (1984) 4 EHRR 293 para 37 where the court held that it “would also be illogical and anomalous to regard as a criminal cause or matter proceedings arising from an offence under the Rules which did not amount to a criminal offence under the general law.”

on the nature of the offence.²⁶⁹ The MDSMA makes this distinction on the grounds of the penal sanction attached to the particular offence. Any offence of which the maximum punishment prescribed does not exceed one year imprisonment is deemed a disciplinary offence.²⁷⁰ Any offence with a prescribed punishment of more than one year imprisonment is consequently seen as a criminal offence, even if it is the type of offence that can only be committed by a military person in a military environment.²⁷¹

The British military system on the other hand distinguishes between criminal and disciplinary offences on the grounds of the military nature of the offence. They classify offences as disciplinary that would be regarded as criminal offences in South Africa, for example the offences of obstructing military operations or assisting the enemy are classified as disciplinary offences.²⁷²

When appearing before the CSMJ and CMJ on a criminal charge it is clear that the individual qualifies as an accused for purposes of the Constitution. What is the status of an individual facing purely disciplinary charges before these courts?

The European Court of Human Rights recognises a state's prerogative to rather use disciplinary proceedings against members of the armed forces than criminal proceedings when the accused contravened a legal rule of the armed forces.²⁷³ The application of fair trial rights should not be restricted only to the application of criminal law but should also apply to "penal proceedings."²⁷⁴ Therefore, where

²⁶⁹ Military Task Team at 46.

²⁷⁰ Section 1 (xviii) of the MDSMA provides that military disciplinary offences are those offences for "which the maximum punishment prescribed in the Code does not exceed imprisonment for a period of one year."

²⁷¹ See for example s 4 of the MDC – the endangering of the safety of forces – which carries a prescribed punishment of imprisonment not exceeding 30 years. In terms of the definition of military disciplinary offences in s 1 (xviii) of the MDSMA, s 4 of the MDC is regarded as a criminal military offence.

²⁷² Ministry of Defence *Manual of Service Law* (2011) 1(1) at 1-7-12–1-7-13.

²⁷³ Stavros at 9–10.

²⁷⁴ *R v Wigglesworth* [1987] 2 SCR 541 para 18 (the words used in s 11 of the *Canadian Charter* ("charged with an offence") should be interpreted to apply to criminal and quasi-criminal proceedings as well as those proceedings that result in penal consequences); para 26 (the

purely disciplinary proceedings are held, the individual is generally not regarded as an accused for purposes of his fair trial rights. If this is applied to the South African position it would create an untenable situation in the CSMJ and CMJ, where an accused would be afforded his fair trial rights when charged with a criminal offence but not when charged with a disciplinary offence. It is therefore necessary to determine whether the penal consequences that can be incurred can assist in establishing the status of the accused.²⁷⁵

The penal consequences

This aspect is considered independently from the nature of the offence. In this context one would determine the “true penal consequences” in determining an individual’s status as an accused.²⁷⁶ The aim of punishment in the SANDF, as mentioned earlier, is mainly to correct discipline and not necessarily to punish individuals for committing offences.²⁷⁷ Punishment in disciplinary forums, such as the CODH, is mainly aimed at correcting discipline and is generally not punitive.²⁷⁸ Where the purpose of the punishment is mainly disciplinary in nature,

proceedings before the Royal Canadian Mounted Police Service Court were neither criminal nor quasi-criminal proceedings, but purely disciplinary because of the disciplinary nature of the offence).

²⁷⁵ The question raised in *Engel v The Netherlands* (1976) 1 EHRR 647 was whether art 6 of the European Convention (similar to the provisions of s 12 of the South African Constitution) ceases to be applicable simply because the state classifies an offence as disciplinary instead of criminal and whether fair trial rights might still apply despite being disciplinary proceedings.

²⁷⁶ Steytler (1998) at 212; Killander M “Arrested, Detained and Accused Persons” in Govindjee A & Vrancken P (eds) *Introduction to Human Rights Law* (2009) at 208; *R v Wigglesworth* [1987] 2 SCR 541 para 26.

²⁷⁷ See the discussion at para 4.1 and ch 3 para 3.1 above.

²⁷⁸ Grossett M *Discipline and Dismissal: A Practical Guide for South African Managers* 2 ed (2000) at 21. The British and American military systems have similar forums. The US equivalent has two processes that can be equated to the South African CODH, namely “non-judicial punishment” and a summary court martial. Non-judicial punishment is described as providing “commanders with an essential and prompt means of maintaining *good order and discipline* and also provides positive behavior changes in service members without the stigma of a court-martial conviction” (Morris at 148 (emphasis added); Roan & Buxton at 193-194). Summary courts martial are conducted in those instances where non-judicial punishment is neither seen as sufficient nor is the matter serious enough for the consequences of a court martial. The main function of this forum is to punish and correct the behaviour of soldiers who have committed minor offences (see Morris at 42-43; and Roan & Buxton at 199-200). The British equivalent is known as the summary hearing, enabling the “chain of command to exercise *immediate and effective authority in all situations* including on operations” (emphasis added.) Both criminal and

the constitutional rights to a fair trial seem not to apply since it only applies to criminal proceedings.²⁷⁹ However, where punishment “which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within a limited sphere of activity,” such as imprisonment or a fine, is imposed, the right to a fair trial should be applicable.²⁸⁰

Loss of liberty

Constitutional rights should protect the individual whenever a punishment is imposed that entails a loss of liberty.²⁸¹ Loss of liberty does not automatically mean the punishment constitutes a criminal penalty.²⁸² Where the loss of liberty serves another purpose than punishment, it would not constitute a criminal penalty.²⁸³

Sentences that involve a loss of liberty include imprisonment,²⁸⁴ detention²⁸⁵ and confinement to barracks. It is clear that sentences of imprisonment and detention always result in a loss of liberty, but this is not necessarily true of

disciplinary offence can be dealt with at this forum *in support of operational effectiveness* (see *Manual of Service Law* (2011) 1(2) at 1-9-5).

²⁷⁹ Steytler (1998) at 212.

²⁸⁰ Steytler (1998) at 212; *R v Wigglesworth* [1987] 2 SCR 541 paras 26. The court held (at para 23) that “where there is a “true penal consequence” it cannot be said as a matter of law that a tribunal with the responsibility of conviction and sentencing is but a disciplinary court administering justice to a professional or other body of specialized persons segregated for this purpose from the general community.” See also *Engel v The Netherlands* (1976) 1 EHRR 647 para 82.

²⁸¹ *R v Wigglesworth* [1987] 2 SCR 541 para 38.

²⁸² Van Dijk & van Hoof at 311 mention a case (*Herbert Eggs v Switzerland*, (1976) 15 ECHR DR 51) where a sentence of five days strict arrest was adjudged as follows: “[a]lthough relatively harsh, this freedom-restricting penalty could not, either by its duration or by the conditions of its enforcement in Basle prison, have caused serious detriment to the applicant. It could not, therefore, in this case be classified as criminal.” It has been argued that only serious deprivation of liberty will change a disciplinary proceeding into a criminal proceeding (see *Engel v The Netherlands* (1976) 1 EHRR 647 para 85; Stavros at 10; *Nel v Le Roux* 1996 (3) SA 562 (CC)).

²⁸³ Steytler (1998) at 212.

²⁸⁴ For a discussion of the sentence of imprisonment in the military context see ch 6 para 6.2.1 below.

²⁸⁵ Detention in this context refers to the sentence of detention in the military detention barracks that can be imposed by a military court for a maximum period of two years (see ch 6 para 6.2.5 below).

confinement to barracks. To determine whether an individual sentenced to confine to barracks is actually deprived of his liberty requires an assessment of the individual's actual situation in the military.²⁸⁶ This issue was specifically addressed in *Engel v The Netherlands*²⁸⁷ where the court held that members of the armed forces are regularly limited in their freedom of movement due to the demands of military service. A mere deprivation of liberty of movement will therefore not constitute a contravention of an accused's rights against arbitrary deprivation of liberty.

In discussing different forms of confinement that existed at the time, the court came to the conclusion that light arrest, which in its description is similar to our sentence of confinement to barracks, does not differ much from the ordinary framework of life in the armed forces.²⁸⁸ A sentence such as confinement to barracks would, according to this approach, not qualify as a deprivation of liberty for the purposes of determining whether fair trial rights should be applied.²⁸⁹ What would constitute a deprivation of liberty for a civilian cannot be judged the same for a member of the armed forces and will only be seen as a deprivation if "it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces...".²⁹⁰ Where the confinement to barracks entails that the member is confined to his living quarters after hours and is not locked in although he may not visit the canteen on the unit, it would not constitute a

²⁸⁶ *Engel v The Netherlands* (1976) 1 EHRR 647 para 59. For a complete discussion in the nature of confinement to barracks as a sentence see ch 6 para 6.2.11 below.

²⁸⁷ *Engel v The Netherlands* (1976) 1 EHRR 647 para 58. It should however be noted that the context of deprivation of liberty the court referred to in this instance was not related to depriving a person of his personal liberty but ensuring that he is not arbitrarily deprived of his liberty. This distinction is of some importance. The arbitrary deprivation of liberty refers to the s 12 right in terms of the South African Constitution against the arbitrary deprivation of liberty. This right refers to the "substantive due process rights" of the accused (see *Snyckers & Le Roux* at 51-8). In contrast the deprivation of the personal liberty of the accused in the context discussed here refers to the criminal procedure rights of the accused in terms of s 35(3) of the Constitution (see *Snyckers & Le Roux* at 51-8 where it is argued that due process analysis should not be used in the interpretation of criminal procedure rights).

²⁸⁸ *Engel v The Netherlands* (1976) 1 EHRR 647 paras 60-62.

²⁸⁹ See *Engel v The Netherlands* (1976) 1 EHRR 647 para 58 where the European Court for Human Rights determined that the deprivation of liberty "does not concern mere restrictions upon liberty of movement".

²⁹⁰ *Engel v The Netherlands* (1976) 1 EHRR 647 para 59; *Stavros* at 10–11.

deprivation of liberty since they are able to perform their normal duties.²⁹¹ At most it places a limitation on the accused's freedom of movement, which given the fact that it can only be imposed on soldiers with the rank of private and is usually imposed while on training when their freedom of movement is largely restricted due to the demands of training anyway, it is submitted that the deprivation of liberty in this context is not sufficient to qualify as "true penal consequences", elevating the proceedings from disciplinary to criminal.²⁹²

A sentence of detention qualifies as a deprivation of liberty, since a member is locked up in a cell and excluded from their normal duties.²⁹³ However, in a dissenting judgment Verdross J compared the detention of soldiers in military detention barracks with the imprisonment of civilians and soldiers in civilian prisons and, not surprisingly, found fundamental differences. Where a civilian is cut off from his ordinary environment and occupation he found that a "soldier detained for disciplinary reasons stays in the barracks and may, from one moment to the next, be ordered to carry out one of his military duties; he thus remains, even whilst so detained, potentially within the confines of military service...such detention does not in principle amount to a deprivation of liberty...."²⁹⁴ Looking at detention as a sentence in the South African context one cannot agree with this judgment. Although an accused has the opportunity to return to his work environment after completion of his sentence of detention, he is removed from this environment for the duration of the sentence and the deprivation of his liberty in this context is sufficiently serious to qualify as "true penal consequences."

²⁹¹ *Engel v The Netherlands* (1976) 1 EHRR 647 para 62. Stavros at 13 does not agree with this contention. Even though a soldier's movements may be restricted because they spend most of their time in a camp, they do in fact have relative freedom of movement when not on duty. Any restrictions imposed as punishment would therefore qualify as a deprivation of liberty.

²⁹² It is submitted that the maximum period of this punishment, being only 21 days, further limits the gravity of the punishment.

²⁹³ *Engel v The Netherlands* (1976) 1 EHRR 647 para 63, specifically the separate opinion of Zekia J.

²⁹⁴ *Engel v The Netherlands* (1976) 1 EHRR 647 in the separate opinion of Verdross J.

Imposition of a fine

The main purpose for imposing a fine is to punish the offender by reducing his financial ability and quality of life.²⁹⁵ As punishment the fine should serve as a deterrent. For a fine to qualify as “true penal consequences” in terms of Steytler’s “extended” definition of who qualifies as an accused, the fine must be so severe that the purpose of the fine not only serves as a deterrent but can further be regarded as redressing the social wrong done. It should not merely be regarded as maintaining internal discipline. Steytler explains it as follows:²⁹⁶

Where a fine is imposed not to recover a loss but as a form of punishment with the purpose of retribution or deterrence, the fine no longer performs a private function but is aimed at protecting the general public. A further indication of the public nature of a fine is whether it is deposited in the national revenue fund.

All fines paid by members of the SANDF are automatically paid into the state’s “B7”-account which means that only the state benefits from the fines. Neither the unit where the crime was committed nor the victim involved will ever benefit from the imposition of the fine. State losses may be recovered by means of a separate court order²⁹⁷ or civil action instituted against the convicted accused by the State Attorney’s office.²⁹⁸

It is an open question to what extent fines imposed by the military courts can really act as a deterrent. To punish the accused and act as a deterrent the fine should, to some extent, reduce the accused’s financial ability and “worsen his quality of life for some time.”²⁹⁹ The maximum fine that can be imposed by the CSMJ is R6000 and by the CODH it is only R600. Payments can also be done in

²⁹⁵ Terblanche S S *A Guide to Sentencing in South Africa* (2007) at 261.

²⁹⁶ Steytler (1998) at 213.

²⁹⁷ Section 129(1) of the MDC.

²⁹⁸ For example where the accused was found guilty of negligent driving of a military vehicle and he was not authorised to drive that vehicle, the damages caused by the accident will be collected from the accused by means of civil action.

²⁹⁹ Terblanche at 261.

instalments on the request of the accused. A study done from statistics provided by the South African Navy has in fact shown that even the imposition of maximum fines do not reduce the recidivism of military offenders.³⁰⁰

4.2.4 The status of the military accused

Unfortunately most military trials do not fit neatly into a category of criminal proceedings. Many military trials before a CSMJ and CMJ are confronted with an accused charged with more than one offence, often combining criminal and disciplinary offences in one trial. However, the fact that the trial has both elements should not detract from the criminal nature of the proceedings.³⁰¹ Although the “nature of the offence” test as proposed by Steytler does not provide a clear answer in such instances it is submitted that the “true penal consequences” test may in fact be of assistance. Even where it is not clear whether the proceedings before the military court are of a criminal nature, the fact that the penal consequences attached to the offences may lead to a deprivation of liberty in the form of imprisonment necessitates protection of the accused in terms of section 35(3) of the Constitution.³⁰² Such an interpretation is also in line with section 39(1) of the Constitution which enjoins interpreters to promote the underlying values of the Constitution. Any interpretation must consider human dignity, equality and freedom. Constitutional interpretation entails a generous inclusive and purposive approach to interpretation rather than

³⁰⁰ See Heinecken L *et al* “Military Discipline: Where Are We Going Wrong?” (2003) 25 *Strategic Review for Southern Africa* 88 at 98. Reference is made to law officers stating that offenders even budget for offences prior to committing the offence. This is especially true at the level of the CODH where the accused knows that the fine cannot be more than R600.

³⁰¹ Snyckers & Le Roux at 51-17 (in discussing *S v Baloyi* 2000 (1) BCLR 86 (CC) stated that “even proceedings that did not form part of the criminal justice system, or were not criminal trials proper, could attract section FC s 35 protection if the character of what the proceedings were aimed at achieving sufficiently approximated that of a criminal prosecution”); *Mhlekwana v Head of the Western Tembuland Regional Authority, Feni v Head of the Western Tembuland Regional Authority* 2000 (2) SACR 596 (Tk) (the discussion on the procedures followed in the traditional courts highlights the similarities between the traditional courts and the military courts. Just as the accused before a traditional court was regarded as an accused before criminal proceedings, the accused before a military court can be considered an accused before criminal proceedings).

³⁰² The sanction attached to all offences in terms of the MDC is imprisonment ranging from three months to 30 years (see appendix A to ch 5).

an exclusionary approach.³⁰³ It is therefore submitted that an accused before a CSMJ and a CMJ is an accused for purposes of section 35(3) protection.³⁰⁴

This submission is only relevant to trials by CSMJ and CMJ since they can impose sentences of imprisonment and detention. The nature of the proceedings as well as the nature of the offences within its jurisdiction clearly indicate that proceedings before the CODH cannot be regarded as criminal. Although the penalty clauses for all military offences consist of imprisonment it is not a sentence within the jurisdiction of the CODH. Confinement to barracks, which do fall within the jurisdiction of the CODH, cannot be regarded as sufficient deprivation of liberty to qualify as “true penal sanction”. CODH proceedings are further much less formal than before the CSMJ or CMJ and the less proceedings resemble a criminal trial the less claim an individual has to full protection under section 35(3).³⁰⁵ An accused before the CODH will therefore not be regarded as an accused before criminal proceedings.

4.3 An evaluation of a selection of fair trial rights, as applied by the court of a senior military judge and court of a military judge

Compliance with the rights to a fair trial is paramount in ensuring that justice is done during a trial. Since an accused before a CSMJ and CMJ is entitled to the rights of a fair trial in terms of section 35(3) of the Constitution, a short evaluation is done of a selection of fair trial rights as they are applied in the military courts. Although it is argued that an accused before a CODH is not entitled to the section 35(3) rights it is submitted that such an accused is still entitled to basic procedural fairness. The CODH is therefore briefly evaluated to determine whether this forum indeed provides its accused with basic fair procedures.

³⁰³ Botha C *Statutory Interpretation: An Introduction for Students* 4 ed (2007) at 119-122.

³⁰⁴ See also *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229D-E where the court found that an accused in the military justice system can indeed be seen as an accused for purposes of the Constitution.

³⁰⁵ Snyckers & Le Roux at 51-13.

The following rights are evaluated:

- 4.3.1 The right to be informed of the charges in enough detail to enable the accused to answer to the charges.
- 4.3.2 Sufficient time and facilities to prepare a defence.
- 4.3.3 A public hearing before an ordinary court.
- 4.3.4 The right to choose and be represented by a legal practitioner of his choice.

The important right regarding appeal and review is discussed elsewhere.³⁰⁶

- 4.3.1 The right to be informed of the charges in enough detail to enable the accused to answer the charges

Section 84(1) of the Criminal Procedure Act states that

[s]ubject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may reasonably sufficient to inform the accused of the nature of the charge.

When a person is charged with an offence, it is required that the charge explain the relevant offence in such a manner and in sufficient particulars that the accused is sufficiently informed of the charge.³⁰⁷ This includes a reference in the

³⁰⁶ See ch 7 para 7.5.3 below.

³⁰⁷ See also s 80 of the MDC; Steytler (1998) at 227; Stavros at 168-169. It is required that the accused be informed with regard to all the elements of the offence and not only the name of the

charge sheet to the provisions applicable to the sentencing regime of a specific offence.³⁰⁸ Most of the available case law finds specific application to the imposition of the minimum sentence regime. It is contended that where the state intends to invoke section 51 of the Criminal Law Amendment Act 105 of 1997 the charge sheet should indicate such an intention. Although the imposition of minimum sentences is not an issue before the military courts, the important principle is that it is preferable that any sentencing legislation on which the state intends to rely should be contained in the charge sheet. This includes the facts the state intends to prove which may influence the sentence.³⁰⁹ Although the charge sheet should specify these particulars, the court in *S v Legoa*³¹⁰ held that it preferred not to lay down general rules as to exactly how and when the facts and possible sentence it might incur should be made known to the accused. Each individual case must be evaluated to determine whether the accused's substantive fair trial rights were violated.³¹¹ Therefore, although it is preferable that the charge sheet should contain a reference to the penalty it is not essential.³¹² To determine whether sufficient information has been given to the accused, it should be kept in mind that the accused is presumed innocent and therefore has no knowledge of the offence.³¹³

offence that he is being charged with. See further Joubert J J (ed) *Criminal Procedure Handbook* 9 ed (2009) at 188; *S v Hugo* 1976 (4) SA 536 (A) at 540E; *S v Smith* 1991 (2) SACR 217 (C) at 219g-h; Govindjee & Vrancken at 208. The CMA held in *S v Mdunyelwa* (CMA 067/2009) that the military judge's failure to inform an unrepresented accused that he could be convicted of s 1 of the Criminal Law Amendment Act 1 of 1988, of which the charge was not contained in the charge sheet, did not prejudice the accused and the conviction was confirmed. It is expected of a court, when faced with an unrepresented accused faced with serious charges, to inform him of these consequences and possible sentences before he enters a plea (see in this regard also *S v Yantolo* 1977 (2) SA 146 (E) at 149A-B; *Van Niekerk v Attorney-General, Transvaal* 1990 (4) SA 806 (A) at 809A; *S v Owies* 2009 (2) SACR 107 (C) at 108a).

³⁰⁸ Terblanche at 46.

³⁰⁹ See *S v Cunningham* 2004 (2) SACR 16 (E); *R v Zonele* 1959 (3) SA 319 (A) at 323A-B; *S v Legoa* 2003 (1) SACR 13 (SCA) para 19; *S v Ndlovu* 1999 (2) SACR 645 (W) at 649f.

³¹⁰ *S v Legoa* 2003 (1) SACR 13 (SCA) para 21.

³¹¹ *S v Legoa* 2003 (1) SACR 13 (SCA) para 21.

³¹² *S v Legoa* 2003 (1) SACR 13 (SCA) para 22; *S v Cunningham* 2004 (2) SACR 16 (E) at 19b; *S v Blaauw* 1999 (2) SACR 295 (W) at 302d-e. See also rr 22-23 of the MDSMA, which governs the content of military charge sheets. There is no requirement in terms of the defence legislation regarding references to penalties in the charge sheets.

³¹³ Steytler (1998) at 227.

These principles have now been constitutionalised. Section 35(3)(a) of the Constitution provides as follows.³¹⁴

Every accused person has a right to a fair trial, which includes the right –

- (a) to be informed of the charge with sufficient details to answer it.

This right starts the moment that the accused is charged and is important because without adequate information the accused cannot begin to prepare his defence.³¹⁵ Although the courts have been hesitant to specify at which stage of the trial the accused must receive sufficient details, they are in agreement that receipt of the information after conviction, during the sentencing phase, does not comply with the constitutional provision.³¹⁶ It is preferable for the information regarding the charge and its consequences to be provided either in the charge sheet or at the time of the plea.³¹⁷ However, as long as the accused is informed of the details during the course of the trial, the courts have found that the accused's fair trial right in terms of section 35(3)(a) has not been violated.³¹⁸

³¹⁴ See also Steytler (1998) at 225 where he is of the opinion that this section should also be read with the s 35(4) requirement that a person should be informed of the right in a language that the person understands. This right is also found in the European Convention (see in this regard Stavros at 63).

³¹⁵ Steytler (1998) at 226; Currie & De Waal (2005) at 776; Stavros at 64; *S v Thobejane* 1995 (1) SACR 329 (T) at 334; *Ex Parte the Minister of Justice: in re R v Masow* 1940 AD 75 at 91 (where “the accused must be informed of the offence with which he is charged and of particulars as to time, place, person and property. Such information need not be completely detailed but it must be reasonably sufficient. To put it in another way, everything which is an essential element in the offence must be set forth in the charge”).

³¹⁶ *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12; *S v Langa* 2010 (2) SACR 289 (KZP) para 23; *S v Bhadu* 2011 (1) SACR 487 (ECG) para 3.

³¹⁷ *S v Bhadu* 2011 (1) SACR 487 (ECG) para 3; *S v Ndlovu* 1999 (2) SACR 645 (W) at 649g-h; *S v Langa* 2010 (2) SACR 289 (KZP) para 23 (“a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole...[it] is...doubtful whether any of them can adequately be made after an accused has initially pleaded to the charge”).

³¹⁸ *S v Bhadu* 2011 (1) SACR 487 (ECG) para 3; *S v Raath* 2009 (9) SACR 46 (C) para 14; *S v Legoa* 2003 (1) SACR 12 (SCA) para 21; the Steyn J judgment in *S v Langa* 2010 (2) SACR 289 (KZP) para 4. Misinformation regarding the possible sentence may also render the trial unfair (see *S v Jacobs* 2011 (1) SACR 505 (ECG) para 10-11).

The main issue discussed in the literature regarding sufficient details of a charge seems to be the accused's right of access to the police docket.³¹⁹ It is submitted that access to police dockets is not an issue in military law. Wherever an offence is serious enough to warrant a police investigation the court, at the arraignment of the accused, will order a preliminary investigation.³²⁰ Such an investigation will incorporate the statements and information of the police docket and consequently the accused and his defence counsel will have sufficient access to the information contained in the police docket.

The right to be informed of the charges and military courts

These constitutional principles also find application in military law. Rule 22(1) of the MDSMA provides that

[a] charge sheet shall be prepared by a prosecutor in respect of every person to be tried by a military court...

With regard to the provision of sufficient information to enable the accused to plead, rule 23 of the MDSMA provides that

(2) Every charge shall state the offence with which the accused is charged and particulars of the act or omission constituting the offence.

(4) The particulars of the act or omission constituting such offence shall be stated in such manner and with such details as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

³¹⁹ Snyckers & Le Roux at 51-108 □ 51-113 and the authority cited there.

³²⁰ See *The right to be informed of the charges and military courts* below.

The military accused is in a much better position than his civilian counter-part since he actually has access to the facts on which his charges are based at various stages of the military justice process.

When an accused is charged with an offence, irrespective of his rank, he appears before a military court for arraignment as soon as possible after the account of the offence has been issued.³²¹ During the arraignment procedure the accused is informed of the charges against him. The level of information required at this stage of the proceedings is dependent on the nature of the offence and the rank of the accused. Where the accused is of or below the rank of a staff-sergeant and he is charged with a disciplinary offence, he may elect to be tried by a CODH. However, to be eligible for trial by a CODH he must plead guilty. To exercise his choice he must be placed in a position where he can make an informed decision. He can only make such an informed decision where he is "informed of the charges with sufficient details to answer it."³²² Under these circumstances the accused must be adequately provided with information as early as his arraignment.

Where the rank of the accused or the seriousness of the offence precludes the disciplinary option, it may not be necessary to provide the accused with full particulars at the arraignment. The court doing the arraignment must, under certain circumstances, order a preliminary investigation.³²³ The purpose of a preliminary investigation is to investigate allegations that members subject to the MDC have committed an offence. The intention must further be to try that accused in a military court. The accused is present during the preliminary investigation and may also have legal representation present during the course

³²¹ Section 29(2) of the MDSMA. The account of the offence is known as the DD1 and contains concise particulars pertaining to the offence that must be completed so that the prosecutor has sufficient information to draw up a charge sheet (see r 6(2) of the MDSMA).

³²² The accused is given the opportunity to consult with defence counsel before exercising his choice.

³²³ A preliminary investigation must be ordered where the accused is charged with an offence other than a military disciplinary offence or where the accused is of the rank of warrant officer or higher (see s 30 of the MDSMA read with r 8 of the MDSMA).

of the investigation. All evidence is recorded and witnesses are sworn in and testify under oath. Where witnesses are not available affidavits are handed in. The affidavits are read over to the accused who may also cross-examine any witness called to testify.³²⁴ A copy of the completed preliminary investigation is made available to the accused and his defence counsel for the preparation of his trial. Upon completion of the investigation a preliminary charge sheet is drawn up and made available to the accused prior to his trial.

It should be noted that the prosecution counsel is not bound by the preliminary charge sheet drawn up after the preliminary investigation. The accused may not object to the charge sheet at his subsequent military trial on the grounds that the charges were not preferred against him at the investigation or that the charge differs from the preliminary charge sheet.³²⁵

In the instances where a CSMJ or CMJ is contemplated but a preliminary investigation was not ordered, the accused will merely be informed of the charges against him.³²⁶ Since the accused is generally not asked to plead during the first appearance (the arraignment), the prosecution counsel will have an opportunity, on completion of the relevant investigations,³²⁷ to draft a final charge sheet where the accused chooses a CSMJ or a CMJ. The final charge sheet will then be read during the actual trial of the accused where he will be required to plead. The final charge sheet must however have been made available to the defence counsel prior to the trial, providing the defence with sufficient time to prepare.

³²⁴ For the comprehensiveness of the evidence see ss 30(7)-(9) of the MDSMA. A preliminary investigation is not a trial where the guilt or innocence of the accused is determined. It is an administrative process to determine whether there is sufficient evidence against the accused to continue with a trial. Where the preliminary investigation finds insufficient evidence the prosecutor can apply for a *nolle prosequi* of the charges.

³²⁵ Section 30(23) of the MDSMA.

³²⁶ Section 29(3)(b) of the MDSMA.

³²⁷ The investigations referred to include police docket investigations, preliminary investigations in terms of s 30 of the MDSMA and r 8-investigations which are investigations done at unit level by the unit prosecutors (usually the adjutant of the unit) to gather evidence. Such an investigation is much less formal than the preliminary investigation.

The right to be informed of the charges and the CODH

Although the legislation provides that a prosecutor may investigate the charges upon receipt of the account of the offence (DD1) it is not compulsory to do so in terms of the MDSMA. However, the Legsatos require all prosecutors at unit level to complete an investigation before framing a charge sheet.³²⁸ It is in fact the practice that the prosecutor may not accept a DD 1 if the complainant or the person issuing the DD1 does not attach an affidavit setting out the circumstances relating to the incident. The arraignment takes place after receipt of the DD1.³²⁹ This means that at the time when the accused appears on his arraignment and needs to exercise his choice regarding the CODH, the prosecution will at least be in possession of some evidence in the form of an affidavit or a complete investigation that can be made available to the accused at his arraignment.

Despite this the Ministerial Task Team has raised concerns that the accused appearing on arraignment and who must opt for a CODH is not protected in that:³³⁰

1. there is no express obligation on the commanding officer to ensure that the accused fully understands the nature of the offences with which he is charged;
2. the accused is not informed that the offence he is charged with falls within the jurisdiction of the commanding officer or what possible sentences can be imposed, thereby resulting in the accused not being able to make an informed decision;³³¹ and

³²⁸ See r 8 of the MDSMA.

³²⁹ Sections 29(1)-(2) of the MDSMA. For a discussion on the arraignment of the accused see ch 3 para 3.2.5 above.

³³⁰ Ministerial Task Team at 47.

³³¹ See at para 4.3.1 above.

3. the accused is not given the right to request further information to enable him to respond to the charge with an appropriate plea.

It is required that the commanding officer, at the arraignment of the accused, informs the accused of the charges he is facing.³³² When the accused is given his election certificate a charge sheet containing all the relevant information required in terms of the legislation, is attached to the election certificate.³³³ Therefore the accused facing a possible CODH is clearly informed of the contents of the charges against him.

Furthermore, the accused is informed that he may consult with a legal practitioner of his choice³³⁴ prior to exercising his election and he therefore has sufficient opportunity to ascertain the nature of the charges in consultation with his legal representative if he is uncertain in this regard.³³⁵ The same can be said regarding the nature of possible sentences that may be imposed.³³⁶ It is submitted that cases before the CODH are distinguishable from the civilian cases discussed. Where the accused is not informed of possible sentences and opts for a CODH, it cannot act to his detriment.³³⁷ When the sentence can prejudice the accused by exposing him to a harsher punishment it is an important principle that the sentence provisions should be indicated on the charge sheet. The sentencing jurisdiction of the CODH is very limited compared to the CSMJ and CMJ and although any sanction may be seen as prejudicial, the accused will not be exposed to severe punishments within the CODH's jurisdiction. His legal representative is in a position to advise him accordingly. Although the court held in *S v Langa*³³⁸ that representation by a legal practitioner does not mean that the

³³² Section 29(3)(a) of the MDSMA.

³³³ Rules 22-23 of the MDSMA.

³³⁴ An accused has the choice of either military defence counsel, free of charge, or a private attorney of his choice at own cost.

³³⁵ Section 29(3)(c) of the MDSMA.

³³⁶ See the discussion at para 5.3.1 above.

³³⁷ See *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 14 where the court held that where an accused is not informed that the provisions relating to minimum sentences will be applied it is to the detriment of the accused, resulting in a substantially unfair trial.

³³⁸ *S v Langa* 2010 (2) SACR 289 (KZP).

court need not satisfy itself that the accused is aware of the possible sentencing regime, it did find that such an inquiry is a factual one. A failure by the commanding officer in providing information on the consequences of the charges should not render the proceedings unfair.³³⁹

Nothing in the legislation prevents the accused from requesting further information from the prosecution regarding the charges, such as witness statements, before deciding to plead guilty on the charges. There is no foreseeable reason why the commanding officer or the prosecution would refuse the accused such access. In the event of such refusal, once again the accused can turn to the assistance from a legal representative in this regard.³⁴⁰ Statements by prosecution witnesses in the military justice environment are generally not privileged as in the civilian environment an accused is entitled to such statements or at the very least, to a summary of the evidence.³⁴¹

The nature and amount of information required to comply with this constitutional requirement always depends on the type of case before the court.³⁴² Even if the accused is unable for some reason to access the witness statement, it is submitted that the nature of the CODH, the fact that it has limited sentencing

³³⁹ *S v Langa* 2010 (2) SACR 289 (KZP) para 25.

³⁴⁰ The accused before a CODH has access to legal representation prior to the trial and can request defence counsel's assistance in obtaining further information. It must also be kept in mind that s 87(1) of the Criminal Procedure Act specifically provides that an accused may request further particulars regarding any charges brought against him. The right in terms of access to information further strengthens the accused's position.

³⁴¹ This is true for all cases before a CMJ or CSMJ. Prior to going to trial, irrespective of whether a preliminary investigation was done or not, the accused and the defence counsel receive such statements or a summary for their trial preparation. Although this is not the practice for cases before a CODH, nothing in the legislation prohibits an interpretation allowing an accused access to the evidence before exercising his choice. See also *S v Nassar* 1995 (2) SA 82 (NM) at 105-106 where the court found that the right of an accused to be provided with "reasonable time and facilities to ensure a fair trial" included providing the accused with, inter alia, the witness statements.

³⁴² *Shabalala v Attorney General of Transvaal* 1995 (2) SACR 761 (CC) paras 37-38 where the court found that in many routine prosecutions in inferior courts access to the police dockets (which would arguably also include other witness statements for military justice purposes) was not required to ensure a fair trial. "This would be the case where there is a simple charge in respect of a minor offence involving no complexities of fact or law in which there is no reasonable prospect of imprisonment..."

jurisdiction and only tries relatively minor offences, will negate the need for detailed access to the evidence.

Since it is the choice of the accused to submit to the jurisdiction of the CODH, he can merely indicate his intention to plead “not guilty” or request legal representation where he is unsure about the charges, the jurisdiction or has difficulty in making an informed decision and the matter will be referred to the CMJ for prosecution. Opting for trial by CSMJ or CMJ will not be to the detriment of the accused. Personal experience has shown that the CSMJ and CMJ take the fact into consideration that the accused is charged with a disciplinary offence cognisable by a CODH and will sentence the accused accordingly, in some instances even more leniently.³⁴³

From the above discussion it is submitted that the accused before a military court as well as the CODH is sufficiently informed of the charges against him to allow him to formulate his plea.

4.3.2 Sufficient time and facilities to prepare a defence

Section 35(3)(b) of the Constitution provides that

[e]very accused person has a right to a fair trial, which includes the right –

(b) to have adequate time and facilities to prepare a defence;

This right covers a wide range of principles such as the accused’s right of access to information and witnesses as well as consultation with a legal representative, specifically the right to assistance by the state for preparation of a defence.³⁴⁴ It

³⁴³ Heinecken *et al* at 92.

³⁴⁴ Snyckers & Le Roux at 51-113.

also entails the right not to be tried too hastily³⁴⁵ resulting in too little time to properly prepare his defence.³⁴⁶

This right is not specifically limited to the trial itself. What constitutes a fair trial can also be dependent on the procedures preceding the trial. Where there is no fairness in the investigation it may taint the trial and result in the trial court being unable to provide the accused with a fair trial.³⁴⁷ Two important aspects to this right need to be considered: the accused must have adequate time to prepare a defence and must have adequate facilities to prepare the defence.

Adequate time to prepare a defence

If a trial is convened too soon, the accused may not have sufficient time to prepare his defence. What would constitute adequate time for preparation would differ from case to case. Factors that may be taken into consideration are “the complexity of the case,³⁴⁸ the sufficiency of time for the appointment of a lawyer and the stage of the proceedings.”³⁴⁹ It is suggested that if the trial takes place too soon after the arrest of the accused, he may still be in shock and, especially where he is unrepresented, this may lead to a plea of guilty due to undue influence by the police or prosecution.³⁵⁰

³⁴⁵ Stavros at 175; Steytler N ‘The Too Speedy Trial – or the Right to be Prepared for Trial’ (1985) 9 *South African Journal for Criminal Law and Criminology* 158; *S v Yantolo* 1977 (2) SA 146 (E) at 149H; *Van Niekerk v Attorney-General, Transvaal* 1990 (4) SA 806 (A) at 807F; Taitz at 132.

³⁴⁶ Steytler (1998) at 231. Taitz at 139 argues that a failure to provide an accused with adequate notice for his trial is a violation of the *audi alteram partem* rule.

³⁴⁷ *S v Nkabinde* 1998 (8) BCLR 996 (N) at 1002.

³⁴⁸ *S v Yantolo* 1977 (2) SA 146 (E) 150D (“[e]ach case must depend on its facts and the court must not open the door to frivolous applications...where the accused has had sufficient opportunity to weigh the case against him...”); Gamble R & Dias N “International Fair Trial Protections in Criminal Trials” (2008) 20 *Sri Lanka Journal of International Law* 25 at 35.

³⁴⁹ Steytler (1998) at 232; Stavros at 175; in general, *S v Gedezi* 2010 (2) SACR 363 (WCC).

³⁵⁰ Taitz at 134.

The purpose of this right is to ensure “equality of arms” between the state and the accused.³⁵¹ “Equality of arms” is a procedural mechanism that attempts to equalise the inequality of power between the state and the accused.³⁵² This does not however mean that the accused is not entitled to procedural and evidential privileges that the prosecution is not entitled to.³⁵³ Steytler contends that although the state is the party who determines when the trial will proceed, usually when the state is prepared and can proceed, the accused should be afforded the same opportunity. The trial should not proceed if the accused is not prepared for his defence.³⁵⁴

This right further affords the accused the opportunity to make an informed decision regarding his plea and trial.³⁵⁵ At the start of the trial the military judge must ascertain whether the accused has had sufficient time to prepare. Where the accused indicates that he did not have sufficient time the matter should be postponed.

This right should not be limited to the trial alone, but should include all proceedings where the accused’s interests may be negatively affected, for example during the plea proceedings or during the sentencing phase.³⁵⁶

³⁵¹ Steytler (1998) at 233. In the military justice system the accused is in a better position than his civilian counterpart since, through the use of military defence counsel, he will have access to the same resources in procuring evidence and witnesses that the prosecution has.

³⁵² Snyckers & Le Roux at 51-105.

³⁵³ Equality of arms should not be interpreted too literally (see Snyckers & Le Roux at 51-106).

³⁵⁴ *S v Gedezi* 2010 (2) SACR 363 (WCC) (a refusal to grant a postponement so that the accused may prepare his defence amounted to a fundamental irregularity, resulting in the accused not receiving a fair trial); *S v Cornelius* 2008 (1) SACR 96 (C) para 7.

³⁵⁵ Steytler (1998) at 233. The State’s obligation to allow adequate time to prepare a defence is, of course, not unlimited (see Steytler (1998) at 234 where he argues that the right may be limited where it is necessary to protect the court’s dignity and authority in instances where the court has the authority to punish an individual for contempt of court *in face curiae*).

³⁵⁶ Steytler (1998) at 234; *Moetjie v The State* 2009 (1) SACR 95 (T) at 102a.

Adequate facilities to prepare a defence

Equality of arms also implies that there must be some equality of resources between the prosecution and the accused.³⁵⁷ The state generally has many more resources than the accused.³⁵⁸ Adequate facilities may imply that an accused should have access to a lawyer as well as access to the information that is held by the state.³⁵⁹ There is a positive duty on the state to provide the accused with such facilities which includes access to the police investigation.³⁶⁰ Refusing an accused access to witness statements deprives the accused of a fair trial and is a breach of his fundamental right to a fair trial.³⁶¹

“Facility” may be afforded its ordinary meaning of an actual place where the accused can consult with his legal representative. The state must provide such facilities where an accused is incarcerated and ensure the facility’s integrity.³⁶² “Facility” can also have another meaning. In *S v Nasser*³⁶³ the court held that “[t]he word ‘facility’,...can mean facilitating or making easier the performance of an action...”³⁶⁴. A positive duty is placed on the state to “facilitate...the preparation of a defence” in order to place the accused in the same position as

³⁵⁷ Steytler (1998) at 235; Gamble & Dias at 37; Stavros at 178 (“[a] positive obligation for the competent authorities can be, therefore, derived...to adopt all appropriate measures designed to place the defence in a situation of parity with the prosecution”); Van Dijk & van Hoof at 319 (“no elements of the examination of the case may be settled when one party is present or represented, but the other is not”).

³⁵⁸ Steytler (1998) at 235.

³⁵⁹ Steytler (1998) at 232; Stavros at 178. See also at 186 where he states that what constitutes “adequate facilities” will differ from case to case. In *National Director of Public Prosecutions v Mohamed* 2003 (2) SACR 258 (C) para 57 the accused was unsuccessful in arguing that an asset seizure order was unconstitutional since it denied him access to his money and thereby the ability to pay for legal representation, infringing his right to adequate facilities to prepare his defence. See also *S v Nasser* 1995 (2) SA 82 (NM) at 105-106.

³⁶⁰ *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) para 72; Govindjee & Vrancken at 208; Steytler (1998) at 235; Van Dijk & van Hoof at 320; *S v Kandovasu* 1998 (9) BCLR 1148 (NmS) at 1152.

³⁶¹ *S v Kandovasu* 1998 (9) BCLR 1148 (NmS) at 1153.

³⁶² *S v Nkabinde* 1998 (8) BCLR 996 (N) at 1002-1003 where the court held that compromising the phone line and consultation area at Westville Prison by installing listening devices was a fundamental infringement of the accused’s constitutional rights, resulting in an unfair trial.

³⁶³ *S v Nasser* 1995 (2) SA 82 (NM).

³⁶⁴ *S v Nasser* 1995 (2) SA 82 (NM) at 106C (facilities are not limited to physical facilities); Steytler (1998) at 235.

the state. The obligation of the state is limited in that it only arises where the accused can show a need for a facility which relates to the preparation of his defence. The state is only obliged to provide an adequate facility. Adequacy is determined by the court and not the accused.³⁶⁵

The right to adequate time and facilities to prepare a defence in the military court

At the arraignment of the accused the MDSMA provides that the commanding officer or the military judge presiding at the arraignment may remand the case for sound reasons which include the need to complete the case or the investigation.³⁶⁶ It also provides for remand to enable the completion of a preliminary investigation.³⁶⁷

Rule 105 of the MDSMA provides that:³⁶⁸

[a]n accused to be tried by a military court shall, whether he or she is in custody or not, be afforded every reasonable opportunity and facility to consult with his or her counsel, interview prospective defence witnesses, and procure the presence of any such witness at his or her trial.

From the moment of arraignment the military accused is informed of his rights regarding legal representation.³⁶⁹ At the arraignment the matter is remanded either for completion of the preliminary investigation or for referral to the Legal Satellite Office for a trial date.³⁷⁰ This means that the accused should have sufficient time during the period of remand to start preparing his defence. Military

³⁶⁵ Steytler (1998) at 235-236. An adequate facility does not entail the best facility (see Steytler (1998) at 191-192 for a discussion of what "adequate" entails).

³⁶⁶ Section 29(3)(d) of the MDSMA.

³⁶⁷ Section 29(3)(e) of the MDSMA.

³⁶⁸ Rule 105 of the MDSMA refers to "military courts" which for purposes of the definition of military courts includes the CODH. It is therefore submitted that r 105 of the MDSMA applies to the CSMJ, CMJ and the CODH.

³⁶⁹ Section 29(3)(c) of the MDSMA.

³⁷⁰ Except in terms of s 29(3)(g) of the MDSMA, as discussed at *The right to adequate time and facilities to prepare a defence before a CODH* below.

courts are required to grant postponements to allow the accused to consult with his legal representative and to adequately prepare for his defence.³⁷¹

A military accused has free access to military defence counsel or he may use private counsel at his own cost. As a uniformed member he is further able to make use of military facilities when in consultation with his defence counsel in the preparation of his defence. He consults with his military defence counsel during office hours and at units which are not located close to a Legato; the defence counsel will make an appointment with the accused prior to the trial and consult with him either at the unit or at the military legal office nearest to where the accused is stationed. If this is not possible the defence counsel can do telephonic consultations. It is therefore not necessary for the accused to provide his own facilities and he need not be indigent before the state provides him with such facilities.

Where the accused is in the detention barracks awaiting trial, provision is made by the detention barracks for appointments with defence counsel in their daily routine. No limit is placed on the number of visits that an accused may receive from his legal representative.³⁷²

The right to adequate time and facilities to prepare a defence before a CODH

Since the CODH only has jurisdiction over guilty pleas where the accused has waived the right to legal representation, it is submitted that an evaluation on fair procedures is only applicable at the pre-trial stage where the accused, after arraignment, must exercise his choice whether to submit to the jurisdiction of the CODH.

³⁷¹ In *S v Hoffman* (CMA 058/2005) the CMA held that insufficient time to allow an accused to prepare for trial constitutes a gross irregularity. It therefore set aside the finding and sentence.

³⁷² See the discussion on the detention barracks at ch 6 paras 6.2.5.1 and 6.2.5.3 below.

The MDSMA provides that a military court may, at the arraignment of the accused, try an accused summarily.³⁷³ This will only be possible in those instances where the accused is charged with a military disciplinary offence, falling within the jurisdiction of the CODH. In all other instances the court must remand the case so that the required preliminary investigation may be done.³⁷⁴ When confronted with the charge and the opportunity to complete the trial immediately, it may lead to the argument that the accused may be compelled into a too hasty trial where he appears before a superior officer for the first time. However, the accused is not literally tried immediately. His rights in terms of the CODH must first be explained to him.³⁷⁵ He is taken before another officer to exercise his choice and he is given the opportunity to consult with defence counsel before making his choice. There is no time limit placed on how long he may take to consult with his defence counsel. The previous discussion on his access to sufficient information should also be kept in mind.³⁷⁶ It is therefore submitted that within the limited confines of its application regarding the CODH, sufficient provision is made for compliance with this right.

4.3.3 A public hearing before an ordinary court

4.3.3.1 Introduction

An ordinary court refers to “a tribunal which not only is not specifically constituted for the occasion but is also adorned with the power and the facilities to ensure compliance with all the fair trial rights listed in FC s 35.”³⁷⁷ The concept “ordinary court” also means that “accused persons should be prosecuted in courts which have previously been established by law”.³⁷⁸ This requirement protects an

³⁷³ Section 29(3)(g) of the MDSMA.

³⁷⁴ Section 29(3)(f) of the MDSMA.

³⁷⁵ Section 29(3)(c) of the MDSMA.

³⁷⁶ See para 4.3.1 above.

³⁷⁷ Snyckers & Le Roux at 51-115.

³⁷⁸ Steytler (1998) at 267; Currie & De Waal (2005) at 783.

accused against prosecution in *ad hoc* courts created by the executive “to the detriment of judicial independence and impartiality”.³⁷⁹

Although the judicial independence and impartiality requirement as found in section 165 of the Constitution fall outside the Bill of Rights, and therefore do not form part of the fair trial rights, the requirements of independence and impartiality of the courts do find application in section 35(3)(c).³⁸⁰ It was stated in *Van Rooyen v The State*³⁸¹ that

...it must be kept in mind that judicial impartiality and the application without fear, favour or prejudice by the courts of the Constitution and all law, as postulated by s 165(2) of the Constitution, are inherent in an accused's right to a fair trial under s 35(3) of the Constitution. One of the main goals of institutional independence is to safeguard such rights.

Ordinary courts should also apply “the duly established procedures of legal process to all cases before it.” When they follow different procedures they are transformed into extraordinary courts.³⁸²

4.3.3.2 Military courts as ordinary courts

Prior to 1999 military courts were not standing courts and were convened on an *ad hoc* basis. These courts martial were not considered ordinary courts.³⁸³ Only an ordinary court can preside over criminal proceedings.³⁸⁴ Only an accused before criminal proceedings is entitled to fair trial rights protection in terms of section 35(3). It is therefore important to determine whether military courts can now, since being re-created as standing courts, be regarded as ordinary courts.

³⁷⁹ Steytler (1998) at 267; Currie & De Waal (2005) at 783.

³⁸⁰ Currie & De Waal (2005) at 783; *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 35.

³⁸¹ *Van Rooyen v The State* 2002 (9) BCLR 810 (CC) para 35.

³⁸² Steytler (1998) at 267.

³⁸³ See *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 21; Snyckers & Le Roux at 51-117.

³⁸⁴ *De Lange v Smuts* 1998 (3) SA 755 (CC) para 70.

The requirements regarding the independence and impartiality discussed earlier in relation to the CSMJ and CMJ apply equally to instances governed by section 35(3) and are not repeated here.

Snyckers and Le Roux state that the aim of section 35(3)(c) is to “ensure that normal criminal trials with full fair trial protection are the only acceptable method whereby the state may prosecute individuals for committing offences.”³⁸⁵ Section 35(3) is however subject to limitation in terms of section 36 of the Constitution. Section 36 will allow a limitation of a right in terms of a law of general application as long as the limitation is reasonable and justifiable in an open and democratic society. Would the CODH, which is established in terms of the MDSMA, then be regarded as a justifiable limitation of the right that only an ordinary court may prosecute individuals for offences?

The CODH proceedings cannot be regarded as criminal proceedings and also do not possess the same level of independence and impartiality expected from an ordinary court. It should rather be regarded as a court *sui generis*.³⁸⁶

The reason for the creation of the CODH, namely the swift enforcement of discipline, is regarded as a legitimate governmental aim.³⁸⁷ A military accused’s right against prosecution in an *ad hoc* tribunal created by the executive can, with this legitimate governmental aim, be limited in terms of section 36 and prosecution by the *ad hoc* tribunal of the CODH will be a justifiable limitation of the accused’s constitutional rights. Although these tribunals, in terms of section 12(1)(b) of the Constitution, need not comply with section 35(3), they do need to satisfy standards of impartiality that are implicit in the minimum requirements of

³⁸⁵ Snyckers & Le Roux at 51-115.

³⁸⁶ The US equivalent of a summary court martial is described as a “unique mechanism” and “tilted more toward internal military discipline than to due process” (see Morris at 41 and 43). No civilian equivalent to the CODH exists.

³⁸⁷ Ministerial Task Team at 35 and 45.

natural justice.³⁸⁸ The standards are independence, impartiality and the fact that all legal disputes must be decided in a fair and public hearing.³⁸⁹ A short evaluation of the CODH against the principles of independence and impartiality is therefore required.

4.3.3.3 The independence and impartiality of the military courts

Although the test for the independence and impartiality of tribunals is similar to the test in terms of section 35 of the Constitution, the same level of independence is not required for these tribunals as in the case of a court of law.³⁹⁰ However, in *Mbebe v Chairman, White Commission*³⁹¹ the High Court found that “in so far as proceedings of a judicial nature is concerned, the Constitutional Court held that a judicial officer...is in all material respects an “impartial entity, independent of the executive and the legislature” who is “to act as arbiter between the individual and the State”...”³⁹² The degree of independence required from the tribunal would depend on the nature of the proceedings before it.³⁹³

Since it is argued that the CODH is a court *sui generis* there are no comparable guidelines regarding the testing criteria for the independence of the presiding officer and the tribunal. However, it is submitted that the guidelines set out in *De*

³⁸⁸ Snyckers & Le Roux at 51-115; *De Lange v Smuts* 1998 (3) SA 755 (CC) paras 65-75 (the basic principles that the tribunal must adhere to).

³⁸⁹ Currie & De Waal (2005) at 704; Currie & De Waal (2001) at 406; Hopkins K “Some Thoughts on the Constitutionality of “Independent” Tribunals Established by the State” (2006) 27 *Obiter* 150 at 154.

³⁹⁰ Currie & De Waal (2001) at 301, 407; Currie & De Waal (2005) at 723, 731; *Freedom of Expression Institute v President of the Ordinary Court Martial* 1999 (2) SA 471 (C) para 24; *Financial Services Board v Pepkor Pension Fund* 1998 (11) BCLR 1425 (C) at 1431.

³⁹¹ *Mbebe v Chairman, White Commission* 2000 (7) BCLR 754 (Tk).

³⁹² *Mbebe v Chairman, White Commission* 2000 (7) BCLR 754 (Tk) at 775 referring to *Nel v Le Roux* 1996 (3) SA 562 (CC) para 14.

³⁹³ Currie & De Waal (2001) at 407; Currie & De Waal (2005) at 731. Since the CODH only has jurisdiction over guilty pleas of less serious offences and limited sentencing jurisdiction, it is submitted that the level of independence that would be required under the circumstances may be limited in light of the requirement of a disciplined force.

*Lange v Smuts*³⁹⁴ in terms of section 34 of the Constitution would be appropriate testing criteria.

The difference in determining the independence of the tribunal versus that of a court of law is that the independence of the tribunal is tested against section 34 of the Constitution and that of a court of law against section 165.³⁹⁵ Section 165 falls outside the Bill of Rights and is therefore not subject to the limitation of section 36 of the Constitution. Consequently the independence of a court of law cannot be limited. This is not the case with tribunals. Since its independence is tested against section 34, which does fall within the Bill of Rights, the independence may conceivably be limited in terms of section 36,³⁹⁶ allowing a deviation from the strict standard set out in section 165.

The independence of the tribunal can be determined by evaluating the tribunal against the criteria similar to that required for the independence of courts of law, namely security of tenure, financial security and institutional independence.³⁹⁷

Security of tenure.

The trial officer conducting the CODH is the commanding officer of the unit or his delegate as determined by law.³⁹⁸ Being a trial officer at a CODH is therefore an *ex officio* appointment in terms of legislation and not a post for which the commanding officer applies. The considerations regarding the appointment of trial officers as discussed previously regarding the CMJ would therefore not find application in this instance.³⁹⁹ The commanding officer remains a trial officer, adjudicating over disciplinary hearings, for as long as he is in command of the

³⁹⁴ *De Lange v Smuts* 1998 (3) SA 785 (CC).

³⁹⁵ Currie & De Waal (2001) at 300; Currie & De Waal (2005) at 723.

³⁹⁶ Currie & De Waal (2001) at 300.

³⁹⁷ *De Lange v Smuts* 1998 (3) SA 785 paras 65-75.

³⁹⁸ Section 11(1) of the MDSMA. See also the definition of "commanding officer" in s 1 of the MDSMA.

³⁹⁹ See para 4.2.1.5 Selection and appointment above.

unit or formation. Security of tenure is therefore not a factor that influences the presiding officer.

Financial security

It is submitted that financial security will also not be a factor that can influence the commanding officer in his performance as trial officer. Being a trial officer is not the main function of a commanding officer. The adjudication of disciplinary hearings will in fact only constitute a small part of his responsibilities as commanding officer. A commanding officer is remunerated as a member of the SANDF and as such will receive all salary adjustments and benefits as prescribed in the appropriate remuneration policy applicable to his rank and mustering. His *ad hoc* responsibilities as trial officer will not have an influence on his remuneration.

Institutional independence

The institutional independence of the tribunal, as with courts of law, should be considered against the backdrop of the doctrine of separation of powers. This doctrine, although not specifically referred to in the Constitution, requires that the functions of government, namely the executive, legislative and judicial functions, should be separated and that each function must be performed by a separate branch of government.⁴⁰⁰ According to the doctrine the executive, on any level, should not interfere with the judiciary's adjudication process on any level.⁴⁰¹

Whereas courts of law form part of the judiciary, tribunals generally form part of the executive, thereby removing the CODH from the environment of the judiciary into the prerogative of the executive.⁴⁰² This may be seen as an interference

⁴⁰⁰ Hopkins at 150.

⁴⁰¹ See the discussion at para 4.2.1.2 above regarding separation of powers.

⁴⁰² Hopkins at 150. This is not necessarily a negative state of affairs. Currie & De Waal (2001) at 108 also aver that the creation of these tribunals provides individuals greater access to justice.

with the doctrine of separation of powers which clearly provides that only the judiciary can discharge a judicial function. The separation of powers doctrine forms an integral part of the democratic process. Its purpose is not only to prevent an “excessive concentration of powers a single organ” by keeping checks and balances on executive powers in place, but also “to promote greater government efficiency.”⁴⁰³ In following the last mentioned purpose, the doctrine of separation of powers is concerned with the effective execution of government powers rather than the judicial limits of its powers.⁴⁰⁴ In this light it may be interpreted that allowing the CODH to adjudicate over certain matters is necessary for the effective enforcement of discipline, an important function in complying with the constitutional imperative of a disciplined force.

Where the adjudication of cases is removed from the courts the *prima facie* indication is that it constitutes a violation of the doctrine of separation of powers. The executive is venturing into the arena of the judiciary. However, in South Africa the doctrine is not applied too rigidly. There are many kinds of checks and balances that can be applied to secure the independence of the judiciary.⁴⁰⁵

In the case of tribunals and forums the checks and balances are insured in two ways: (1) The guarantee of independence and impartiality required in terms of section 34; and (2) the right to review⁴⁰⁶ by the High Court of South Africa.

Hopkins is of the opinion that as long as there are sufficient checks and balances in place to guarantee the independence of the tribunal, it is permissible to allow tribunals to perform judicial functions, both in terms of the separation of powers

⁴⁰³ Hopkins at 151.

⁴⁰⁴ Hopkins at 151.

⁴⁰⁵ *First Certification Judgment* 1996 (4) SA 744 (CC) para 111.

⁴⁰⁶ Hopkins at 154. This right is also afforded an accused before a CODH (see r 68(9)(c) of the MDSMA). In *Mbebe v Chairman, White Commission* 2000 (7) BCLR 754 (Tk) at 776 the court found that where the tribunal proceedings are subject to review by a judicial entity the proceedings are independent and impartial.

doctrine and the guarantee of access to courts, even if the tribunal is attached to the executive.⁴⁰⁷

Although all findings and sentences given by the CODH are effective immediately,⁴⁰⁸ they are all subject to review.⁴⁰⁹ Where review counsel is of the opinion that a finding and sentence cannot be upheld, the matter is referred to the Director: Military Judicial Review who will then exercise the review powers assigned to his function by law.⁴¹⁰ In doing this, the Director has similar powers as those exercised by the CMA, thereby exercising a judicial function. However, the Director: Military Judicial Reviews cannot be seen as a judicial officer. He is an administrative official exercising a judicial function.⁴¹¹ What is however relevant here is the possibility that review counsel cannot be seen as an independent and impartial review court for the purposes of constituting sufficient checks and balances as averred to above.

However, the accused may also apply for review of the disciplinary hearing by the CMA and he has the right to approach the High Court of South Africa for relief. This may act as sufficient checks and balances as required by Hopkins.⁴¹²

The test for determining the independence of the tribunal is whether “from the objective standpoint of the reasonable and informed person, [the court will] be perceived as enjoying the essential conditions for independence.”⁴¹³ An informed person would realise that security of tenure and financial security will not be sufficient to influence the independence of the tribunal.

⁴⁰⁷ Hopkins at 153.

⁴⁰⁸ Rule 68(9)(a)(i) of the MDSMA.

⁴⁰⁹ Rules 68(9)(a)(ii) and 71(2) of the MDSMA; s 34(1) of the MDSMA. The matter will only be reviewed by the CMA on application by the accused (see r 68(9)(a)(iii) of the MDSMA).

⁴¹⁰ Section 34(3) of the MDSMA.

⁴¹¹ See ch 7 para 7.5.2 below.

⁴¹² Rule 68 of the MDSMA.

⁴¹³ Currie & De Waal (2005) at 724.

With regard to institutional independence the reasonable and informed individual should also realise that although the commanding officer, as a senior officer and part of middle management, forms part of the executive, the level of application of the law and interpretation of legal issues are severely limited in terms of the jurisdiction of the CODH, thereby limiting the executive opportunity to interfere.⁴¹⁴

In terms of legislation, the commanding officer has very limited jurisdiction. He may only adjudicate matters where the individual admits his guilt. Where the individual complies with the legislative requirements set out for trial by a CODH, the commanding officer will bring out a finding of guilty. In any other instance where he is of the opinion that the accused has a possible defence, it is not within his power to find the individual “not guilty”.⁴¹⁵ He must stop the proceedings and refer the matter to a CMJ, who will decide the legal issues.⁴¹⁶ Executive interference is hereby limited to the extent of being negligible.

Impartiality of the presiding officer

Determining the institutional independence of the tribunal is not sufficient. The impartiality of the tribunal or the presiding officer is also important. Impartiality “refers to a state of mind or attitude of the tribunal in relation to the issues and

⁴¹⁴ The limitation of his jurisdiction is necessary to protect the accused. The level of a commanding officer’s legal knowledge may differ depending on the arm of service in which he is employed. In practice this means that an accused person in the Army will be tried by a commanding officer who would have completed the Advanced Military Law Course presented by the School of Military Justice. This is a six week course covering the basic principles of criminal law, law of evidence, the law of armed conflict and military law. A large component of the course consists of a practical phase where moot military courts are conducted to ensure that all officers who complete the course are knowledgeable on the practical aspects of the CODH. This course is compulsory for all Army officers as a promotional course. This is however not the case for the other arms of service. Consequently, commanding officers in the other arms of service will not have the same training background and may in fact only have limited exposure to military law or the law in general. At the very least all members of the SANDF undergoing military training are exposed to basic military law training which forms part of the curriculum of most courses presented by the SANDF, such as basic military training, officer’s formative training and the various other promotional courses throughout a member’s career in the SANDF. This limited exposure is however not sufficient to make any person proficient in military justice.

⁴¹⁵ This will only happen in instances where the officer commanding questions the accused during the trial.

⁴¹⁶ Section 29(7) of the MDSMA.

the parties in a particular case and connotes absence of bias.”⁴¹⁷ Impartiality refers to two aspects. Firstly the presiding officer must be factually impartial, referring to actual impartiality and secondly, the presiding officer must be free of perceived bias. The fact that the presiding officer is factually impartial does not exclude the possibility of perceived bias.⁴¹⁸ Since the perception of bias may be more damaging to the perceived impartiality of the CODH, the test for determining bias remains, as with section 35 of the Constitution, whether “a fully informed person would harbour a reasonable apprehension of bias.”⁴¹⁹ It has been argued that the test for determining bias should be applied more strictly in those instances where non-judicial officers are performing judicial functions. This is because judicial officers are more likely to be perceived as impartial than non-judicial officers, and tribunals are generally more susceptible to suspicions of bias than courts of law.⁴²⁰

The procedures of the CODH address the concerns regarding actual as well as perceived bias in the following manner: The commanding officer cannot compel an accused to be tried before him or any other CODH. The election is not done in the presence of that commanding officer and he cannot sign as a witness on the required election certificate.⁴²¹

Provision is also made for the recusal of the commanding officer if he is of the opinion that he is likely to be biased or where he signed as a witness on the accused’s election certificate.⁴²² It is of interest to note that the grounds for recusal of the presiding officer at the CODH are substantially less than those

⁴¹⁷ Currie & De Waal (2005) at 724.

⁴¹⁸ Van der Leeuw G “Court Martial, Judicial and Administrative Tribunals, and the Rule against Bias” (1993) 110 SALJ 430 at 430-431.

⁴¹⁹ Currie & De Waal (2001) at 408; Currie & De Waal (2005) at 724; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 48; *Financial Services Board v Pepkor Pension Fund* 1998 (11) BCLR 1425 (C) at 1432.

⁴²⁰ Van der Leeuw at 443; *Council of Review, South African Defence Force v Mönning* 1992 (3) SA 482 (A) at 493E.

⁴²¹ Section 29(6) of the MDSMA.

⁴²² Rule 63 of the MDSMA.

provided for the military judge.⁴²³ This may be because of the fact that the jurisdiction of the commanding officer is limited and the protection required by an accused is not as extensive as in the case of the court of a military judge where the consequences of conviction are more severe.

Where the commanding officer does not recuse himself and continue with the trial, the accused is also given the opportunity to object to being tried by that commanding officer. Although the grounds for objection are not set out in the rules of procedure governing disciplinary hearings, it is submitted that the grounds for objection will be the same as those before the court of a military judge.⁴²⁴ Such grounds would include, inter alia, the commanding officer having a personal interest in the finding, having investigated the charges or where there is likely to be a conflict of interest.

Total impartiality is not possible. The commanding officer is a public official and a senior officer in the SANDF. It is inevitable that he will have a certain bias towards the enforcement of discipline and be influenced by the policies used in the SANDF.⁴²⁵ If the commanding officer does not recuse himself or confirm the objection raised by the accused, the accused will have the opportunity to make representations to the review authority.⁴²⁶ The fact that the accused at the CODH is not represented by defence counsel does not prevent an accused from availing him of this right to review. It is the duty of the commanding officer to inform the accused after announcing the sentence that the case will be reviewed by review counsel and that he may apply for review by the CMA.⁴²⁷

It is submitted that the commanding officer at the CODH does not have independence from the executive. Although security of tenure and financial

⁴²³ Compare r 63 of the MDSMA with r 35 of the MDSMA.

⁴²⁴ Rule 36 of the MDSMA; s 20(9) of the MDSMA.

⁴²⁵ Van der Leeuw at 437. This is not necessarily a negative state of affairs for purposes of enforcing discipline.

⁴²⁶ The accused may also apply for the review by the CMA of the proceedings within 14 days after his conviction (see s 34(5) of the MDSMA; r 68(9)(c) of the MDSMA).

⁴²⁷ Rules 68(9)(a)(ii)-(iii) of the MDSMA.

independence do not play a role in his decision making, some concerns exist regarding the institutional independence and perceived impartiality of the commanding officer. It is however submitted that due to the nature of the tribunal not qualifying as a court of law, the same level of independence is not required as for a court of law. The accused voluntarily submits to the jurisdiction of the CODH and coupled to his rights of appeal and review, it is submitted that sufficient checks and balances exist to protect the accused against unfair treatment at the hearing.

4.3.3.4 The right to a public hearing

The right to a public hearing is given so that justice can be seen to be done.⁴²⁸ The Criminal Procedure Act gives substance to this principle in that it provides that⁴²⁹

[e]xcept where otherwise expressly provided by this Act or any other law, criminal proceedings in any court shall take place in open court, and may take place on any day.

This section reflects an important principle of our jurisprudence, namely that hearings should be held in public.⁴³⁰ There are two reasons for this principle,⁴³¹

⁴²⁸ Snyckers & Le Roux at 51-120.

⁴²⁹ Section 152 of the Criminal Procedure Act.

⁴³⁰ *Klink v Regional Court Magistrate* 1996 (3) BCLR 402 (SE) at 414; *Nel v Le Roux* 1996 (3) SA 562 (CC) para 17; *Sanderson v Attorney-General, Eastern Cape* para 23.

⁴³¹ Steytler (1998) 250; Currie & De Waal (2005) 782; *Klink v Regional Court Magistrate* 1996 (3) BCLR 402 (SE) at 404. A further reason is given by Snyckers & Le Roux 51-121 in that this right is also an important safeguard of impartiality.

namely the enhancement the public's confidence in the criminal justice system⁴³² and protecting an accused from a secret trial.⁴³³

This right has also been constitutionalised in section 35(3)(c).⁴³⁴

Every accused person has a right to a fair trial, which includes the right – (c) to a public trial before an ordinary court;

A public trial means that the public have access to the proceedings and that the hearing is conducted in open court.⁴³⁵ To qualify as a public trial there must be an oral hearing.⁴³⁶ It is also required that the public should be informed in advance that the trial will be held and a failure to do so may affect the overall fairness of the trial.⁴³⁷

There are, however, a number of acceptable limitations on the right to a public hearing.⁴³⁸ These limitations include instances that are in the interest of state security, good order, public morals as well as those instances where it would be in the interest of justice to do so.⁴³⁹

⁴³² Currie & De Waal (2005) at 782. This reason may also be of extreme importance for the military justice system when determining the perception regarding the independence and impartiality of the military judges. See also *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 23; Steytler (1998) at 250; Stavros at 189 (the impartiality and independence of the judiciary can be seen in the way that they conduct the hearing); *S v Leepile* 1986 (3) SA 661 (W) at 665I-J; *Klink v Regional Court Magistrate* 1996 (3) BCLR 402 (SE) at 414.

⁴³³ *Axen v the Federal Republic of Germany* (1984) 6 EHRR 195

⁴³⁴ See also Steytler (1998) at 247. This does not include appeal cases (see in this regard *S v Pennington* 1997 (10) BCLR 1413 (CC) para 50).

⁴³⁵ Steytler (1998) at 251.

⁴³⁶ Govindjee & Vrancken at 209; *G.A. van Meurs v The Netherlands* (1990) para 6.1.

⁴³⁷ Steytler (1998) at 249; Stavros at 190; Govindjee & Vrancken at 209; *G.A. van Meurs v The Netherlands* (1990) para 6.2. In terms of s 32(3) of the MDSMA cases to be tried by the CMJ or CSMJ where a preliminary investigation was held, are placed on the role by means of a notice of enrolment issued by the local representative of the Adjutant General or a person under the command of the local representative. See s 32(4) of the MDSMA for the particulars contained in the notice of enrolment.

⁴³⁸ *Nel v Le Roux* 1996 (3) SA 562 (CC) para 17.

⁴³⁹ Section 153(1) of the Criminal Procedure Act; Steytler (1998) at 253; Stavros at 191; Currie & De Waal (2005) at 782; Govindjee & Vrancken at 209.

Trial in an open court before a CSMJ and CMJ

The general requirement in terms of military law is that all military trials are conducted in open court.⁴⁴⁰ Once the CSMJ or CMJ is properly constituted the military court opens and is conducted in the presence of the accused, the prosecutor, and members of the public who wish to attend.⁴⁴¹ The proceedings continue in open court unless the prosecutor or the accused applies for the case to be heard *in camera*. An application for a trial *in camera* is considered by the presiding military judge⁴⁴² in a closed sitting after hearing evidence and allowing the prosecutor and the accused to address the court on this matter.⁴⁴³ However, the court will have to justify any limitation to the accused's right to a public trial in terms of the limitation clause.⁴⁴⁴

The court only closes to read the preliminary investigation and during its deliberation on finding. The finding on each charge preferred against the accused is announced in open court.⁴⁴⁵ The sentencing procedures are conducted in open court and after the judge closes the court for deliberation on sentence, the judge will announce the sentence and relevant court orders in open court.⁴⁴⁶

Trial in an open court before a CODH

The proceedings before the CODH are conducted in open court, subject to section 33(3) of the MDSMA.⁴⁴⁷ The proceedings are conducted in the presence

⁴⁴⁰ Section 33(3) of the MDSMA.

⁴⁴¹ Rule 31(1) of the MDSMA.

⁴⁴² Rule 34(1) of the MDSMA. Since the presiding judge is now authorised to make a determination whether to hold the trial *in camera* and not the convening authority, such a determination should now be able to withstand constitutional scrutiny.

⁴⁴³ Rules 34(2)–(3) of the MDSMA. The ground for an *in camera* trial includes the interests of justice, public safety, the administration of justice, national security or the protection of the identity of juveniles or witnesses other than the accused.

⁴⁴⁴ Section 36 of the Constitution; Currie & De Waal (2005) at 782.

⁴⁴⁵ Rule 58 of the MDSMA.

⁴⁴⁶ Rule 59(11) of the MDSMA.

⁴⁴⁷ Rule 68(8) of the MDSMA.

of the accused, prosecutor and any witnesses who wish to attend.⁴⁴⁸ The whole of the proceedings, including sentencing, are conducted in open court⁴⁴⁹ and the commanding officer only closes to consider sentence.⁴⁵⁰ The sentence is announced in open court.⁴⁵¹

Considering the procedures followed in the military courts and the requirements laid down for the trials *in camera*, it is submitted that the military courts comply with the requirements set by section 35(3)(c) of the Constitution.

4.3.4 The right to choose and be represented by a legal practitioner of his choice

The right to legal representation encompasses three forms, namely the right to a legal practitioner of one's choice, a legal practitioner assigned at state expense or a legal practitioner provided by the Legal Aid Board.⁴⁵² The first two forms are addressed by sections 35(3)(f) and (g) of the Constitution, which provides that⁴⁵³

⁴⁴⁸ Rule 61 of the MDSMA. It is submitted that although the proceedings before the CODH may be heard *in camera*, the nature of the offences and the lack of witnesses called makes it highly unlikely that a commanding officer will ever be faced with such an application.

⁴⁴⁹ Rule 67 of the MDSMA. Since there is no evidence to consider subsequent to the accused's guilty plea, there is no need for the court to close and consider its findings.

⁴⁵⁰ Rule 68(7) of the MDSMA. The directory use of the word "may" indicates that the commanding officer need not close to consider sentence and may in fact sentence the accused without any deliberation. It is however submitted that such a practice is detrimental to the administration of justice. The accused at least deserves some consideration and deliberation on sentence. Justice must be seen to be done.

⁴⁵¹ Rule 68(8) of the MDSMA.

⁴⁵² *S v Cornelius* 2008 (1) SACR 96 (C) para 8; Steytler (1998) at 302.

⁴⁵³ Currie & De Waal (2005) at 760. Although Goredema C "Implications of Suspects' and Other Detainees' Rights to Legal Assistance Before the First Appearance in Court in South Africa" (1997)10 SACJ 237 discusses the right to legal representation in terms of s 35(2) of the Constitution, which is only applicable to arrested individuals, it is submitted that his discussion is also relevant in terms of the s 35(3) rights which is worded in exactly the same way (see Goredema at 238). See also *S v Cornelius* 2008 (1) SACR 96 (C) paras 12-13; *S v Philemon* 1997 (2) SACR 657 (W); *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v van Wyk* 1989 (3) SA 368 (E) (although the matter was decided prior to the Constitution and the Bill of Rights, informing an indigent accused of his right to legal aid is important). The right to legal aid as envisaged by the Constitution will not be discussed in the context of military law since all accused are entitled to legal representation provided by the state, free of cost to the accused in the form of military defence counsel.

[e]very accused person has a right to a fair trial, which includes the right –

- (f) to choose, and be represented by, a legal practitioner, and to be informed of the right promptly; [and]
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

The right to legal representation is seen as an essential part of the fair trial rights⁴⁵⁴ since the adversarial system requires that both the prosecution and the accused participate fully in the proceedings. This will only be possible if the accused has the required legal skills and knowledge to participate fully and the assistance of a lawyer may be necessary to this end.⁴⁵⁵ Where an accused elects to represent himself, the court has a duty to ensure that the accused is aware of the seriousness of the offence and the possible consequences should he continue without legal representation.⁴⁵⁶

The right to legal representation attaches to an accused from the first appearance until the conclusion of the appeal process and the accused must be given a reasonable time to obtain representation.⁴⁵⁷ Fair trial rights are also

⁴⁵⁴ Stavros at 201; Gorendema at 252; *S v Philemon* 1997 (2) SACR 657 (W) at 656a-b; *Legal Aid Board v The State* 2011 (1) SACR 166 (SCA) para 2. See *S v Nyanga and Eight Similar Cases* 1990 (2) SACR 547 (Ck) where the court found that the explanation of these rights are not a mere formality, it is an important function of the presiding officer (see at 547h–548b for the content of what should be explained to the accused).

⁴⁵⁵ Steytler (1998) at 302; *S v Khanyile* 1988 3 SA 795 (N) 798A-B; *Legal Aid Board v The State* 2011 (1) SACR 166 (SCA) paras 1-2.

⁴⁵⁶ Currie & De Waal (2005) at 762; *S v Mbhense* 2009 (1) SACR 640 (W) at 647f-g (if the right to legal representation is not explained adequately to an accused, it would render the trial unfair); *S v Cornelius* 2008 (1) SACR 96 (C) para 14; *S v Nyanga* 1990 (2) SACR 547 (Ck); *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T) at 196F-J.

⁴⁵⁷ Steytler (1998) at 302–303; Currie & De Waal (2005) at 763; Stavros at 202; *S v McKenna* 1998 (1) SACR 106 (CC) at 112j. Section 73 of the Criminal Procedure Act entitles an accused to legal representation only after arrest and at the criminal proceedings (see ss 73(1)-(2) of the Criminal Procedure Act). The accused must however be informed of this right at the earliest opportunity (see s 73(2A) of the Criminal Procedure Act in this regard). Of importance is also s 24(1)(a) of the MDSMA where it is stated that military defence counsel may represent any person subject to the MDC from the moment that prosecutions are instituted against them, in other words

expressly included in the sentencing phase of the trial.⁴⁵⁸ This entails remand of the case where required in order to obtain legal representation.⁴⁵⁹ A denial of such a reasonable opportunity may render a trial unfair.⁴⁶⁰

4.3.4.1 The right to legal representation of a military accused

These constitutional rights are also afforded to military personnel.⁴⁶¹

Every person subject to the Code has the right –

- (a) to legal representation of own choice at his or her own expense, or to be assigned military defence counsel at state expense when he or she is to appear before or to be tried by a Court of a Military Judge or Senior Military Judge; and
- (b) to consult with his or her legal representative or with a military defence counsel prior to making any election to be heard at a disciplinary hearing.

Although the MDSMA does not determine that the accused must be informed promptly as stated in the Constitution, in practice the accused is informed of this right when he appears for the first arraignment after he has been charged with an offence.⁴⁶² The Ministerial Task Team however voiced concerns regarding the sufficiency of the explanation of the right to legal representation as explained to

when they are charged, when they are tried by a CSMJ or CMJ or where they have been convicted but still have a remedy or recourse such as review or appeal procedures to follow.

⁴⁵⁸ *S v Zenzile* 2009 (2) SACR 407 (WCC) at 415a.

⁴⁵⁹ *Steytler* (1998) at 303; s 73(2B) of the Criminal Procedure Act; *S v Harris* 1997 (1) SACR 618 (C) at 622d-e; *S v Maduna* 1997 (1) SACR 6467 (T) at 652b. Section 29(3)(d) of the MDSMA allows the court to remand a case from time to time for sound reasons – which would include allowing the accused to consult with defence counsel- before continuing with the trial.

⁴⁶⁰ *S v Saule* 2009 (1) SACR 196 (Ck) para 22, *S v Philemon* 1997 (2) SACR 657 (W) at 661i; *S v Shabangu* 1976 (3) SA 555 (A) at 558F-H.

⁴⁶¹ Section 23 of the MDSMA.

⁴⁶² Section 29(2) of the MDSMA provides that any person warned after committing a military offence must be brought before a military court for arraignment as soon as possible after receipt of the written account of offence (DD1) and s 29(3)(c) provides that the court must then ensure “that person understands his or her rights in respect of legal representation and a disciplinary hearing.”

the accused during his arraignment. Their concern pertains to the accused eligible for trial by a CODH.⁴⁶³ It is inferred that the accused is not informed of the right to consult with a defence counsel to assist him in his decision to choose a disciplinary hearing. It is submitted that the contention by the Ministerial Task Team is not correct. Rule 29(6) of the MDSMA specifically provides that the accused only exercises his right “upon having taken or waived the taking of legal advice”. The pro-forma election certificate also requires that the accused indicate on the certificate whether he has taken such advice or not.⁴⁶⁴

It is submitted that this is sufficient. Once the accused is informed of his right to legal representation there is nothing preventing him from doing so. It is not the task of the prosecution or the trial officer to continuously remind him of his rights.⁴⁶⁵ One may urge him to make use of legal representation, but the choice remains his. As was stated in *S v Shaba*⁴⁶⁶

[n]et soos daar geen plig op 'n beskuldigde rus om die Staat se bewyslas te verlig of te vergemaklik nie, is daar geen plig op die Staat om 'n verdagte so te begelei dat hy nie sy voet teen 'n klip stamp nie. Al wat vereis word, is dat 'n verdagte of aangehoudene op hoogte van sy regte moet wees en dat hy onbelemmerd en vrywillig 'n besluit uitoefen oor hoe hy sy regte gaan uitoefen.

It must be kept in mind that the right to legal representation of an accused facing a CODH is limited to the pre-trial procedures only. Such an accused does not have the right to legal representation. He waives his right to legal representation when submitting to the jurisdiction of the CODH.

⁴⁶³ Ministerial Task Team at 47.

⁴⁶⁴ See also s 23(b) of the MDSMA.

⁴⁶⁵ *S v Shaba* 1998 (1) SACR 16 (T) at 20d.

⁴⁶⁶ *S v Shaba* 1998 (1) SACR 16 (T) at 20g-h: The court found that just as there is no onus on the accused to assist the state in proving its case, the state is under no obligation to prevent the accused from making a mistake. All that is required is that the suspect or detained person be informed of his rights and be given the unfettered opportunity to exercise his rights in a voluntary manner.

Once the accused has exercised his right to legal representation and is facing a CSMJ or CMJ, the accused is generally provided with military defence counsel although he may choose to appoint a civilian lawyer at his own expense. Military defence counsel is provided at state expense.

The head of the military defence counsel is the Director: Military Defence Counsel.⁴⁶⁷ Each of the five Legatos has a contingent of defence counsel with a Senior Defence Counsel as head. They report to the Director: Military Defence Counsel. Only members holding a degree in law can be assigned as military defence counsel.⁴⁶⁸ It is however not required that defence counsel must be an admitted attorney or advocate in order to function as defence counsel.⁴⁶⁹ An officer is assigned to the function of defence counsel by the Adjutant General for a fixed period or for a specific deployment.⁴⁷⁰ All functions must be performed in “a manner consistent with properly given policy directives, but which is otherwise free from executive or command interference.”⁴⁷¹

Military defence counsel is generally assigned to cases depending on their availability and therefore an accused is limited as to his choice regarding a specific defence counsel. The accused has the right to choose any lawyer who is willing to defend him.⁴⁷² However, because of limited availability of specific military defence counsel, this may not always be possible. An accused may request a specific defence counsel and the senior defence counsel may then, “in his or her discretion, accede to the request if the practicalities of the situation and

⁴⁶⁷ Section 13(1) of the MDSMA determines the qualifications and appointment of the Director.

⁴⁶⁸ Section 13(2) of the MDSMA.

⁴⁶⁹ This is different from the requirements set for military lawyers in the Canadian forces where it is required that their law officers must be admitted to their respective bars (see McNairn (2000) at 251).

⁴⁷⁰ Sections 14(2) and 15 of the MDSMA.

⁴⁷¹ Section 14(4) of the MDSMA.

⁴⁷² Steytler (1998) at 304. An accused need not accept a lawyer appointed by the state. If he is not satisfied, he can still avail himself of his choice of legal representation (see in this regard *S v Dangatye* 1994 (2) SACR 1 (A) at 23e-f; Currie & De Waal (2005) at 763; *S v Lombard* 1994 (2) SACR 104 (T) (the Interim Constitution did not afford an accused the right to legal representation of his choice at state expense). There are however exceptions such as where the appointed attorney does not want to accept the instructions of the accused and then a postponement should be granted (see *S v Manhuanyana* 1996 (2) SACR 283 (E) at 284d-e, g-h).

the exigencies of the service favour the appointment of the specified defence counsel to represent the accused.”⁴⁷³ Where senior military defence counsel do not appoint a requested defence counsel, the accused will have to choose another. His right to choose a specific defence counsel may be legitimately limited where that individual is not available and cannot be used to unreasonably delay the completion of the trial.⁴⁷⁴

The accused before a military court is in fact in a better position than most accused before a civilian court. Where an accused before a civilian court is only entitled to legal representation at state expense where “substantial injustice would otherwise result”, the military accused is always provided with legal counsel at state expense when appearing before a CSMJ or CMJ, irrespective of the seriousness of the charges or whether he is pleading guilty or not. If he is not satisfied with military counsel he may pay for private counsel of his choice.

It is therefore submitted that the right to legal representation as set out in the MDSMA and applied by the CSMJ and CMJ complies with this constitutional requirement of a fair trial.

4.4 Conclusion

From the above discussion it is clear that the CSMJ and the CMJ are regarded as ordinary courts for the purposes of conducting criminal trials and affording an accused his fair trial rights. Although certain concerns exist regarding the institutional and personal independence of these courts, it is submitted that, as lower courts, there are sufficient checks and balances in place to state that these courts possess a sufficient degree of independence to qualify as an ordinary court.

⁴⁷³ Rule 11(2) of the MDSMA.

⁴⁷⁴ Steytler (1998) at 305; s 73(2C) of the Criminal Procedure Act; *S v Molenbeek* 1997 (12) BCLR 1179 (O) at 1784; *S v Saule* 2009 (1) SACR 196 (Ck) para 21; *Paweni v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 723E.

The CSMJ and the CMJ also afford the accused the protection required in terms of section 35(3) of the Constitution, in some instances even more so than the civilian courts.⁴⁷⁵

The same cannot be said of the accused before the CODH. Such an accused is not considered to be an accused before criminal proceedings and therefore the section 35(3) fair trial rights do not attach to him. The CODH is not considered to be a court of law. It can also not be seen as a tribunal for the purposes of section 34 of the Constitution.⁴⁷⁶ It could be described as a court *sui generis*. The accused is still entitled to basic fair trial procedures, which include independent and impartial proceedings.

At this level there is a real possibility of executive influence. In the analogous forum of the summary court martial in the United States of America, Morris⁴⁷⁷ argues that

[b]ecause summary courts-martial are convened at a relatively low level – battalion command or its equivalent – there is a greater chance of command influence and hasty, incomplete, or amateurish investigations...there is less direct judicial involvement in the process of referring a case to summary court, as well as in trying and reviewing the case.

However, the fact that it is the accused's choice to opt for a CODH acts as a check on executive influence.⁴⁷⁸ A further check is the accused's right to appeal and review. It is therefore submitted that the CODH does in fact follow a fair procedure in conducting the trial and the military accused's rights are sufficiently protected.

⁴⁷⁵ See the discussion on the right to legal representation at para 4.3.4.1 above.

⁴⁷⁶ Because of the nature of the guilty plea, these trials cannot be considered a dispute and section 34 of the Constitution consequently does not find application.

⁴⁷⁷ Morris at 43.

⁴⁷⁸ Morris at 43.

CHAPTER 5:

PROCEDURAL ASPECTS REGARDING SENTENCING IN THE MILITARY COURTS

5.1 Introduction

It has been stated in numerous works on sentencing that sentencing is the most difficult and probably the most neglected part of the criminal trial.¹ This statement is also true for military courts. Although military punishments have been listed in legislation as recently updated as 1999, the only change the MDSMA brought about was to change the maximum amounts of the fines that could be imposed by the various military courts. No other development has been made in the sentencing jurisdiction of military courts since the defence legislation of 1957. In spite of certain constitutional concerns such as those raised regarding the constitutionality of the separate military prosecution counsel,² to date no attempt has been made to address other concerns regarding specific sentences such as cashiering. In fact, certain sentences and their execution have changed little since the previous century.³ Although it cannot be argued that the unique nature of the offences found in military law requires unique punishments, military punishment has not kept abreast with the developments within the civilian criminal procedure or constitutional environments. One need only look at the MDC, which was supposedly amended with the advent of the MDSMA, to see how neglected penalty clauses are in military law. Section 151 of the MDC, which creates the offence of contempt of a military court, refers to a punishment on conviction of “a fine not

¹ Kruger A *Hiemstra's Criminal Procedure* (2008) at 28-1; Terblanche S S *A Guide to Sentencing in South Africa* (2007) at 1; Krugel W F & Terblanche S S *Praktiese Vonnisoplegging* (1990) at 103; Joubert J J (ed) *Criminal Procedure Handbook* 9 ed (2009) at 287.

² Raised and addressed in *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

³ See in this regard the discussion on field punishment in ch 6 at para 6.2.6 below.

exceeding *50 pounds* or in default of payment to imprisonment for a period not exceeding two months.”⁴

5.2 Legal framework for military sentences

The existing legal framework for sentencing by the military courts comprises the Constitution, various pieces of defence legislation, outdated SANDF policy documents and more recently, the decisions by the CMA as they pertain to sentencing. Academic works on sentencing may also be of some assistance in those instances where military punishments are comparable to civilian punishments, but they are limited due to the uniqueness of most military sentences and the statutory nature of military courts’ sentencing jurisdiction.

It is important to keep the Constitution in mind during sentencing because all courts and organs of state are bound by the Constitution.⁵ Certain sections of the Constitution relate to the SANDF and an individual’s rights of equality, dignity and protection against cruel, inhuman and degrading punishment must be taken into consideration.

The relevant defence legislation considered is the Defence Act 44 of 1957, as amended, which includes the First Schedule or Military Discipline Code (MDC), the Defence Act 42 of 2002, the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA) and the Rules of Procedure to the MDSMA. The task of having a coherent discussion of sentencing procedure in the SANDF is made difficult by the fact that sections pertaining to sentencing are spread across these various documents and are further spread haphazardly within the documents themselves. Although the Criminal Procedure Act has very little application in this regard, it may provide valuable guidelines for the military courts to follow.

⁴ Emphasis added.

⁵ All law must be interpreted with due regard to the spirit, purport and object of the Constitution (see s 39(2) of the Constitution).

Due to the unique nature of some of these sentences, policy documents were developed explaining the execution of the sentence. The documents are however outdated, mainly dating from the 1980's. Some procedures are not contained in policy and are based on customs and practices established in the SANDF.

The CMA is a relatively new and potentially important source in the development of sentencing practice in the SANDF.⁶ Unfortunately, the use of the CMA decisions is limited to those few sentences that are reviewed by the CMA because of the automatic review process. Very few, if any decisions are available with regard to the lesser sentences imposed by the military courts.⁷

5.3 Sentencing discretion

South African civilian courts enjoy a wide sentencing discretion.⁸ Exercising this discretion can be very difficult because of the large number of factors that must be taken into consideration.⁹ Military courts also have fairly wide sentencing discretion, with the same factors to consider as the civilian courts, but with the added complication of striking a balance between the unique needs of the military, the purpose of sentencing in the military environment and discipline.¹⁰

Firstly a determination must be made of which of the facts are relevant to sentencing and then the sentencing judge must decide what weight to attach to

⁶ CMA decisions are available from 1999.

⁷ This matter is briefly discussed below.

⁸ Kruger at 28-2; Joubert at 288.

⁹ Terblanche (2007) at 114; Joubert at 287; Terblanche S S & Roberts J V "Sentencing in South Africa: Lacking in Principle but Delivering Justice?" (2005) 18 *South African Journal of Criminal Justice* 187 at 189; Vowell D "To Determine an Appropriate Sentence: Sentencing in the Military Justice System" (1986) 114 *Military Law Review* 87 at 102.

¹⁰ Bednar R J "Discharge and Dismissal as Punishment in the Armed Forces" (1962) *Military Law Review* 1 at 27.

each.¹¹ Secondly a choice must be made, for example whether the accused should be removed from society and then the court must decide on the duration of the sentence, whether the sentence should be suspended, for how long and under which conditions it should be suspended. Although most military cases tried by the military courts are similar in nature, each one has the potential to be unique. Since most accused will present different personal circumstances contributing to the offence the individualisation of sentences is important.

The wider the sentencing discretion of the court, the more personal characteristics of the sentencing officer may be evident.¹² Although the Constitutional Court accepted that a measure of inconsistency is acceptable during the imposition of the sentence,¹³ disparity in sentencing is regarded as one of the main concerns with the South African sentencing system and consistency in sentencing should be promoted.¹⁴ Recent decisions emphasised the need for comparison of previous cases in reaching parity in sentencing. The Supreme Court of Appeal held that¹⁵

[a]lthough each case stands against the setting of its own facts and circumstances, it may be necessary to have a look at comparative cases in determining whether the trial court properly exercised its discretion in its imposition of sentence.

It is not clear what the position is regarding the CMA. The CMA has on occasion found that sentencing in the military courts should be more consistent

¹¹ Terblanche & Roberts at 193; *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-h.

¹² Terblanche (2007) at 115.

¹³ *S v Dzukuda*; *S v Tshilo* 2000 (4) SA 1078 (CC).

¹⁴ Joubert at 288; South African Law Commission *Report: Sentencing (A New Sentencing Framework)* (2000) at para 1.43; South African Law Commission *Discussion Paper 91: Sentencing (A New Sentencing Framework)* (2000) para 3.1.4.

¹⁵ *S v Coetzee* 2010 (1) SACR 176 (SCA) paras 17 and 26 (parity is consequently one of the factors that should be taken into account when varying a sentence); *S v Michele* 2010 (1) SACR 131 (SCA); *S v GL* 2010 (2) SACR 488 (WCC) para 33 (considering the degree of culpability of an accused); *S v PN* 2010 (2) SACR 187 (ECG) at 193d-194g (comparing previous decisions as a benchmark not to deviate from the prescribed minimum punishment); *S v Mapipa* 2010 (1) SACR 151 (ECG) para 15; *S v De Klerk* 2010 (2) SACR 40 (KZP) paras 17-26.

and have in fact varied sentences imposed by the military courts to achieve this principle. In *S v Feni*¹⁶ the defence counsel argued that in a number of similar previous cases accused persons were sentenced to a fine. The CMA did not find that the sentence imposed on corporal Feni was shockingly inappropriate, but held that due to the need for parity in sentencing the sentence had to be varied to a fine of R1000. More often the CMA had however accepted the principle that each case should be judged according to its own facts and circumstances, accepting the principle of individualisation of sentences. In fact, it is mentioned as the most important factor when sentencing an offender.¹⁷ This seems to be in contrast with the principle that there should be parity among sentences for “the same offences committed under more or less similar circumstances.”¹⁸ Consistency does not however mean that all sentences must be the same. If there is too much uniformity the court’s ability to take significant individual differences into consideration is limited.¹⁹

Balancing these two contrasting principles is not an easy task. The CMA gave the following guidelines to the military courts on how to approach sentencing:²⁰

- a. Each case must be dealt with on its own merits.
- b. As far as possible, military courts should strive to maintain uniformity and consistency as regards sentence for similar

¹⁶ In *S v Feni* (CMA 28/99) the accused was found guilty of common law fraud in that he was dishonest during an exam and was sentenced by the military court to reduction to the rank of lance corporal.

¹⁷ See *S v Feni* (CMA 28/99) where the court referred to *S v Giannoulis* 1975 (4) SA 867 AD with approval.

¹⁸ In this regard the court held in *S v Feni* (CMA 28/99) that “[u]nequal inconsistent and uneven sentences for equal offenders infringe the general sense of justice. Uniformity and consistency in punishment leads to legal certainty and confidence in the administration of military justice.” See also Office of the Judge Advocate General *Guidance on the Sentencing in the Court Martial* (OJAG) (2009) at 4 where it is stated that “[s]entencing is a complex and difficult exercise and whilst it must not be reduced to a rigid and mechanistic process, consistency of approach is essential to maintain public confidence.”

¹⁹ Terblanche (2007) at 125.

²⁰ *S v Feni* (CMA 28/99).

offences and committed under more or less similar circumstances.

- c. Uniformity should, however, not be elevated to a rule. It is just a helpful method to determine an appropriate sentence.
- d. Disparity in the sentence imposed on offenders who committed the same offence(s) under similar circumstances will not necessarily warrant interference on review or appeal.
- e. Where, however, there is a disturbing disparity among such sentences, and the circumstances under which the offences were committed were more or less the same, and there are no personal factors warranting such disparity, interference on review or appeal with the sentence may, depending on the circumstances, be warranted. **The ground of interference would be that the sentence is disturbingly inappropriate.** See *S v Giannoulis*, *supra*.
- f. In ameliorating the more severe sentence, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances. See **R v Fallison 1969 (1) SA 477 (R, AD)**.

These are only guidelines given by the CMA and do not take away the discretion of the military court to impose a sentence where it is of opinion it is an appropriate sentence. *S v Mokgoko*²¹ held that “[g]uidelines by this Court are called “Guidelines” because they are guidelines. This Court has never tried to give strict instructions for imposing sentence, and does not intend to do so” and in *S v Ngcobo*²² it held that “[i]t must always be borne in mind that the question of the imposition of the sentence is wholly the competency of the trial

²¹ *S v Mokgoko* (CMA 188/2001).

²² *S v Ngcobo* (CMA 02/2010).

court...” and the CMA will only interfere with the sentence where “there was a misdirection when the sentence imposed was considered.”

Sentencing discretion is however not totally free. Courts have to operate within the structure provided by the law but within these boundaries the court can exercise their discretion as they see fit.²³ The basic principle is that this discretion lies with the trial court and a higher court should not interfere because they would have imposed a different sentence.²⁴ In *S v Martin*²⁵ defence counsel argued that the sentence imposed on the accused was disproportionate to the crime and the needs of society and that another court may have imposed a different sentence. The CMA found the “only reason this court can impose another sentence is if the court considers the sentence shockingly inappropriate, **not** if the court might impose a lesser sentence...”²⁶

The court should only interfere where it would be reasonable to do so. The test for reasonableness has been described as “whether the trial judge could reasonably have imposed the sentence she did.”²⁷ The CMA has held that interference in the sentence will be acceptable where the sentence imposed was “shockingly inappropriate.”²⁸ In *S v Xaba*²⁹ the court held that if a sentence of discharge was considered too severe for purely disciplinary offences, imprisonment would be considered even more inappropriate and varied the

²³ Terblanche (2007) at 116; van Zyl Smit D “Sentencing and Punishment” in Woolman S & Chaskalson M (eds) *Constitutional Law of South Africa* (1996) at 28-4. In *S v Venter* (CMA 160/2002) the court held that although s 6(3) of the MDSMA determines that the CMA is the highest military court and binds all other military courts, this “does not by any means bind a military court to impose a particular sentence for a particular offence merely because this Court expressed its opinion that a particular sentence was an appropriate sentence in a particular case.”

²⁴ See *S v Bembe* (CMA 121/2000) where the CMA held that the “court will interfere with a sentence which is shockingly inappropriate or where there were any irregularities. The court will however not interfere merely because it would not have imposed that sentence itself.”

²⁵ *S v Martin* (CMA 10/07).

²⁶ Emphasis added. For similar reasoning by the CMA see also *S v Hako* (CMA 005/2004); *S v Katjedi* (CMA 05/2009); *S v Ngcobo* (CMA 02/2010).

²⁷ *S v Pieters* 1987 (3) SA 717 A; *S v Ramabokela* 2011 (1) SACR 122 (GNP) para 31; *S v Kgosi* 1999 (2) SACR 238 (SCA) para 10; *S v Dayile* 2011 (1) SACR 245 (ECG) para 17; *S v Michele* 2010 (1) SACR 131 (SCA) para 13.

²⁸ *S v Martin* (CMA 10/07).

²⁹ *S v Xaba* (CMA 052/2001).

sentence to a fine and suspended detention. In *S v Stuurman*³⁰ it was found that the “sentence imposed [was] shockingly inappropriate under the circumstances of this case and the personal circumstances of the accused. The imposition of a fine in addition to discharge from the SANDF is totally unacceptable.” In *S v Du Plessis*³¹ the CMA interfered with the sentence because it found that “effective detention is shockingly inappropriate in the present case.” The court may also express its opinion regarding inappropriate lenient sentences.³²

While sentencing discretion allows for balanced and fair sentencing as well as the individualisation of sentences³³, some negative aspects regarding sentencing discretion have been identified.³⁴

A dimension is added to sentencing that has nothing to do with the crime or the accused in the case. The personality and convictions of the sentencing military judge may have an influence on his approach towards sentencing. This may be particularly true for the presiding officer at the CODH. Presiding officers at the CODH have no training regarding sentencing practice. The curriculum presented at the Advanced Military Law Course presented by the School of Military Justice does not make provision for any training in this regard, yet the presiding officer is authorised to impose punishment on an accused. Since he has no training with regard to an objective approach towards sentencing it is to be expected that his personal experience as the officer commanding of the unit or a member of middle management on the unit may play a considerable part in his approach towards sentencing.

³⁰ *S v Stuurman* (CMA 124/2000).

³¹ *S v Du Plessis* (CMA 13/2009).

³² See *S v Kanu* (CMA 17/2010) and the discussion on inappropriate lenient sentences in ch 7 at para 7.4.8 below. A too lenient sentence can be just as wrong as a sentence that is too severe (see also *S v Holder* 1979 (2) SA 70 (A); *S v Mthembu* 2011 (1) SACR 272 (KZP) para 22; *S v Vekueminina* 1993 (1) SACR 561 (NM) at 562c-d; *S v Ncobo*; *S v Zwelibhangile*; *S v Dlamini* 1988 (3) SA 954 (N) at 957A).

³³ Terblanche (2007) at 119; *S v Toms*, *S v Bruce* 1990 (2) SA 802 (A) at 806l.

³⁴ Terblanche (2007) at 119.

A further aspect is that different views of presiding officers often result in disparity of sentences for similar crimes. This may result in an infringement of an accused's right to equal and fair treatment. This matter has been raised by the CMA on various occasions.³⁵ Two aspects are worth mentioning in this regard.

Military judges are appointed from various backgrounds. Traditionally military judges were appointed from the senior ranks of the military legal division, from members who have gained experience as military legal practitioners at units, military prosecution counsel or military defence counsel. These military judges will have an in-depth understanding of military culture and the serious nature of military offences which may seem trivial to a civilian. The military legal division also has a reserve force component which is mainly constituted of civilians who are called up from time to time to render service. It is happening more frequently that members from the reserve force are appointed in a permanent capacity within the military legal division, also as high ranking military judges. These military judges may have little or no experience within the military environment and of how things function at unit level. They will necessarily have a different approach towards sentencing military offenders than those judges with more military experience. This may lead to widely divergent approaches in sentencing, exacerbating the disparity found in sentencing in military courts.

As mentioned above, the CMA has held in *S v Feni*³⁶ that military courts should, as far as possible, "strive to maintain uniformity and consistency as regards sentence for similar offences and committed under more or less similar circumstances." Although a military court is not bound by the decisions of another military court, except the CMA,³⁷ the lack of published military court decisions makes it extremely difficult for one military judge to determine what another military judge decided under similar circumstances. It is not viable to

³⁵ See the discussion on parity of sentences and *S v Feni* (CMA 28/99) above.

³⁶ *S v Feni* (CMA 28/99).

³⁷ Section 6(3) of the MDSMA.

expect military judges to have parity of sentences if they have no access to other decisions. The only decisions that are published, albeit in a limited way, are those from the CMA. These decisions are only of limited assistance to the military courts. Only a limited number of sentences go on automatic review, so comments on any other sentence than imprisonment, cashiering, detention, dismissal or discharge from the SANDF are extremely rare. In many CMA cases, especially those pre-2002, the finding or sentence was varied accompanied with a statement that reasons would follow, but those reasons are not available. Such cases are of no assistance to any military judge or researcher. The format of publication is also not user-friendly. It is distributed by review counsel from time to time and not all military legal practitioners receive copies. There is no index which makes research difficult. It is suggested that the publication of military court decisions would have a positive influence on sentencing practice in military courts.

This leads to the third negative aspect mentioned by Terblanche in that disparity results in unpredictability of the outcome of criminal cases which may lead to uncertainty of the law.³⁸

Since parity in sentencing is a concern of the CMA and there are currently no clear guidelines regarding sentencing it is suggested that the military justice system give serious consideration to the implementation of sentencing guidelines, especially at the CODH level where parity in sentencing may be beneficial to unit moral. Military sentencing guidelines will enhance sentence parity among the courts.³⁹ Sentencing guidelines are provided to the military

³⁸ Terblanche (2007) at 119.

³⁹ Immel S M "Development, Adoption, and Implementation of Military Sentencing Guidelines" (2000) *Military Law Review* 159 at 160. The US Military have very wide sentencing jurisdiction, being able to sentence an accused to death but they have no sentencing guidelines. The resultant disparity in sentencing has on occasion been criticised (see Immel at 161 and 171-173 in this regard). Prior to 1959 US Military Courts were instructed to consider sentence uniformity but the Court of Military Appeal held in *United States v Mamaluy*, 27 CMR. 176 (CMA 1959) that panel members did not have the required information at hand to enable them to determine a uniform sentence and they were therefore not "adequately equipped to consider sentence uniformity." See also in this regard Sylkatis S R "Sentencing Disparity in Desertion

courts in various other jurisdictions. The Australian and British military justice systems are but a couple that have such sentencing guidelines, especially for the lower courts. One such example is the summary hearing in the Britain Armed Forces.⁴⁰

General guidelines are provided to commanding officers as well as guidelines applicable to specific offences. Typically the charge is mentioned, the mitigating and aggravating factors that may be taken into account are listed, a range of punishments and sentencing guidance is given. Specific guidance and suggested tariffs for fines are provided in the case of AWOL, which is a prevalent offence.⁴¹ For all other offences within the jurisdiction of the commanding officer two entry points are provided for the presiding officer to consider.⁴² The first entry point is used when the accused pleads not guilty and the offence is subsequently proven. The offender will not receive any discount on sentencing under these circumstances. The second point of entry is where the accused admits his guilt and the entry point is then calculated in terms of

and Absent without Leave Trials: Advocating a Return of “Uniform” to the Uniform Code of Military Justice” (2006) *Working Paper 1201* at 5-6. It is submitted that the South African military courts are currently in the same position. As argued above, the number of sentences on which the CMA has commented is extremely limited and in connection with CODH appearances it is non-existent. Most military judges, especially commanding officers at the CODH are not equipped to determine a uniform sentence. Sentencing guidelines will assist in this regard. Appropriate military sentencing guidelines for the South African context requires further research and falls outside the current discussion. For guidelines see Terblanche S S “Sentencing Guidelines for South Africa: Lessons from Elsewhere” (2003) *South African Law Journal* 858-882.

⁴⁰ See *Manual of Service Law* (2011) 1(2) at 1-14-3 to 1-14-7 for an example of the general instructions issued to commanding officers in the British forces to use as a quick guide at summary hearings.

⁴¹ *Manual of Service Law* (2011) 1(2) at 1-14-3. The following extract of the sentencing guidelines applicable to AWOL at 1-14-5 to 1-14-6 serves as example: The range of punishments are given as a guideline stating that the entry point for the offence of AWOL is a fine but for a first offence an admonishment, restriction of privileges or stoppage of leave may be seen as appropriate. Where the AWOL is regarded as more serious, the appropriate sentence would be one of detention. A sliding scale is then provided, recommending up to six days’ pay as a fine for AWOL of up to 24 hours, nine days’ pay as a fine for up to two days AWOL and so forth. As sentencing guidance the commanding officer is reminded that due to the prevalence of AWOL as an offence the deterrent element of the punishment must be emphasised, the impact on the offender’s unit must be considered and that a repetition of absences without leave should be treated more seriously.

⁴² *Manual of Service Law* (2011) 1(2) at 1-14-3.

the guidelines provided for the reduction of sentence for guilty pleas made at the earliest opportunity.⁴³

The sentencing guidance given refers to specific factors taken into consideration when deciding the severity of the offence and may include factors such as the impact of the offence on the unit and the level of responsibility of the offender at the time of the offence. Some mitigating factors listed may include, inter alia, substantial cooperation given during the investigation of the offence, good professional record of the offender, serious illness and any severe adverse effect that the potential sentence may have on the offender and his family. Aggravating factors such as previous convictions, the vulnerability of the victim, alcohol and a breach of trust may be taken into consideration.⁴⁴ Following such guidelines would assist in reaching parity in sentence, especially at CODH level, thereby ensuring the fair and equal treatment of offenders.

5.4 Finding an appropriate sentence

The most important task of the trial court after a finding of guilty is determining an appropriate sentence. An appropriate sentence does not mean the most severe sentence.⁴⁵ An appropriate sentence would be one that balances all the relevant factors and circumstances of the case.⁴⁶ It is trite that “[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society.”⁴⁷ The civilian courts consequently follow the three pillars as set out

⁴³ See para 5.4.24 below.

⁴⁴ *Manual of Service Law* (2011) 1(2) at 1-14-4.

⁴⁵ Kruger at 28-1.

⁴⁶ Krugel & Terblanche at 104; Du Toit E *et al* *Commentary in the Criminal Procedure Act* (1997) at 28-10; Schonteich M “Public Perception and Judicial Process” (1999) *Sentencing in South Africa – Occasional Paper 43* Institute for Security Studies at 7; *S v RO* 2010 (2) SACR 248 (SCA) para 30.

⁴⁷ *S v Zinn* 1969 (2) SA 537 (A) at 540G-H; *S v Rabie* 1975 (4) SA 855 (A); *S v Holder* 1979 (2) SA 70 (A); *S v Olivier* 2007 (2) SACR 596 (C) para 12; *S v Vehueminina* 1993 (1) SACR 561 (NM) at 562d; *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) para 10; Krugel & Terblanche at 106-107; Terblanche & Roberts at 198; Du Toit *et al* at 28-10B-3; Kruger at 28-3.

in *S v Zinn*.⁴⁸ This means that the sentence should reflect the seriousness of the crime, take into consideration any mitigating and aggravating factors that affect the blameworthiness of the offender and at the same time consider the interests of society by protecting society and deterring offenders from committing further crimes.⁴⁹ An aggravating or mitigating factor is any factor that the court can properly take into account when determining an appropriate sentence.⁵⁰ This does not imply that all the factors must be afforded equal weight. Terblanche is of the opinion that “the three factors of the *Zinn* triad have to be considered in conjunction with one another and that each should be *afforded a certain weight* depending on the facts of the case.”⁵¹ Military courts also follow the *Zinn* triad when considering an appropriate sentence. In a military context the three legs of the triad may translate in the military court considering the nature of the offence and its consequences, the effect of the offence on discipline in the unit or broader SANDF, its effect on operational effectiveness and the status of the offender which will include his rank and level of responsibility.

5.4.1 The Crime

It is important that the sentence imposed by the court should reflect the severity of the crime.⁵² Although military crimes can be described as mainly disciplinary offences and cannot be compared to the seriousness of crimes such as murder or rape tried by the civilian courts, military offences should be judged against the constitutional requirement of discipline and the need for a disciplined force.⁵³ The unique circumstances of service in the Armed Forces may

⁴⁸ *S v Zinn* 1969 (2) SA 537 (A).

⁴⁹ See also Terblanche (2007) 127; Snyman C R *Criminal Law* 5 ed (2008) at 19-20.

⁵⁰ Terblanche (2007) at 185; *S v Ramba* 1990 (2) SACR 334 (A) at 341i-342a.

⁵¹ Terblanche (2007) at 146; *S v De Kock* 1997 (2) SACR 171 (T).

⁵² Terblanche (2007) at 148; *S v Siavhe* (CMA 73/2004). See also Terblanche & Roberts (2005) at 201 where it is argued that the seriousness of the offence will always be the starting point for determining the severity of the sentence. This is influenced by the harm occasioned by the offence and the offender’s degree of culpability in inflicting the harm.

⁵³ Section 200(1) of the Constitution. In *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 23 it was argued that “military justice is concerned

constitute varying degrees of mitigation or aggravating factors that may not find application in a civilian environment.⁵⁴ It is against this background that the “seriousness of the offence” as a leg of the triad in military sentences should be judged.

It is not suggested that disciplinary offences are more serious and that the seriousness of certain criminal offences over which the military courts do in fact have jurisdiction inside the borders of the Republic is not taken into consideration during sentencing.⁵⁵ All crimes committed by soldiers should in fact be seen as serious, especially where those crimes are committed while the accused is on deployment outside the borders of the Republic. In *S v Sibi*⁵⁶ the accused was found guilty of being drunk on duty. Generally drunkenness is seen as a disciplinary offence but at the time the offence was committed, the accused was deployed outside the borders. The court held that “[b]eing drunk on duty in an operational zone is a serious offence.” In *S v Louw*⁵⁷ the accused was found guilty of pointing a firearm at a fellow soldier, which in its own right is considered a serious offence. However, the court considered this more serious since at the time of the offence the accused was deployed in Burundi to protect the Minister of Burundi. This incident had international repercussions and reflected negatively on the image of the SANDF. In *S v Moolman*⁵⁸ and *S v Magumasholo*⁵⁹ the assault on a foreign national committed while on

not so much with the prosecution of crime but with the maintenance of discipline” and at para 38 that military discipline is “about having an effective armed force capable and ready to protect the territorial integrity of the country and the freedom of its people.” In *S v Bene* (CMA 15/2009) the accused was convicted of disobeying lawful commands and using threatening, insubordinate or insulting language. The CMA held that the “offences are at the heart of discipline and were committed in a training environment against the person who is chiefly responsible for discipline and also in front of subordinates...” This was seen as aggravating.

⁵⁴ OJAG 29; *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence 2001 (2) SACR 632 (CC)* para 31 regarding the uniqueness of military service.

⁵⁵ In *S v Mmakola* (CMA 26/2009) the seriousness of the crime of assault was taken into account, in *S v Zondo* (CMA 67/2008) the seriousness of theft from the accused’s employer was considered and in *S v Nipha* (CMA 08/07) the court considered the seriousness of assault with the intent to do grievous bodily harm, especially where the assault was unprovoked.

⁵⁶ *S v Sibi* (CMA 119/2000).

⁵⁷ *S v Louw* (CMA 054/2004).

⁵⁸ *S v Moolman* (CMA 02/2008).

⁵⁹ *S v Magumasholo* (CMA 18/2009).

deployment was viewed in a very serious light and the court held that “[o]ur soldiers are supposed to keep the peace as a disciplined force in a war torn country.”

All crimes in the MDC with a maximum penalty of one year imprisonment are seen as disciplinary offences and those prescribing more than one year imprisonment are seen as criminal offences and considered more serious.⁶⁰ The maxima contained in the penalty clauses of the specific military crimes can therefore be taken into consideration when determining the seriousness of the offence. However, the circumstances relating to each crime can differ and it is therefore important to consider each case individually and not make a “generalised assessment of severity.”⁶¹

Terblanche states that one of the most difficult steps in determining an appropriate sentence is finding one which reflects the seriousness of the offence and that sentencing officers should find a point of departure to use when imposing sentence for a specific type of crime, especially where the crimes are committed regularly.⁶²

⁶⁰ The penalty clause is not always an indication of the seriousness of the offence. The CMA found in *S v Ngako* (CMA 165/2002) that although s 27(b) of the MDC, the taking of a military vehicle without authority and using it for purposes other than in the public interest, is seen as a disciplinary offence, it is in fact similar to a contravention of s 1 of the General Law Amendment Act 1 of 1988 where an offender can be sentenced to the same punishment as in the case of theft.

⁶¹ Terblanche (2007) at 148. See the CMA cases above regarding the seriousness of disciplinary offences committed outside the borders of the Republic. In cases where the accused is convicted of multiple charges, the offence is also considered more serious. See in this regard *S v Mageti* (CMA 138/2000) where the accused was found guilty of a number of charges which on their own were not very serious and the periods of the accused’s absence without leave were relatively short, however the court found that it was more serious since he was convicted of “quite a number of offences committed over a protracted period of time” (see also *S v Mokoka* (CMA 16/07); *S v Nugget* (CMA 095/2001); *S v Nene* (CMA 110/2001); *S v Renase* (CMA 085/2001) where the court held that the period of absence of 368 days, made the AWOL a serious offence).

⁶² Terblanche (2007) at 149.

The view that society has of the crime must also be taken into account, but the court should not subject itself to the opinion of society.⁶³ In a military context this aspect refers to the view the military society has of the crime. Civilians may not view military offences in a serious light. This is due to the fact that “what would be acceptable in another employment relationship is not only impermissible for a soldier but may be visited by punishment as severe as deprivation of liberty for several years.”⁶⁴ Discipline is an important aspect, as is rank, and these aspects will influence how serious the military community sees the offence. It was held in *S v Gcakosi*⁶⁵ that “[d]iscipline (including self discipline) is of paramount importance in the SANDF and the accused did not display any discipline at all” and in *S v Maphosa*⁶⁶ a discharge was considered appropriate where the court was of the opinion that “the accused is not susceptible to discipline and should no longer be subjected thereto.” In the matter of an assault in the presence of a senior officer the CMA held that the accused did “not show any regard for military discipline.”⁶⁷ These factors were seen as aggravating. Offences committed by officers are also punished harshly.⁶⁸

An offence that has the potential to undermine discipline and cohesion within the Armed Forces, such as theft from a comrade⁶⁹ or the assault of a superior officer,⁷⁰ may be more aggravating than theft committed in terms of the common law or common law assault. An offence such as drunkenness may

⁶³ Terblanche (2007) at 149; *S v Makwanyane* 1995 (3) SA 391 (CC).

⁶⁴ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2001 (2) SACR 632 (CC) para 31.

⁶⁵ *S v Gcakosi* (CMA 50/2004).

⁶⁶ *S v Maphosa* (CMA 198/2001).

⁶⁷ *S v Mmakola* (CMA 026/2009).

⁶⁸ *S v Mkhabela* (CMA 134/2000).

⁶⁹ Soldiers are expected to operate in a close community and it is imperative that a soldier is able to trust his comrade. His life may depend on it. Theft from a comrade undermines the mutual respect and trust that is necessary to operate in this environment and may in the long term undermine the operational effectiveness of the Armed Forces (see also OJAG at 31).

⁷⁰ Violent offences in the military are discussed in OJAG at 33 where it is opined that “personnel in Armed Forces are trained to exercise controlled and lawful violence towards the enemy. Unlawful violence displays a lack of discipline and can corrode unit cohesiveness and operational effectiveness; particularly when directed at service colleagues.”

seem trivial, but if committed while in a dangerous environment, such as weapons training, it becomes a very serious offence.⁷¹

The seriousness of the crime must however not overshadow the other factors that must be taken into consideration.⁷²

5.4.2 The criminal

5.4.2.1 Introduction

This aspect refers to the individualisation of the sentence.⁷³ Factors that are taken into consideration are inter alia the age,⁷⁴ rank of the accused, employment, the marital status,⁷⁵ dependants⁷⁶ and health of the accused. These factors are usually seen as mitigating factors but under certain circumstances they may also operate as aggravating factors.

5.4.2.2 Age and rank

In a number of judgments the CMA held that where the accused is still young and does not have many years experience in the SANDF, the court considers it as mitigation. At the same time that fact that an accused of more advanced age with many years service has no previous conviction may also be seen as mitigating, although the fact that he has many years experience may

⁷¹ See also OJAG at 30 where the seriousness of drug use was discussed. This discussion applies equally to the abuse of alcohol. It was stated that “[p]ersonnel in the Armed Forces who carry lethal weapons, operate and maintain dangerous equipment, or bear responsibility for the safety of others must display higher standards of behaviour than civilians. They must expect to be punished more severely for breaching those high standards.”

⁷² Terblanche (2007) at 150; *S v Rabie* 1975 (4) SA 855 (A); *S v Fhetani* 2007 (2) SACR 590 (SCA) para 5.

⁷³ See Terblanche (2007) at 150; Kruger at 28-3; *S v Du Toit* 1979 (3) SA 846 (A) at 857H-858A; *S v De Kock* 1997 (2) SACR 171 (T) at 183h-j.

⁷⁴ See Joubert at 293 for the influence of the youth of the offender on sentencing.

⁷⁵ *S v Ngcobo* (CMA 02/2010).

⁷⁶ *S v Zondo* (CMA 67/2008) found the fact that the accused was a single father with three dependent daughters a mitigating factor. See also *S v Mpi* (CMA 8/2010) for a further example.

sometimes be held as aggravating because he was in a position of trust or knew enough of the system to manipulate it.⁷⁷

The higher the rank of the accused, the higher the degree of culpability that is assigned to the accused. It was found that where an officer in the SANDF is dishonest, it should be considered an aggravating factor.⁷⁸ The same level of responsibility is expected from senior non-commissioned officers.⁷⁹ The fact that the accused is a member of the military police was regarded as aggravating in a number of cases. In *S v Schmahl*⁸⁰ the accused was convicted of corruption in that he transported illegal immigrants from Zimbabwe using military transport. The fact that the accused was a member of the military police was seen as aggravating and he was discharged with ignominy from the SANDF. Where members of the military police are found guilty of theft and other criminal offences, imprisonment is considered an appropriate sentence, even where the accused is a first offender.⁸¹ Where the accused is in a position of trust, the breach of that trust is regarded as an aggravating factor in sentencing.

5.4.2.3 Criminal record

The question is further whether the fact that the accused is a first offender or has previous convictions may also be taken into consideration when determining an appropriate sentence. A perusal of CMA judgments shows that being a first offender is generally taken into consideration by the court as a

⁷⁷ In *S v Muti* (CMA 03/07) the CMA held that “[h]is decision not to inform his superiors of his problem or whereabouts is totally irresponsible for a man of his age...” and in *S v Mokoka* (CMA 16/07) the accused was regarded as an adult with more than ten years service and was expected to know what procedures to follow for not being at work.

⁷⁸ *S v Maduba* (CMA 51/2008); *S v Mkhabela* (CMA 134/2000); *S v Simelane* (CMA 15/2000).

⁷⁹ *S v Thys* (CMA 27/2009) held that the accused was “a warrant officer and as such he is primarily responsible for good discipline in the unit.”

⁸⁰ *S v Schmahl* (CMA 13/07).

⁸¹ *S v Matsoba* (CMA 51/2001); *S v Mokubung* (CMA 133/2001); *S v Mdunyelwa* (CMA 67/2005); *S v Vosloo* (CMA 68/2005); *S v Ndaba* (CMA 23/2006).

mitigating factor.⁸² It is however only one of the factors that are taken into consideration for mitigation and is on its own not sufficient to have any significant effect in the sentence.⁸³ Whether being a first offender should in fact be regarded as a mitigating factor would depend in part on the seriousness of the offence committed. The CMA held that in certain circumstances it would even be justified to sentence first time offenders to direct imprisonment.⁸⁴

Proven previous convictions can be seen as strongly aggravating when imposing sentence.⁸⁵ It should however be kept in mind that the accused is being sentenced for the crime that he has committed and the fact that he has previous convictions does not increase the seriousness of the offence.⁸⁶ It may however result in a harsher punishment being imposed. In *S v Buthelezi*⁸⁷ the court held that the accused “has previous convictions which cannot be ignored and which must be reflected in the sentence eventually decided upon.” In *S v Lufele*⁸⁸ and *S v Renase*⁸⁹ the only aggravating factor present was the accused’s previous record. The five previous convictions of the accused in *S v*

⁸² The fact that the accused was a first offender without previous convictions was considered mitigating in *S v Kena* (CMA 66/2000). See also *S v Afrika* (CMA 88/2000); *S v Miya* (CMA 185/2000); *S v Shirinda* (CMA 64/2001); *S v Dlamini* (CMA 94/2001); *S v M* 2007 (2) SACR 60 (W) para 63; Kruger at 28-4; *S v Mthembu* 2011 (1) SACR 272 (KZP) para 11 (the court *a quo* held that the “appellant showed true contrition and regret for what he had done, was a first offender, and accepted that he was a good candidate for reformation...”).

⁸³ A mitigating factor is one that generally reduces a sentence that would have been imposed in the absence of mitigating factors (see Terblanche (2007) at 186).

⁸⁴ *S v Radebe* (CMA 49/2008); *S v Matsoba* (CMA 51/2001); *S v Ndaba* (CMA 23/2006).

⁸⁵ Terblanche (2007) at 188; Schonteich at 9; Terblanche & Roberts at 195; Joubert at 293.

⁸⁶ Terblanche (2007) at 189. This may be difficult to apply considering that the sentences listed in s 12 of the MDSMA are in order of severity. One would expect the military court to start its sentencing at the bottom of the list of sentences, if appropriate, and as the accused continues with his criminal or undisciplined behaviour he will graduate to the more severe punishment until he is discharged or imprisoned. Previous convictions eventually lead to harsher punishments, although the CMA has on occasion held that previous convictions are not necessarily indicative of a habitual offender (see *S v Wehr* (CMA 31/2000)). See also *S v Monaheng* (CMA 20/2009) where the court held that an accused with 14 previous convictions for the same and related offences “has been sentenced to fines, extra duties and even detention. None of these sentences had any rehabilitative effect on the accused. Therefore the sentence of Discharge from the SA National Defence Force is the only appropriate sentence in these circumstances.” Previous convictions may however show that the moral blameworthiness if the accused has increased and he would consequently be liable for a harsher punishment than a first offender (see van Zyl Smit (1996) 28-10).

⁸⁷ *S v Buthelezi* (CMA 10/99).

⁸⁸ *S v Lufele* (CMA 114/2000).

⁸⁹ *S v Renase* (CMA 85/2001).

*Kau*⁹⁰ were seen as indicative that the accused “has a disciplinary problem.” It is difficult to determine the weight that should be attached to the previous conviction. The weight attached is dependent on the sentencing rationale followed by the courts. Where the emphasis is on the incapacitation and prediction, more weight will be attached to previous convictions than a court focusing on proportionality and retribution.⁹¹ A perusal of CMA judgments indicates that the military courts may favour a prediction and incapacitation approach. Previous convictions are frequently regarded as strongly aggravating and are often cited as reason for a discharge. When determining an appropriate sentence the previous sentences imposed for previous convictions could be taken into account where the accused failed to respond to previous sentences.⁹² This is only relevant where the facts of the previous conviction are relevant to the current conviction. However, repetition of the same offence cannot on its own justify imposing increasingly more severe punishments.⁹³ The aggravating effect of the previous conviction is also dependent on when the previous offences were committed.⁹⁴

5.4.2.4 Remorse

Of interest is the apparent emphasis placed on guilty pleas as a show of remorse and taken into consideration by military courts *a quo* as mitigation in sentence.⁹⁵ Since a lack of remorse is seen as an aggravating factor,⁹⁶ the

⁹⁰ *S v Kau* (CMA 87/2001); *S v Mokoena* (CMA 01/2009).

⁹¹ For a complete discussion in this regard see Von Hirsch A “Proportionality and Progressive Loss of Mitigation: Further Reflections” in Roberts J V & von Hirsh A (eds) *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (2010) at 1-3.

⁹² This seems to be the approach followed by the military courts (see *S v Monaheng* (CMA 20/2009)).

⁹³ Kruger at 28-28.

⁹⁴ Although the accused had previous convictions for the same and other disciplinary offences, the court found that the accused had a clean record for more than two years prior to the offence, thereby mitigating the seriousness of the previous convictions (see *S v Ramoholo* (CMA 86/2001)).

⁹⁵ Joubert at 291. It has been the author’s experience in military trials that defence counsel routinely equate a plea of guilty with remorse. Numerous examples are found in CMA cases, although, to be fair, it is only one of the mitigating factors taken into account and on its own is not sufficient to outweigh the aggravating factors. See in this regard *S v Fesi* (CMA 11/2000)

question is to what extent the fact that the accused pleaded guilty should be taken into consideration as a mitigating factor.

British military law has an interesting approach towards guilty pleas. The Armed Force Act 2006 allows for a reduction in sentence for the early admission of the charge by the accused.⁹⁷ Commanders must apply the sentencing principles followed by the civilian courts.⁹⁸ When the accused is to be sentenced the commanding officer or the Judge Advocate must take into consideration at which stage of the trial proceedings the accused indicated his intent to plead guilty.⁹⁹ Where the accused had indicated his intention 'at the first reasonable opportunity', for example during the police investigation, a reduction of one third of his sentence is deemed appropriate. Where he only admits his guilt at the last moment, for example right before the trial start and the witnesses are about to testify, he may only receive a 10 percent reduction in his sentence.¹⁰⁰ Any admission after the start of the trial will attract very little reduction in sentence. During sentencing the accused must be informed of any credit he received for his admission of his guilt. The reason for giving the reduction¹⁰¹

where the accused's guilty plea was seen as a sign of remorse and *S v Mofokeng* (CMA 04/2008) where the accused pleaded guilty and "admitted his shame regarding his actions that he took the law into his own hands after being insulted by the complainant." A similar approach was followed in *S v Mnisi* (CMA 45/2000); *S v Dlamini* (CMA 94/2001); *S v Montse* (CMA 48/2000).

⁹⁶ Terblanche (2007) at 189; *S v Matolo* 1998 (1) SACR 206 (C) at 211g; *S v Qamata* 1997 (1) SACR 479 (E) at 482b; *S v van de Venter* 2011 (1) SACR 238 (SCA) where the court *a quo* took a lack of remorse as an aggravating factor; *S v Dumba* 2011 (2) SACR 5 (NCK) para 11; *S v Shaw* 2011 (1) SACR 368 (ECG) at 375h where the accused only expressed his remorse after his conviction and the court did not accept his remorse as genuine. For a contrary view see *S v Mbatha* 2009 (2) SACR 623 (KZP) paras 30-31 where the court held that a lack of showing remorse cannot always be considered an aggravating factor.

⁹⁷ Section 239 of the Armed Forces Act 2006.

⁹⁸ *Manual of Service Law* (2011) 1(2) at 1-13-6.

⁹⁹ This is in accordance with the guidelines set out by the Sentencing Guidelines Council in terms of s 153(2) of the Criminal Justice Act 2003 which requires a court to impose the shortest term of imprisonment that is appropriate given the seriousness of the offence (see Sentencing Guidelines Council *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) at 4).

¹⁰⁰ Sentencing Guidelines Council at 5.

¹⁰¹ *Manual of Service Law* (2011) 1(2) at 1-13-20; Sentencing Guidelines Council at 6 where it is stated that the purpose for giving credit is to encourage those offenders who are guilty to

is to recognise the benefits that come from a guilty plea not only to witnesses and victims, but also in enabling the CO [commanding officer] and other authorities to deal more quickly with outstanding matters.

The principle of reduction of the sentence for a guilty plea is based on the effective administration of justice and is not seen as a factor in the mitigation of sentence.¹⁰²

In our law it is accepted that pleading guilty is not necessarily a sign of remorse. The Supreme Court of Appeal recently reiterated that¹⁰³

a plea of guilty in the face of an open and shut case against an accused person is a neutral factor...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse...Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.

The CMA follows similar reasoning. In *S v Makhubela*¹⁰⁴ the court held that the fact that the accused pleaded guilty is not necessarily a sign of remorse and that “[a]ccused often plead guilty when they know the evidence against them is overwhelming, as in the present case.” Nevertheless, many trial judges make this distinction, which is a matter of some concern.

plead guilty at the first available opportunity. It is within the courts prerogative to decide what constitutes the “first reasonable opportunity” (see Sentencing Guidelines Council at 10).

¹⁰² Sentencing Guidelines Council at 4.

¹⁰³ *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13; *S v M* 2007 (2) SACR 60 (W) paras 72-76.

¹⁰⁴ *S v Makhubela* (CMA 53/2003).

5.4.2.5 Other factors

The health status of the accused may act as a mitigating factor.¹⁰⁵ In *S v Mdletshe*¹⁰⁶ the fact that the accused was terminally ill was considered as a mitigating factor. In *S v Nofemele*¹⁰⁷ the accused's epilepsy was regarded as mitigating, *S v Miya*¹⁰⁸ considered the accused's depression as a strong mitigating factor and *S v Dyantyi*¹⁰⁹ found illness to be a possible strong mitigating factor.

The culpability of the offender may also be taken into consideration as mitigation or aggravation regarding the sentence. Offences in the MDC generally do not specify the *mens rea* required for conviction of a specific offence, except for certain offences.¹¹⁰ Most offences in the MDC can consequently be committed either intentionally or negligently. The culpability with which the offence is committed can have a mitigating or aggravating effect on the sentence.¹¹¹ Where offences are premeditated, the CMA sees this as aggravating,¹¹² but offences committed negligently are considered less serious.¹¹³ In *S v Buthelezi*¹¹⁴ the court held that it is mitigating where "there is no indication that the applicant acted with malice, dishonest intent or in deliberate disregard of discipline." As a basic guideline the CMA has also remarked that it "is generally accepted that disciplinary offences do not attract the same degree of moral blameworthiness as "criminal" offences."¹¹⁵

¹⁰⁵ Du Toit *et al* 28-10B-5; Kruger at 28-3; *S v Mabutho* 2005 (1) SACR 485 (W).

¹⁰⁶ *S v Mdletshe* (CMA 63/2005).

¹⁰⁷ *S v Nofemele* (CMA 019/2002).

¹⁰⁸ *S v Miya* (CMA 185/2000).

¹⁰⁹ *S v Dyantyi* (CMA 56/2000).

¹¹⁰ For example see s 19(1) of the MDC which requires willful defiance of authority and s 13 of the MDC requires intention for a conviction of desertion.

¹¹¹ *S v Nxumalo* 1982 (3) SA 856 (A) at 861H; *S v GL* 2010 (2) SACR 488 (WCC) for an example of the application in civilian court.

¹¹² *S v Simelane* (CMA 15/2000); *S v Hako* (CMA 0005/2004); *S v Mpi* (CMA 8/2010).

¹¹³ *S v Sechaka* (CMA 089/2001); *S v Dlamini* (CMA 094/2001); *S v Boshielo* (CMA 16/2009).

¹¹⁴ *S v Buthelezi* (CMA 10/99).

¹¹⁵ *S v Xaba* (CMA 052/2001).

The personal circumstances of the offender may be important in consideration of the sentence but have often not had much influence on the ultimate sentence. The aggravating factors may often dominate the mitigating personal circumstances of the accused.¹¹⁶

5.4.3 The interests of society

The interests of society can work either as mitigation or aggravation.¹¹⁷ CMA judgments, as discussed below, show that this aspect often acts as an aggravating factor in the SANDF. The interests of society may be relevant in two respects:¹¹⁸

1. It can refer to the reaction of members of the community to the commission to the crime, for example their condemnation of the crime or their expectations regarding the sentence of the accused.
2. The sentence could serve society by preventing a repeat of the crime through deterrence, rehabilitation and the protection of society by removing the offender.¹¹⁹

The society that is relevant in this context includes the civilian as well as the military society. Although Terblanche states that the second aspect mentioned above is the one that is relevant to sentencing, it would seem that where the interests of the community are discussed in the context of military courts, it is rather the community's condemnation of the crime that is highlighted, which relates to the seriousness of the offence rather than purely to the interests of the society.

¹¹⁶ Terblanche (2007) at 151; *S v Ngcobo* (CMA 02/2010).

¹¹⁷ Terblanche (2007) at 152.

¹¹⁸ Terblanche (2007) at 152.

¹¹⁹ Terblanche (2007) at 153.

The CMA considered the interests of the community in *S v Hako*¹²⁰ by highlighting the community's reaction to the offence, stating that

[i]t is commonly known that the SANDF has been plagued by theft from its stores and messes. Theft is a crime and not a mere disciplinary offence. This court has in the past taken it serious if members of the SANDF steal if they are on duty or have to stand guard when they steal. This breaks down the essential element of trust. When members who bear rank commit crime and involve subordinates in their crimes the whole order in the SANDF is corrupted. Their integrity is suspect to say the least.

The CMA also held in *S v Mathebula*¹²¹ that “the impact of the incident on the image of the South African and United Nations forces is detrimental” and in *S v Magumasholo*¹²² that “[t]hese crimes cause embarrassment to the South African National Defence Force and the United Nations.”

These CMA judgments show that the CMA mainly focuses on the effect of the crime on the image of the SANDF in their condemnation of the crime. This should be judged against the background of one of the aims of a separate military justice system, namely the enforcement of discipline to ensure operational effectiveness. The best interests of the SANDF will therefore play an important role in sentence consideration.¹²³

The importance of the opinion of the military community was also emphasised in *R v Lingard and Kirk*¹²⁴ where the British Court of Appeal found

¹²⁰ *S v Hako* (CMA 005/2004).

¹²¹ *S v Mathebula* (CMA 60/2008).

¹²² *S v Magumasholo* (CMA 18/2009).

¹²³ See in this regard also OJAG at 7.

¹²⁴ *R v Lingard and Kirk* [2009] EWCA Crim 1745 para 12.

[i]t is, in our judgment, extremely important that due deference should be given by the courts to decisions of the military authorities in sentence in cases of this kind [*in casu* a case of theft and criminal damage in a military barracks]. They, and they alone, are best placed to appreciate the significance of an offence such as this in relation to questions of morale and maintenance of appropriate behaviour in their units.

It would seem as if the interests of society as a factor within the military sentencing environment may have a different focus than is the case with the civilian courts. The emphasis is on the community's reaction to the crime rather than the future prevention of the crime.

This does not however mean that deterrence, rehabilitation and the protection of the community is not taken into consideration. The prevention of crimes remains important in ensuring a disciplined force. Suspended sentences are regularly imposed in an attempt to deter individuals from committing crimes. The CMA opines that a suspended sentence is imposed as a deterrent and not as a punishment.¹²⁵ Suspended sentences have not always been successful as a deterrent. In *S v Pono*¹²⁶ the court found that numerous previous sentences, including suspended detention had no rehabilitating or deterrent effect. Barely eight months after being sentenced to suspended detention the accused in *S v Mkhencele*¹²⁷ went AWOL again and was "not even perturbed by the possibility that he may be sentenced to detention and to be losing his rank in the process."

Various military punishments may satisfy the aim of protecting the military community. Although the imprisonment of the offender may protect the SANDF, other forms of punishment may achieve the same result. An accused's dismissal or discharge from the SANDF will also protect the military

¹²⁵ *S v Mzayifani* (CMA 148/2005).

¹²⁶ *S v Pono* (CMA 10/2008).

¹²⁷ *S v Mkhencele* (CMA 56/2008).

community. If he is no longer in the employ of the SANDF, the military society is protected.

Sentencing is not the only way of deterring military offenders. It is submitted the practice of the promulgation plays an important role in general deterrence within the unit.¹²⁸

Deterrence as a form of crime prevention is not the only way of considering the best interests of society in imposing a sentence. Any sentence that gives society an advantage or at least creates the least harm can be considered being in the interests of society. A sentence with a positive purpose for the community is a sentence in the interest of the community.¹²⁹

The rehabilitation of the offender could therefore also be considered in the interests of society. It constitutes a positive purpose because the training of soldiers is expensive for the taxpayer. Retaining the services of these trained soldiers would be in the economic interest of society. Rehabilitation in the military context is best achieved by means of detention or corrective punishment which includes extra drill in order to correct an offender's discipline in instances of less serious offences.¹³⁰

These factors must be kept in mind when the sentencing court considers the relevant penalty clauses in determining an appropriate sentence.

5.5 Penalty clauses

In determining an appropriate sentence it is important to determine the nature and the extent of the sentence that can be imposed by the particular court.¹³¹

¹²⁸ See para 5.9.1 below.

¹²⁹ *S v Maki* 1994 (2) SACR 414 (E); *S v Bezuidenhout* 1991 (1) SACR 43 (A) at 51d-e.

¹³⁰ See ch 6 at paras 6.2.5 and 6.2.12 below.

¹³¹ Terblanche (2007) at 23; Terblanche & Roberts at 189.

The statutory penalty clause as well as the court's general sentencing jurisdiction is taken into account.¹³²

Military courts have jurisdiction over those military offences found in sections 4 to 49 of the First Schedule to the Defence Act 44 of 1957 (MDC). All of these offences have a prescribed punishment of imprisonment varying from 21 days to 30 years. See addendum A to this chapter for an overview of the offences and penalty clauses applicable.¹³³ Military courts also have jurisdiction over a wide number of civilian criminal offences.¹³⁴

The penalty clauses of these military offences are used as an indication of the seriousness of the offence.¹³⁵ The more severe the term of imprisonment attached to the offence, the more serious the offence is considered to be. All offences up to imprisonment not exceeding a maximum term of one year are considered to be disciplinary offences.¹³⁶ This distinction is important in determining the jurisdiction of the CMJ and the CODH. The CODH's jurisdiction is limited to military disciplinary offences, subject to further restriction in terms of military prosecution policy.¹³⁷

Military courts do not impose sentence in terms of the Criminal Procedure Act and therefore the list of sentences in terms of section 276(1) of the Criminal Procedure Act does not apply to military courts.¹³⁸ As a creature of statute,

¹³² Terblanche (2007) 23.

¹³³ Sourced from the Ministerial Task Team Report and the MDC.

¹³⁴ *Minister of Defence v Potsane, Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 15.

¹³⁵ Terblanche (2007) at 39; *S v Sibisi* 1998 (1) SACR 248 (SCA) at 251f-h.

¹³⁶ Section 1(xviii) of the MDSMA.

¹³⁷ See ch 3 at para 3.2.5 above in this regard.

¹³⁸ Although the criminal procedures followed in civilian courts are also applied by the military courts, r 21 of the MDSMA provides that this does not supplement the powers of the military courts and military courts are therefore bound to those sentences provided in s 12 of the MDSMA. The situation is different for the British military courts. Since 31 October 2009 most of the sentencing options introduced by the Criminal Justice Act 2003 have been available to the British military justice system, although military courts do in fact have wider sentencing options than the civilian Crown Courts since they may also impose those punishments that are

military courts are bound by section 12 of the MDSMA for their general sentencing jurisdiction.¹³⁹

In terms of the Criminal Procedure Act, section 276(1) is subject to other penalty clauses in other Acts. It does not allow for any other sentence than that prescribed by statute,¹⁴⁰ except where another statute allows a court to impose a sentence other than the sentence mentioned in the Criminal Procedure Act, the court may impose such a sentence, as long as it falls within its jurisdiction to do so.¹⁴¹ This means, for example, that a court cannot impose a fine as a sentence if it has not been prescribed by the penalty clause of the particular legislation.¹⁴²

This state of affairs in the civilian courts differs from the situation regarding sentencing in the military courts. All the prescribed penalties in terms of the MDC refer to imprisonment as a punishment, but imprisonment is rarely imposed by the military courts. Other punishments in terms of section 12 of the MDSMA are more likely to be imposed. The same would apply where an accused is prosecuted in the military court for a civilian criminal offence. Any appropriate punishment in terms of section 12 may be imposed, irrespective of what the penalty clause of the offence provides.

Section 51 of the MDC states that

[t]he court convicting any person of any offence under this Code, instead of imposing upon that person any penalty prescribed herein in respect of such offence, impose upon him or her any other penalty within the court's jurisdiction

unique to the military justice system. The civilian courts do not have this jurisdiction (see OJAG at 6 and 12).

¹³⁹ Du Toit *et al* at 28-9.

¹⁴⁰ Section 276(2) of the Criminal Procedure Act.

¹⁴¹ Section 276(2)(b) of the Criminal Procedure Act..

¹⁴² Joubert at 305; Terblanche (2007) at 27; Kruger at 28-53; *S v Pretorius* 1980 (4) SA 568 (T) at 571D.

which is provided for in this Code in respect of any offence, not being a more severe penalty than the maximum penalty so prescribed

Section 51 of the MDC only refers to military offences but it is submitted that it applies to all trials before the military courts, including civilian criminal offences. If it was the intention of the legislature to allow the military court extended jurisdiction in the instances of sentencing offenders for convictions of civilian offences, the legislature would surely have expressly provided for such an exception.

The CSMJ has the highest sentencing jurisdiction of the military courts. It may impose any sentence referred to in section 12 of the MDSMA, including an unlimited period of imprisonment, subject only to the maximum penalty provided by law for a specific offence.¹⁴³ The CMJ may also impose any sentence in terms of section 12 of the MDSMA, but its jurisdiction regarding a sentence of imprisonment is limited to a maximum period of two years.¹⁴⁴

The CODH has the most restricted jurisdiction and may only impose those sentences provided for in section 12(1)(i) to (m), subject to a maximum fine to the amount of R600.¹⁴⁵

¹⁴³ Section 9(2) of the MDSMA.

¹⁴⁴ Section 10(2) of the MDSMA.

¹⁴⁵ Section 11(2) of the MDSMA. The British military justice system distinguishes between two courts which have jurisdiction over military personnel, to wit the Court Martial (our equivalent of the CSMJ and CMJ) and the summary hearing (our equivalent to the CODH). The commanding officer conducting a summary hearing in the British military however has a much wider discretion than our commanding officers. Apart from their basic sentencing options, they may be given extended powers by higher authority. They are authorised to try, summarily, a number of criminal offences such as assault, theft and fraud and have a much wider sentencing jurisdiction. They may hear guilty as well as not guilty pleas. They are authorised to sentence an offender to up to 90 days' detention where extended powers are granted by higher authority and fines are limited to an amount equal to 28 days' pay of the offender. They can also make service compensation orders where an accused is ordered to pay damages to the victims of their crimes up to the amount of one thousand pounds. These commanding officers are not military judges and would not be seen as independent and impartial in terms of the requirements of our Constitution and law, yet they have far reaching jurisdiction. It is justified by the argument that operational effectiveness requires commanders to have effective control over discipline at all times. The accused do however have recourse to the Summary Appeal

It must always be kept in mind when interpreting the penalty clauses of the offences and in determining an appropriate sentence that the military court must impose sentence against the background of the values found in the Constitution as well as the rights in the Bill of Rights.¹⁴⁶ The Constitutional principles regarding equality, dignity and a prohibition on cruel and unusual punishment must be considered.

5.6 Pre-sentencing procedures

5.6.1 Pre-sentencing procedures in the Court of a Senior Military Judge and Court of a Military Judge

Immediately after a finding of guilty it is the duty of the prosecution counsel to read out the offender's list of previous convictions and submit it as evidence to the court.¹⁴⁷ The presiding judge will then enquire from the accused whether the content of the DD28 is correct.¹⁴⁸

If the accused confirms the contents, the DD28 is marked as an annexure to the Record of Proceedings. Where the accused denies the correctness of the record of proceedings, the court must hear evidence in this regard. All evidence or arguments presented by the prosecution counsel or the defence

Court which is presided over by a civilian judge where they are not satisfied with the outcome or sentence of their summary hearing.

¹⁴⁶ Terblanche (2007) at 23; *S v Dzukuda* 2000 (2) SACR 443 (CC) paras 37-38; Van Zyl Smit D "Sentencing and Punishment" in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 49-3.

¹⁴⁷ The list is contained in the DD28 form, being a summary of the accused's personal particulars and previous convictions (see ch 3 at para 3.2.3.5 above for a discussion of the DD28). The prosecution counsel has a duty to ensure that the information on the DD28 is correct. The CMA held in *S v Sithole* (CMA 187/2001) that "[p]rosecutors, who get the completed records of service (DD28) from units, should not blindly accept what is on the DD28, but should, in an attempt to put reliable information before the court, be able to identify obviously wrong information on the DD28 and have it rectified. After all, the presiding military judge will look at all previous convictions when considering an appropriate sentence." The DD28 may not be disclosed to the court at any time prior to the accused's conviction (see r 119 of the MDSMA).

¹⁴⁸ Rule 59(1) of the MDSMA.

must be recorded. The court will then close to consider the finding on the correctness of the DD28. After consideration by the military judge (and the assessors, where applicable) the court will announce its finding regarding the DD28 in open court.¹⁴⁹ Where the court orders an amendment of the DD28 the amendment will be affected on the same DD28 and handed in as an annexure. Where no amendments are made, the original DD28 will be handed in as an annexure.

After the DD28 has been handed in, both parties have the opportunity to place other facts before the court that should be taken into consideration for the determination of an appropriate sentence. The relevant facts regarding sentencing must be placed before the court.

After agreeing on the relevant facts for the determination of sentence and the presentation of evidence in mitigation and aggravation by both parties,¹⁵⁰ the accused or his defence counsel as well as the prosecution counsel now have the opportunity to address the court on sentence. Once the prosecution counsel has addressed the court, the defence is given the opportunity to reply to the prosecution's address. The address on sentence is very important since it is the last opportunity both parties have to highlight factors that they wish the court to take into consideration. The parties may, during the address, submit to the court their submissions on what would constitute an appropriate sentence.¹⁵¹

If there are no assessors sitting with the judge, the court may close to consider any facts relevant to the sentence. If there are assessors, the court must close

¹⁴⁹ Rule 59(2) of the MDSMA.

¹⁵⁰ See the more detailed discussion of this aspect in ch 3 at para 3.2.3.5 above.

¹⁵¹ The address on sentence may be critical in the court's decision in deciding on an appropriate sentence. In *S v Nangu* (CMA 60/2000) the court held that "[t]he address on sentence by the defence counsel was inadequate. It mentioned work related problems but neither the court nor the defence counsel elicited more information...Care should be taken by both defence and prosecution counsel to ensure that they suggest proper and valid sentences to the military judge in their addresses on sentence."

to consider such facts.¹⁵² After consideration of the facts, the court will re-open and the assessors will withdraw from the proceedings in open court.¹⁵³ Assessors play no part in the actual sentencing of the accused and the court, now consisting of the military judge alone, may close and take time for the consideration and determination of an appropriate sentence.¹⁵⁴ The military judge then decides on the sentence, records it and announces the sentence in open court.¹⁵⁵

5.6.2 Pre-sentencing procedures at the Commanding Officer's Disciplinary Hearing

It is important that all the information is placed before the court so that the court can determine an appropriate sentence. This is especially true during the sentencing process of the CODH. No evidence is led during the trial and this is the only opportunity that the presiding officer has to find the facts and determine an appropriate sentence. Without this process the presiding officer will have no information regarding the offence, the offender or the impact the offence had on the military community and will not be able to impose an appropriate sentence.¹⁵⁶

The process of handing in the DD28 is exactly the same as in the case of a trial before a CSMJ or CMJ, with the only difference that the accused is not assisted by defence counsel and will have to argue matters pertaining to the DD28 without such assistance. The pre-sentencing process is similar to that followed at the CSMJ and CMJ, allowing for the differences necessitated by the absence of defence counsel.¹⁵⁷

¹⁵² Rule 59(7) of the MDSMA.

¹⁵³ Rule 59(8) of the MDSMA.

¹⁵⁴ Rule 59(9) of the MDSMA.

¹⁵⁵ Rule 59(11) of the MDSMA.

¹⁵⁶ See *S v Samuels* 2011 (1) SACR 9 (SCA) paras 7-8; *S v Siebert* 1998 (1) SACR 554 (SCA) at 568c and 559a for a similar application in the civilian courts.

¹⁵⁷ Rule 68 of the MDSMA.

The CODH can also only impose one sentence for all the charges¹⁵⁸ and the presiding officer may not suspend any sentence imposed. The orders are announced directly after the sentence.¹⁵⁹

5.7 Forms of punishment

In terms of the Criminal Procedure Act, the forms of punishment for the commission of a crime can be described as a loss of freedom, forced payment of money, the loss of property, the payment of compensation, the provision of free services and the loss of certain privileges.¹⁶⁰ The different courts within the South African judiciary have different sentencing jurisdictions prescribed by law, the High Court having inherent jurisdiction to sentence any offender and the Magistrate's Court, being a creature of statute, having a more limited sentencing jurisdiction.¹⁶¹

Similarly, military courts are also limited in their sentencing jurisdiction. Being created in terms of the MDSMA its sentencing jurisdiction is also provided for and limited by the MDSMA. Section 12 of the MDSMA provides:

12(1) Whenever a military court convicts any person of any offence, it may, subject to the maximum penalty provided by law for the offence, the limits of its own penal or disciplinary jurisdiction, and sections 32, 92 and 93 of the Code, impose upon the convicted person a sentence consisting of one or more of –

- (a) imprisonment;
- (b) in the case of an officer –

¹⁵⁸ See discussion at para 5.7.2 below.

¹⁵⁹ Rule 68(8) of the MDSMA.

¹⁶⁰ Act 51 of 1977. See also Terblanche (2007) at 4.

¹⁶¹ Van Zyl Smit (2002) at 49-3.

- (i) cashiering; or
 - (ii) dismissal from the South African National Defence Force;
- (c) in the case of any other rank than that of an officer –
 - (i) discharge with ignominy from the South African National Defence Force; or
 - (ii) discharge from the South African National Defence Force;
- (d) in the case of any other rank than that of an officer, detention for a period not exceeding two years;
- (e) in the case of a private or equivalent rank, field punishment for a period not exceeding three months;
- (f) in the case of an officer –
 - (i) reduction to any lower commissioned rank; or
 - (ii) reversion from any acting or temporary rank to his or her substantive rank;
- (g) in the case of any other rank than that of an officer –
 - (i) reduction to any lower rank, to any non-commissioned rank or to the ranks; or
 - (ii) reversion from any acting or temporary rank to his or her substantive rank;
- (h) reduction in seniority in rank;
- (i) a fine not exceeding R6000,00;

- (j) in the case of a private or equivalent rank, confinement to barracks for a period not exceeding 21 days;
- (k) in the case of a private or equivalent rank, corrective punishment for a period not exceeding 21 days;
- (l) in the case of any other rank than that of an officer, extra non-consecutive duties for a period not exceeding 21 days; or
- (m) a reprimand:

Provided that for the purpose of this Act and of the Code, each penalty provided for in this section shall be deemed to be less severe and less serious than the preceding penalty for the relevant rank.¹⁶²

5.7.1 The right to equality and the military

From a cursory reading of section 12(1) of the MDSMA it is clear that the Act distinguishes between punishments for officers¹⁶³ and punishments for other ranks.¹⁶⁴ The military court will in practice punish an officer more severely than the other ranks. This may be because, with rank comes certain privileges not afforded lower ranks, and officers are consequently burdened with more responsibilities. Because of the need for discipline and respect for rank in the military environment, a higher level of accountability is expected from officers in

¹⁶² The opinion of the British Judge Advocate General is that it cannot be said that, as is the case in s 164 of the Armed Force Act 2006, the sentences mentioned first are more severe than the subsequent sentences mentioned. The impact of the specific offence on each individual person must be considered. A sentence of detention imposed on a warrant officer may be more severe on the accused, taking into consideration the consequences of the punishment than a straightforward dismissal may for example have.

¹⁶³ An “officer” as defined in s 1 of the Defence Act 42 of 2002 “in relation to the Defence Force, means a person on whom permanent or temporary commission has been conferred by or under this Act, and who has been appointed to the rank of officer.”

¹⁶⁴ “Other ranks” as defined in s 1 of the Defence Act 42 of 2002 “in relation to the Defence Force, means any member thereof other than an officer.” This would include members from the entry level rank of private (or airman for the Air Force and seaman for the Navy) up to the rank of warrant officer class 1, the highest non-commissioned officer’s rank.

the SANDF.¹⁶⁵ The Ministerial Task Team is however of the opinion that the different treatment of offenders, depending on the seniority of the offender with regard to offences and sentencing, is a violation of the constitutional right to equality, resulting in unfair and unequal treatment.¹⁶⁶ Would the different treatment of officers and other ranks or difference in treatment due to seniority amount to a violation of the right to equality as found in the Constitution?

The relevant sub-sections of section 9 of the Constitution which find application in this regard state that

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The idea of equality is that people who are in similar situations should be treated the same. This right protects the “equal worth of the bearers of the right.” It is therefore strictly speaking not a right to equal treatment, but a right

¹⁶⁵ Although no policy documents and defence instruction regarding the status of officers could be found, it may be pertinent to refer to the South African National Defence Force *Service Guide for Officers* (1997) at 1 where it is stated that the “...President commissions selected members of the National Defence Force to take responsibility for the conduct of military operations. The commission grants them the authority to exercise control over other members and requires that they obey the commands of those more senior in rank. The individual officer must be prepared for the personal commitment that is demanded...to professionalism and the maintenance of high personal standards. It is remarked (at 5) that “[i]n order to develop discipline, the officer must set a personal example of discipline both in word and deed. An officer’s devotion to duty and integrity must be beyond reproach.” It is also an accepted principle in other jurisdictions. The same distinction is made in the British military where officers as offenders are more likely to receive a harsher punishment than other ranks “to reflect the fact that the highest standards of behaviour are expected of commissioned officers” (see OJAG at 38).

¹⁶⁶ See Ministerial Task Team *Report by the Ministerial Task Team on the Transformation of the Military Legal System* (2005) para 135.

to have “one’s equal worth with others respected, protected, promoted and fulfilled.”¹⁶⁷

A distinction can be made between formal and substantive equality. Formal equality means “sameness of treatment: the law must treat individuals in like circumstances alike.”¹⁶⁸ Substantive equality “requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.”¹⁶⁹ Substantive equality is the approach that best supports the fundamental values enshrined in the Constitution.¹⁷⁰ It was found by the Constitutional Court that¹⁷¹

[w]e need...to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances...Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action...

Although section 9 contains five subsections it is submitted that when determining whether the difference in treatment between officers and non-commissioned officers is unconstitutional, the two subsections quoted above, being subsections (1) and (3) are relevant to this enquiry.

Section 9(1) refers to three aspects, namely “equality before the law” referring to the equal treatment when any law is executed, “equal protection of the law”

¹⁶⁷ Rautenbach I M “Introduction to the Bill of Rights” *Bill of Rights Compendium* (2008) para 1A57.1; Currie I & De Waal J *The Bill of Rights Handbook* 5 ed (2005) at 230-231.

¹⁶⁸ Currie & De Waal (2005) at 232; Rautenbach at para 1A57.1; Albertyn C & Goldblatt B “Equality” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 35-6.

¹⁶⁹ Currie & De Waal (2005) at 233; Rautenbach at para 1A57.1; Albertyn & Goldblatt at 35-7 referring to Martha Minow who said that it “is not the characteristics of the individual or the group that are the concern, but the social arrangements that make the differences matter.”

¹⁷⁰ Currie & De Waal (2005) at 233.

¹⁷¹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41; Currie & De Waal (2005) at 233.

referring to the concept that all laws must treat people equally and “equal benefit of the law” referring that every person should benefit equally from the law.¹⁷² This section contains a general prohibition against the unequal treatment of individuals.

Section 9(3) refers to specific forms of unequal treatment.¹⁷³ These listed grounds constitute unfair discrimination and they have more serious consequences than other forms of discrimination. It prohibits direct as well as indirect discrimination and is not restricted to the grounds listed in this subsection.¹⁷⁴

The test for determining whether the right to equality has been infringed has been set out by the Constitutional Court in *Harksen v Lane*.¹⁷⁵ A threshold test is firstly applied. The question is firstly whether the provision or conduct differentiates between individuals or categories of individuals. If there is no differentiation then there is no infringement of section 9 of the Constitution.¹⁷⁶ It should be noted that the right to equality does not prevent the government from differentiating between individuals if there is a legitimate reason to do so. Differentiation is allowed as long as it does not amount to unfair discrimination.¹⁷⁷

Once it is found that the provision does differentiate between individuals, the two-stage analysis must be applied. The first stage involves an evaluation of the provision against section 9(1). This stage tests whether there is a rational basis for this differentiation, in other words whether there is “a rational

¹⁷² Rautenbach at para 1A57.2.

¹⁷³ Rautenbach at para 1A57.2; Currie & De Waal (2005) at 235.

¹⁷⁴ Rautenbach at para 1A57.2. Indirect discrimination refers to those instances where the differentiation on face value seems not to discriminate against anyone but the impact or effect of the differentiation results in discrimination (see also Currie & De Waal (2005) at 260).

¹⁷⁵ *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 53; Currie & De Waal (2005) at 235-236; Rautenbach at para 1A57.5; Govindjee A & Vrancken P (eds) *Introduction to Human Rights Law* (2009) at 74-75; Albertyn & Goldblatt at 35-17.

¹⁷⁶ Currie & De Waal (2005) at 236, Albertyn & Goldblatt at 35-17.

¹⁷⁷ Currie & De Waal (2005) at 239; Albertyn & Goldblatt at 35-18.

connection between the differentiation in question and a legitimate governmental purpose that it is designed to achieve.”¹⁷⁸ If that is not the case then the provision is in violation of section 9(1).

However, if there is a rational basis this does not mean that the right to equality is not violated. The differentiation may still constitute unfair discrimination in terms of section 9(3) or (4) of the Constitution. This is the second stage of the enquiry.¹⁷⁹ The third part of the test is determining whether the limitation clause of the Constitution can justify the unfair discrimination and differentiation.¹⁸⁰

There are therefore three ways in which the right to equality can differentiate between individuals: Firstly “mere differentiation” which would not be in violation of section 9 as long as there is a rational connection between the provision and the governmental purpose it aims to achieve.¹⁸¹ Secondly there can be differentiation that amounts to unfair discrimination because it violates section 9(3) and (4)¹⁸² and the third instance refers to those instances of fair discrimination.¹⁸³

There are two aspects regarding the difference in treatment between members of the SANDF which concerns the Ministerial Task Team. The first is the fact that only officers can be sentenced to cashiering and dismissal and that all other ranks are sentenced to discharge with ignominy or discharge from the

¹⁷⁸ Currie & De Waal (2005) at 236; Albertyn & Goldblatt at 35-18; Govindjee & Vrancken at 76. See also *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC) para 25 where the Constitutional Court held that “[i]n regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law...Accordingly before it can be said that mere differentiation infringes s 8 [now s 9 of the Constitution] it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it.”

¹⁷⁹ Currie & De Waal (2005) at 236; Govindjee & Vrancken at 77.

¹⁸⁰ Currie & De Waal (2005) at 236.

¹⁸¹ Albertyn & Goldblatt at 35-18; *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC).

¹⁸² Albertyn & Goldblatt at 35-19.

¹⁸³ Currie & De Waal (2005) at 237.

SANDF.¹⁸⁴ As will be shown below, there is no substantial difference in the execution or consequences of cashiering and discharge with ignominy from the SANDF.¹⁸⁵ Other than in name, there is also no difference in the execution or consequences of a sentence of dismissal from the SANDF and discharge from the SANDF. It is therefore submitted that, in following the test regarding the right to equality discussed above, there is no substantial difference between the treatment of officers and other ranks regarding these sentences. Consequently there is no violation of section 9 in this regard.¹⁸⁶

The second aspect refers to the difference between the treatment of offenders depending on the seniority of the victim and the offender in terms of sections 15¹⁸⁷ and 16¹⁸⁸ of the MDC. Both sections refer to the crime of assault. Section 15 of the MDC states that

[a]ny person who assaults or points a firearm at or draws any weapon against his superior officer, shall be guilty of an offence and liable for conviction to imprisonment for a period not exceeding five years.

Section 16 of the MDC states that

[a]ny person who assaults or points a firearm at or draws any weapon against or ill-treats any person who is by reason of rank or appointment subordinate to him, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three years.

¹⁸⁴ Section 12(1)(b)(i)-(ii) and s 12(1)(c)(i)-(ii) of the MDSMA.

¹⁸⁵ See the discussion in ch 6 at paras 6.2.2 and 6.2.3 below on the process of cashiering and discharge with ignominy; SADF "Kassering en Ontslag met Oneer uit die SA Weermag" *Appendix A to Army Departmental Standing Order SALO GS1/73* (1986).

¹⁸⁶ This does not refer to the constitutionality of the sentences of cashiering (see ch 6 at para 6.2.2 below) or discharge with ignominy (see ch 6 at para 6.2.3 below). That aspect is discussed in ch 6 below.

¹⁸⁷ Assaulting a superior officer.

¹⁸⁸ Assaulting or ill-treating a subordinate.

What is clear from comparing these two sections with each other is that the assault on a superior officer is seen as a more serious offence than the assault on a subordinate and the subordinate can be sentenced more harshly merely because he is of a lower rank. This, according to the Ministerial Task Team is a violation of the right to equality. In applying the test as set out in *Harksen v Lane*,¹⁸⁹ the following is relevant:

The right to equality does not mean that every person must be treated exactly the same. Law will inevitably differentiate between people. The Constitutional Court distinguishes between “mere differentiation” and “differentiation that amounts to discrimination.”¹⁹⁰ Albertyn and Goldblatt see discrimination as “distinctions made on the basis of prohibited grounds” to be those mentioned in section 9(3) of the Constitution and “mere differentiation” as the “myriad distinctions that are made by a modern state in the business of effective government.”¹⁹¹ As an example Albertyn and Goldblatt mention the sentencing of offenders for different crimes as “mere differentiation.”¹⁹² The question is whether the law has a legitimate reason to do so.¹⁹³ The different treatment due to seniority of rank does not relate to any of the listed grounds of discrimination¹⁹⁴ nor can it be seen as differentiation on analogous grounds.¹⁹⁵ It is submitted that the differentiation between individuals on the ground of rank seniority cannot be seen as discrimination, but merely as differentiation. So, in

¹⁸⁹ *Harksen v Lane* 1998 (1) SA 300 (CC).

¹⁹⁰ *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC) para 23.

¹⁹¹ Albertyn & Goldblatt at 35-17.

¹⁹² Albertyn & Goldblatt at 35-18.

¹⁹³ Currie & De Waal (2005) at 239.

¹⁹⁴ Promotion within the ranks of the SANDF is governed by various personnel policies and race, ethnicity, sexual orientation, gender, etc, apart from affirmative action prescriptions, have no bearing on whether a member is promoted within the ranks. Affirmative action will be considered fair discrimination, but falls outside this research. Unfair discrimination is described as differential treatment of individuals that is hurtful or demeaning and has an unfair impact where “it imposes burdens on people who have been victims of past patterns of discrimination, or where it impairs to a significant extent the fundamental dignity of the complainant” (see Currie & De Waal (2005) at 242’ 244 and 246; Govindjee & Vrancken at 77).

¹⁹⁵ Analogous grounds are differentiation on grounds that are analogous to those mentioned in s 9(3) of the Constitution and are “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparable serious manner” (see Currie & De Waal (2005) at 243-244).

accordance with the first step in the test, it is clear that the MDC differentiates between superior officers and their subordinates. A determination must be made whether there is a rational governmental purpose for this differentiation to prevent it from being in violation of section 9(1) of the Constitution.

The Defence Act states that the SANDF must “perform its function in accordance with the Constitution”.¹⁹⁶ The Constitution states that “the defence force must be structured and managed as a disciplined military force.”¹⁹⁷ The important role of discipline was summarised in *Minister of Defence v Potsane*:¹⁹⁸

The ultimate objective of the military in time of peace is to prepare for war to support the policies of the civil government. The military organisation to meet this objective requires, as no other system, the highest standard of discipline...[which] can be defined as an attitude of respect for authority that is developed by leadership, precept and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed. This is not the characteristic of the civilian community. It is the ultimate characteristic of the military organisation. It is the responsibility of those who command to instill discipline in those who they command. In doing so there must be the correction and punishment of individuals...

The need for strict discipline was also accepted by O'Regan J in *SANDU v Minister of Defence*,¹⁹⁹ quoting *R v Généreux*²⁰⁰ with approval:

¹⁹⁶ Section 2 of the Defence Act 42 of 2002.

¹⁹⁷ Section 200(1) of the Constitution.

¹⁹⁸ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) paras 38 and 44 regarding the court's discussion on a separate military justice system and the right to equality; Morris L J *Military Justice: A Guide to the Issues* (2010) at 3-4 and 5 where it is stated that the military justice system is not only meant to enforce discipline. It provides “discipline coupled with justice.”

¹⁹⁹ *South African National Defence Union v Minister of Defence* 1999 (10) BCLR 615 (CC) para 28.

²⁰⁰ *R v Généreux* [1992] 1 SCR 259.

[T]he armed forces depend upon the strictest discipline in order to function effectively...Clearly, without the type of rigorous obedience to a rigid hierarchy which the military demands of its members, our national defence and international peace-keeping objectives would be unattainable.

Because of the need for discipline offences exist in the MDC to enforce this discipline. Offences such as using threatening or insubordinate language²⁰¹ or the disobeying of lawful commands given by superior officers²⁰² are punishable by imprisonment from six months to five years, depending on the circumstances. The Code of Conduct for Uniformed Members of the SANDF, which all members of the SANDF must obey, requires uniformed members to state inter alia that "I will obey all lawful commands and *respect all superiors*."²⁰³

The CMA found that an accused who attacked his superior officer with a kitchen knife badly affected morale and discipline. The court held that the "[r]elationship of trust between leaders and subordinates and even between fellow soldiers is destroyed as no soldier wants to go into battle with someone that he or she cannot trust to cover his or her back."²⁰⁴

It should therefore be clear from the above discussion that respect for, and under certain circumstances the enforcement of the rank structure is imperative for the enforcement of discipline. A differentiation between superior officers

²⁰¹ Section 17 of the MDC states that "[a]ny person who uses threatening or insulting language to, or by word or conduct displays insubordination or behaves with contempt towards his superior officer, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding six months."

²⁰² Section 19 of the MDC criminalises the disobeying of lawful commands. There are various levels of accountability and ways in which the section can be contravened but by way of example reference is made to s 19(1) of the MDC which provides that "[a]ny person who in willful defiance of authority disobeys any lawful command given personally by his superior officer in the execution of his duty, whether orally, or in writing or by signal, shall be guilty of an offence and liable on conviction, if he committed the offence while on service, to imprisonment for a period not exceeding five years, and in any other case to imprisonment for a period not exceeding two years."

²⁰³ Emphasis added.

²⁰⁴ *S v Gaobonwe* (CMA 19/2008).

and subordinates is necessary to comply with the unique situation of the SANDF. This is also true for other jurisdictions. British military law also makes this distinction. The offence of “misconduct towards a superior officer” may under certain conditions carry a term of imprisonment for a period of up to ten years while the punishment for “ill-treatment of subordinates” carries a term of imprisonment of up to two years.²⁰⁵ Both offences are however seen as serious. The ill-treatment of subordinates is serious because it undermines morale and discipline, potentially causing loss of confidence in the chain of command. However, the authority of superior officers must be upheld at all times since the “integrity and effectiveness of Armed Forces rely on obedience and respect to those in authority.”²⁰⁶ Disobedience or misconduct towards superior officers undermines the chain of command and can have a serious effect on the operational effectiveness of the Armed Forces.²⁰⁷

It is therefore submitted that the need for a disciplined defence force will be a legitimate governmental purpose in attaching different degrees of seriousness to section 15 of the MDC and section 16 of the MDC. It must also be kept in mind that the government need only show that the differentiation is rational and need not justify an enquiry into other possible methods of achieving its purpose.²⁰⁸

It is further submitted that the difference in seriousness of the crimes does not result in unequal or different treatment of the individuals under the law. They are treated equally by the law in that the same criteria apply for conviction.²⁰⁹

²⁰⁵ *Manual of Service Law* (2011) 1(1) at 1-7-40

²⁰⁶ OJAG at 42.

²⁰⁷ OJAG at 49.

²⁰⁸ Currie & De Waal (2005) at 241; Albertyn & Goldblatt at 35-20. The Constitutional Court held in *Jooste v Score Supermarkets Trading (Pty) Ltd* 1999 (2) SA 1 (CC) para 17 that “[i]t is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the legislature could be improved in one respect or another.”

²⁰⁹ See also *S v Rens* 1996 (1) SA 1218 (CC) where the Constitutional Court held that the differentiation between appeals from the lower and superior courts did not result in discrimination as long as “persons appealing from or to a particular court are subject to the same procedures.”

Both assault on a superior and on a subordinate is illegal, both are serious and seen as criminal offences, one is just viewed as more serious than the other, just as certain types of assault in criminal law are viewed more seriously than others. Although section 15 of the MDC potentially allows for harsher punishment, the sentencing discretion of the court must be considered since it does not preclude mitigating factors being taken into consideration by the court. Subordinates are seldom sentenced more harshly than the superior who commits a similar offence. The CMA has on more than one occasion held that the seniority of the offender is in fact an *aggravating* factor when it comes to sentencing.²¹⁰

It is therefore submitted that the potential difference in treatment depending on the seniority in rank cannot be regarded as a violation of the right to equality. It is seen as an integral part of the Defence Force and a necessity for the proper functioning of the Defence Force.

5.7.2 Sentencing more than one crime at a time

Section 280(1) of the Criminal Procedure Act authorises a court to impose multiple punishments when an accused has been convicted of multiple offences.²¹¹ This includes offenders who have already been sentenced and who have not yet completed the sentence, such as a person with a suspended sentence.²¹² In imposing more than one sentence the court retains its full jurisdiction with regard to each offence.²¹³ It is further possible to impose sentences for different offences in combinations that would not be allowed for a single offence, as long as the imposed sentence remains appropriate and

²¹⁰ In *S v Jacob* (CMA 13/07) the fact that the accused was a senior non-commissioned officer was seen as aggravating, as well as the accused being a warrant officer in *S v Thys* (CMA 27/2009). In the cases of *S v Simelane* (CMA 15/2000) and *S v Mkhabela* (CMA 134/2000) the fact that the accused were officers was seen as aggravating.

²¹¹ See also Terblanche (2007) at 179; Du Toit *et al* at 28-18Z; Kruger at 28-38(1).

²¹² Kruger at 28-39; Terblanche (2007) at 183.

²¹³ Kruger at 28-39; Joubert at 318; *S v Breytenbach* 1988 (4) SA 286 (T) at 292G.

practicable.²¹⁴ This may however result in a cumulative effect where the resultant punishment is too severe.²¹⁵ The court must ensure that the cumulative effect is reduced considering all the circumstances and the “totality of the criminal behaviour” of the offender.²¹⁶ The cumulative effect may be reduced by ordering that the sentences run concurrently, by reducing any of the sentences or by taking the counts together for the purpose of sentencing.

Sections 280(2) and (3) of the Criminal Procedure Act allows the sentencing court to order that sentences consisting of imprisonment or correctional supervision run concurrently. These are the only two sentences that may be ordered to run concurrently and then only with the same punishment.²¹⁷ The sentencing court must specifically order that the sentences run concurrently otherwise they will be served consecutively.²¹⁸ It is also possible for the court to order that any part of the sentence run concurrently with another part of the sentence.

The cumulative effect may also be countered by reducing each sentence so that the overall sentence is not excessive.²¹⁹ Although it is one of the few ways in which the cumulative effect of multiple fines can be curbed, this method may be criticised on the grounds that the sentence, when viewed separately, may seem inadequate and inappropriate for the specific offence.²²⁰

Another method followed by the courts but not specifically provided for by the Criminal Procedure Act is taking the counts together for the purpose of sentencing.²²¹ This is usually done where the different charges are basically

²¹⁴ Terblanche (2007) at 179.

²¹⁵ Du Toit *et al* at 28-18N; Joubert at 318; *S v Mpofo* 1985 (4) SA 322 (ZHC) at 324G-J; *S v Maseola* 2010 (2) SACR 311 (SCA); *S v Schrich* 2004 (1) SACR 360 (C).

²¹⁶ Terblanche (2007) at 180.

²¹⁷ Joubert at 318; *S v Jeffries* 2011 (2) SACR 350 (FB) para 12.

²¹⁸ Du Toit *et al* at 28-18Z; Kruger at 28-39; *S v Brummer* 1974 (4) SA 846 (N) at 847; *S v Breytenbach* 1988 (4) SA 286 (T) at 292H.

²¹⁹ Joubert at 318.

²²⁰ Terblanche (2007) at 181-182; Joubert at 318.

²²¹ Joubert at 318.

part of one transaction.²²² It is however not a requirement that the offences should be closely connected.²²³ This method may be difficult to apply since the sentencing court must ensure that the eventual sentence imposed for the different counts is a competent one for each crime for which the accused is convicted and the court's jurisdiction is limited as if the court was sentencing only one offence.²²⁴ The appeal court may experience difficulty with this method if it is of the opinion that the sentence should be varied or set aside and the use of this method is not encouraged.²²⁵

The cumulative effect of the sentences may also apply in instances where the accused is already serving another sentence or has a suspended sentence that is still in effect. When imposing a new sentence on such an accused, the sentencing court must take the possible cumulative effect into consideration when imposing sentence.²²⁶

Although the court in *S v Tshomi*²²⁷ held that it is preferable to impose separate sentences for the separate charges,²²⁸ the military courts can impose only one sentence, irrespective of the number of charges of which the accused has been convicted.²²⁹ This rule must be read with section 92 of the MDC which also provides that where one sentence is imposed on all the charges, and that sentence is a valid sentence in respect of any one of the charges, the sentence will be regarded as a valid sentence in respect of all of the charges for which

²²² *S v De Klerk* 2010 (2) SACR 40 (KZP) para 29; Kruger at 28-41; Terblanche (2007) at 182; Du Toit *et al* at 28-20.

²²³ Du Toit *et al* at 28-20; Kruger at 28-40; *S v Pase* 1986 (2) SA 303 (E).

²²⁴ Terblanche (2007) 182; *S v Hayman* 1988 (1) SA 831 (NC).

²²⁵ *S v Ngubase* 2011 (1) SACR 456 (ECG) where the court held that separate counts should only be taken together for sentencing in exceptional circumstances. In this regard see also Kruger at 28-40; Rabie M A & Maré M *Punishment: An Introduction to Principles* 5 ed (1994) at 319; Terblanche (2007) at 182; Du Toit *et al* at 28-20; *S v Swart* 2000 (2) SACR 556 (SCA) paras 20-21.

²²⁶ Kruger at 28-39; Terblanche (2007) at 183; *S v Cele* 1991 (2) SACR 246 (A) at 248j.

²²⁷ *S v Tshomi* 1983 (3) SA 662 (A) at 665F.

²²⁸ Kruger at 28-41; Joubert at 318; *S v Swart* 2000 (2) SACR 556 (SCA).

²²⁹ Rule 59(10) of the MDSMA; s 92 of the MDC.

the accused has been convicted.²³⁰ When imposing the one sentence, the court may however combine the sentences provided in section 12 of the MDSMA.²³¹ Any combination of sentence is possible, subject to the provisions of section 93 of the MDC.

Section 93 of the MDC sets out those sentences that cannot be combined and also provides for mandatory combinations. Imprisonment cannot be combined with field punishment or detention and where an accused is sentenced to field punishment such field punishment cannot be combined with a sentence of detention.²³² When an officer is sentenced to imprisonment, the sentence must be combined with one of cashiering and in the case of a non-commissioned officer or private it must be combined with a sentence of discharge with ignominy.²³³ If a non-commissioned officer or warrant officer is sentenced to detention, the sentence must be combined with one of reduction to the ranks. A sentence of detention may be combined with a discharge, but this is not compulsory.²³⁴

Where the military court is faced with sentencing an accused to imprisonment, detention or field punishment at a time where the accused is already serving such a sentence the military court may not order that the sentences run concurrently.²³⁵ Such sentences will run consecutively, creating a risk of a cumulative effect. This must be taken into consideration by the sentencing court. As it cannot counter the cumulative effect by ordering that the sentences run concurrently, also not for suspended sentences, the only solution may be to impose a less severe punishment for the current offence, once again risking an inappropriate sentence when considering the current offence. Allowing military

²³⁰ This is in contrast with the practice in the civilian courts that a sentence that is allowed in terms of one offence but not regarding the other offence cannot be imposed for both of the charges (see *S v S* 1981 (3) SA 377 (A); Kruger at 28-41).

²³¹ Section 12(1) of the MDSMA.

²³² See the discussions on these sentences in ch 6 at paras 6.2.5 and 6.2.6 below.

²³³ Sections 93(3)-(4) of the MDC.

²³⁴ Section 93(4)(b) of the MDC.

²³⁵ Rule 111(3) of the MDSMA.

courts to impose concurrent sentences under these circumstances may solve this problem.

The sentencing of more than one offence by the British military courts depends on the type of military court. Where an accused is found guilty of two or more charges at a summary hearing the presiding officer must impose one “global” sentence which may, as in the South African military courts, consist of a combination of more than one punishment.²³⁶ The presiding officer may combine any of the punishments within his jurisdiction, except for those expressly excluded in the Armed Forces Act 2006.²³⁷ Where an offender is convicted by a court martial the military judge may pass a separate sentence in respect of each offence of which he is convicted.²³⁸

There is no clear reason why South African military judges are limited in their sentencing jurisdiction to the same state of affairs whether an accused is found guilty of one or of multiple offences. Allowing multiple sentences for multiple convictions may also address the concerns of the CMA regarding sentences considered too lenient.²³⁹

5.8 Suspension of sentences

A suspended sentence is one²⁴⁰

which has been imposed, in all the detail required for the proper imposition of such sentence, but the operation of which is suspended for a specified term,

²³⁶ Section 131(5) of the Armed Forces Act 2006; *Manual of Service Law* (2011) 1(2) at 1-13-21.

²³⁷ For the permitted combinations see *Manual of Service Law* (2011) 1(2) at 1-13-23 to 1-13-24. For the prohibited combinations see s 38 of the Armed Forces Act 2006; regulation 5 of the *Armed Forces (Minor Punishments and Limitations on Power to Reduce Rank) Regulations* (2009).

²³⁸ Section 255 of the Armed Forces Act 2006; *Manual of Service Law* (2011) 2 at 2-29-41.

²³⁹ See the discussion on sentences considered too lenient in ch 7 at para 7.2.3.2 below.

²⁴⁰ Terblanche (2007) at 348; Krugel & Terblanche at 905.

subject to the offender's fulfilling the conditions on which the suspension has been based.

In terms of the Criminal Procedure Act any sentence, including a fine, can be suspended for a maximum period of five years.²⁴¹ The civilian courts may impose a wide variety of conditions for the suspension of the sentence.²⁴² These conditions can be classified as either negative or positive conditions of suspension.²⁴³

A negative condition consists of a requirement that the accused must not commit a specific crime or type of crimes within the specific period of his suspension. It does not require any positive action from the offender, only that he refrains from doing something. A positive condition requires positive action from the accused, such as the payment of compensation.²⁴⁴

The suspension of sentences by military courts is governed by section 12(3) of the MDSMA which states that

[w]hen a military court sentences any offender to detention or to imprisonment it may order the operation of the whole or any portion of the sentence of detention, or the whole of the sentence of imprisonment to be suspended for a period not exceeding three years on the conditions that it may determine in the order.

²⁴¹ Section 297 of the Criminal Procedure Act; Terblanche (2007) at 348.

²⁴² For a discussion of the various conditions of suspension see Du Toit *et al* at 28-45 to 28-46; Kruger 28-73 to 28-78; Joubert at 317-318. The most common condition of suspension is that the accused abstain from committing the offence for a specified period of time (see Kruger at 28-70).

²⁴³ Kruger at 28-70; Terblanche (2007) 349.

²⁴⁴ A perusal of CMA cases shows that nearly all suspensive conditions imposed by military courts consist of negative conditions. It usually entails that the sentence is suspended on condition that the accused does not commit the same or a similar offence within the period of suspension. However, see *S v Swanepoel* (CMA 44/2010) where the CMA changed the sentence of discharge to a suspended sentence on condition that the accused submits to a medical assessment and treatment. This is a positive suspensive condition.

From this section it is clear that only detention and imprisonment can be suspended, either the whole sentence or a portion of the sentence of detention or when imprisonment is imposed, the whole of the imprisonment must be suspended.²⁴⁵ Since cashiering and discharge with ignominy are mandatory orders when an accused is sentenced to imprisonment, they can also be suspended, but only when imposed as part of the sentence of imprisonment.²⁴⁶ When a discharge is imposed with the sentence of detention, the discharge cannot be suspended as it is not mandatory to impose a discharge together with detention.²⁴⁷

Suspended sentences imposed by the military courts may only be suspended for a maximum period of three years.²⁴⁸ Where the military court imposes a suspended sentence, they must attach conditions to the suspension otherwise the sentence will be invalid.²⁴⁹ The MDSMA allows the court a wide discretion in the imposition of suspensive conditions and a clear set of guidelines has not yet been given by the CMA. It is submitted however, that the military court would not be able to impose conditions that allow them more powers than they would normally have, for example the military court would not be able to set community service or the commitment to a treatment facility as a suspensive condition.²⁵⁰ The suspended sentence must in itself be an appropriate sentence since it may be implemented at a future date if the accused does not

²⁴⁵ See *S v Qunto* (CMA 19/99); *S v Cuthalele* (CMA 33/2000); *S v Kagiso* (CMA 39/2000); *S v Mogorosi* (CMA 007/2005); *S v Sibeko* (CMA 10/2000) where the CMA held that only detention and imprisonment could be suspended because the military court is “a creature of statute and its powers are limited to those provided for in the Act.”

²⁴⁶ The mandatory sentence of cashiering, when imposed as an independent sentence, cannot be suspended by the military court (see s 12(3) of the MDSMA).

²⁴⁷ Section 12(3) of the MDSMA read with s 93(4)(b) of the MDC which states that “[a] warrant officer or non-commissioned officer who is sentenced to detention...*may* also be sentenced to be discharged...” (see also *S v Mnyengeza* (CMA 51/2000)).

²⁴⁸ Section 12(3) of the MDSMA.

²⁴⁹ *S v Jam-Jam* (CMA 105/2000) where the CMA imposed conditions of suspension where the military court *a quo* failed to do so. For the position in the civilian courts see Terblanche (2007) at 357.

²⁵⁰ Take note of *Burger v Roos* 1959 (4) 393 (A) at 398 where it was held that a general reference to the practice in civilian courts does not provide the military courts with a supplementary source of rules.

comply with the conditions.²⁵¹ Any conditions must relate to the crime of which the accused has been convicted, but need not be restricted to it²⁵² and the accused must understand the conditions of the suspension.²⁵³ This is particularly relevant where the accused is subject to a positive condition for suspension because the accused must know exactly what actions he must take to comply with the condition.²⁵⁴

A further important guideline pertains to the requirement that the suspending condition must be reasonable. “In essence this means that they should be formulated in such a manner that they will not cause future unfairness or injustice and that they have regard for human infallibility.”²⁵⁵ It should not be possible for a petty offence to trigger the suspended sentence. This approach

²⁵¹ Although the opinion is expressed that suspension of a sentence has a softening effect on that sentence (see Terblanche (2007) at 350; *S v Toms*; *S v Bruce* 1990 (2) SA 802 (A) at 834D-E), the court held in *S v Chipape* 2010 (1) SACR 245 (GNP) para 35 that a suspended sentence “is not a light sentence.” See also in this regard *S v Rooi* 2007 (1) SACR 668 (C) at 671b-c; *S v Peskin* 1997 (2) SACR 460 (C) at 468i-469a. The CMA also found that the suspension of a sentence does not make the sentence less severe (see *S v Mogorosi* (CMA 007/2005)). In *S v Curtis* (CMA 101/2002) the CMA held that a sentence of suspended imprisonment and discharge with ignominy was shockingly harsh and that “[a] suspended sentence of imprisonment must be taken as if it could be served” (see also *S v Khumalo* (CMA 17/99)).

²⁵² Kruger at 28-78; Terblanche (2007) at 358; *R v Cloete* 1950 (4) SA 191 (O). Various examples exist in the CMA judgments. Most conditions of suspension imposed by the military courts are conditions that the accused does not commit the same or similar crimes for which he has been found guilty by the court. The conditions must also not be too narrowly defined. In *S v Molehe* (CMA 06/20010) the accused was convicted of the contravention of s 20(a) of the MDC, which is the theft of public property. The accused was sentenced to a fine as well as a suspended sentence of imprisonment and discharge with ignominy. The condition of suspension entailed that the accused could not be convicted of the contravention of s 20 of the MDC within the period of suspension, but did not include common law theft. “This means that if the accused commits theft of property that is not public property or does not belong to a comrade or an institution of the SANDF, the suspended sentence cannot be enforced. It surely was the intention of the court to prevent the accused to steal again and not only to prevent him from stealing from the state or his comrades.” The CMA varied the condition of suspension to read that the accused must not be convicted of theft during the time of his suspension, thereby including common law theft, s 20(a) and (b) of the MDC instances.

²⁵³ Kruger at 28-79. It has been found on numerous occasions that conditions that refer to groups of crimes are too wide and “not sufficiently clear” (see in this regard *S v Tsanshana* 1996 (2) SACR 157 (E) 159d-e; *S v Mjware* (1990) (1) SACR 388 (N); *S v Manqina* 1996 (1) SACR 258 (E)). This matter has however not yet been raised in the CMA where numerous cases refer to such conditions such as “crimes of which dishonesty is an element.”

²⁵⁴ Terblanche (2007) at 361.

²⁵⁵ Terblanche (2007) at 360. See also *S v Grobler* 1992 (1) SACR 184 (C); *S v Titus* 1996 (1) SACR 540 (C); *S v Robberts* 2000 (2) SACR 522 (SCA).

was followed by the CMA in *S v Khumalo*²⁵⁶ where the accused was sentenced to a fine as well as a suspended sentence of nine months' imprisonment and cashiering, suspended on condition that the accused does not contravene section 14(a) of the MDC (absence without leave) during the three year period of suspension. The CMA was of the opinion that the suspending condition was too harsh since one day AWOL may subsequently trigger the suspended sentence and send the accused to prison. The CMA consequently varied the condition to one where "the accused is not convicted of the contravention of section 14(a) of the Code for a consecutive period of 15 days or more, committed during the period of suspension."

The conditions of suspension will fall away after the period of suspension has elapsed, when the accused is promoted to his next rank²⁵⁷ or where he is discharged from the SANDF. It makes no difference whether he receives his discharge as a sentence, by means of resignation or whether his contract expires and is not renewed. Once a member leaves the employ of the SANDF, the suspended sentence imposed by the military court becomes unenforceable. In *S v Strydom*²⁵⁸ the military court sentenced the accused to discharge with ignominy from the SANDF and six months' imprisonment suspended for a period of two years on condition that the accused does not commit common law theft during the period of suspension. The CMA varied the sentence to one of discharge with ignominy from the SANDF. The court held that "[t]he sentence imposed should be executable. The accused is leaving the Force in any event, which would make the suspended sentence unenforceable." The Criminal Procedure Act²⁵⁹ requires that the court that imposed the suspended sentence or a court of equal or higher jurisdiction must put the sentence into operation if

²⁵⁶ *S v Khumalo* (CMA 17/99).

²⁵⁷ No policy documentation supporting this practice could be found, but it was confirmed by the CMA in *S v Kanu* (CMA 17/2010). Since members of the SANDF are generally due for promotion after a period of three years in their current rank, it can only be speculated that this fact may contribute to the limit of three years imposed on the suspension of military sentences.

²⁵⁸ *S v Strydom* (CMA 151/2001).

²⁵⁹ Section 279(9)(a) of the Criminal Procedure Act.

the offender does not comply with the conditions of suspension.²⁶⁰ Civilian courts have concurrent jurisdiction with military courts over offences committed in terms of the MDC.²⁶¹ The military court however only retains jurisdiction as long as the offender is a member of the SANDF.²⁶² After a discharge from the SANDF the military court no longer has such jurisdiction and the civilian court consequently no longer has concurrent jurisdiction. There will be no grounds on which to enforce a military court sentence. It must also be kept in mind that offences committed in the SANDF for which a member is sentenced by the military court are not entered into the civilian criminal record of the accused and civilian courts will therefore have no knowledge of the offences committed during the accused's employ in the SANDF.

5.8.1 Bringing into operation of suspended sentences

There are two situations in which a suspended sentence may be brought into operation:²⁶³

1. Where, during the reading of the previous convictions on the DD28, it becomes apparent that the accused was convicted of an offence during his current trial which violated the conditions of suspension of a previous suspended sentence.²⁶⁴
2. When a condition of suspension (other than a condition relating to the commission or conviction of a specific offence) has not been fulfilled.²⁶⁵

²⁶⁰ Du Toit *et al* at 28-51.

²⁶¹ Section 105(1) of the Defence Act 44 of 1957.

²⁶² Section 3 of the MDSMA.

²⁶³ A suspended sentence can only be brought into operation where a hearing is conducted regarding the alleged contravention of the suspensive conditions (see Terblanche (2007) at 374; *S v Payachee* 1973 (4) SA 531 (NC) 536B-C).

²⁶⁴ Section 33(2) of the MDSMA.

²⁶⁵ Section 36 of the MDSMA. This is generally in the event that an allegation is made that the accused did not comply with a positive suspensive condition (see Terblanche (2007) at 375).

In the first instance, the court will inform the prosecution and defence counsel of the possibility as soon as the DD28 has been read so that both parties may lead evidence or address the court on whether the suspended sentence should be brought into operation. All the evidence and arguments must be recorded and attached to the record of proceedings. The court has a discretion and need not bring a suspended sentence into operation. Where they decide not to bring the suspended sentence into operation the court may further suspend the sentence. Although civilian convictions are also recorded on the DD28, the military court does not have the jurisdiction to bring a suspended sentence imposed by a civilian court into operation.

In the second instance the accused has received a suspended sentence for which certain other conditions of suspension relating to the non-commission of the offence were laid down. A subsequent complaint or allegation is then made that one or more of these suspensive conditions were not fulfilled.²⁶⁶

A prosecution counsel will be assigned to the case and the matter will be brought before a CSMJ or a CMJ which must investigate the allegation that the individual did not comply with the conditions.²⁶⁷

Where the court is satisfied that the accused did in fact violate his conditions of suspension, the court may order that the accused be committed to serve the sentence or any unexpired portion of that sentence. If the court is not satisfied that the accused did in fact violate the conditions, they may further suspend the sentence.²⁶⁸

²⁶⁶ In *S v Swanepoel* (CMA 44/2010) the CMA varies a sentence of discharge to a sentence of 180 days' detention and reduction to the ranks suspended on condition that the accused undergoes re-evaluation of his medical classification and undergoes the prescribed treatment. If he should fail to undergo the re-evaluation as stipulated, the unit could request that the suspended sentence be imposed.

²⁶⁷ The procedure of proving that the accused did not comply with the suspensive conditions is similar to those described in *S v Gantsha* 1990 (2) SACR 104 (Ck) at 107e-108a; *Terblanche* (2007) at 375-376.

²⁶⁸ See also *Terblanche* (2007) at 376.

5.9 Post-sentence procedures

After the sentence and all court orders are announced in open court, the military judge must inform the accused that where he was sentenced to imprisonment (including suspended imprisonment), discharge with ignominy or, dismissal or discharge from the SANDF, the sentence will not be executed until the finding and the sentence is reviewed by the Court of Military Appeal.²⁶⁹ He is also informed of his rights in terms of appeal and review.²⁷⁰

Depending on the offence of which the accused was convicted he may be released from custody of his case immediately after the sentence is pronounced.²⁷¹ The accused must be kept in custody pending the automatic review of his case but may apply to the local representative of the Adjutant General for release pending his review.²⁷² The accused may then be released subject to certain conditions for his release and where he refuses to attend the promulgation of his sentence when it is upheld on review, he will be re-arrested and kept in custody.

5.9.1 Promulgation of sentence

Every finding by a military court, irrespective of whether it is a conviction or an acquittal, sentence and order made by the military court must be promulgated as soon as possible after the completion of the trial.²⁷³ Promulgation of the sentence must be done on parade according to the customs of the relevant arm

²⁶⁹ Rule 59(12)(a) of the MDSMA.

²⁷⁰ Rule 59 of the MDSMA and r 68 of the MDSMA applicable to the CODH. See the discussion regarding the right of appeal and review in ch 7 at para 7.6.2 below.

²⁷¹ Sections 34(9)-(10) of the MDSMA which provides that individuals sentenced to a reprimand, extra duties, corrective punishment, confinement to barracks, a fine, reversion of acting to temporary rank, reduction to any lower rank, seniority in rank or reduction to the ranks as well as a sentence of detention or imprisonment that is wholly suspended, may be released immediately.

²⁷² Section 34(11) of the MDSMA. Where the accused is released, the period that he was not in custody will not be included when calculating the period of his sentence (see in this regard s 34(12) of the MDSMA).

²⁷³ Section 35 of the MDSMA.

of service or in another manner as determined by the officer commanding of the unit. The finding, sentence and orders must also be published in the unit orders.²⁷⁴

All relevant information regarding the force number, rank and name, the particulars of the offence, the finding and sentence and orders, where applicable, is noted on a certificate of promulgation and read out during the promulgation. The unit must indicate on the certificate which manner of promulgation was followed, the date on and the unit order in which the promulgation was published to ensure that units comply with the promulgation requirements.²⁷⁵

Where an accused was sentenced to imprisonment, suspended imprisonment, cashiering, discharge with ignominy, dismissal from the SANDF or discharge from the SANDF, which must be confirmed by the CMA before it can be executed, the sentence will be executed on parade simultaneously with the promulgation of that sentence.²⁷⁶

Although the promulgation of the sentence is not part of the sentencing process, it holds an element of shaming.²⁷⁷ The reason for the 'shaming' in this context is not the stigmatisation of the offender. Promulgation should rather be seen as 're-integrative shaming' which "strengthens the moral bonds between the offender and the community."²⁷⁸ By promulgating the sentence, the community can see that justice was done. It is not only guilty findings that are promulgated but also findings of not guilty. This is an important aspect for the accused because often, especially in a close knit environment of a unit, people

²⁷⁴ Rule 69(1) of the MDSMA. Other methods of promulgation may include reading out the finding, sentence and orders at the regular communication session scheduled between the officer commanding and members of the unit or at the monthly Big Tea.

²⁷⁵ Rule 70(1) of the MDSMA.

²⁷⁶ Rule 69(2) of the MDSMA read with s 34(2) of the MDSMA.

²⁷⁷ See the discussion on shaming punishments as discussed in ch 6 at para 6.2.2.2 below.

²⁷⁸ Claasen L H "Shaming as a Form of Restorative Justice – a Possible South African Application" (2006) *Primus* 11 at 17.

may hear that the accused was charged. It is a positive aspect for the restoration of the accused's dignity if those same individuals also hear that he was found not guilty and that his name has been cleared. The deterrent value of reading out the particulars of the accused, the finding and sentence must not be underestimated.

ADDENDUM A TO CHAPTER 5

Periods of imprisonment prescribed by the Military Discipline Code

Maximum period of imprisonment	Offence	Description
30 years	Sec 4 MDC	Offences that relate to the endangering of the safety of forces. These offences relate to shameful conduct, such as shamefully abandoning or surrendering an aircraft or garrison, treacherously communicating with the enemy, having been a prisoner of war and subsequently serving the enemy voluntarily, and other related conduct. These offences relate to the offence of treason.
10 years	Sec 5 MDC	Where a person in command of troops fails to engage the enemy in an appropriate manner or withdraws from action without proper cause.
	Sec 6 MDC	This section pertains to shameful conduct in action that does not amount to section 4 instances. It includes shamefully abandoning arms or ammunition, harbouring or protecting the enemy or showing cowardice in behaviour towards the enemy.
	Sec 7 MDC	These include behaviour that amounts to a failure to report activities that are likely to endanger the safety of the forces, such as reporting a person who is assisting the enemy in acquiring arms or ammunition.

	Sec 13 MDC	Where the accused deserts from the SANDF while on service.
	Sec 20 MDC	Where the accused steals property belonging to the SANDF or to an institution of the SANDF or the receiving of such property, knowing it to be stolen.
	Sec 21 MDC	These offences relate to the acquisition or the disposal of public property. This includes selling, disposing or lending public property without the necessary authority or accepting any fee or reward for the acquisition of the property.
5 years	Sec 10 MDC	Where an accused commits mutiny or conspires with others to commit mutiny.
	Sec 11 MDC	The interference with any guards, watch keepers and sentries or giving false alarms committed while the accused is on service.
	Sec 15 MDC	Assault of a superior officer, pointing a firearm at the superior or drawing any weapon against a superior officer.
	Sec 18 MDC	Where an accused malingers, feigns disease or injures himself or someone else with the intention of avoiding service or rendering another person unfit to do their service or duty.
	Sec 19(1) MDC	Where an accused willfully defies the lawful commands given to him personally by his superior officer in the execution of his duty while on service.
	Sec 22 MDC	Where an accused willfully or negligently allows a vessel or aircraft to be hazarded, stranded or wrecked.

3 years	Sec 16 MDC	This offence pertains to the ill-treatment of, assault of or pointing of a firearm at a subordinate by a superior officer.
2 years	Sec 8 MDC	These relate to offences relating to signals, watchwords and the unauthorised disclosure of information. This includes the altering or delay of signals and making watchwords known to individuals who are not authorised to know them. Unauthorised disclosure of troop movements or regarding aircraft and vessels are also punishable under this offence.
	Sec 9 MDC	Any unauthorised interference with aircraft or vessels that so amounts to an offence under one of the other provisions is prohibited in terms of this section.
	Sec 12 MDC	Dereliction of duty by a sentry or a watch keeper is prohibited under this provision. This includes instances where the accused leaves his post before being properly relieved, sleeps on duty or is under the influence of alcohol or drugs.
	Sec 13 MDC	All other instances of desertion that are not committed while the accused is on service.
	Sec 19(1) MDC	The willful defiance of authority and disobeying of a lawful command in those instances where the accused is not on service.
	Sec 20(b) MDC	Where the accused steals property belonging to another person who is also subject to the MDC. These are instances of theft from a comrade or fellow soldier.

	Sec 23 MDC	This includes instances where a person willfully abandons, damages or destroys public property or property belonging to an institution of the SANDF or diverts or detains supplies without sufficient cause.
one year (these are categorised as disciplinary offences.)	Sec 11 MDC	Interfering with guards, watch keepers or sentries or giving a false alarm in circumstances where the accused is not on service.
	Sec 12 MDC	Where the accused is found guilty of dereliction of duty by sleeping on duty, leaving his place of duty before being properly relieved or being intoxicated on duty in circumstances where the accused is not on service.
	Sec 14 MDC	This includes any of the offences that pertain to absence without leave or failing to report for duty or at a place of parade.
	Sec 19 MDC	The disobeying of lawful orders given by a superior officer in circumstances not amounting to a contravention of section 19(1) MDC. This also includes the disobeying of directions given by the commander of a vessel or aircraft, irrespective of the rank or status of such commander. The commander of the aircraft or vessel may also be a civilian.
	Sec 24 MDC	This constitutes the negligent loss, damage or destruction of kit, equipment or public property that was issued to the offender in the use of his duty.

	Sec 25 MDC	This is the willful or negligent damage or destruction of public property. This offence also includes a failure to prevent the willful or negligent damage or destruction of such property.
	Sec 26 MDC	Where a person is responsible for stores, stock or money in any SANDF store, office or institution and subsequently negligently performs their duties, resulting in deficiencies in the stores.
	Sec 27 MDC	Where a person takes or uses an article issued to another person without permission or uses it otherwise than in the public interest.
	Sec 28 MDC	This section regulates the negligent or reckless driving of a motor vehicle that is public property or flying an aircraft in a negligent or reckless manner while under the influence of alcohol or narcotics.
	Sec 29 MDC	Fraudulent enlistment which includes enrolling in any portion of the SANDF without disclosing that he has not been regularly discharged from another portion of the SANDF or the Armed Forces of another country or willfully giving a false answer on an enrolment paper.
	Sec 30 MDC	Making false entries or statements on official documents.
	Sec 31 MDC	Making false accusations or statements against another person who is subject to the MDC.
	Sec 37 MDC	Where an accused resists or willfully obstructs any member of the SANDF in the performance

		of any of his duties relating to the arrest, custody or confinement of a person subject to the MDC or where he refuses or neglects to hand over any person under his control who is accused of an offence punishable by a civil court when requested to do so by an appropriate civil authority.
	Sec 46 MDC	This section includes any conduct that causes actual or potential prejudice to good order and military discipline.
6 months	Sec 17 MDC	The contravention of this section entails the use of threatening, insubordinate or insulting language or displaying insubordination or contempt towards his superior officer.
	Sec 19(4) MDC	Where a patient in a hospital willfully disobeys any lawful direction concerning his hospital or medical treatment that is given to him by the hospital staff.
	Sec 19(5) MDC	The negligent disobeying of a unit, formation or force order where it was the duty of the accused to obey the order and he was under an obligation to have knowledge of the particular order.
	Sec 34 MDC	This section includes various offences that relate to military courts, such as failing to attend as a witness after he has been summoned to appear as such or refusing to produce a document in his possession or under his control which he is in terms of law required to produce.

	Sec 38 MDC	These include offences related to the arrest of members, such as where the accused orders another into arrest without just cause or unnecessarily detains a person in arrest or custody.
	Sec 43 MDC	This refers to instances where the accused makes any false representation regarding his rank.
	Sec 45 MDC	This relates to the behaviour of the accused at any time where the accused behaves in a riotous or unseemly fashion or fails to suppress any riotous or unseemly behaviour by any other person subject to the MDC.
3 months	Sec 33 MDC	Where a person is drunk on or off duty or unfits himself for the proper performance of his duty due to the excessive consumption of alcohol or narcotics.
	Sec 36 MDC	Where an accused refuses to answer questions, produce documents or gives false evidence at a preliminary investigation or a board of inquiry.
	Sec 44 MDC	Where an accused wears any decoration or medal that he is not entitled to or wear any badge, emblem, colours or any insignia of a political organisation.
one month	Sec 42 MDC	This offence relates to the redress of wrongs procedure and punishes an accused where he received a complaint but unduly delayed addressing the complaint or sending it up to higher authority. This section is also contravened where the accused puts in a

		redress of wrongs but fails to follow the correct channels of command.
21 days	Sec 34(2) MDC	This concerns the willful conduct of an individual that is likely to bring a military court into contempt or disrepute and the court may summarily order the accused to be imprisoned for the period or any lesser punishment.

CHAPTER 6

MILITARY SENTENCES

6.1 Introduction

In order to appreciate the possible impact of the Bill of Rights on the punishments imposed by military courts, it is important to investigate the various punishments available to the military courts, their possible consequences and constitutional vulnerabilities. The discussion is mainly centered on the unique military punishments, but will also include a short section on imprisonment, fines and reprimands which, although not unique to the military environment, may find different application than in the civilian environment.

6.2 Punishments

6.2.1 Imprisonment

Imprisonment is one of the most severe punishments that can be imposed by our courts¹ and is defined as “admission into a prison and confinement of an offender in a prison for the duration determined by a court.”² Imprisonment is governed by Act 111 of 1998 and a prison is defined as “any place established under this Act as a place for the...detention, confinement training or treatment of persons liable to detention in custody.”³

¹ Krugel W F & Terblanche S S *Praktiese Vonnisoplegging* (2010) at 206; Van Zyl Smit D “Sentencing and Punishment” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 49-26; Joubert J J (ed) *Criminal Procedure Handbook* 9 ed (2009) at 297. This is also true for military courts.

² Terblanche S S *A Guide to Sentencing in South Arica* 2 ed (2007) at 211; Kruger A *Hiemstra’s Criminal Procedure* (2008) at 28-27.

³ Section 1 of the Correctional Services Act 111 of 1998; Terblanche (2007) at 211.

Although section 276(1) of the Criminal Procedure Act provides for six forms of imprisonment as punishment, these forms of punishment are essentially the same since the prisoner is treated the same regardless of the type of imprisonment imposed by the court.⁴ Imprisonment is not clearly defined in the military sentencing context. The definition in terms of the MDC is vague and defined as “imprisonment with or without compulsory labour”.⁵ It is not clear whether the imprisonment authorised by section 12 of the MDSMA would include a reference to the other forms of imprisonment or is only referring to a determinate period of imprisonment.

The following should be considered. The CSMJ is not limited in the extent to which it can sentence a military offender to imprisonment. Although section 12 of the MDSMA only refers to a sentence of “imprisonment” in general the military court may impose determinate as well as life imprisonment. The maximum period of imprisonment provided for in the penalty clauses of the military offences indicates a determinate term of imprisonment. Therefore military courts may only, when sentencing an offender to imprisonment, impose a determinate period of imprisonment, subject to a maximum period of two years in the case of a CMJ. The minimum period for which imprisonment can be imposed by the military courts is 30 days⁶ with no limit on the maximum

⁴ Imprisonment includes determinate imprisonment, imprisonment for life, indefinite imprisonment following a declaration as a dangerous or habitual criminal, periodical imprisonment as well as imprisonment from which an accused can be released on correctional supervision (see Terblanche (2007) at 26); Kruger at 28-13 to 28-14; Du Toit E *et al* *Commentary on the Criminal Procedure Act* (1997) at 28-9; Joubert at 298 who regards these forms as “different terms of imprisonment, rather than completely separate kinds of punishment.”

⁵ Section 1 of the MDC. This definition is however outdated and should be reconsidered. Imprisonment with hard labour was abolished by the Criminal Law Amendment Act 16 of 1959 and it is doubtful that any court may still order imprisonment with any form of labour (see Van Zyl Smit D “Sentencing and Punishment” in Woolman S & Chaskalson M (eds) *Constitutional Law of South Africa* (1996) at 28-2). It is submitted that the definition as found in the Criminal Procedure Act and the Correctional Services Act may provide valuable guidelines in formulating an appropriate definition in military law. Of relevance is the opinion of the South African Law Reform Commission *Discussion Paper 123 Statutory Law Revision: Legislation Administered by the Department of Defence Project 25* (2011) at 23.

⁶ Section 93(2)(a) of the MDC. The use of threatening or insulting language at a military court serves as exception when an accused willfully causes a disturbance or performs any other act that may bring the military court into contempt or disrepute. In such instances the court can

period of time for the CSMJ, except the limits provided in the penalty clause itself. For common law offences, with no prescribed maximum period, the MDSMA merely authorises the military courts to impose “imprisonment” as a sentence without indicating which forms of imprisonment may be imposed on the offender. Although not specifically provided for, the CSMJ may in fact impose a sentence of imprisonment for life.⁷

Whether other forms of imprisonment, such as periodical imprisonment or declaration as a dangerous criminal, might be imposed by military courts is a different matter altogether. Since the Criminal Procedure Act 51 of 1977 limits the power to declare any person a habitual or dangerous criminal to “a superior court or a regional court,”⁸ it is submitted that no form of indefinite imprisonment is available to military courts. The same argument applies to a sentence of imprisonment from which the accused can be released on correctional supervision:⁹ Military courts cannot impose correctional supervision and would therefore not be able to impose a sentence of imprisonment which could result in that very sentence. Rule 21 of the MDSMA clearly states that the “criminal procedure as applied by the civilian courts of the Republic does not supplement the powers of the military courts or these rules” and since correctional

summarily order that the offender be imprisoned for a period not exceeding 21 days (see s 34(2) of the MDC). Compare the minimum period of imprisonment by a military court with that of a civilian court of four days (see s 284 of the Criminal Procedure Act; Du Toit *et al* at 28-20C; Kruger at 28-45; Joubert at 299).

⁷ At the trial for the murder of a 14-year old Burundi prostitute while he was on deployment, flight-sergeant Flippie Venter was found guilty by a CSMJ in 2007 and sentenced to 24 years’ imprisonment. The prosecution counsel argued for a sentence of *life imprisonment* but the senior military judge was satisfied that 24 years’ imprisonment would be an appropriate sentence (see Hlala P “24 Years’ Jail For Killing Burundi Teen” *Pretoria News* 05/09/07). The CMA however found that 24 years’ imprisonment was too harsh and amended the sentence to one of 18 years’ imprisonment and discharge from the SANDF with ignominy (see *S v Venter* (CMA 72/2008)). The authority to impose life imprisonment creates an interesting contradiction. In the civilian environment only the High Court may impose life imprisonment due to the limited sentencing jurisdiction of the lower courts (see Krugel & Terblanche at 205). In ch 4 above it was intimated that the CSMJ and CMJ may have the status analogous to a Magistrate’s Court, yet here is an example of a lower court with a much higher sentencing jurisdiction regarding imprisonment than the ordinary court of similar status. The maximum penalty allowed by British court martial is life imprisonment (see Office of the Judge Advocate General *Guidance on Sentencing in the Court Martial* (2009) at 12).

⁸ Sections 286 and 286A respectively.

⁹ Section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

supervision is not a sentencing option in terms of section 12 of the MDSMA, it is not a sentence that they may impose. A sentence to periodical imprisonment, as provided for in terms of section 285 of the Criminal Procedure Act would not violate rule 21 of the MDSMA since periodical imprisonment does not give the military court more sentencing powers than it already has. It is also a determinate sentence. It may further be justified in terms of section 124 of the MDSMA which provides that where a matter arises for which no provision has been made, the court must follow the course that is consistent with the MDSMA, the MDC and which serves the requirements of justice. However, one of the main reasons for imposing periodical imprisonment is to allow the offender to keep his employment and provide for his family.¹⁰ Where an offender is sentenced to imprisonment by a military court he must also be discharged from the SANDF, thereby removing the incentive for imposing periodical imprisonment. It is submitted, therefore, that it would not be possible to argue convincingly that it is the intention of the legislature that periodical imprisonment should be available to military courts.

Although not specifically stated in the Correctional Services Act 111 of 1998, the purpose of imprisonment is to punish the offender, to prevent further crime and to rehabilitate the offender.¹¹

Determinate imprisonment is the form of imprisonment most commonly imposed by civilian courts.¹² Although imprisonment is not a sentence that is commonly imposed in military law, determinate imprisonment is the form usually imposed by military courts when sentencing to imprisonment.¹³ This

¹⁰ Du Toit *et al* at 28-21; Joubert at 302.

¹¹ Terblanche (2007) at 211-212. The CMA found in *S v Hunter* (CMA 66/2002) that "[i]mprisonment as punishment should be aimed at, inter alia, rehabilitating a person from repeating the unacceptable behaviour of committing offences."

¹² Terblanche (2007) at 217; Joubert at 298. OJAG at 12 argues that the length of the sentence imposed by the military court should follow the civilian court's example.

¹³ It is possible for the military court to sentence an offender to life imprisonment but after a perusal of CMA judgments from 1999 to 2011 no example could be found of any other form of imprisonment than determinate imprisonment imposed by the military courts.

type of imprisonment entails that the court “determines the duration of the sentence, without any strings attached.”¹⁴

The decision to impose imprisonment is a difficult one and outside of the *Zinn* triad,¹⁵ there are no real guidelines in our law on when to impose imprisonment.¹⁶ What is clear however is that imprisonment should not be imposed if it can be avoided.¹⁷ There are other sentences available that could be regarded as appropriate sentences without resorting to imprisonment. Under certain circumstances correctional supervision might be one such sentence.¹⁸ However, this does not mean that imprisonment should never be imposed. The punishment must ultimately fit the seriousness of the crime.¹⁹ Military courts do not have the option of imposing correctional supervision but section 12 of the MDSMA provides for a range of sentences differing in severity between a fine and imprisonment and which might be considered appropriate sentences. Since imprisonment is not an appropriate sentence for a disciplinary offence, a sentence of imprisonment should not be imposed by a military court for an offence unless the same offence would also attract a sentence of imprisonment in the civilian courts.²⁰ In the military, with the emphasis on the enforcement of discipline, it would be more acceptable to

¹⁴ Terblanche (2007) at 217.

¹⁵ See *S v Zinn* 1969 (2) SA 537 (A); ch 5 at para 5.4.

¹⁶ Terblanche (2007) at 219. The CMA found in a number of cases that effective imprisonment may in fact be an appropriate sentence for first offenders. See in this regard *S v Ntetema* (CMA 14/2007) where the court found that effective or suspended imprisonment may be an appropriate sentence for a first offender in cases of assault with the intent to do grievous bodily harm; *S v Schmahl* (CMA 13/2007) where effective imprisonment was seen as an appropriate sentence for members of the military police convicted of criminal offences, even though they were first offenders; *S v Radebe* (CMA 49/2008) where the court stated that the accused, who was convicted of theft of paper worth R2375 and was sentenced to discharge with ignominy, should consider himself lucky that he was not sentenced to effective imprisonment, which would have been an appropriate sentence under the circumstances.

¹⁷ Krugel & Terblanche at 203; *Persadh v R* 1944 NPD 357 at 358; *S v Seoela* 1996 (2) SACR 616 (O) at 620c.

¹⁸ *Du Toit et al* at 28-10H; Kruger at 28-33; *S v Chipape* 2010 (1) SACR 245 (GNP) para 28.

¹⁹ *S v Holder* 1979 (2) SA 70 (A) at 77H-78A; *S v Samuels* 2011 (1) SACR 9 (SCA) paras 9-10; *Du Toit et al* at 28-10B-4.

²⁰ OJAG at 12. It should be kept in mind that certain offences may be seen as more serious in a military context and may therefore attract a sentence of imprisonment while a civilian court may hold a different opinion.

sentence an offender to forms of punishment that have the improvement of discipline as main purpose, as the enforcement of discipline could hardly be a legitimate reason for imposing imprisonment.²¹ In the military context imprisonment should only be imposed for serious criminal offences.

In determining the duration of the prison sentence, courts have a wide discretion, limited only by their jurisdiction and the nature of the crime. Most offences heard by military courts are of a disciplinary nature and the criminal offences generally cannot be seen as serious enough to justify a long term of imprisonment. Criminal offences justifying long-term imprisonment would be those committed outside the borders of the Republic, such as murder, rape, treason and culpable homicide. It is submitted that offences over which the military court has jurisdiction inside the country's borders are not sufficiently serious to justify long-term imprisonment. The reason for imposing long-term imprisonment is to protect the community by removing dangerous criminals from it.²² The case of flight-sergeant Venter, who was sentenced to 18 years' imprisonment, serves as extreme example.²³ In *S v Timakwe*²⁴ the CMA confirmed a sentence of effective imprisonment for a period of 23 years plus discharge from the SANDF with ignominy for a conviction, *inter alia*, of murder committed in Burundi. If imprisonment is considered an appropriate sentence, military courts will generally impose relatively short periods of imprisonment.²⁵

²¹ See *S v Miya* (CMA 195/2001) where the accused was convicted of several charges of absence without leave (AWOL) for a combined period of 20 days, 23 hours and 15 minutes. He was sentenced to a fine of R3000, 2 months imprisonment and discharge with ignominy, of which the whole period of imprisonment and discharge with ignominy was suspended for a period of 3 years. The CMA found that the sentence of imprisonment and discharge with ignominy was not an appropriate sentence for purely disciplinary offences and varied the sentence to one of a fine of R3000. In *S v Mogajane* (CMA 68/2000) the court similarly found that a sentence of a fine of R600 and a suspended sentence of imprisonment of 30 days and discharge from the SANDF was not an appropriate sentence for disciplinary offences.

²² Kruger at 28-29. Most military offences are of a disciplinary nature and the military offenders cannot be regarded as dangerous criminals.

²³ *S v Venter* (CMA 72/2008).

²⁴ *S v Timakwe* (CMA 64/2005).

²⁵ In *S v Afrika* (CMA 88/2000) the accused was found guilty, *inter alia*, of attempted fraud and sentenced to a fine of R1000, 12 months imprisonment and cashiering of which the imprisonment and cashiering were wholly suspended for a period of three years. The CMA found that although imprisonment is an appropriate sentence for fraud, the period of

Short periods of imprisonment may in fact be advantageous under certain circumstances in that²⁶

[a] short term of imprisonment is sometimes necessary to denounce an offence which, whilst serious, is not so serious as to merit lengthy imprisonment. It may also be required in order to give effect to the principle of deterrence either in respect of the particular wrongdoer or as an exercise in general deterrence.

This statement, which predates the introduction of correctional supervision, may no longer be true as correctional supervision has to a certain extent taken over from short-term imprisonment as the sentence to impose when a fine is not sufficiently severe.²⁷ Correctional supervision can be imposed in those instances where the court would like to show its condemnation of the offence but does not feel that it is appropriate to merely impose a fine. Military courts may not impose correctional supervision but there are a number of punishments between imprisonment and a fine that will show the condemnation of the military court and act as a deterrent without having to imprison the offender, such as the reduction of an accused rank, detention or a discharge from the SANDF.

Not only is imprisonment a serious sentence in its own right, the consequences of a sentence of imprisonment in the military environment also warrants consideration.

imprisonment was shockingly inappropriate for a first offender and considering other mitigating factors varied the sentence to suspended period of three months' imprisonment and cashiering. In *S v Hunter* (CMA 66/2002) a period of three years' imprisonment and cashiering was seen as "disturbingly inappropriate" for a conviction of 12 charges of common law fraud and varied to a suspended sentence of six months' imprisonment and cashiering.

²⁶ *S v Sakabula* 1975 (3) SA 784 (C) at 786D. Short periods have however in other instances been seen as inappropriate (see *Krugel & Terblanche* at 205; *Du Toit et al* at 28-10B-9; *S v Abt* 1975 (1) SA 214 (A) at 219H; *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo* 2009 (2) SACR 361 (SCA)).

²⁷ See *S v R* 1993 (1) SACR 476 (A) at 488F-H.

An officer sentenced to imprisonment must also be sentenced to cashiering.²⁸ The cashiering must take place before the officer is committed to prison. When any other rank than that of an officer is sentenced to imprisonment that individual must also be sentenced to discharge with ignominy.²⁹ Where an individual is cashiered or discharged with ignominy, that individual's employment is terminated and he is no longer a member of the SANDF.³⁰ He will therefore no longer be subject to the MDC and military law. However, the sentence of imprisonment imposed by the military court will continue to run even though the accused is no longer subject to the military court that imposed the sentence in the first place.³¹

Unlike other military sentences, a sentence of imprisonment does not commence immediately after it has been announced in open court.³² Imprisonment is one of the punishments where the sentence will not be executed until such time as the matter has been reviewed by the CMA.³³ Once it has been reviewed and confirmed, the sentence is deemed to have commenced at the time it was announced in open court.³⁴

²⁸ Section 93(3) of the MDC. See the discussion on cashiering at 6.3.2.2 below.

²⁹ Section 93(4) of the MDC.

³⁰ Section 59(1)(d) of the Defence Act 42 of 2002.

³¹ Section 93(6)(b) of the MDC. This is also the case where the accused is sentenced to detention (see *Prinsloo v Union Government (Minister of Defence)* 1946 TPD 132).

³² Section 118 of the MDC.

³³ Section 34(2) of the MDSMA states that "[e]very sentence of imprisonment, including a suspended sentence of imprisonment, cashiering, discharge with ignominy, dismissal or discharge shall be reviewed by a Court of Military Appeals and shall not be executed until the review has been completed" (see also r 59(2)(a) of the MDSMA).

³⁴ Rule 113 of the MDSMA. This rule must be read with s 118(2) of the MDSMA. Where a sentence is varied by the CMA to imprisonment, detention or field punishment, the sentence is deemed to have started at the time that the sentence was varied by the CMA. Rule 113 of the MDSMA created some difficulty in the recent past in that an accused who was released from custody in terms of s 34(9) of the MDSMA usually returned to work pending review of his case and received his salary as usual. Once the sentence is confirmed however, the date of termination of sentence is backdated from the date of the CMA judgment to the date of the pronouncement of the sentence in court. The personnel system then automatically read the months of remuneration as an overpayment and erroneously deducted all money paid to the accused as his salary for the period awaiting review from his pension money. This unintended consequence seems to be rectified.

Where the accused is sentenced to imprisonment that accused must be detained pending the review of his case.³⁵ However, the CMA only sits on an *ad hoc* basis resulting in a situation where a case may take up to 18 months before it is reviewed by the CMA.³⁶ It would be a gross violation of the accused's rights to keep him in custody for an extended period of time pending the outcome of the review process. The MDSMA therefore provides for the release of the accused pending the review of his case. After completion of the trial the accused may apply to the local representative of the Adjutant General³⁷ to be released pending the finalisation of his review. The local representative of the Adjutant General may impose certain conditions for the release of the accused.³⁸ Any period spent in custody awaiting review will be included in the calculation when determining the date of completion of his sentence of imprisonment.³⁹

An accused is also not compelled to perform any duties in terms of his sentence of imprisonment until such time as the finalisation of the review by the CMA.⁴⁰ Where an accused has to perform certain duties or labour due to a sentence of imprisonment, he must first be medically examined prior to being required to perform the duty and in the event of being found medically unfit, he is not compelled to do such duty or labour.⁴¹

³⁵ Section 34(9) of the MDSMA. Where the sentence of imprisonment is wholly suspended the accused must be released immediately after announcement of the sentence: see s 34(10) of the MDSMA.

³⁶ This situation might have changed since the CMA currently convenes on a more regular basis (see the discussion in ch 7 at para 7.5.3.1 below).

³⁷ This person is normally the Officer in Charge (OIC) of the relevant Legato.

³⁸ Section 34(11) of the MDSMA; *S v Visagie* (CMA 34/2000) where the CMA stated that the local representative of the Adjutant General should not hesitate to exercise their discretion. The conditions of release may vary since no guidelines are provided by law. However, it has been this author's experience that one such condition is invariably that the accused must report to work every day, failure of which will result in his re-arrest and subsequent confinement. It is also generally provided that the accused must report to a superior every day he is required to attend his place of duty.

³⁹ Rule 113 of the MDSMA.

⁴⁰ Rule 113 of the MDSMA.

⁴¹ This applies equally to sentences of detention and field punishment (see r 111(b) of the MDSMA in this regard).

The court is not the only role-player that influences a sentence of imprisonment. The Minister of Defence and Military Veterans may establish one or more prisons in the RSA to which offenders sentenced to imprisonment by military courts may be committed to complete their sentence or she may determine that they serve their sentence in a prison established by the Department of Corrections in terms of the Corrections Services Act.⁴² There are currently no prisons established by the Minister and all offenders sentenced by military courts serve their sentences in prisons under the control of the Department of Corrections.⁴³

The Minister may order that a person who has been sentenced to imprisonment serves their sentence in another place in lieu of a prison under the control of the Department of Corrections. In the event that a sentence of less than 14 days is imposed the Minister may also order that the sentence be served in this other appointed place.⁴⁴ A sentence of imprisonment need therefore not necessarily mean that the military offender must serve their sentence in a prison. The Adjutant-General may in fact also order that a sentence of imprisonment be served at the detention barracks.⁴⁵

Although no instance was found where such an order had been made, it is a more likely scenario where an accused is prosecuted and sentenced outside

⁴² Section 120(1) of the MDC. In the unlikely event that the Minister does establish such a prison, she is authorised to make regulations governing this prison (see s 120(3) of the MDC for the guidelines regarding these regulations).

⁴³ Section 120(1) of the MDC. British Service members sentenced to imprisonment are also sent to a civilian prison under the auspices of the Department of Prisons. The US military corrections system is however operated independently from the US Bureau of Prisons. The Army has overall responsibility with the various arms of service operating subordinate correctional facilities. Military prisoners do not serve their sentence in civilian prisons. Very few inmates, if any, return to service upon completion of their sentence. Although rehabilitation is a goal set for military prisons in terms of their Regulations, this is interpreted as rehabilitation of inmates in preparation for their return to civilian life (see Morris L J *Military Justice: A Guide to the Issues* (2010) at 119-120).

⁴⁴ Section 112 of the MDC. Although the minimum period of imprisonment is in fact 30 days, this probably refers to contempt of court punishments in terms of s 34(2) of the MDC where the prescribed punishment is imprisonment not exceeding 21 days.

⁴⁵ Section 119 of the MDC. No record could be found of such an order and the current position is that offenders sentenced to imprisonment are handed over to the Department of Corrections for the execution of their sentences.

the borders of the RSA. Military courts have extra-territorial jurisdiction over their members⁴⁶ and specific provision is made for sentences of imprisonment and detention that must be served outside the borders of the Republic.⁴⁷ The General Officer Commanding, SANDF, may authorise any officer in command of troops outside the borders of the Republic to establish detention barracks where offenders can be committed and serve their sentence.⁴⁸ Where a person is sentenced to imprisonment outside the borders of the Republic he is usually returned to the Republic to serve his sentence. However, if it is not possible to do so under the circumstances, then the accused will serve his sentence in the detention barracks that were established by the officer in command of the troops on service.⁴⁹

All the regulations applicable to the detention barracks in South Africa are applicable to any detention barracks outside of the Republic and while the General Officer Commanding is authorised to make written changes to these regulations as required, he may not make any of the conditions more severe for any inmates.⁵⁰

⁴⁶ Section 3(1) of the MDSMA states that “[t]his Act shall...apply to any person subject to the Code irrespective whether such person is within or outside the Republic.” Section 5 of the MDSMA further states that “[w]henver this Act is enforced outside the Republic, any finding, sentence, penalty, fine or order made, pronounced or imposed in terms of its provisions shall be as valid and effectual, and shall be carried into effect, as if it had been made, pronounced or imposed in the Republic.”

⁴⁷ Section 121 of the MDC.

⁴⁸ Section 121(1) of the MDC.

⁴⁹ Section 121(2) of the MDC. The case of flight-sergeant Venter once again serves as example. The trial was started in Burundi but later moved to South Africa and he is currently serving his sentence in a South African prison. From interviews with a number of military legal practitioners who have deployed, it can be stated that all members on deployment will be returned to South Africa to serve their sentences. It must also be kept in mind that only serious offences will be punished with effective imprisonment and a member who has committed such a serious offence while on deployment will be returned to South Africa in order to avoid further embarrassment for the SANDF. Information regarding the offences committed by SANDF members on deployment and subsequent sentences is regarded as classified information by the SANDF and was not available for the purposes of this research, except those cases reviewed by the CMA.

⁵⁰ Section 121(5) of the MDC.

Where a sentence of imprisonment is imposed on an accused where that accused is already serving a sentence of imprisonment, the new sentence will only commence after the expiration of the first sentence, irrespective of any provisions to the contrary.⁵¹ A sentence of imprisonment can be wholly suspended by the military court for a period of three years.⁵²

Whenever a person is sentenced to imprisonment by a military court, the person in charge of the prison must receive, admit and keep the offender in custody in compliance with a warrant of committal.⁵³ The warrant of committal can be signed by the presiding military judge, the commanding officer of the offender, the adjutant of the offender, the Adjutant General or the local representative of the Adjutant General.⁵⁴

Since military members sentenced to imprisonment serve their sentence at prisons from the Department of Corrections, the release policy of the Department will apply. The military judge cannot make any recommendation regarding the release of the military offender and offenders may be released on parole in accordance with policy. Where an offender is sentenced to a period of less than 24 months' imprisonment the National Commissioner may release the prisoner on parole or correctional supervision without any period of effective imprisonment actually being served.⁵⁵ Other than when released on community corrections by the National Commissioner, no further formalities are required.⁵⁶ If an offender is sentenced to a determinate period of imprisonment

⁵¹ Rule 111(c) of the MDSMA. This will result in flight-sergeant Venter's 18 year prison term only commencing once he has completed the 10 year sentence he was serving at the time of the military trial for killing his children and assaulting his wife, imposed by a civilian court.

⁵² Section 12(3) of the MDSMA. Imprisonment and detention are the only two sentences imposed by a military court that can be suspended. Although detention can be wholly or partially suspended, this section does not provide for the partial suspension of imprisonment.

⁵³ Section 122 of the MDC.

⁵⁴ Section 37 of the MDSMA.

⁵⁵ Section 75(7)(a) of the Correctional Services Act; Terblanche (2007) at 228; Krugel & Terblanche at 209-211. Anecdotal evidence from military defence counsel shows that this practice is frequently employed by the Department of Correctional Services regarding offenders sentenced by military courts.

⁵⁶ Section 52 of the Correctional Services Act 111 of 1998.

of two years or more the prisoner must generally serve at least half of his sentence before he can be considered for parole.⁵⁷

It is not only sentences of imprisonment imposed by military courts that influence members of the SANDF. In cases where an accused has been found guilty by a civilian court and sentenced to imprisonment without the option of a fine, the accused's employment in the SANDF is also terminated.⁵⁸

6.2.2 Cashiering

Cashiering originates from British military law and has not changed fundamentally, even after the advent of the Constitution. The punishment is not defined in the defence legislation but in *Collins English Dictionary*⁵⁹ is defined as "to dismiss with dishonour from the armed forces."⁶⁰ The South African Law Reform Commission defines it as "the dishonourable dismissal (separation from the service) of an officer coupled with the cancellation of that officer's commission, thus barring the convicted offender from holding military office."⁶¹

The defence legislation also does not set out how a sentence of cashiering must be executed. The only document setting out the process of cashiering is a standing order from 1986,⁶² still applicable today.

The process can be described as follows:⁶³

⁵⁷ Section 73(6) of the Correctional Services Act. Where the offender has served 25 years of a sentence he must also be considered for parole. See further s 73 of the Correctional Services Act for the different periods applicable to the different forms of imprisonment before parole can be considered.

⁵⁸ Sections 54(7)(b) and 59(1)(d) of the Defence Act 42 of 2002.

⁵⁹ *Collins English Dictionary* 6 ed (2009) at 114.

⁶⁰ The Ministerial Task Team, in its discussion on cashiering, refers to the definition found in the *Longman Dictionary of Contemporary English* as "to dismiss (someone usually an officer) with dishonour from service in the armed forces" (see Ministerial Task Team *Report by the Ministerial Task Team on the Transformation of the Military Legal System* (2005) para 4).

⁶¹ SA Law Reform Commission at 18-19.

⁶² SADF *Kassering en Ontslag met Oneer uit die SA Weermag: Aanhangsel A tot SA Leër Order SALO GS1/73* (1986).

Where an accused is sentenced to be cashiered, the sentence must be executed in public on parade. Where the case is of a sensitive nature, the execution of the sentence can be done on office bearing.⁶⁴

The parade consists of members of the unit or at least a smaller formation of the unit. Where members of the unit are not on parade, they must attend as spectators.⁶⁵ A military band, an escort and the accused will also be in attendance. The single escort must be of the same rank as the offender.

The members on parade march onto the parade ground, forming three sides of a square. The band stands behind the back row of the parade. After the parade has formed up, the accused and his escort march onto the parade ground and halt in front of the adjutant.

The unit officer commanding takes his position on parade next to the adjutant. The officer commanding orders the adjutant to announce the sentence. As soon as the adjutant starts reading out the sentence, the drummers of the band start drumming and continue until the end of the ceremony. As soon as the accused's number, rank and name are called he will come to attention and step

⁶³ The process described in the *SADF Standing Order* is only available in Afrikaans and the description below is paraphrased from this document.

⁶⁴ An office bearing is not a formal process regulated by law. The process may differ from unit to unit and between the various Arms of Service, but the basic principles remain the same. It can best be compared to a disciplinary interview between an employer and employee in the civilian environment. The procedure is known in the SA Air Force as "office bearing", in the SA Army and Health Services as "office orders" and in the SA Navy as "defaulters". The procedures currently being used date from the inception of the SANDF with the most recent document describing the office bearing procedure being *Algemene Riglyne vir die Uitvoering van Kantoorhouding: Aanhangsel B tot SA Leër Order GS1/5* (1985). Office bearings are not only conducted in cases of ill discipline where it is referred to as "negative" office bearing. It can also have a positive aspect such as informing the member of his promotion or transfer. Office bearings can be seen as a means of formal communication between a superior and a subordinate. For the purpose of this discussion any reference to office bearings will be a reference to "negative" office bearings.

⁶⁵ General deterrence is one of the major purposes of this punishment and compelling all members from the accused's unit to attend ensures that all members are aware of the consequences of the accused's conduct, possibly deterring them from committing similar offences.

forward. After the sentence has been read out the accused is ordered to leave the parade ground.

The accused is led off the parade ground by the escort and escorted to the duty room. The accused changes into civilian clothes after which he is escorted outside unit lines. The drummer stops drumming as soon as the accused and his escort leave the parade ground. The rest of the parade is excused.

Where the cashiering is executed on office bearing, the accused and his escort report to the office of the commanding officer where the adjutant will read out the sentence. The accused is marched out of the office and is taken to change into civilian dress after which he will be escorted off the unit.⁶⁶

The accused is not allowed to wear any headdress, decorations or medals on parade and may also not wear his dagger (if in the South African Air Force) or sword (if in the Navy) on parade. All administrative documentation must be completed before the accused leaves the unit since the accused may not return to the unit as a visitor after execution of the sentence.

The effect of cashiering is that the accused's medals are withdrawn and he forfeits the pension contribution made by the state. Only the contribution to the pension fund made by him will be paid out. The commission of the officer is terminated and regarded as having been cancelled and his Deed of Commission must be returned.⁶⁷

Because of the seriousness of the sentence this is not a punishment imposed lightly by the court. The sentence is considered in those circumstances where the court views the accused's conduct as disgraceful and to the detriment of the

⁶⁶ Due to the constitutional concerns discussed below, cashiering is mostly carried out on office bearing.

⁶⁷ Section 54(7)(a) of the Defence Act 42 of 2002. A Deed of Commission is signed and issued by the President on the appointment of all officers and warrant-officers.

reputation of the SANDF. Cashiering is not regarded as an appropriate sentence for purely disciplinary offences.⁶⁸ A perusal of CMA judgments shows that very few officers have been sentenced to cashiering as an independent sentence and since 2009 no such sentences could be found. Cashiering currently only appears in the CMA judgments as part of the mandatory combination when an officer is sentenced to imprisonment. The sentences of imprisonment are mostly suspended, resulting in the cashiering also being “suspended” since being coupled to the imprisonment it is only be executed if the imprisonment is activated.

6.2.2.1 Cashiering as a mandatory sentence

Cashiering is clearly not a sentence that is favoured by the military courts. There are however two instances where the imposition of cashiering is mandatory, namely (1) in the case of an officer who contravenes section 32 of the MDC by behaving “in a scandalous manner unbecoming the character of an officer and a gentleman”,⁶⁹ or (2) an officer who is sentenced to any term of imprisonment.⁷⁰

The definition of section 32 of the MDC is very wide. Any act by an officer which is regarded as “scandalous”, whether committed intentionally or negligently, would comply with the definition of the proscription and the officer may be found guilty. Although no definition exists in the defence legislation of what constitutes “scandalous” behaviour the *Collins English Dictionary* defines

⁶⁸ In *S v Magama* (CMA 49/2005) the accused was found guilty of five charges of AWOL and one charge of disobedience to orders and sentenced to be cashiered. The CMA found that cashiering is an inappropriate sentence for offences of a disciplinary nature. *In casu* the court varied the sentence to one of dismissal from the SANDF. In *S v Mabye* (CMA 103/2004) a sentence of cashiering was confirmed by the CMA subsequent to a conviction of *crimen iniuria*, common law indecent assault and four charges of riotous or unseemly behaviour.

⁶⁹ Section 32 states that “[a]ny officer who behaves in a scandalous manner unbecoming of the character of an officer and a gentleman, shall be guilty of an offence and shall on conviction be cashiered.”

⁷⁰ Section 93(3) of the MDC. The cashiering must be executed before the accused is taken to prison to serve his sentence.

it as “shame or outrage arising from a disgraceful action of event.”⁷¹ “Disgraceful” is defined as “a condition of shame, loss of reputation or dishonour...exclusion from confidence or trust.”⁷² The CMA have found that cashiering “should only be considered in matters where the conduct of the accused is seen as criminal or taints the image of the SANDF or brings the Force into disrepute”.⁷³

Civilian courts are not likely to consider a penalty clause as mandatory unless the wording of the penalty clause makes it very clear,⁷⁴ as mandatory sentences interfere with the courts’ sentencing discretion. It is submitted that the wording of section 32 of the MDC is very clear as it reads “...*shall* on conviction be cashiered.”⁷⁵ Whereas the other penalty clauses in the MDC state that a person is “liable on conviction” to a certain punishment, section 32 of the MDC states that the offender “shall on conviction be cashiered.” In following the argument put forward in *S v Toms; S v Bruce*⁷⁶ regarding the interpretation of the penalty clause,⁷⁷ section 32 of the MDC leaves the court with no discretion to deviate from the sentence. No mitigation, aggravation or the level of culpability of the offender will make a difference to the implementation of the sentence. If found guilty, the offender will be cashiered.

Because of the fact that the court has no sentencing discretion when it convicts an accused of the contravention of section 32 of the MDC, it has become the practice of military prosecutors to add alternative charges to the charge sheet, in order to give the court some sentencing discretion.⁷⁸

⁷¹ *Collins English Dictionary* at 710.

⁷² *Collins English Dictionary* at 218.

⁷³ *S v Magama* (CMA 49/2005). Offences of a sexual nature would also constitute scandalous behaviour (see *S v Mabye* (CMA 103/2004)).

⁷⁴ Terblanche (2007) at 41.

⁷⁵ Emphasis added. See *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 811H where the court held that the legislature must indicate clearly whether it intends a mandatory sentence.

⁷⁶ *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 811B and 822C-D.

⁷⁷ See also Terblanche (2007) at 24 in this regard.

⁷⁸ For example, although officers would traditionally have been charged with the contravention of s 32 of the MDC, such officers are now preferably charged with, for example, crimen iniuria, indecent assault, the contravention of s 45 of the MDC (riotous or unseemly behaviour) or

6.2.2.2 Cashiering and the right to dignity

The manner in which the cashiering is executed raises possible constitutional concerns. The cashiering of the officer results in the dismissal of that officer from the SANDF. Dismissal from the SANDF may be constitutionally unproblematic, but the way in which the dismissal is effected might be unconstitutional.⁷⁹ However, the ceremony attached to the sentence of cashiering makes it a more severe punishment than ordinary dismissal. The public nature of the ceremony has the potential to humiliate the accused. Not only is he dismissed from the SANDF, but all his former colleagues and subordinates bear witness to his dishonour.

Section 10 of the Constitution states that

[e]veryone has inherent dignity and the right to have their dignity respected and protected.

Human dignity is one of the core values of the Constitution and must be respected at all times.⁸⁰ South Africa is founded on “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.”⁸¹ The right to dignity forms the basis for the interpretation of all the

similar offences. This does not prevent the court from imposing a sentence of cashiering, but it allows them some discretion in this regard, depending on the aggravating and mitigating factors applicable. See *S v Store* (CMA 03/2003) where the accused was found guilty of the contravention of s 45(a) MDC (riotous or unseemly behaviour) which is generally regarded as a disciplinary offence, depending on the facts of the case. He was sentenced to cashiering.

⁷⁹ Van Zyl Smit (2002) at 49-30.

⁸⁰ Currie I & De Waal J *The Bill of Rights Handbook* 5 ed (2005) at 272.

⁸¹ Section 1(a) of the Constitution; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 34. In *S v Makwanyane* 1995 (3) SA 391 (CC) para 44 the Constitutional Court stated that the right to dignity, together with the right to life, can be seen as the most important human rights.

other rights and applies to those specific rights that “give effect to the value of human dignity.”⁸²

In the context of sentencing the right to dignity is therefore closely linked to the right not to be treated in a cruel, inhuman or degrading way as provided by section 12(1)(e) of the Constitution.⁸³

In *S v Williams*⁸⁴ the court found that

...measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment...Respect for human dignity is one such value; acknowledging it includes an acceptance by society that...even the vilest criminal remains a human being possessed of common human dignity.

All punishments undermine human dignity to some degree. The right to dignity is therefore one of the rights that must be taken into consideration when determining if a punishment constitutes cruel, inhuman or degrading punishment.⁸⁵ The right against cruel, inhuman and degrading treatment or punishment can be divided into three distinct concepts.⁸⁶ When a punishment is imposed it need not violate all three to be regarded as unconstitutional. The

⁸² Currie & De Waal (2005) at 275; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35 where the Constitutional Court held that “[h]uman dignity...informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.”

⁸³ Van Zyl Smit (2002) at 49-30; Currie & De Waal (2005) at 276; *S v Williams* 1995 (3) SA 632 (CC) para 35; *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) paras 54-55. This right is found in various international human rights documents (see as example Article 5 of the *Universal Declaration of Human Rights* which prohibits “torture or...cruel, inhuman or degrading treatment or punishment” and Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which states that “torture or...inhuman or degrading treatment or punishment.”

⁸⁴ *S v Williams* 1995 (3) SA 632 (CC).

⁸⁵ Currie & De Waal (2005) at 276; Van Zyl Smit (1996) at 28-13; *S v Makwanyane* 1995 (3) SA 391 (CC) paras 94 and 135.

⁸⁶ These concepts are cruel punishment, inhuman punishment and degrading punishment.

right may be violated if the punishment violates any one of these concepts. However, the impairment of human dignity must be involved in the specific concepts tainted by the punishment in order to constitute a violation of section 12(1)(e) of the Constitution.⁸⁷

In defining what should be understood under the concept of “cruel” and “inhuman” the Constitutional Court in *S v Williams*⁸⁸ used the *Oxford English Dictionary* which defines “cruel” as “causing or inflicting pain without pity”, “inhuman” is defined as “destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous” and “degrading” is defined as “lowering in character or quality, moral or intellectual debasement.” In evaluating these definitions it is submitted that cashiering does not inflict pain nor does it qualify as inhuman. However, considering the explanation given by the European Court of Human Rights⁸⁹ that degrading conduct is conduct “which [arouses] in the victims feelings of fear, anguish and inferiority leading to humiliation and debasement and possible breaking of the physical or moral resistance”, it is submitted that cashiering can be classified as a degrading punishment.

Cashiering may violate section 12(1)(e) in two respects:

1. it may be considered cruel, inhuman or degrading punishment because of the mandatory nature of the offence for a conviction of section 32 of the MDC. The punishment must fit the crime and where the punishment is not proportional to the crime it may constitute cruel, inhuman or degrading punishment. The test to be applied is whether the sentence is grossly disproportionate to the circumstances under which the crime was committed as well as the offender’s circumstances.⁹⁰

⁸⁷ *S v Dodo* 2001 (3) SA 382 (CC) para 35; *S v Saayman* 2008 (1) SACR 393 (E) at 398c; Van Zyl Smit (1996) at 28-13.

⁸⁸ *S v Williams* 1995 (3) SA 632 (CC) para 24.

⁸⁹ *Denmark et al v Greece Report of 5 Nov 1969* (1969) XII *Yearbook of the European Convention on Human Rights* at 186 as quoted in *S v Williams* 1995 (3) SA 632 (CC) para 27.

⁹⁰ *S v Dodo* 2001 (3) SA 382 (CC) para 37; *S v Vries* 1996 (12) BCLR 1666 (Nm); Van Zyl Smit (1996) at 28-6; *R v Smith (Edward Dewey)* [1987] 1 SCR 1987 at 1046 where the court held that ‘in assessing whether a sentence is grossly disproportionate [the court] must consider the

2. it may be considered cruel, inhuman or degrading because of the way in which the sentence is executed.⁹¹

In determining whether punishment can be seen as cruel or inhuman the Canadian Supreme Court suggested three characteristics against which the punishment can be weighed:⁹²

1. The punishment or the duration must be such “as to outrage the public conscience or be degrading to human dignity.”
2. The punishment must go beyond what is required for the achievement of a legitimate social aim, taking into account the purposes of punishment and possible adequate alternatives.
3. The punishment is imposed in an arbitrary fashion in “the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.”

The execution of cashiering on parade, but also on office bearing, is an extremely humiliating experience, not only for the offender but also for those compelled to attend the parade.⁹³ The public shaming of an accused as part of

gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case to determine what range of sentences would have been appropriate to punish, rehabilitate, deter or protect society from this particular offender.”

⁹¹ In *R v Smith (Edward Dewey)* [1987] 1 SCR 1987 at 1046 the court held that the “court must also measure the effect of the sentence, which is not limited to its quantum or duration but includes also its nature and the conditions under which it is applied.” See the process of execution as described above. Van Zyl Smit (1996) 28-21 states that “[o]ffenders should not be publicly humiliated or compelled to do things which undermine their dignity as human beings.”

⁹² *R v Smith (Edward Dewey)* [1987] 1 SCR 1987 at 1049

⁹³ This has been the author’s experience and the perceptions gathered from subsequent interviews with attendees after the cashiering parade of Chaplain Siwali who was sentenced to 12 months imprisonment and cashiering on a conviction of indecent assault in 2006. Irrespective of the seriousness of the conviction, it was the general feeling amongst attendees that the imprisonment alone would have been appropriate and the cashiering parade was extremely degrading and harsh. The sentence was confirmed in *S v Siwali* (CMA 34/2006).

a sentence is difficult to justify.⁹⁴ However, shaming could be acceptable under limited circumstances in terms of certain principles of restorative justice. Braithwaite⁹⁵ distinguishes between “shaming that is ‘stigmatization’ and shaming that is ‘reintegrative’” but shaming must not be done in a degrading or humiliating way.⁹⁶ Stigmatisation shaming sets the offender apart from the rest of society and makes him an outcast.⁹⁷ This type of shaming will not withstand constitutional scrutiny. It is submitted that the public nature of the cashiering parade can be classified as stigmatisation shaming.

The purpose of the punishment is ultimately to sever the employ of the offender but in a way that expresses the military community’s condemnation of the scandalous, “despicable, contemptuous or ignominious”⁹⁸ nature of his actions. The aim can be achieved just as well by dismissing the offender from the SANDF. It is the opinion of the South African Law Reform Commission that cashiering is in violation of section 12(1)(e) of the Constitution due to “blatant unconstitutionality and obsolescence in the South African military justice system.”⁹⁹ Although the Commission suggests that cashiering should be replaced with “dismissal with ignominy”,¹⁰⁰ it is submitted that this proposal would not address the violation of section 12(1)(e) since the execution of a discharge with ignominy is essentially the same as in the case of cashiering. Actual change can only be brought about if the manner of execution of the sentence is changed.

⁹⁴ See *S v Saayman* 2008 (1) SACR 393 (E); *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 755 (CC) para 35.

⁹⁵ Braithwaite J “Setting Standards for Restorative Justice” (2002) 42 *The British Journal of Criminology* 563 at 567

⁹⁶ This was in principle accepted in *S v Saayman* 2008 (1) SACR 393 (E) at 400d-e.

⁹⁷ Claasen L H “Shaming as a Form of Restorative Justice – A Possible South African Application” (2006) *Primus* 11 at 17.

⁹⁸ *S v Quvane* (CMA 22/99).

⁹⁹ SA Law Reform Commission at 19.

¹⁰⁰ SA Law Reform Commission at 19.

6.2.2.3 Dishonourable discharge in other jurisdictions

In order to find possible solutions it is necessary to consider the different forms of dismissal available in other jurisdictions.

The approach in Canada and Britain seem to be similar in the sense that both jurisdictions distinguish between “dismissal with disgrace from Her Majesty’s Service” and “dismissal from Her Majesty’s Service.”¹⁰¹

In Canada no distinction is made between the punishments for officers and those of non-commissioned officers and both are sentenced to the same sentence, which is dismissal with disgrace from the Canadian Armed Forces.¹⁰² It is further provided that a sentence of dismissal with disgrace may be coupled with a sentence of imprisonment. Where an individual is sentenced to such dismissal he may not serve in any military or civilian capacity in service of the Government of Canada again, unless there is some emergency or his sentence is set aside.¹⁰³ There is no parole in the execution of this sentence.¹⁰⁴

This punishment is also regarded as one of the most severe punishments which affect the benefits of the individual upon his release from the Canadian forces.¹⁰⁵ Although dismissal with disgrace is one of the punishments that can be imposed for the offence of behaving in a disgraceful manner,¹⁰⁶ it differs from the South African equivalent in that the dismissal is not mandatory upon conviction. It is merely one of the possible sentences that may be imposed. One of the principles of sentencing followed by the Canadian military courts is that the punishment ultimately imposed should constitute the minimum

¹⁰¹ For the Canadian position see s 139(1) of the National Defence Act (R.S.C., 1985, c. N-5); *Queen’s Regulations and Orders: Volume II – Chapter 104: Punishments and Sentences* (2008); for the British position see s 164(1) of the Armed Forces Act 2006.

¹⁰² Section 141(1) of the National Defence Act.

¹⁰³ Section 141(2) of the National Defence Act; *R v Semrau*, 2010 CM 4010 para 50.

¹⁰⁴ Personal correspondence with Professor D McNairn of the Faculty of Law, Ottawa University, Canada on 25/10/2011.

¹⁰⁵ *R v Semrau*, 2010 CM 4010 para 50.

¹⁰⁶ Section 93 of the Code of Service Discipline, Part III of the National Defence Act.

intervention that can be regarded as adequate in the specific circumstances.¹⁰⁷ The Canadian court martial held in *S v Semrau*¹⁰⁸ that a disgraceful manner requires behaviour that is shockingly unacceptable in the circumstances and although the accused was found guilty of killing a wounded and unarmed insurgent while deployed in Afghanistan, dismissal with disgrace was not regarded as an appropriate sentence. He was instead sentenced to a reduction in rank and dismissal from the Canadian Armed Force.¹⁰⁹

Dismissal with disgrace is not a sentence that is imposed lightly. In 2004 Private Kyle Brown was convicted by court martial of manslaughter for his role in the torture and death of a Somali teenager. He was sentenced to five years' imprisonment and dismissal with disgrace.¹¹⁰ In other cases, also constituting serious offences, the military court did not impose dismissal with disgrace. Where an accused was convicted of a number of offences of a sexual nature he received a sentence of a fine and a reprimand¹¹¹ and in a case of the sexual abuse of a minor the accused was sentenced to imprisonment and dismissal from the Armed Forces.¹¹² It seems that the implementation of this sentence is reserved for rare occasions and remains totally within the discretion of the trial judge to impose. This sentence is not of a mandatory nature in Canada.

As in Canada, British military law does not distinguish between discharges as sentence for officers and non-commissioned officers. Non-commissioned officers and warrant officers are reduced to the ranks and commissioned officers also forfeit their rank.¹¹³ The offender may subsequently not work in any military or civilian capacity in the employ of the Crown for a period of ten

¹⁰⁷ *R v Semrau*, 2010 CM 4010; *R v Leading Seaman J.R. Lueke*, 2008 CM 3007.

¹⁰⁸ *R v Semrau*, 2010 CM 4010.

¹⁰⁹ *R v Semrau*, 2010 CM 4010 paras 9 and 53. An accused sentenced to an ordinary dismissal from the Armed Forces does not automatically forfeit his rank. If the rank is reduced when sentenced to dismissal it will have an impact on the money paid out to the offender at the severance of his employment.

¹¹⁰ Létourneau G *Report on the Somalia Commission of Enquiry* (1997).

¹¹¹ *R v Ex-Warrant Officer J.A.G. Deschamps*, 2009 CM 1013.

¹¹² *R v Corporal M.A. Wilcox*, 2009 CM 2014.

¹¹³ Sections 295(2) and (4) of the Armed Forces Act 2006.

years when sentenced to dismissal with disgrace and seven years for ordinary dismissal.¹¹⁴ It is seen as an exceptional form of punishment that is only imposed where the nature and the circumstances make a sentence of ordinary dismissal inadequate to reflect the gravity with which the court regards the conduct.¹¹⁵ Unlike the opinion of the South African CMA, the British military court is of the opinion that the offence itself need not be disgraceful to attract dismissal with disgrace as a punishment. Any conduct that is of such a nature that the court wishes to “mark its displeasure” may attract this punishment. In determining the appropriateness of the sentence the court will consider the nature of the offence, the surrounding circumstances, the rank of the accused and the degree of responsibility expected of him, as well as whether the sentence would be in the best interests of the state.¹¹⁶

The United States military allows for three comparable types of discharge.¹¹⁷ As is the case in South Africa, a distinction is made between the separation from service of an officer and a non-commissioned officer. Officers are sentenced to dismissal and this is a sentence that can only be imposed by a general court martial.¹¹⁸ The US Armed Forces also used to distinguish between a dismissal and a cashiering of officers. A dismissal was the ordinary “dishonorable termination of service” and a cashiering entailed a parade.¹¹⁹ The execution of the parade was done in a similar way to the South African cashiering parade but this has been eliminated, resulting in dismissal losing “the original lasting sting inherent in this punishment, i.e., degradation, loss of reputation and disgrace...”¹²⁰ The accused does however lose certain

¹¹⁴ Rant J W & Blackett J *Courts-Martial, Discipline, and the Criminal Process in the Armed Services* 2 ed (2003) at 328.

¹¹⁵ OJAG at 15, Rant & Blackett at 329.

¹¹⁶ OJAG at 15; Rant & Blackett at 328.

¹¹⁷ There are in fact six types of discharges, but undesirable discharge, general discharge and honourable discharge are considered administrative discharges which fall outside the scope of this discussion (see Bednar R J “Discharge and Dismissal as Punishment in the Armed Forces” (1962) *Military Law Review* 1 at 6).

¹¹⁸ Bednar at 7; Morris at 105.

¹¹⁹ Bednar at 6.

¹²⁰ Bednar at 7. Cashiering parades in the US Armed Forces ended in 1890 (see Bednar at 6).

veterans' benefits, pension money and may consequently not be employed in the civil service.

Non-commissioned officers are sentenced to a dishonourable discharge imposed by a general court martial. Such sentence is reserved for those "who should be separated under conditions of dishonour, after having been convicted of ...felonies, or of offenses of a military nature requiring severe punishment."¹²¹ A dishonourable discharge is seen as the equivalent of a dismissal imposed on officers. This sentence is also common in instances where an accused was sentenced to lengthy confinement periods.¹²²

A bad-conduct discharge can be imposed by either a general or a special court martial and is only available in case of enlisted personnel. This type of discharge is regarded as less severe than the dishonourable discharge and the offender will not lose all his benefits as a consequence.¹²³ This type of discharge is mostly imposed for military offences, a serious criminal offence considered to be an isolated incident or in the case of a series of minor violations of the law.¹²⁴

6.2.2.4 Cashiering: possible solutions for South Africa

In Britain and the USA dishonourable discharges are not executed on parade. There is no difference between the execution of a dishonourable discharge and an ordinary discharge. The difference lies in the consequences regarding, *inter alia*, pension payouts, medals and the retaining of rank.

¹²¹ Bednar at 3.

¹²² Morris at 105. The consequences of a dishonourable discharge are severe. An accused loses most of the privileges associated with military status, e.g. most benefits due to military veterans, such as education and home loans and they also lose the privilege of being buried in a national cemetery. Originally an offender also lost his US nationality when sentenced to a dishonourable discharge but in 1958 this was declared unconstitutional (see Bednar at 8).

¹²³ Morris at 105.

¹²⁴ Bednar at 8-9; Morris at 105.

They do however maintain the distinction between a dishonourable discharge and an ordinary discharge. There is a need in the military environment to retain this distinction. It is therefore not argued that cashiering in the sense of the dishonourable discharge be done away with. It is a sentence that should be retained if the concerns regarding its execution are addressed.

The issues regarding the implementation of cashiering are twofold: (1) it may result in an arbitrary sentence or (2) it may constitute degrading punishment. Firstly, if cashiering is imposed irrespective of whether the crime, circumstances of the offender or the interests of society are considered, it would result in the imposition of an arbitrary sentence that might be disproportionate to the seriousness of the crime and the blameworthiness of the offender. It is submitted that cashiering should be removed from the statute as a mandatory sentence for the contravention of section 32 of the MDC. An alternative penalty clause should be provided so that the court's discretion to impose an appropriate sentence is restored.

Secondly, in circumstances where the offence is serious enough to justify the dishonourable severance of the offender's employ in the SANDF, the execution of the sentence might be contrary to section 12(1)(e) of the Constitution and constitute degrading punishment. It is suggested that the sentence of cashiering remains but that the execution of the punishment be changed. It is not an absolute requirement that the sentence should be executed on either parade or office bearing. It can be executed in the same manner as dismissal or discharge from the SANDF. This is also the manner in which the sentence is approached in the jurisdictions discussed above. Because of the negative connotation to the term "cashiering" and the practice in other jurisdictions, consideration should be given to changing the sentence to one of "dishonourable dismissal or discharge" from the SANDF.

6.2.3 Discharge with ignominy

Discharge with ignominy is the equivalent of cashiering, but is imposed on ranks other than officers, in other words privates to warrant officers. It is seen as a very severe punishment.¹²⁵ It is not defined in the defence legislation but the *Collins English Dictionary* defines it as “disgrace or public shame.”¹²⁶ It is the equivalent of a dishonourable discharge.

The CMA has accepted the definition in the *Military Justice Study Guide* of the Naval Justice School (Newport Rhode Island) and ‘discharge with ignominy’ can therefore be defined as¹²⁷

the most severe punitive discharge; reserved for the warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after being convicted of serious offenses of a civil and military nature warranting severe punishment; it may be awarded only by a General Court-Martial.

The process followed in the execution of the sentence is similar to that of cashiering.¹²⁸ The only difference lies in the escort of the accused, in this case the Regimental Sergeant-Major (RSM)¹²⁹ of the unit who joins the escort next to the accused. On parade the RSM gives the orders to the accused and not the escort.

The consequences regarding the accused’s medals and pension fund contribution are the same as with cashiering. As with imprisonment and cashiering, whenever an accused is sentenced to discharge with ignominy, the accused must be detained until review of his case is completed, but can, on

¹²⁵ In *S v Kholomba* (CMA 13/99) the court opined that such a sentence could prevent or make it extremely difficult for an accused to find future employment.

¹²⁶ The Ministerial Task Team para 4 defines ignominy as “a state of shame or dishonour.”

¹²⁷ *S v Kholomba* (CMA 13/99).

¹²⁸ SA Army SALO GS1/73 para 1.

¹²⁹ The Regimental Sergeant-Major is a warrant officer class 1 appointed at a unit and is responsible for maintaining discipline and regimental standards at the unit.

application to the local representative of the Adjutant General, be released from custody under certain conditions.¹³⁰

As is the case with cashiering, discharge with ignominy is not an appropriate sentence for purely disciplinary offences. In *S v Kholomba*¹³¹ the Court of Military Appeal quoted the Manual for Courts-Martial United States (1994 ed) with approval where it is stated that

[a] dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment.

The CMA has found that such a discharge is appropriate for offences involving a lack of integrity and dishonesty.¹³² Although discharge with ignominy is not a mandatory sentence for any specific offence, it is mandatory whenever an accused of any rank other than an officer has been sentenced to imprisonment.¹³³ Where such imprisonment is suspended, the discharge with ignominy is also suspended. The sentence of discharge with ignominy will be executed before an accused is sent to prison to serve his sentence. The same concerns regarding the constitutionality raised about cashiering pertaining to cruel, inhuman and degrading punishment as well as human dignity are relevant with a sentence of discharge with ignominy.

¹³⁰ Section 34(9) of the MDSMA.

¹³¹ *S v Kholomba* (CMA 13/99). This approach was confirmed in *S v Nxumalo* (CMA 20/99). In *S v Quvane* (CMA 22/99) the accused was convicted of AWOL and had one previous conviction of AWOL. The court stated that “the evidence did not reveal any despicable, contemptuous or ignominious behaviour on the part of the accused.” The sentence was varied to one of discharge from the SANDF.

¹³² *S v Makwela* (CMA 01/2009); *S v Visagie* (CMA 16/2004); *S v Khalankomo* (CMA 47/2004); *S v Reddy* (CMA 201/2000); *S v Makhanya* (CMA 58/2001).

¹³³ Section 93(4)(a) of the MDC.

6.2.4 Discharge or dismissal from the SANDF

A discharge or a dismissal from the SANDF is imposed by a military court in those instances where the court is of the opinion that the accused's further employment in the SANDF is undesirable. A dismissal is imposed on an officer¹³⁴ and a discharge on any rank other than an officer.¹³⁵ The same principles apply to both. The effect of this sentence is that the accused is no longer in the employ of the SANDF.¹³⁶ He does however retain any medals received during his time of service and there are no financial implications with regard to the pension payout of the accused.¹³⁷

A discharge is however still considered a serious punishment. Considering the CMA's findings as discussed above that imprisonment, cashiering or discharge with ignominy are not appropriate sentences for disciplinary offences, dismissal or discharge have been found to be "the most severe sentence that could be considered [for a disciplinary offence] and should only be imposed if the court finds that there is no mitigation that warrants a less severe sentence."¹³⁸

A discharge will not be given lightly. A perusal of CMA judgments shows that discharges or dismissals are only considered as appropriate sentences in those instances of serious transgressions or where the accused has a long record of previous convictions and that most of the other, lesser sentencing options have been exhausted and did not have the desired effect of rehabilitation or deterrence on the accused.¹³⁹ In *S v Pono*¹⁴⁰ the CMA stated the following in this regard:

¹³⁴ Section 12(b)(ii) of the MDSMA.

¹³⁵ Section 12(c)(ii) of the MDSMA.

¹³⁶ Section 59(1)(d) of the Defence Act 42 of 2002.

¹³⁷ Personal experience as prosecutor in the military courts.

¹³⁸ *S v Makhanya* (CMA 58/2001).

¹³⁹ *S v Maphosa* (CMA 198/2001) where, after numerous convictions and sentences of fines, suspended detention and reduction to the ranks, the court found that the accused was not "susceptible to discipline and should no longer be subjected thereto." The accused was subsequently discharged from the SANDF. According to *S v Msibi* (CMA 52/2008) the accused was no longer considered a candidate for rehabilitation since he had previously been

The accused has a poor service record, one that is riddled with charges of absence without leave. He was sentenced to fines, suspended detention, extra duties and effective detention. None of these sentences seems to have had any rehabilitating or deterring effect. The only appropriate sentence, therefore, is one of discharge from the SA National Defence Force.

Where a warrant officer or non-commissioned officer is sentenced to detention, they may also be sentenced to a discharge from the SANDF.¹⁴¹ The CMA has however found that it is not advisable to sentence an accused to detention and a discharge from the SANDF.¹⁴² The purpose of detention is to rehabilitate an accused within the military organisation and by discharging the accused after he has served his term of detention would defeat the object of the sentence of detention.¹⁴³

Where an accused has been sentenced to dismissal or discharge from the SANDF, the accused must be kept in custody pending the review of his case.¹⁴⁴

sentenced to a fine, suspended detention and detention but went on AWOL again. The accused was discharged. During 14 years of service the accused in *S v Mkhencele* (CMA 58/2008) served only one year in which he was not absent without leave. Fines, extra duties and suspended detention with the possibility of losing his rank did not deter him. He was also not considered a candidate for rehabilitation and subsequently was sentenced to discharge from the SANDF.

¹⁴⁰ *S v Pono* (CMA 10/2008).

¹⁴¹ Section 93(4)(b) of the MDC.

¹⁴² See *S v Mzayifani* (CMA 148/2003). In *S v Makitle* (CMA 27/99) the accused was sentenced to a period of six months detention and discharge from the SANDF. The Court was of the opinion that detention would serve no purpose because of the accused's lack of discipline during deployment. They stated that [t]here is no purpose whatsoever to attempt rehabilitation by means of detention. He is simply not fit for service in a defence force." The sentence was amended to one of discharge with ignominy from the SANDF. The approach is different in British military law. Offenders who are sentenced to discharge are frequently also sentenced to detention. The Military Corrective Training Centre (MCTC) Colchester provides a training programme for those individuals who are to be discharged on completion of their sentence of detention. These inmates receive less military training but their programmes comprise a significant element of pre-release training aimed at assisting the offender in making a successful transition from military to civilian life (see OJAG at 18).

¹⁴³ *S v Khoza* (CMA 82/2001).

¹⁴⁴ Section 34(9) of the MDSMA. Such an individual will be kept in the detention barracks pending his appeal. Although an officer cannot be sentenced to detention, an officer may be kept in the detention barracks in custody, pending his appeal. The treatment of the officer is different to that of a sentenced accused. See the discussion below.

The accused may apply to the local representative of the Adjutant General for his release, pending the finalisation of his review.¹⁴⁵

6.2.5 Detention.

Although detention involves the deprivation of a person's liberty, it cannot be equated with a sentence of imprisonment.¹⁴⁶ Detention was introduced as a punishment so that soldiers whose offences did not justify a discharge would not be subjected to the stigma of imprisonment.¹⁴⁷ Where the purpose of imprisonment is to remove the offender from society, the reason for imposing a sentence of detention is to afford the offender the opportunity to rehabilitate himself and remain in the employ of the SANDF.¹⁴⁸ For the same reason a sentence of imprisonment cannot be combined with a sentence of detention.¹⁴⁹

Under certain circumstances, such as where the accused is serving outside the borders of the Republic or is serving at sea, the court sentencing the accused

¹⁴⁵ Section 34(11) of the MDSMA; *S v Visagie* (CMA 34/2000). The situation is handled exactly the same as in the case of imprisonment, cashiering and discharge with ignominy.

¹⁴⁶ In *R v Ball, R v Rugg* [1998] EWCA Crim 473 the Courts Martial Appeal Court held that a sentence of detention could be harsher than a similar period of imprisonment due to the fact that remission granted for imprisonment is half of the sentence whereas detention only remits one third of the sentence. The court further did not distinguish between a sentence of imprisonment and detention since both constitute a deprivation of liberty. This is clearly not correct. In the subsequent case of *R v Holmes* [2004] EWCA Crim 3180 the Courts Martial Appeal Court did acknowledge the difference between imprisonment and detention. See also *S v Kloppers* 1986 (1) SA 657 (T) for the South African approach.

¹⁴⁷ Department of Defence *Military Discipline Code, Regulations and Orders and Instructions* (1940) at 496 and para (g) where it is stated that "[a] soldier who is convicted by a court-martial of a purely military offence, and who, at the expiration of his sentence, will rejoin his corps, should not ordinarily be sentenced to imprisonment." At this stage of its development, military law only required cashiering for officers sentenced to imprisonment. Other ranks could be discharged, but it was not compulsory as is currently the situation (see also OJAG at 19).

¹⁴⁸ *S v Khoza* (CMA 82/2001). In *S v Mbunga* (CMA 36/2008) the accused had previous convictions and sentences of a reprimand, extra duties and a fine. The CMA found that the military court should try and rehabilitate the offender by means of detention. The sentence of discharge from the SANDF was varied to 60 days detention and reduction to the ranks. In *S v Seroke* (CMA 44/2008) the accused had previously been sentenced to a reprimand, fines and a suspended sentence of detention. It stated that "[a]t no stage was the rehabilitative effect that effective detention might have on the accused put to the test." They opined that the accused "deserves a final opportunity to show discipline" and his sentence of discharge from the SANDF was varied to 60 days' detention and reduction to the ranks.

¹⁴⁹ Section 93(2)(b) of the MDC.

to detention may be of the opinion that it is impractical for the accused to serve the period of detention and may then sentence the accused to deprivation of pay in lieu of detention.¹⁵⁰

Detention can be imposed by a CMJ or CSMJ for a maximum period of two years.¹⁵¹ This sentence can only be imposed on those ranks other than an officer, i.e. from the rank of private to warrant officer.¹⁵² Since no rank carrying person may serve a sentence of detention, any non-commissioned officer above the rank of private will also be sentenced to reduction to the ranks.

This means that the accused is reduced to the rank of private, irrespective of his rank at the time of sentencing. This has severe salary implications for the accused. His salary is adjusted to the minimum salary of a private and he loses all rank seniority. He is then on the same level as a newly appointed private. This has future implications for his pension payout as well. Detention is therefore a very severe sentence to impose on a senior non-commissioned officer. The removal of his rank is also not temporary. Once he completes his sentence of detention he rejoins his colleagues at his unit as a private. Apart from the monetary implications, this sentence is a very humiliating one, especially for senior non-commissioned officers.¹⁵³ Because of the inevitable

¹⁵⁰ Section 12(2) of the MDSMA. This also applies to a sentence of confinement to barracks. The deprivation of pay is calculated at “the rate of one-half day’s pay for every day’s detention or one-quarter day’s pay for every day’s confinement to barracks, which, but for this provision, the military court would have imposed upon the offender.”

¹⁵¹ This is also the situation in the British Armed Forces. The court martial may impose a maximum period of two years’ detention. Detention is however also a sentence that can be imposed by a commanding officer at a summary hearing. Commanding officers may sentence an accused below the rank of lance corporal to detention. The maximum period that can be imposed by a commanding officer with basic powers is 28 days and where the commanding officer has extended powers the maximum period of detention that can be imposed is 90 days.

¹⁵² Section 12(1)(d) of the MDSMA read with r 112 of the MDSMA.

¹⁵³ It has been the author’s experience that senior non-commissioned officers would rather ask for a sentence of discharge from the SANDF than one of detention. Notice should be taken of the situation in the British Armed Forces. Where a warrant officer or non-commissioned officer is sentenced to detention by the court martial, the accused is not automatically reduced to the ranks. The court martial may reduce him to the ranks or to any lower rank than the one held at the time of sentencing. Where he is not reduced to the rank, the non-commissioned officer is treated as a private for the duration of his sentence of detention and after completion of his

consequences of this sentence, effective detention is not a sentence that is imposed lightly by the court. A perusal of CMA judgments shows that an accused is more likely to receive a sentence of suspended detention. Detention can be suspended either wholly or partially.¹⁵⁴

Because of the serious consequences attached to this punishment, the court must be of the opinion that the offence is serious enough to warrant a sentence of detention. If the crime is serious enough, the court must consider, taking into account all factors, whether detention would be an appropriate sentence. Once the court determines that it is an appropriate sentence, the court must decide on the length of the sentence. Although the period imposed must be the shortest period that would be appropriate under the circumstances, it should be long enough so that rehabilitation can take place.¹⁵⁵ The CMA does not provide any guidelines in this regard nor do the South African military detention barracks currently have any rehabilitation programmes. No research has been done on the effectiveness of the drill and physical training regime currently used in rehabilitating offenders. Much can therefore be learned from the British rehabilitation programme followed at MTCT Colchester.¹⁵⁶

A person sentenced to detention must be kept in custody pending the review of his case and may apply to the local representative of the Adjutant General for release from custody pending finalisation of the review.¹⁵⁷ A sentence of detention will continue to run even if the offender ceases to be subject to the

sentence he regains his original rank or the lower rank that he has been sentenced to (see s 294(1) of the Armed Forces Act 2006; OJAG at 17).

¹⁵⁴ Section 12(3) of the MDSMA. See the discussion on the suspension of sentences in ch 5 at para 5.8 above.

¹⁵⁵ See also *Manual of Service Law* (2011) 1(2) at 1-13-16 and 1-13-25.

¹⁵⁶ See the discussion at para 6.2.5.2 below.

¹⁵⁷ Section 34(9) and (11) of the MDSMA. The accused is kept in the detention barracks pending his appeal. He is however treated differently from sentenced individuals. See the discussion below. In British military law the question whether the accused will start serving his detention sentence depends on the accused. The accused must, after sentence, indicate whether he wants to start his sentence immediately or postpone it with 14 days to allow him to appeal the sentence.

MDC during the time of serving his sentence,¹⁵⁸ such as when the offender's contract expires while he is still serving his sentence of detention. He will only be discharged from the SANDF on completion of the sentence.

Detention must be served in the detention barracks (military correctional facilities).¹⁵⁹ The Minister may establish one or more detention barracks or appoint certain premises to be used as detention barracks.¹⁶⁰ There are currently only two detention barracks operational in South Africa. One is situated in Wynberg, Cape Town and the other in Bloemfontein. There are currently no other premises directed as detention barracks. The Minister is also responsible for drawing up regulations for the detention barracks. The current regulations are outdated.¹⁶¹ The General Officer Commanding of the SANDF in command of troops on deployment outside the borders of the Republic may establish a detention barracks where offenders sentenced to detention outside the borders may serve their sentence.¹⁶² The Minister may also authorise an offender outside the borders to serve detention in any detention barracks or

¹⁵⁸ Section 93(6)(b) of the MDC. In terms of s 104(5)(c) of the Defence Act 44 of 1957 the MDC applies to all persons lawfully detained or serving a sentence of detention or imprisonment in terms of the MDC. This was confirmed in *Nyaphuli v Minister of Defence* [2008] JOL 22381 (O) at 3, where the court applied s 104(5)(c) to a former member of the SANDF serving a sentence of imprisonment in a civilian prison although the offender was no longer a member of the SANDF since being sentenced to imprisonment and discharge with ignominy by a military court.

¹⁵⁹ Section 119 of the MDC. Detention barracks are defined in the *Detention Barracks Regulations* as "any place, prison or detention barracks appointed or established in terms of section one hundred and twelve of the Act [Act 44 of 1957] or section one hundred and twenty or one hundred and twenty-one of the Code."

¹⁶⁰ Section 120(2) of the MDC. The British Armed Forces only has one detention facility, the MCTC Colchester.

¹⁶¹ Section 120(3) of the MDC; s 82(1)(u) of the Defence Act 42 of 2002. The detention barracks are regulated by the *Detention Barracks Regulations – GN R1190/61*, published under Government Notice R1190 in *Government Gazette Extraordinary* 131 of 8 December 1961, as amended by GN R1949 in GG 5317 dated 22 October 1976 and GN R569 dated 1984. The Regulations are to be replaced by *Military Police Agency Instruction (MPAI) 29/2006: Procedures on the Management and Administration of Military Correctional Facilities in the DOD* pending the approval of the *Department of Defence Instruction (DODI)/MPA/00001/2006: Management and Administration of Military Correctional Facilities in the DOD*, but to date the instruction has not been approved.

¹⁶² Section 121(1) of the MDC.

place of confinement established or controlled by a commander of another force serving in co-operation with the SANDF.¹⁶³

Where an offender is serving his sentence in the detention barracks he may be removed to any other detention barracks to serve the rest of the unexpired portion of his sentence.¹⁶⁴ Outside of the Military Police Agency, who is responsible for the detention barracks, few people are aware of what the sentence actually entails. Concern has been raised regarding the nature of the sentence and the detention barrack's compliance with the United Nations Convention against Torture.¹⁶⁵ Detention is a harsh punishment but to determine whether it is so harsh that it contravenes the UN Convention Against Torture, a brief overview is given of the current management regime followed in the detention barracks.

6.2.5.1 The detention barracks

In its evaluation of the detention barracks the Department of Defence (DOD) made the following policy statement:¹⁶⁶

The MPA [military police agency] is responsible for the management and administration of MCF's¹⁶⁷ in the SANDF. A quantum leap must, however, be taken that will shed the present negative image of MCF's and move to that of

¹⁶³ Section 121(3) of the MDC.

¹⁶⁴ Rule 114 of the MDSMA.

¹⁶⁵ See Munting L *Guide to the UN Convention Against Torture in South Africa* (2008) at 23. Munting could not evaluate the regulations to see whether the regime and management of the detention barracks comply with the UN Convention since the DOD was busy redrafting the regulations. These regulations have to date not been finalised. See also Jobson M and Bantjes M *South African No Torture Consortium Launched* (2008) who said that "[r]esearch has shown that the understanding of torture and the necessity of its absolute prohibition is completely absent from the operational procedures of military detention barracks..."

¹⁶⁶ *MPAI 29/2006* at 1-10. This view is also in line with the opinion of the CMA regarding the rehabilitative value of the sentence of detention (see *S v Makitle* (CMA 27/99); *S v Msibi* (CMA 52/2008)).

¹⁶⁷ The colloquial term "detention barracks" was replaced with the term "military correctional facility" or MCF. "Detention barracks" is used throughout this thesis since it is the most widely known term.

an institution of educators, facilitators and mentors of constructive development that facilitate positive behavioural change. This implies that all involved with MCF's will have to ensure that military offenders confined in MCF's will be accepted back into society as productive contributors.

It was consequently identified that the detention barracks' regulations had to be brought in line with the Constitution, the Correctional Services Act, the Defence Act and the international principles for the treatment of inmates.¹⁶⁸ The SANDF based its new procedures on the UN standards and minimum rules for the treatment of offenders. It should be noted at this stage that although the relevant Department of Defence Instruction (DODI) has not yet been approved, the MCF's have as far as possible already implemented the procedures set out in this document.¹⁶⁹

The basis for the treatment of inmates at the detention barracks is grounded in the international principles that all persons under confinement must be treated in a humane manner with respect for the inherent dignity of all individuals. No person must be subjected to torture or cruel, inhuman or degrading treatment and individuals who are awaiting trial should be kept separately from those who have already been sentenced.¹⁷⁰

Male and female inmates are segregated. All meals, training, free time and outdoor programmes are rotated so that contact between these two groups is prevented. Provision is also made for pregnant females and female inmates

¹⁶⁸ *MPAI 29/2006* at 1-1 and 1-5.

¹⁶⁹ The *MPAI* and the Department of Defence Instruction (DODI) of 2006 provides for the implementation of skills upliftment training that must be presented to the inmates. Due to the fact that the relevant departmental instructions have not yet been approved, skills upliftment training has not yet been implemented. Discussions are currently underway to determine whether Bloemfontein MCF should be designated as a rehabilitation correctional facility and Wynberg as the disciplinary correctional facility. It may however be more cost effective to treat both MCF's equally where it is not necessary to transfer an inmate from one MCF to another.

¹⁷⁰ *MPAI 29/2006* at 1-5; United Nations *Standard Minimum Rules for the Treatment of Prisoners* (1977) as adopted by the First UN Congress on the Prevention of Crime and Treatment of Offenders.

with infants.¹⁷¹ Arrested and sentenced members are kept separately and short and medium-term sentenced members are segregated from long-term sentenced members.¹⁷²

Certain requirements are set out for cell accommodation such as sufficient floor space so that the inmate can sleep comfortably and move freely within the cell, sufficient light, ventilation and access to ablution facilities. Although provision is made that inmates may share cells, due to the low number of inmates at the detention barracks, inmates are kept in separate cells.¹⁷³ They are also allowed visits by professional officers.¹⁷⁴

6.2.5.2 Admission procedures

On admission to the detention barracks the offender is searched and must surrender all property. No staff member is allowed to do a body cavity search and if it is determined that such a search is necessary, a medical officer must be called to conduct the search.¹⁷⁵ His family and his unit are informed by means of a letter setting out *inter alia* his schedule for visits, telephone calls and his envisaged release date.¹⁷⁶

¹⁷¹ *MPAI 29/2006* at 2-4. It is almost unheard of for females to be sentenced to detention. In a perusal of the CMA judgments of 1999 to February 2011 no example was found of a female sentenced to effective detention.

¹⁷² *MPAI 29/2006* at 2-4. Short-term sentences are those sentenced to between 1 to 30 days detention, medium terms to between 31 and 60 days and long-term sentences as periods longer than 61 days.

¹⁷³ *MPAI 29/2006* at 2-5. For example, during June/July 2011 the Wynberg MCF only had two inmates in custody.

¹⁷⁴ *MPAI 29/2006* at 2-14. Professional officers include health care workers, environmental health officers, the chaplain, social work officer, psychologist, military legal practitioner, medical officer or any other person with statutory inspection authority. These officers have unrestricted access to the inmates and may make appointments at any time to see inmates.

¹⁷⁵ *MPAI 29/2006* at 3-5. Where an officer is admitted the admission procedures are exactly the same except that no private or non-commissioned officer may search an officer. Only an officer can search another officer.

¹⁷⁶ *MPAI 29/2006* at 3-9. Remission of sentence means "that portion of a sentence of a person serving a sentence that is remitted by one quarter of his sentence" (see *MPAI 29/2006* at 1-4). Remission will therefore always be a quarter of the sentence, irrespective of the length of the sentence imposed. Remission at MCTC Colchester is calculated depending on the length of the sentence imposed. No remission is allocated up to a period of 24 days' detention imposed. Where the offender is sentenced to 25 days, 35 days are allocated on a sliding scale of up to

The inmate is informed of his rights in terms of section 35 of the Constitution and he is informed of the Legal Satellite Office Hotline number after which certificates are issued in this regard which the inmate signs as acknowledgement.¹⁷⁷

The inmate is brought on office bearing at the commanding officer of the MCF within the first working day of his admission. The commanding officer informs him of the classification system,¹⁷⁸ the privileges that he should strive for, the routine as well as discipline expected from him.

Where the inmate is a rank bearing member he will be informed of his choice to wear his rank for the duration of his confinement. No rank bearing members

one third remission to ensure that the inmate actually serves at least 24 days' detention. Additional remission can be earned for a sentence of over 90 days to be allocated at the discretion of the commandant of the MCTC of up to one sixth of his sentence (see *Manual of Service Law* (2011) 1(2) at 1-13-25; OJAG at 18).

¹⁷⁷ *MPAI 29/2006* at 3-7. The Legsato Hotline number is the cellphone number of the military defence counsel who is on duty at the relevant legal satellite office. See also Munting L *Preventing and Combating Torture in South Africa: A Framework for Action Under CAT and OPCAT* (Torture Booklet) (2008) at 7; *S v Makwanyane* 1995 (3) SA 391 (CC) para 143 where the court held that people in prison "retain all the rights to which every person is entitled under chap 3, subject only to limitations imposed by the prison regime that are justifiable."

¹⁷⁸ There are four categories within this system. A-class inmates receive the most privileges and are identified by means of a red identification ribbon worn on the left breast pocket. They are allowed to wear their field dress belt (webbelt) during their daily routine and are allowed to wear their camouflage uniform on Fridays. B-class inmates have less privileges and are identified by wearing a blue identification ribbon on the left breast pocket. They are allowed to wear their field dress belt on Fridays. C-class inmates wear the normal MCF overall and have restricted allocated privileges. All inmates are classified as C-class inmates on admission to the MCF. D-class inmates are the lowest category and have no privileges. They wear the normal MCF overall and are identified by wearing the red combat helmet inner (doiby) when in the unit lines. Outside unit lines the doiby is substituted with the camouflage hat. If the inmate commits an offence during his period of detention and is tried by disciplinary hearing, he will immediately be demoted to D-class (see *MPAI 29/2006* at 4-7). The classification system is implemented as a reward system where positive actions are rewarded and the inmate is held accountable for his actions by demotion to a lower category if he does not comply with the set standard (see *MPAI 29/2006* at 4-1). The staff officers complete evaluation sheets for the classification system. Evaluations are done twice daily and inmates are evaluated on the cleanliness of their cells, their personal appearance and hygiene, their conduct, which includes their discipline and military bearing, as well as their behaviour. Where the inmate is a first offender, he is considered for re-classification after a period of 21 days and a repeat offender is only considered for reclassification after a period of 35 days. Thereafter reclassification is considered on a monthly basis (see *MPAI 29/2006* at 4-7).

may undergo a sentence of detention but it may happen that a rank bearing member is admitted either because he was arrested for an offence and is now awaiting trial, or he has been sentenced to imprisonment, dismissal or discharge but is awaiting review of his sentence.

He may choose to either wear his rank insignia, in which case he will be kept in segregation,¹⁷⁹ or choose not to wear his rank and participate in the soldiership training. He will be addressed by his rank but will not be afforded any saluting and compliments for the duration of his confinement.¹⁸⁰ Where he refuses to exercise a choice, the commanding officer will choose on his behalf and he will be kept in segregation.

6.2.5.3 Detention barracks routine

Different routine are followed on weekdays than over the weekends and public holidays.¹⁸¹

During the week inmates are woken at 04h00 each morning when they must immediately leave their beds and start preparation for their morning cell inspection in accordance with precise military specification. After *reveille* it is morning hygiene and cleaning of the cells, ablution and offices, followed by the morning inspection of the cells, ablution blocks, beds, trunks and the

¹⁷⁹ If an inmate is kept in segregation he is allowed to eat in his cell, conduct his ablution routine in isolation and smoke in the demarcated area of his cell block. The rest of the time he is mostly confined to his cell and his daily fitness exercises are also done in isolation. Where a rank bearing member is detained pending his trial, he need not make a choice. He will automatically be kept in segregation and his rank will be respected, except that no saluting and compliments will be shown.

¹⁸⁰ *MPAI 29/2006* at 6-1. The other inmates will be informed on parade of the status of the rank bearing inmate so that they may know to address him on his rank. He will however not be saluted by the staff officers or the other inmates and they will not stand to attention when addressing him. He is not in command and control of the staff or other inmates, irrespective of his rank.

¹⁸¹ This discussion is based on *MPAI 29/2006*.

inmates.¹⁸² It is usually during this time that inmates can report sick and must then be referred to the medical officer.

Inmates are released from their cells for the breakfast parade. Breakfast is eaten in the mess hall and no conversation is allowed between inmates. They wash their utensils in the kitchen area and all utensils are handed back to the staff officers. This is followed by a smoke parade, where those inmates who smoke are issued with a cigarette.¹⁸³ This is followed by medicine parade where inmates are issued with their prescribed medication. All appointments with specialist officers are confirmed at this time.

Soldiership training is started with a morning parade where scripture reading and prayers are held, but religious observance is voluntary. Training consists of a period of parade ground drill sessions, which would include punishment drill, overseen by a qualified drill instructor, followed by a period of physical training (PT) given by a qualified PT instructor to enhance the inmates' fitness and preparedness.

Provision is made for a period of skills upliftment training,¹⁸⁴ but as mentioned, this has not yet been implemented. In lieu of skills upliftment, the detention barracks continues with soldiership training.¹⁸⁵ Periods are however made

¹⁸² Hygiene is important and a hygiene register is kept. A compulsory weekly hygiene inspection is done on inmates' feet, hands and skin, weekly inspections are done by an environmental health officer who must inspect the offices and facilities and a quarterly fumigation is done.

¹⁸³ Inmates are not allowed to borrow, take or give cigarettes to or from other inmates. If they do not have a cigarette then they do not smoke.

¹⁸⁴ It is foreseen that skills upliftment training will be presented to medium and long-term inmates. Such training will be presented by qualified instructors or teachers and a qualification certificate will be presented to the inmate on completion of the training. Language proficiency and basic numeracy has been identified by the Centre for Advanced Training as two of the most significant shortcomings of DOD personnel. It is also suggested that inmates undergo awareness training in topics such as domestic violence, equal opportunities, HIV and AIDS and stress management.

¹⁸⁵ Soldiership training includes constructive labour such as external labour in work teams. The commanding officer may authorise the use of work teams where sentenced inmates will be taken outside the MCF to conduct maintenance. They are not allowed to do any other labour and before work teams are authorised, the commanding officer must first consider the Bill of

available to professional officers on an *ad hoc* basis for presentations to the inmates on various issues such as HIV/AIDS awareness lectures.

Lunch, smoke parade and medicine parade is handled the same way as during breakfast. If any of the inmates have an appointment with a specialist officer, the appointments will be conducted after lunch. This is once again followed by soldiership training, including parade ground drill, PT and constructive labour.

The evening programme consists of supper parade, smoke and medicine parade. This is followed by evening hygiene parade which includes personal hygiene and cleaning of the ablution facilities after which inmates are given the opportunity for reading or studies.¹⁸⁶ At lights out a final cell inspection is done.

During weekends no training is done and it is up to the commanding officer to determine the programme for the weekends. *Reveille*, morning parade, inspections and meals are the same as during week days. During the time when training would have been done, opportunity is given to inmates to receive visitors and visit the MCF library, in accordance with their privileges. Time is allocated to wash and iron uniforms and personal items, to write letters and make telephone calls. The attendance of church parade is not compulsory and those who do not wish to attend are locked in their cells for the duration of the parade. Although no constructive labour is done over weekends, inmates may request to be allowed to do constructive labour. The senior staff member must then allow the inmates to do such labour if MCF control staff are available.

Rights and the possible harm to the dignity of the inmate when working outside the MCF. They will only be allowed to work in military units. Rank bearing members are not allowed to work in work teams, unless they have requested to do so in writing.

¹⁸⁶ Although inmates will not be allowed to start with studies at state expense while in detention, if an inmate was busy with study at state expense he may get authority to continue with his studies while he is serving his sentence of detention.

6.2.5.4 Parole

A military inmate can be released on parole.¹⁸⁷ It can however not be compared with the parole granted to an inmate from a civilian prison. In terms of the regulations an inmate may apply in writing to the commanding officer for release on parole who may then grant parole to the inmate for a maximum period of seven days on certain conditions.¹⁸⁸ Parole in this context should rather be classified as leave. When an inmate is released on parole, any vacation leave that he has available must be utilised for the period on parole and if he has no leave credit available special leave without pay must be used.¹⁸⁹ After the period of seven days he must return to complete his sentence of detention. The period for which parole has been granted cannot be used to extend the sentence.

6.2.5.5 Solitary confinement and mechanical restraints

Another matter that may be of concern regarding the UN Convention against Torture is the use of solitary confinement and mechanical restraints.

The MCF Regulations provides for two types of solitary confinement:

¹⁸⁷ Parole is defined in *MPAI 29/2006* at 1-4 as “conditional release of an inmate in terms of the MCF Regulations.”

¹⁸⁸ Clause 14(2) of the *Detention Barracks Regulations* of 1961, as amended by Government Notice R1949 GG 5317 dated 22 October 1976. Parole can be granted where there is, *inter alia*, death or serious illness of a wife or relative by consanguinity or affinity in the 1st or 2nd degree, serious domestic difficulty or any other circumstances that the commanding officer may deem sufficient.

¹⁸⁹ Clause 14(5) of the *Detention Barracks Regulations*. In *S v Mathibela* (CMA 28/2002) the accused was granted parole [the court referred to it as leave] from the detention barracks to attend his mother’s funeral. While on parole, he requested an extension of his leave which was not granted. He only returned after 20 days and was subsequently charged for AWOL. In terms of the *Detention Barracks Regulations* he had to serve an extra 25 days of detention, which seems to be the whole period of his absence and he forfeited the three months remission he was entitled to in terms of the Regulations. The court *a quo* sentenced him to discharge from the SANDF but the CMA regarded the 25 days extra detention and forfeiture of remission as mitigation, even though it was because of his own actions, and varied the sentence to a R5000 fine and a further suspended sentence of 120 days of detention.

1. Administrative close confinement.
2. Disciplinary solitary confinement.

Administrative close confinement can be imposed by the commanding officer of the MCF for a number of reasons. It is usually given for protective reasons, either to protect the inmate from other inmates or from himself, where it is necessary to protect evidence in a criminal investigation, where the inmate intentionally acts disorderly for a continuous period of time or when requested by the inmate. Such an application by the inmate must be accompanied by a professional officer's report. A close confinement order must be reviewed on a weekly basis and special quarters must be provided.¹⁹⁰

Disciplinary solitary confinement can only be imposed as a court sentence, as discussed below. The detention barracks cannot confine an inmate to solitary confinement as a punishment for poor discipline or behaviour.

Where an inmate is sentenced to solitary confinement the inmate will forfeit his privileges linked to his category of privileges, he will not be allowed to do constructive work and will do his PT periods of 30 minutes each in isolation. He must keep his cell clean and may not be deprived of his normal cell furnishings.¹⁹¹

The question that must be answered is which court can impose a sentence of solitary confinement. Military courts, including the CODH, can only impose those sentences provided in section 12 of the MDSMA. There is no provision in the MDSMA, Defence Act or the MDC that provides for solitary confinement as part of the sentence of detention. The regulations do however provide for a trial

¹⁹⁰ *MPAI 29/2006* at 7-1.

¹⁹¹ *MPAI 29/2006* at 7-2. Cell furnishings may only be removed where an inmate shows serious destructive tendencies, in which case the inmate must be provided with a sleeping mat, or where an inmate has suicidal tendencies when everything is removed that he can use to harm himself.

by a superintendent of the detention barracks.¹⁹² In the current terminology it would refer to a trial by the detention barracks' commanding officer. In terms of the regulations such a court may sentence an inmate to *inter alia* solitary confinement, forfeiture of privileges or extra labour. Since the MPAI was drafted in 2006, after the implementation of the new military court system, one would expect the drafters to have taken the sentencing jurisdiction in terms of section 12 of the MDSMA into consideration. However, since an inmate serving detention remains subject to the MDC, any offences committed during the serving of his sentence will fall under the jurisdiction of the commanding officer. The commanding officer of the detention barracks in Wynberg, for example, holds the rank of captain and is therefore not authorised to conduct disciplinary hearings. It should be kept in mind that where there is a conflict between the MDSMA and any other legislation, or in this instance the regulations, the MDSMA will prevail.¹⁹³ It is submitted that disciplinary solitary confinement is not a punishment that can be imposed. Currently, pending approval of the Department of Defence Instructions, solitary confinement is not used in the detention barracks.

The commanding officer does however have a limited disciplinary jurisdiction over inmates. Depending on the seriousness and nature of the transgression by the inmate, the commanding officer may have the inmate appear before him on office bearing. The commanding officer may impose such corrective measures as he may deem appropriate, for example limiting the inmate's privileges for a certain period of time.¹⁹⁴ All such actions must be recorded.

¹⁹² Clause 2 Chapter IV "Discipline" in the *Detention Barracks Regulations* of 1961.

¹⁹³ Section 4(1) of the MDSMA.

¹⁹⁴ In an interview with the warrant officer in charge of the Wynberg MCF it was indicated that a typical disciplinary measure would be for example to take away an inmate's smoking privileges for a period of five days. No limitation may be placed on meals, medical appointments, etc.

6.2.5.6 MTCT Colchester training and education programmes

The CMA propagates detention as a rehabilitative sentence. However, as discussed above, programmes to this effect are not yet operational in the South African detention barracks. The detention barracks also have no experience in running rehabilitation programmes. Since the British military justice system provides for detention as a sentence it may be of some assistance to compare the MCF with MTCT Colchester as a possible benchmark for the implementation of rehabilitative programmes. MTCT Colchester makes provision for three types of inmates. Those who have been arrested and are kept in custody pending trial; those who have been sentenced and are housed in A-company and those who has been sentenced to discharge on completion of their detention housed in D-company. The South African detention barracks only makes provision for the first two of these categories.

The MTCT have extensive training facilities which include an outdoor range, a small arms trainer, sports field and an assault course. The education wing offers a wide range of courses and is central to the rehabilitative function of the centre.¹⁹⁵ The training regime is designed on a six month rotational basis.¹⁹⁶ This is in stark contrast to the South African detention barracks which have none of these facilities. All weapon ranges and sports fields are situated outside the barracks and inmates do not have access thereto.

Colchester has three different training programmes. The basic programme consists of a four week programme concentrating mainly on fitness training and weapons handling. Any accused sentenced to 42 days detention or less undertakes this programme.¹⁹⁷

¹⁹⁵ *Manual of Service Law* (2011) 1(2) at 1-13-C-1; Ministry of Defence *A Guide to the Military Corrective Training Centre* (2011) in general.

¹⁹⁶ OJAG at 18.

¹⁹⁷ *Manual of Service Law* (2011) 1(2) at 1-13-C-2.

There is a twenty week modular programme covering subjects such as weapons, field craft, aircraft recognition, map reading, health and hygiene and education. This programme is presented to inmates that have been sentenced to periods of longer than 42 days.¹⁹⁸

Inmates that are sentenced for periods of more than two rotations (more than 12 months) take part in special programmes for the completion of advanced training which may include work in the community.¹⁹⁹

Apart from the above programmes inmates must also attend modules designed to cover individual training.²⁰⁰ These modules include themes such as substance abuse, equality and diversity training. The education wing is responsible for improving the inmates' verbal and written communication skills so that they can be more receptive to further training. It also offers course work to facilitate the attainment of nationally recognised qualifications.²⁰¹

Those inmates who are sentenced to discharge after completion of their period of detention (D-company), are also subjected to training. They do not receive as much military training as A-company, but have to do a number of PT periods each week to keep up their level of fitness. They carry out resettlement, education and vocational training. Some examples of vocational training are plumbing or training as motor mechanics. They are also involved in community projects such as literacy and numeracy instruction where required.²⁰²

¹⁹⁸ *Manual of Service Law* (2011) 1(2) at 1-13-C-2.

¹⁹⁹ *Manual of Service Law* (2011) 1(2) at 1-13-C-2; OJAG at 18.

²⁰⁰ *Manual of Service Law* (2011) 1(2) at 1-13-C-2. A retired officer and his assistant, usually a senior non-commissioned officer, are appointed to take responsibility for the welfare of all the inmates. These individuals are trained in sentence planning where the training, education and individual training modules are determined. Sentence planning is done for each inmate upon arrival at MCTC Colchester. An individual approach is favoured by the MCTC because "[i]nmates at MCTC can range from those accused of serious offences, to immature people who have had difficulty coping with Service life. Many need to learn self-discipline or require help to establish their self-confidence and to develop a positive approach to life" (see in this regard *Manual of Service Law* (2011) 1(2) at 1-13-C-3).

²⁰¹ For a more detailed account see *Manual of Service Law* (2011) 1(2) at 1-13-C-2.

²⁰² *Manual of Service Law* (2011) 1(2) at 1-13-C-2.

Discharged individuals are therefore also rehabilitated and retrained to make a positive contribution when leaving the Armed Forces.

If the SANDF is really serious about the rehabilitation of ill-disciplined soldiers, and turning them into productive, disciplined individuals, then serious consideration should be given to similar training programmes as those run by MTCT Colchester. Although the SANDF would probably be hampered by budget constraints it is suggested that the SANDF utilises the various experts already in the employ of the SANDF to assist in this regard.

6.2.5.7 The military detention barracks and CAT

Although an attempt is being made towards the better treatment of inmates in the detention barracks, serious shortcomings remain. In spite of the DOD's policy statement that the MCF management and regime must be brought in line with the Constitution and international UN standards, it is a serious concern that the provisions of the UN Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²⁰³ and the Optional Protocol to CAT (OPCAT)²⁰⁴ have not been implemented in the context of MCF's.

With the prominence of human dignity as a core value of the Constitution, the humane treatment of inmates in places of detention cannot be over-emphasised.²⁰⁵ People who are deprived of their liberty are vulnerable and at

²⁰³ Ratified by South Africa in 1998. The emphasis of CAT is on the criminalisation, prosecution and the punishment of perpetrators of CAT (see Munting *Torture Booklet* at 2).

²⁰⁴ Signed by South Africa in 2006, but not yet ratified. The emphasis of OPCAT is the prevention of torture and cruel, inhuman and degrading treatment or punishment (see Munting *Torture Booklet* at 2; Streater O *Review of Existing Mechanisms for the Prevention and Investigation of Torture and Cruel, Inhuman and Degrading Treatment or Punishment in South Africa* (2008) at 2.

²⁰⁵ See ss 10, 12(1)(e) and 37 of the Constitution; *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) para 88; *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) para 14; Munting at 8.

risk of human rights violations.²⁰⁶ They must be protected against such violations.

The right not to be tortured or subjected to cruel, inhuman or degrading punishment and treatment was realised in various international human rights documents.²⁰⁷ Because of our history this right is also enshrined in our Constitution²⁰⁸ but Munting warns against understanding it from a purely historical and political perspective.²⁰⁹ It is not only political prisoners that are at risk but in fact any person who “is deprived of their liberty at the mercy of officials of the state.”²¹⁰

Where people are detained they have no freedom of choice and are totally dependent on the officials who are detaining them. Any pressure placed on such an individual can consequently be seen as an interference with the individual's dignity.²¹¹ Prisons are not the only institutions that deprive individuals of their freedom. Other such institutions include police detention cells, foreign national repatriation centres and psychiatric hospitals.²¹² The military detention barracks clearly also deprives its inmates of their freedom.²¹³ As such this means that the MCF must comply with the requirements for the protection of individuals against torture or cruel, inhuman and degrading treatment or punishment.²¹⁴

²⁰⁶ Munting *Torture Booklet* at 6.

²⁰⁷ The prohibition on torture has been recognised since 1948 by its inclusion in the *Universal Declaration of Human Rights* (see Streater at 14 for a list of international treaties ratified by South Africa).

²⁰⁸ Section 12(1)(d)-(e) of the Constitution.

²⁰⁹ Munting at 15; Streater at 2-3.

²¹⁰ Munting at 15; Munting *Torture Booklet* at 4.

²¹¹ Munting at 16. According to Novak M & McArthur E “The Distinction Between Torture and Cruel, Inhuman or Degrading Punishment” (2006) *Torture* 16(3) 147 at 150 the distinction between torture and cruel, inhuman or degrading punishment does not lie in the intensity of the pain or suffering, but in the powerlessness of the victim.

²¹² Munting at 17; Streater at 6.

²¹³ Munting at 17. .

²¹⁴ Deprivation of liberty is described as “...any form of detention or imprisonment or the placement of a person in a public or private of custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority” (see Streater at 6; article 4(1) of the OPCAT). Inmates at the MCF are not completely left to the mercy of the

The main concern raised by Munting in this regard is the fact that the MCF's are not subject to any independent oversight and inmates' recourse are limited to internal complaints procedures.²¹⁵ The internal complaints procedure is inadequate in protecting an individual inmate who complains. Because the inmate is still a member of the SANDF and subject to military law and discipline, any complaint must follow the official command and control channel. A complaint is registered during the morning hygiene period to the MCF personnel on duty who makes the required entry into the occurrence book where the matter will be attended to by the MCF commanding officer. Matters that the commanding officer cannot attend to are forwarded to the MCF Committee for attention. The MCF commanding officer gives feedback to the inmate and where he is not satisfied with the outcome the matter can be referred to the MCF Committee again. Where required, a final decision on the matter can be taken by the Chief of the Military Police Agency and his decision is final.

External, independent oversight is however extremely important in the context of detention. Because detention facilities are not open to public scrutiny, inmates are particularly vulnerable to human rights violations. There can be no

staff officers. Although CAT has not been implemented, staff officers must comply with the South African Army Order setting out guidelines for the prevention of ill-treatment of members of the SA Army. These guidelines will apply to other arms of service as well (see in this regard South African Defence Force *Maatreëls Ter Voorkoming van Mishandeling van Lede van die SA Leër* (1993)). This order generally defines ill-treatment as “*enige optrede wat neig om 'n persoon fisies of geestelik te benadeel of sy selfrespek of waardigheid aan te tas.*” It re-iterates that intensive training within the prescribed training guidelines cannot be seen as ill-treatment. It further, *inter alia*, gives guidelines for the imposition of extra drill, imposed as corrective punishment or corrective training and physical training. Both extra drill and physical training whether as punishment or training, must be given within the acceptable training guidelines provided. No bad language may be used and any physical training or drill may only be given by qualified instructors. Parade ground drill and physical training presented at the detention barracks must comply with these guidelines.

²¹⁵ Munting at 23. The internal complaints procedure is set out in *MPAI 29/2006* at 5-14 to 5-15.

accountability if there is no transparency.²¹⁶ This is why the provisions of OPCAT are of importance.²¹⁷

OPCAT aims to prevent torture and improve conditions of detainees through regular visits to places of detention by an international body (the Sub Committee to the Prevention of Torture (SPT)) and national bodies (known as National Preventive Mechanisms or “NPM”s) and by confidential and open dialogue with the state.

Torture has been defined as²¹⁸

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

However, acts which do not qualify as torture are also prohibited. See Article 16 of the CAT which states that

[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

²¹⁶ Munting *Torture Booklet* at 12.

²¹⁷ Streater at 1.

²¹⁸ Article 1 of the CAT.

It is not always clear what the difference between torture and cruel, inhuman and degrading treatment or punishment in terms of CAT is. When considering whether the conditions of the detention constitutes torture or should rather qualify as cruel, inhuman or degrading, the European Court and European Commission on Human Rights have found that the cumulative effects of *inter alia* overcrowding, inadequate sanitation, heating, light, food and contact should be considered and that such conditions, which on their own may constitute cruel, inhuman or degrading treatment, may cumulatively amount to torture.²¹⁹

The ill-treatment of prisoners has received wide attention by the South African courts. The court has on occasion found that the confinement of awaiting trial prisoners in “punishment cells” was a “wrongful and intentional interference with the absolute rights relating to personality, to which every man is entitled.”²²⁰

This approach was confirmed in *Goldberg v Minister of Prisons*²²¹ where the court found that

[i]t seems to me that fundamentally a [i] convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law, expressly or by implication, or those inconsistent with the circumstances in which he, as a prisoner is placed. Of course, the inroads which incarceration necessarily makes upon a prisoner’s personal rights and liberties...are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied...

²¹⁹ See Streater at 13 and the international precedents cited there.

²²⁰ *Whittaker and Morant v Roos and Bateman* 1912 AD 92 at 122-123. However, the court also found (at 104) that awaiting trial prisoners will lawfully be subjected to a certain amount of prison discipline and “personal restraint”.

²²¹ *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) at 39C-F; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 142C.

A prisoner's right not to be subjected to cruel, inhuman and degrading treatment was confirmed and his section 35(2)(e) rights re-iterated in *Stanfield v Minister of Correctional Services*.²²² *S v Makwanyane*²²³ confirms that prisoners do not lose all their rights, although their right to dignity is inevitably impaired by the imposition of imprisonment as a sentence.²²⁴

Treatment of inmates in the MCF's cannot objectively be seen as torture, nor is there any infringement of their rights in terms of section 35(2)(e) of the Constitution. Inmates receive the same medical treatment as other members of the SANDF. They are treated by the same medical officers in the same military hospitals as all other members. They also have access to the services of military psychologists, social work officers and other professional officers. Their food is prepared by the same mess kitchen that prepares the meals for the living-in members of the messes of the units where the MCF's are situated. They eat the same food as is provided for other members of the mess. There is no overcrowding and hygiene is viewed very seriously.

The only question that remains is whether the enforced periods of parade ground drill and physical training (PT) can be seen as cruel, inhuman or degrading treatment. Drill is seen as the cornerstone of military discipline.²²⁵ That is the reason why corrective training imposed on office bearing often imposes punishment drill for minor disciplinary transgressions. The parade

²²² *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) para 89; *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) para 14. Section 35(2)(e) of the Constitution states that every detained person is entitled "to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

²²³ *S v Makwanyane* 1995 (3) SA 391 (CC).

²²⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) paras 142-143.

²²⁵ South African Army Infantry Formation *Drill All Arms Précis* (2006) at 1-1 describes the importance of drill on discipline as follows: "The object of drill is to develop, in the individual soldier, that sense of instinctive obedience that will assist him, at all times, to carry out his orders. That the foundation of discipline is based on drill has been proved over and over again. Good drill, well rehearsed, closely supervised and demanding the highest precision, is an exercise in obedience and alertness. It sets the standard for the execution of any duty, both for the individual and the unit" and at 2-2 states "[d]iscipline is the aim – drill is the method."

ground drill undertaken during a sentence of detention is a combination of normal drill instruction and punishment drill, which although harsh, is designed to enhance a soldier's discipline.

The physical training periods are also not imposed as punishment but are done to enhance the fitness of the soldier.²²⁶ Only acceptable PT exercises presented by a qualified PT instructor are allowed. Inmates undergoing PT and drill instructions are compelled to take water breaks. It is by no means suggested that the drill and PT is conducted in exactly the same manner as would be the case during drill and PT periods in units to members of the SANDF who are under training. The regimen is harsh and the conditions under which it is conducted are not relaxed. However, one must keep in mind why the inmate is serving a sentence of detention. Detention will only be imposed in cases of a serious lack of discipline. It is not an appropriate sentence for criminal offences. Inmates in the MCF's are very rarely first offenders. A perusal of CMA judgments in fact reveals that detention is usually imposed as a last chance by the court to try and rehabilitate the soldier for future service as a disciplined member of the SANDF.²²⁷ It is therefore submitted that due to the actual treatment of offenders serving detention and the unique nature of military life and its requirements for discipline,²²⁸ the imposition of detention as a sentence does not constitute cruel, unusual or degrading treatment or punishment.

²²⁶ All uniform members of the SANDF are subject to bi-annual fitness tests and inmates serving a sentence of detention are not exempted from these fitness tests.

²²⁷ See *S v Mbunga* (CMA 38/2008) as discussed above. Detention is however not always successful on rehabilitating offenders. In *S v Msibi* (CMA 52/2008) the CMA was satisfied that the accused was not a candidate for rehabilitation where the accused had previously been sentenced to a fine, suspended detention and effective detention. The accused went AWOL again and was sentenced to a discharge from the SANDF. In *S v Mkhencele* (CMA 58/2008) the court found that fines, extra duties and a suspended sentence of detention where the possibility existed of losing his rank, did not deter the accused. He was not seen as a candidate for rehabilitation and his sentence of discharge from the SANDF was confirmed.

²²⁸ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 31.

This is also the opinion held in other jurisdictions. The Judge Advocate General is of the opinion that the treatment of inmates at MTCT Colchester is similar to that received during basic military training. The aim of the training is to “return retrained Service personnel to their service to continue their career.”²²⁹

This does not however absolve the SANDF of its responsibility in terms of OPCAT to have an independent oversight body to ensure compliance with CAT. The type of punishment in the form of drill and physical training may be easily abused and could be used in a cruel or degrading way. It is imperative that staff officers at the MCF’s receive training in this regard.

No policy exists in the SANDF regarding torture. Currently the South African Police Service is the only governmental body which has created policy regarding the prevention of torture and cruel, inhuman and degrading punishment.²³⁰ Since the Military Police Agency has the same powers as the SAPS it is suggested that the MPA peruse the SAPS document in drawing up a policy document for the prevention of torture and cruel, inhuman and degrading punishment in the military.²³¹

There are no clear guidelines on what the national preventative measure (NPM) must look like and the state may decide to either establish a new structure, use an existing structure to fulfill the mandate of OPCAT or to amend the mandate of an existing structure to perform the functions of an NPM.²³² It is suggested that the Judicial Inspectorate of Prisons established in terms of the Correctional Services Act 111 of 1998 can be used as an NPM with minor changes to its

²²⁹ OJAG at 18.

²³⁰ *Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police Service* which came into operation on 1 July 1999 (see in this regard Streater at 16).

²³¹ Section 31 of the Defence Act 42 of 2002 regarding the military police functions.

²³² *Munting Torture Booklet* at 15.

mandate.²³³ Since the MCF is a detention facility where people are deprived of their liberty, the Judicial Inspectorate of Prisons may be the most appropriate body to act as independent oversight body for the MCF. This would be the most plausible option since the MPAI already makes provision for access to inmates by “any person with a statutory inspection authority” and limited statutory changes need to be made to defence legislation.²³⁴

It is submitted that a sentence of detention, when imposed early on in the career of the young, lower-ranking offender, may be of great value to the SANDF. Unfortunately, effective detention is seldom imposed and is usually suspended. With the correct programmes for skills development the MCF can be critical in the retraining and retaining of skilled personnel who are showing a lack of discipline. The military courts are, in the author’s experience, hesitant to impose effective detention as a sentence because of the consequences attached to the sentence.

Here the example of the rehabilitation programmes used by MTCT Colchester could be of great assistance. If the legislation is amended to allow for the retention of the accused’s rank when sentenced to detention, it is a sentence that can be used more effectively. The procedures of the South African detention barracks already make provision for the treatment of rank bearing members who are awaiting trial. If such treatment is not seen as a viable option, it is submitted that the temporary suspension of the accused’s rank should be considered so that he is returned to his original or a lower rank after completion of the sentence. The SANDF will benefit from the retraining and

²³³ Muntig *Torture Booklet* at 16; Streater at 17-28 for a discussion on the structure and mandate of the Judicial Inspectorate of Prisons. Notice should be taken of the processes followed by the British Chief Inspector of Prisons. The MCTC Colchester is regularly inspected by HM Inspectorate of Prisons at the request of the Provost Marshall (Army) (see HM Chief Inspector Prisons *Report on an Unannounced Short Follow-Up Inspection of the Military Corrective Training Centre* (2010) at 5). HM Inspectorate of Prisons has the same function as the South African Judicial Inspectorate of Prisons. It is therefore re-iterated that the Judicial Inspectorate of Prisons would be an appropriate body to keep oversight over the detention barracks.

²³⁴ MPAI 29/2006 at 2-14.

rehabilitation of a member without the severe financial and humiliating consequence to the member who loses his rank.

It is also submitted that consideration be given to sentencing members to a discharge coupled with a period of detention as is done in Britain. This is already a sentencing option in terms of the MDC. Millions of rands are spent on the training of soldiers, housing, feeding and clothing them and providing free medical care to all soldiers and their dependents. The SANDF is already involved in skills development and upliftment in terms of recruitment of short-term members. By simply discharging members who do not conform to the disciplinary standard of the SANDF, the courts are sending highly trained undisciplined individuals with no other skills than weapons and combat training into an unsuspecting community. This may have some serious consequences when such individuals turn to a life of crime because they have no other way of supporting their families. By providing vocational training and other life skills, such individuals may be better equipped to cope with life outside the Defence Force. The Education, Training and Development (ETD) Division within the SANDF may be of some assistance in this regard. The SANDF may also liaise with NGO's in assisting discharged members undergoing detention.

6.2.6 Field punishment

Field punishment can be imposed as a sentence in the case of a private for a period not exceeding three months.²³⁵ It is imposed for any offence committed outside the borders while the accused is on active service or serving on a ship at sea.²³⁶

²³⁵ Section 12(1)(e) of the MDSMA. The sentence commences immediately after the sentence has been announced in open court (see s 118(1) of the MDC). In the event that the accused is sentenced to another sentence which is subsequently varied by the CMA, the sentence of field punishment is seen as commencing on the date on which the sentence is varied.

²³⁶ Section 93(5) of the MDC which also states that field punishment cannot be imposed with a sentence of detention. It can also not be combined with a sentence of imprisonment (see s 93(2)(b) of the MDSMA).

It is defined as the “performance in custody in the field of such labour and extra drills and duties as may be prescribed.”²³⁷ There is currently no clearer description of what field punishment entails. This is a punishment that originated from the British Army in 1881 and has basically shown little development ever since. Historically, however, field punishment was divided into field punishment no1 and field punishment no 2.²³⁸

6.2.6.1 Historical position of field punishment

Field punishment no 1 consisted of the offender being kept in irons or handcuffs and secured to a fixed object, such as a gun wheel to prevent his escape. He was attached to the fixed object for a maximum period of two hours per day, but not more than three out of four consecutive days, for a maximum period of 21 days. Where irons were not used, straps and ropes were used to secure the offender. He was also subjected to labour and restraints as if he had been sentenced to imprisonment with hard labour.

Field punishment no 2 was executed in the same way as field punishment no 1, except that the offender was not secured to a fixed object.

It was further required that field punishment had to be executed in such a way that it did not cause injury or leave any permanent mark on the offender. Where a medical practitioner indicated that a continuation of the field punishment would be prejudicial to the health of the offender, the punishment had to be ceased.

When the unit of the offender was on the move, the punishment had to be carried out regimentally, but where the unit was halted there was a provost

²³⁷ Section 1 of the MDC. This definition has been applicable since the advent of the Defence Act 44 of 1957 and has not been changed since.

²³⁸ War Office *Manual of Military Law* (1914) at 721.

marshal²³⁹ who was responsible for carrying out the punishment. When the unit was on the move the offender would not be secured to a fixed object, but marched with their unit and performed all their military and extra fatigue duties.²⁴⁰

Little has changed regarding the implementation of field punishment during the time of the Union Defence Force. The court martial could impose field punishment as directed by the rules made from time to time by the Governor-General and consisted of personal restraint or hard labour, but did not include flogging or attachment to a fixed object. The accused was treated the same as “defaulters”.²⁴¹ The field punishment was not allowed to inflict injury to “life or limb.”²⁴²

6.2.6.2 Current position of field punishment

While undergoing field punishment, the offender may be required to perform his normal military duties.²⁴³ Whenever the accused's unit is on the move, is about to move or the chief disciplinary officer is not available, field punishment may be carried out regimentally.²⁴⁴ The Adjutant General may order that the sentence of field punishment or any portion thereof may be served in the detention barracks.²⁴⁵ The accused may be handcuffed or otherwise secured while doing his field punishment to prevent his escape.²⁴⁶ If the chief disciplinary officer is available and the unit is not on the move, the offender must be handed over to the chief disciplinary officer to undergo his sentence.²⁴⁷

²³⁹ This would equate to the modern day chief disciplinary officer referred to in s 149(3) of the MDC.

²⁴⁰ *Manual of Military Law* at 721-722.

²⁴¹ Treatment as “defaulters” is the same treatment as a person sentenced to “confinement to barracks”.

²⁴² Department of Defence *Military Discipline Code, Regulations and Orders and Instructions* (1940) at 86; s 44(5) of the MDC of the Defence Act of 1912.

²⁴³ Section 149(1) of the MDC.

²⁴⁴ Section 149(2) of the MDC.

²⁴⁵ Section 119 of the MDC.

²⁴⁶ Section 149(2) of the MDC.

²⁴⁷ Section 149(3) of the MDC; r 111(a) of the MDSMA.

The disciplinary officer must execute the sentence in accordance with the MDC and the warrant handed over in which he is authorised and required to execute the sentence.²⁴⁸ Before being required to perform the field punishment, the offender must be declared medically fit and in the event that he is not medically fit, he will not be required to do such duties.²⁴⁹ Where the offender is sentenced to another sentence of field punishment while he is already serving such a sentence, the first sentence must be completed before the new sentence can be served.²⁵⁰

It is clear from the above discussion that vestiges of the historic guidelines have remained. The current definition, as shown above, refers to "...such labour...as may be prescribed" while historically the punishment included hard labour. The enforcement of the punishment while the unit is moving has also remained the same. The constitutional rights regarding cruel, inhuman and degrading punishment have not been considered in the continued existence of this punishment. However, for the same reasons as set out above regarding the sentence of detention, it is submitted that the "forced performance of physical exercise" in the military cannot be regarded as cruel, inhuman or degrading punishment.²⁵¹

What may however be open to constitutional challenge is the vagueness of the definition of what constitutes field punishment. In terms of the requirement of legality or the common law principle *nulla poena sine lege* a punishment must be sufficiently defined to meet the requirements of legality.²⁵² What exactly

²⁴⁸ Rule 111(a) of the MDSMA.

²⁴⁹ Rule 111(b) of the MDSMA.

²⁵⁰ Rule 111(c) of the MDSMA.

²⁵¹ See in this regard Muntingh at 23 where the opinion is raised that field punishment may possibly be in contravention of the Constitution and the Convention against Torture since it entails "forced performance of physical exercise."

²⁵² Van Zyl Smit (1996) at 28-2. The same argument may be raised with the sentence of 'confinement to barracks' which is also not clearly defined by statute or regulation. Military courts are however required to clearly indicate on the Record of Proceedings what the content

constitutes field punishment must be defined by the Minister by means of the Defence Regulations.²⁵³ This has not been done. Although the Defence Regulations are in the process of being redrafted, it is not clear to what extent, if at all, the new regulations will address this definition.²⁵⁴ In *S v R*²⁵⁵ the court discussed the difficulties with uncertain content in the context of the different forms of correctional supervision. It held that the court had to determine the content of the correctional supervision and that this detail should not be left in the hands of the correctional authorities. This view could also be applied to the overbroad definition of field punishment. No guidelines currently exist in explaining what would constitute “such labour and extras drills and duties as may be prescribed.” One would suppose that “extra drills” may be similar to those ordered when the offender is sentenced to corrective punishment and that “duties” would receive a similar interpretation to extra duties imposed as a sentence. However, what would constitute “labour” is not clear. Is it different from “duties”? There are a wide range of actions that may constitute military “labour”. This leaves too much discretion in the hands of the disciplinary officer when no clear guidelines exist. It must also be kept in mind that clear guidelines exist in terms of policy documents for punishments such as corrective punishments, as discussed below. The military court must specify what specific duties are to be included in the punishment. It is not left to the unit to decide the content of the punishment. However, without the legislative guidelines of the Defence Regulations, as required, it is submitted that the

of the punishment of “confinement to barracks” must entail and may therefore comply with the requirement of legality.

²⁵³ Ministerial Task Team at para 19.

²⁵⁴ Budget speech by the Minister of Defence and Military Veterans on 13 April 2011 states that the new Defence Regulations are ready for submission to Parliament in 2011.

²⁵⁵ *S v R* 1993 (1) SA 476 (A) at 492A the court held that “*die verantwoordelikheid om ‘n gepaste vonnis te vel, rus altyd op die regterlike beampte en mag nie, selfs by die oplegging van korrektiewe toesig, geabdikeer word nie. Tydens die uitdiening van sy straf is die toesiggeval in groot mate uitgelewer aan die amptenate van die Departement van Korrektiewe Dienste; om die bepaling daarvan ook aan hulle oor te laat, sou pligsversaking wees.*” See also *S v Tsanshana* 1996 (2) SACR 157 (E) at 160d; *S v Ndaba* 1993 (1) SACR 637 (A); *S v Somers* 1994 (2) SACR 401 (T); *Du Toit et al* at 28-10P. In *S v Sekoboane* 1997 (2) SACR 32 (T) at 41g the court held that “[d]ie strafkomponent moet soos alle straf wat ‘n hof toemeet behoorlik begrens word en deur die hof (en nie ‘n ander instansie nie) opgele word” and 42H that “[o]m ‘n straf te onskryf is niks anders as goeie regspraak nie en myns insiens ‘n regterlike plig ten einde burokratiese vergrype waarteen daar geen appel is nie te voorkom.”

military court will not be in a position to determine the content of the punishment of field punishment.

It is foreseen that the Defence Regulations will probably not address the definition of field punishment as it is not a future punishment option for a military court in terms of the Military Discipline Bill.²⁵⁶ The Ministerial Task Team postulates that this punishment is not currently available to the military courts because it is not defined by the Minister.²⁵⁷ However, “duties” and “extra drill” are already covered by other punishments available to the military courts and therefore it is submitted that there is in fact no need for field punishment as a sentencing option.

6.2.7 Reduction in rank or to the ranks

An officer can be sentenced by a CSMJ or a CMJ to reduction to any lower officer’s rank.²⁵⁸ Other ranks can be reduced to any lower non-commissioned officer’s rank or to the ranks.²⁵⁹ For this sentence to be imposed the offender must have a substantive rank and can therefore not be imposed on a private.

²⁵⁶ Clause 40 of the Military Discipline Bill prescribed the punishments that can be imposed by the military courts. Field punishment has been removed as a sentencing option.

²⁵⁷ Ministerial Task Team para 20.

²⁵⁸ Section 12(1)(f)(i) of the MDSMA. See *S v Matjila* (CMA 163/2002) where, *inter alia*, two co-accused with the ranks of colonel were sentenced to reduction to the substantive rank of major (which is two ranks lower than the current ranks of the accused). The CMA found that under the circumstances the relevant mitigating factors were not sufficiently considered and the sentence was varied to reduction to the substantive rank of lieutenant colonel (which is one rank lower).

²⁵⁹ Section 12(1)(g)(i) of the MDSMA. Reduction to the ranks means to be reduced to the rank of a private. In *S v Mogorosi* (CMA 009/2004) a warrant officer class 1 was sentenced to discharge from the SANDF for a conviction of theft and conduct to the prejudice of military discipline. The sentence was varied by the CMA to one of reduction to the rank of warrant officer class 2. In *S v Manamela* (CMA 32/2005) the accused, who was a lance corporal, was sentenced to discharge from the SANDF for a conviction of fraud, forgery and the unlawful use of a military vehicle. The CMA was of the opinion that the trial court did not take sufficient notice of the mitigating factors and that the accused was a first offender and varied the sentence to reduction to the ranks. In terms of s 135 of the Armed Forces Act 2006 in British military law, reduction in rank can only be imposed on warrant officers and non-commissioned officers. This also applies to reduction from a temporary to substantive rank. This is a sentence that can be imposed by a commanding officer at a summary hearing. Where the accused is of the rank of lance corporal, he can be reduced in rank by a commanding officer

Reduction in rank or reduction to the ranks is considered where the conduct of the accused does not comply with the conduct expected from a person of his rank.²⁶⁰ Although the accused still has value to the military, he no longer deserves the responsibility of his current rank level.²⁶¹ It results in a reduction in responsibility and status of the accused. He will however have the opportunity in future to rise through the ranks and increase his responsibility. The effect of these sentences is that the salary will change to the minimum salary of the lower rank. The promotion seniority is also reduced to the lowest in the new rank.²⁶² This is a punishment that may have a general deterrent effect on other members of the SANDF because it is a visible sentence. The offender has to wear his lower rank and it is visible for all to see. This is also a sentence that offenders may find extremely humiliating.²⁶³

When considering reduction to a lower substantive rank the court must hear evidence on the current salary of the offender, the benefits linked to the rank,

with basic powers. However, for the reduction in rank of any accused holding the rank of corporal to warrant officer, the commanding officer needs extended powers. The summary hearing may reduce an accused with one rank. At the court martial the accused may be reduced by more than one rank. The accused is also, as in South African law, reduced to the lower salary of the demoted rank (see *Manual of Service Law* (2011) 1(2) at 1-13-36).

²⁶⁰ In *S v Zitha* (CMA 86/2000) the accused, a warrant officer class 2, was reduced to the ranks because his lack of discipline showed that he “does not deserve to be a non-commissioned officer.” This is a reduction of five rank levels.

²⁶¹ Vowell D K “To Determine an Appropriate Sentence: Sentencing in the Military Justice System” (1986) 114 *Military Law Review* 87 at 107. This sentence can be seen as a commitment to the rehabilitation of the offender, since his services are retained and he will be able to once again attain his former rank over time.

²⁶² Rule 112(1) of the MDSMA. The Ministerial Task Team at 102 do not see the reduction of rank as a severe punishment, but it is submitted that the inevitable consequences of loss of salary and rank seniority, coupled with the negative effect this has on the offender’s pension, makes this a severe punishment. The value of the pension that a member receives at retirement is calculated by taking into consideration the salary received in his final two years of service. Reduction in rank will mean a lower salary level on exiting the SANDF and consequently a lower monthly pension.

²⁶³ In terms of British military law any warrant officer who has been reduced to the lowest rank as a result of a sentence by a military court or administrative procedure has the right to claim his discharge rather than suffering the reduction. The warrant officer must apply for such a discharge within 28 days of the reduction of his rank and the discharge must be affected as soon as possible, unless warlike operations are in force. This allows a warrant officer to leave the armed forces if he does not wish to remain in service as a private (see *Manual of Service Law* (2011) 1(2) at 1-18-B-1).

the seniority of the member, ie when his next promotion is due as well as the salary of the lower rank. When considering reduction to the ranks as a sentence the prosecutor and defence counsel are given the opportunity to present argument or to lead evidence on the member's current salary level, the minimum salary of a private as well as any other factor that may influence the court in deciding on the appropriateness of this sentence.²⁶⁴

6.2.8 Reduction from a temporary rank to a substantive rank

It may happen from time to time that a member of the SANDF is promoted to a temporary senior rank for command purposes. If the conduct of the person does not fit the behaviour expected from a person occupying that rank, the sentence will reduce the person from his temporary rank to his substantive rank.²⁶⁵

If the offender received remuneration in accordance with his temporary rank, the effect of the reduction will be that he will revert back to the salary he received in his substantive rank.²⁶⁶ Generally a promotion to a temporary rank does not result in the member receiving a higher salary and a reduction to his substantive rank will have no pecuniary effect. The prosecution and defence counsel will have to present argument or lead evidence before the court in this regard.

This is not considered to be a severe sentence.

²⁶⁴ Rule 58(6) of the MDSMA. In *S v Miya* (CMA 185/2000) the accused was sentenced to a reduction in rank but the court did not hear any evidence in this regard. The CMA stated that "[r]eduction of rank will amount to severe loss of income to the accused. As the military judge did not hear any evidence or address in mitigation with regard to the effect of that, a sentence of reduction to the ranks will have on the financial position of the accused. He should have requested the prosecutor and defence counsel to address him on the matter before it can be said that he applied his mind to affect such a sentence." The sentence was varied to a fine.

²⁶⁵ Sections 12(1)(f)(ii) and 12(1)(g)(ii) of the MDSMA.

²⁶⁶ Rule 112(2) of the MDSMA.

6.2.9 Reduction in seniority of rank.

Where the court is of the opinion that the conduct of the accused does not warrant him being promoted to his next rank promotion at that time, the court may sentence the accused to a reduction in seniority of rank.²⁶⁷ The accused does not lose his rank. The effect of the sentence is that his next promotion date is effectively postponed.²⁶⁸ This is not a sentence that will be imposed if the main purpose of punishment is one of general deterrence. The deterrent effect of the punishment is mainly limited to the accused who is sentenced since there is no outward manifestation of this sentence.

To assist the court in deciding whether this would constitute an appropriate sentence, the prosecution and defence counsel must present argument or lead evidence regarding the date of the appointment of the accused to his current rank as well as to any other factor that the court must take into consideration. Although this sentence may have some monetary implication in the long run due to the postponement of the accused's promotion, it is submitted that this is not a severe sentence. It often happens that a person in the SANDF does not get promoted on their due date because of various factors, such as the unavailability of posts or the completion of promotional courses. A date on which the member becomes due for promotion does not automatically guarantee that the member will be promoted on time. It is however suggested that before the court imposes this sentence, evidence must be heard from the

²⁶⁷ Section 12(1)(h) of the MDSMA. In British military law this sentence can only be imposed on an officer in terms of s 134 of the Armed Forces Act 2006 (see *Manual of Service Law* (2011) 1(2) at 1-13-33).

²⁶⁸ A person's seniority date is the day upon which he was promoted to his current substantive rank. From that day on he begins building up seniority in the rank and promotion to his next higher rank will partly depend on achieving a certain amount of seniority in that rank. If the accused was promoted to his rank for example on 1 January 2008 and the court is of opinion that he should forfeit seniority for a period of three years, it is regarded as if he was promoted on 1 January 2011. It will therefore postpone his next promotion with a period of three years. See *S v Brits* (CMA 41/2004) where the accused, a flight-sergeant, was sentenced to reduction in seniority of rank as if he was promoted on 13 September 2002, the date of the trial on a charge of indecent assault. The accused requested a review of his case by the CMA. According to the CMA the sentence was not in accordance with real and substantive justice and was varied to one of discharge from the SANDF.

accused's career manager. Certain posts are coupled to certain ranks and if the accused had been identified for a certain position requiring a certain rank, the long-term effect should be taken into consideration when deciding whether reduction in seniority would be an appropriate sentence.

6.2.10 A fine.

A fine is "a sentence by the court which orders the offender to pay a specific amount of money to the State."²⁶⁹ It is regarded as the most frequently imposed sentence in the South African civilian courts and is mainly imposed for less serious offences.²⁷⁰ This contention is also true for military courts.

It had been found by the courts that the purpose of the fine is to keep offenders out of prison.²⁷¹ Terblanche however states that the purpose of a fine "being punishment, is to punish the offender by reducing the offender's financial ability and, in this manner, to worsen the quality of life for some time."²⁷² A fine should also be a deterrent.

A fine can be imposed for any common law crime and in terms of the criminal procedure applicable to civilian courts, for all statutory offences for which it is prescribed.²⁷³ Although imprisonment is the prescribed punishment for almost all statutory military offences, military courts are authorised to impose fines for any of these offences.²⁷⁴

²⁶⁹ Terblanche (2007) at 261.

²⁷⁰ Terblanche (2007) at 261; Joubert at 304.

²⁷¹ Krugel & Terblanche at 493; Kruger at 28-53; *R v Nhlapo* 1954 (4) SA 56 (T) at 58G. This purpose does not find application in military law since military courts do not have the jurisdiction to impose imprisonment as default for the payment of the fine. The exception is in terms of s 93(6)(a) of the MDC where the court sentences an accused who at conviction is no longer subject to the MDC and sentences that accused to a fine, and may sentence the accused "to a period of imprisonment not exceeding two months in default of payment of the fine."

²⁷² Terblanche (2007) at 261; Kruger at 28-56; *S v Dreyer* 1990 (2) SACR 445 (A) at 449f.

²⁷³ Terblanche (2007) at 262; Krugel & Terblanche at 109 and 404; Kruger at 28-53; Joubert at 305.

²⁷⁴ Section 51 of the MDC. See the discussion in ch 5 at para 5.5 above.

In military courts the maximum fine that may be imposed by the court is R6000 and in the case of an CODH, the maximum of the fine that can be imposed is R600.²⁷⁵

In its decision to impose a fine as a sentence, the court must first of all determine if the crime is not too serious for the imposition of a fine.²⁷⁶ If that is the case, the military court has various options as discussed above which may reflect a more appropriate sentence. The court must then determine what would constitute an appropriate fine. Once this is determined, the financial means of the accused can be taken into consideration and the fine adjusted either upward or downward.²⁷⁷

When considering the offender's ability to pay the fine, the amount of the fine should not be reduced to such an extent that it loses its deterrent effect or is no

²⁷⁵ Section 12(1)(i) of the MDSMA read with s 11(2) of the MDSMA. The Adjustment of Fines Act as applied by civilian courts does not find application in military law. In terms of clause 40 of the Military Discipline Bill it is foreseen that fines will, once it comes into operation, be determined in terms of the Adjustment of Fines Act. British courts-martial are only limited by the maximum amount prescribed by statute and there is no limit to the fine awarded for Service disciplinary offences. Summary hearings are limited to a fine of maximum 28 days' pay of the accused where the accused is of the rank below a warrant officer. The maximum amount deductible for officers and warrant officers is up to 14 days' pay. Where an accused chose to be tried by court martial, the court martial's jurisdiction is limited to the maximum amount the accused would have received at the summary hearing, ie 28 days' pay (see OJAG at 21; *Manual of Service Law* (2011) 1(2) at 1-13-37).

²⁷⁶ Joubert at 305.

²⁷⁷ Terblanche (2007) at 262; Krugel & Terblanche at 406; Kruger at 28-57 to 28-58. Where a fine is considered an appropriate sentence, the court should impose a fine and the accused's inability to pay the fine should not prevent the court from imposing an appropriate fine (see *S v Seoela* 1996 SACR 616 (O) at 622a-b). For a contrary position see *S v Ncobo*; *S v Zwelibhangile*; *S v Dlamini* 1988 (3) SA 954 (N) at 956C; *R v Nhlapo* 1954 (4) SA 56 (T). A perusal of the CMA judgments at the author's disposal does not give a clear indication of factors that the court will consider specific to the imposition of fines. This is because fines are not sentences that are reviewed by the CMA unless requested by the accused. However, in *S v Maduba* (CMA 51/2008) the CMA was of the opinion that a fine of R5000 was too lenient where "dishonesty of officers are concerned. A more serious sentence would not have been inappropriate." In *S v Ngako* (CMA 165/2002) the accused was sentenced to a fine of R600 for a conviction of unauthorised use of a military vehicle. Under the circumstances the court felt that the sentence was "lenient in the extreme and cannot be regarded as conducive to military discipline." In general, however, a fine is seen as appropriate in disciplinary offences and in the case of first offenders (see *S v Feni* (CMA 28/99); *S v Mbatha* (CMA 07/99)). For the determination of an appropriate fine in British military law see the guidelines set out in s 249 of the Armed Forces Act 2006 and discussed in *Manual of Service Law* (2011) 1(2) at 1-13-38. The process is similar to that followed in South African law.

longer appropriate considering the seriousness of the crime.²⁷⁸ The difficulties experienced in the civilian environment regarding the collection of fines²⁷⁹ are not of concern to the military courts. When sentenced to a fine, the accused is placed under deduction of pay and the Chief Paymaster of the SANDF will automatically deduct the fine from the salary of the accused.²⁸⁰ A sentence of a fine is effective immediately.²⁸¹

6.2.10.1 Deductions from pay in terms of section 130 of the MDC

Where an accused is sentenced to a fine, the court may place the accused under deduction of pay for the amount of the fine.²⁸² The fine may be deducted from his salary in installments as determined by the Chief Paymaster.

Where the court proceeded with or commenced with a trial where the accused is no longer subject to the MDC at the time of the trial and is sentenced to a fine by the military court, the accused will only be released from custody when he has paid his fine.²⁸³

²⁷⁸ Terblanche (2007) at 266; Kruger at 28-57; *R v Motlagomang* 1958 (1) SA 626 (T) at 630A-B; *S v Vekueminina* 1993 (1) SACR 561 (Nm) at 564; *S v De Beer* 1977 (2) SA 161 (O) at 164A; *S v Solani* 1978 (1) SA 432 (Tk) at 433H.

²⁷⁹ Terblanche (2007) at 261.

²⁸⁰ Section 130 of the MDC as discussed at para 6.2.10.1 below. Where the accused has difficulty in affording the fine, he can apply to the Chief Paymaster for payment of the fine in installments. Experience has shown that installments of three months at most is usually authorised. The accused submits a request for such installments via the personnel section of the unit, attaching proof of income and expenditure and it is submitted to the Chief Paymaster through the normal channels of command. A similar process is followed by the British military courts, except that the judge advocate presiding over the court martial or the commanding officer will make a determination regarding the payment of the fine in installments. It is generally accepted that a fine should not be repaid over more than 12 months. If after some time, the accused's circumstances have changed and he can no longer afford the installments, the accused may request the commanding officer to vary the fine (see *Manual of Service Law* (2011) 1(2) at 1-13-38). This is not possible in South African military law.

²⁸¹ Rule 59(12)(b)(i) of the MDSMA.

²⁸² Section 130 of the MDC.

²⁸³ Section 34(1)(b) of the MDSMA.

6.2.11 Confinement to barracks.

Confinement to barracks is a sentence available to all military courts. It can only be imposed on offenders of the rank group private or equivalent rank.²⁸⁴ It can be imposed for a maximum period of 21 days.²⁸⁵

Experience has shown that this sentence is ideally suited for offenders undergoing regimental training where it would not be suitable to remove the offender from the training environment. Because of the nature of the sentence, it is advisable that the court investigate or hear evidence on the facilities available at the unit to determine whether implementation of the sentence is feasible.

Confinement to barracks is described in the Military Discipline Code of 1940 as follows:²⁸⁶

Defaulters will be required to answer to their names at uncertain hours throughout the day, and will be employed on fatigue duties to the fullest practicable extent with a view to relieving well-conducted soldiers there-from. Defaulters will attend parade, and take all duties in regular turn. When the fatigue duties required are not sufficient to keep the defaulters fully employed, the O.C.²⁸⁷ may order them to attend punishment drill (provided that they shall not be liable to punishment drill after the expiration of ten days from the date of award of confinement to barracks.) Confinement to barracks in the case of the S.A.M.C.²⁸⁸ will not carry with it punishment drill if awarded to men actually at

²⁸⁴ A "private" is the term used in the South African Army and the Medical Health Services for a non-rank bearing member. The equivalent of a private in the other Arms of Service is an "airman" for the South African Air Force and a "seaman" for the South African Navy. For disciplinary matters candidate officers (CO's) are also regarded as the equivalent of a private.

²⁸⁵ Section 12(1)(j) of the MDSMA read with s 11(2) of the MDSMA.

²⁸⁶ *Military Discipline Code, Regulations and Orders and Instructions* at 452. The punishment has not changed significantly over the years and remains the same.

²⁸⁷ Commanding officer of the defaulter.

²⁸⁸ South African Medical Corps.

the time doing duty in hospital. Confinement to barracks shall commence from the time of award.

Currently, execution of the sentence is as follows:

1. The member is restricted to the unit lines. He is not detained but his movements after hours are very restricted. Within the unit lines the accused has relative freedom of movement.
2. The member forfeits the use of the recreational facilities on the unit.
3. He is easily identifiable because he wears distinguishing clothing.²⁸⁹
4. He is required to move in double march wherever he goes within a unit.²⁹⁰
5. The maximum period of 21 days may be adjusted to fit the offence. Any lesser amount of days may be imposed.
6. The trial officer may also add variants to the punishment depending on the nature of the offence. Any variation must be documented on the trial documentation. It may include any or all of the following:
 - (i) Reporting to the officer on duty as stipulated;
 - (ii) Punishment drill with or without equipment;²⁹¹

²⁸⁹ The accused undergoing this punishment must wear a red combat helmet inner also known as a dooby. This can be classified as a form of “stigmatisation shaming” (see the discussion at para 6.2.2.2 above) and can be regarded as unconstitutional degrading punishment.

²⁹⁰ Double march means at a slow jog or 180 paces per minute.

- (iii) Report in different types of uniform at specified times to ensure the uniform is clean and tidy; and
- (iv) Stand inspection in his room.

The period of confinement to barracks starts immediately after the sentence has been announced in open court.²⁹²

Concern has been raised whether confinement to barracks complies with the objectives of the UN Convention against Torture, because it “imposes additional duties and prohibits extra-mural and leisure activities” on the offender.²⁹³

The same argument regarding the necessity of a disciplined forced raised in the discussion on detention is relevant here. This is not a unique punishment and variations are found in other jurisdictions.

6.2.11.1 Similar punishments in other jurisdictions

As example of similar punishments the “stoppage of leave order”, “restriction of privileges order” and “service supervision and punishment orders” (SSPO) as found in the British Armed Forces may be used.²⁹⁴ “Stoppage of leave” may be imposed by summary hearing or court martial on all accused of and below

²⁹¹ Extra drill will be executed outside normal working hours, up to a maximum of one hour and may not be executed for more than 15 minutes continuously without the accused being allowed to stand at ease for at least 30 seconds. Members must be allowed to drink water as they require prior to and during the extra drill. Double time drill may only be ordered during the last five minutes of the first half-hour and again during the last five minutes of the second half-hour. All extra drill must be done in camouflage uniform with skeleton kit which includes a water bottle and may be with or without a weapon. All drill movements may only be done in accordance with the SADF Order *Drill All Arms* of 1971.

²⁹² Rule 59(12)(b)(i) of the MDSMA.

²⁹³ See Muntingh at 23.

²⁹⁴ *Manual of Service Law* (2011) 1(2) at 1-13-40. The following discussion is based mainly on this source material. Service supervision and stoppages orders and the minor punishments, which include “stoppage of leave” and “restriction of privileges” are authorised in terms of s 132 of the Armed Forces Act 2006 for summary hearings and s 164 of the Armed Forces Services Act 2006 for courts martial. The minor punishments are set out in *The Armed Forces (Minor Punishment and Limitation on Power to Reduce in Rank) Regulations* (2009).

the rank of warrant officer.²⁹⁵ The punishment entails that the accused may not leave his ship or unit for a specified number of days without the permission of his commanding officer.²⁹⁶ This punishment does not prevent the accused from having contact with his family outside the unit per telephone or e-mail. Further restriction may also be imposed on the accused as the commanding officer deems fit. These administrative restrictions may entail that the accused must report on parade several times during the day to ensure that he is present on the ship or within the unit.²⁹⁷ He may be required to report in different uniforms throughout the day to ensure that his uniform is correct and neat. He may also be prohibited from going into certain areas within the unit, such as the bar or canteen. This punishment may be imposed for a maximum period of 14 days.²⁹⁸

“Stoppage of leave” is frequently combined with the punishment of “restriction of privileges”. This punishment is only available to an accused of the rank of private²⁹⁹ and is seen as a useful punishment in assisting with the reformation and rehabilitation of the accused. The punishment requires the accused to perform certain extra duties for the duration of the punishment. The nature of the extra duties is determined by the commanding officer and may include any work, training or other military duty that the commanding officer deems appropriate. The punishment is imposed for a maximum period of 14 days and may be ordered to run consecutively with the punishment of stoppage of leave.³⁰⁰

Extra duties may start two hours before the start of the accused’s normal working day and may end six hours after the end of the accused’s normal working day. Extra duties may be imposed for a period of five and a half hours

²⁹⁵ Section 2 of *The Armed Forces Regulations*.

²⁹⁶ Section 3(1) of *The Armed Forces Regulations*.

²⁹⁷ The maximum number of musterings (parades) is six within a 24 hour period.

²⁹⁸ Section 3(2) of *The Armed Forces Regulations*.

²⁹⁹ Section 2 of *The Armed Forces Regulations*.

³⁰⁰ *Manual of Service Law* (2011) 1(2) at 1-13-42; s 4 of *The Armed Forces Regulations*.

per 24 hours.³⁰¹ He may also be required to report on parade up to six times per 24 hours and this is seen as one of his extra duties.

A service supervision and punishment order is available to the accused of the rank private or equivalent.³⁰² This sentence is usually imposed where a junior member frequently misbehaves despite the imposition of other lesser punishment. This punishment is deemed an appropriate alternative to detention.³⁰³ The punishment is divided into two periods, firstly the initial period after which the commanding officer will review the conduct of the accused to determine whether he should be released from the punishment and the secondary period consisting of the remainder of the sentence.³⁰⁴

Certain mandatory and discretionary requirements must be adhered to with the imposition of the sentence. The commanding officer will include such discretionary requirements as he deems fit unless the operational requirements of the unit dictate otherwise.³⁰⁵ The mandatory requirements are that the accused forfeits one sixth of his salary³⁰⁶ and that he may not apply for leave during this period without the permission of the commanding officer. The rest of the requirements, which is within the discretion of the commanding officer, is that he may order the accused to perform extra duties as directed, he may be prevented from entering specific areas of the ship or unit without the permission of the commanding officer and he will not be allowed to leave the ship or unit for the duration of the punishment without the permission of the commanding officer.³⁰⁷

³⁰¹ Section 4(8) of *The Armed Forces Regulations*.

³⁰² Section 173 of the Armed Force Act 2006 defines a service supervision and punishment order as "an order that imposes on the offender, for a period specified in the order, such requirements as regulations made by the Defence Council may prescribe."

³⁰³ *Manual of Service Law* (2011) 1(2) at 1-13-31.

³⁰⁴ *Manual of Service Law* (2011) 1(2) at 1-13-31.

³⁰⁵ *Manual of Service Law* (2011) 1(2) at 1-13-31.

³⁰⁶ Section 173(1)(b) of the Armed Forces Act 2006.

³⁰⁷ *Manual of Service Law* (2011) 1(2) at 1-13-32.

Service supervision and punishment orders can be imposed for periods of 30, 60 or 90 days.³⁰⁸ The duration of the initial period depends on the length of the sentence imposed. When the order is for 30 days, the commanding officer will review the accused for the first time after a period of 14 days has elapsed to determine whether the accused has shown sufficient progress and improvement of his discipline to be released from the sentence.³⁰⁹ The initial period for a sentence of 60 days is 18 days and for a period of 90 days it is 21 days. If the accused has not shown sufficient improvement he will serve the remainder of the service supervision and punishment order (the secondary period). The commanding officer will thereafter review the accused every 14 days for possible release from the punishment.³¹⁰ It is therefore up to the accused whether he will serve the whole sentence. It is an excellent incentive for the accused to improve his discipline and behaviour.

The service supervision and punishment order closely resembles confinement to barracks as a punishment although the period of the punishment is much longer than what can be imposed by South African military courts. However, the “stoppage of leave” and “restriction of privileges” orders also have certain characteristics in common. It can be argued that these punishments cannot be regarded as cruel, inhuman or degrading since members of the armed forces are used to restrictions of their movements and the places they may enter, especially in an operational environment and it can therefore not be seen as cruel or inhuman to restrict the movements soldiers or give them extra duties to do. The environment that soldiers operate in is vastly different from those that civilians are used to and although it would never be acceptable to treat soldiers in a cruel, inhuman or degrading way, it is submitted that the concept of what is

³⁰⁸ Section 173(2) of the Armed Forces Act 2006.

³⁰⁹ Section 174 of the Armed Forces Act 2006.

³¹⁰ *Manual of Service Law* (2011) 1(2) at 1-13-31. The commanding officer may also vary the requirements imposed during sentencing on review after the initial period. If there are overriding medical or compassionate grounds the commanding officer may conclude the punishment (see *Manual of Service Law* (2011) 1(2) at 1-13-33).

acceptable restrictions will necessarily be different from what is understood to be acceptable in the civilian environment.

6.2.11.2 Confinement to barracks: not cruel, inhuman or degrading

Experience has shown that confinement to barracks is generally imposed on single, living-in members undergoing training. During military training it is often the case that members are restricted to the unit lines for the first part of the course. Certain areas within the unit or even outside the unit lines, which may include leisure facilities, may be declared out of bounds. Movement on double march while on course and room and uniform inspections are common occurrences in the military.³¹¹ Requiring soldiers used to these conditions to perform them as a punishment should not be regarded as cruel, inhuman or degrading.

This is however not an appropriate sentence to impose on members not living in the single quarters or barracks, such as married members. Since the offender is restricted to his room and surrounding area, has to stand room and uniform inspection and report to the officer on duty at different times, this sentence is only appropriate for those members living in the barracks.

6.2.12 Corrective punishment

Corrective punishment can be imposed by a military court on any accused with the rank of private.³¹² It is defined as “additional supervised training, work or drill for two hours per working day, done or carried out within unit lines”.³¹³ The main component of this punishment is usually the extra drill.

³¹¹ This has been the experience of the author during basic military training and officer’s formative training.

³¹² Section 12(1)(k) of the MDSMA.

³¹³ Section 1(viii) of the MDSMA.

The same principles applicable to punishment drill imposed as a requirement of confinement to barracks are applicable to extra drill imposed as corrective punishment.³¹⁴ The same concerns regarding the constitutionality and the Convention against Torture as with field punishment has been raised in connection with this punishment.³¹⁵

This punishment is imposed where the court is of opinion that the offender shows a lack of discipline and proper conduct. Corrective punishment, which is a sentence imposed by a military court, should not be confused with corrective training, a non-judicial punishment imposed on members regarding matters of minor ill-discipline. Non-judicial punishment however falls outside the scope of this thesis.

6.2.13 Extra non-consecutive duties

This sentence can be imposed by any military court on any other rank than an officer, for a maximum period of 21 days.³¹⁶ This sentence may be imposed by the court where the accused shows a lack of discipline.³¹⁷ The accused may still be required to perform his normal duties after which he will be required to perform the extra duties. Since the punishment commences immediately after being announced in open court, the period in which the duties must be performed starts immediately after sentencing. The court must therefore explore the feasibility of the implementation of this sentence before it is imposed.³¹⁸

³¹⁴ All drills are done in accordance with *Drill All Arms and Maatreëls ter Voorkoming van Mishandeling van Lede van die SA Leër: Aanhangel C tot SALO GS1/65/86* (1993).

³¹⁵ Muntingh at 23. See the discussion above regarding confinement to barracks as a constitutionally sound punishment.

³¹⁶ Section 12(1)(l) of the MDSMA.

³¹⁷ Morris at 159 describes extra duties as “a few hours work at the end of the duty days, sometimes also on weekends, designed to fatigue the soldier and to prompt the reflection that, it is hoped, makes him aware of the consequences of his actions and deters him – as well as fellow soldiers who see him perform these duties – from further misconduct.”

³¹⁸ From personal observation the implementation of extra duties could be said to be an effective sentence if the accused is convicted of being absent without leave for short periods. The following serves as an example: Members of the security squadron work in shifts, during

A period of 24 hours must elapse between duties, which means that the offender will not perform 21 duties over the 21 day period. He will at most be able to perform ten to eleven duties over the maximum period of time.

6.2.14 Reprimand

A reprimand may be imposed where the court is of the opinion that although the offence is not too serious and the accused should be treated leniently, the offence still warrants a sentence. It is a sentence typically imposed at a CODH for first offenders. This is a punishment that can be imposed on all rank groups.³¹⁹

This punishment is comparable to a caution and discharge in terms of the Criminal Procedure Act,³²⁰ in that a caution is imposed where the offence is “so trivial or technical that the trial process itself amounts to sufficient punishment”

which they work for five days and are then off for five days. If a member absents himself without leave, a sentence of extra duties for a period of five days could effectively prevent him from going on leave during his off days. He will have to work non-consecutive duties over this period, resulting in him being on duty every other day for the period where he was supposed to be off. It is submitted that this is a better deterrent than, for example, a fine.

³¹⁹ Section 12(1)(m) of the MDSMA. As a punishment it has not yet received attention from the CMA since it is not a sentence that is subject to automatic review, nor is it a sentence that is likely to be submitted for review by the accused because of being “shockingly harsh and inappropriate”. British military law provides for severe reprimands, reprimands and admonishments. Severe reprimands and reprimands can be given to officers, warrant officers and non-commissioned officers. It is not a sentence available for the rank of private. It can be given as a written or verbal reprimand and is frequently coupled to sentences with financial implications such as a fine or a service compensation order. A reprimand is seen as more severe than an admonishment indicating a stronger degree of displeasure in the accused’s behaviour. Reprimands may in fact have a negative effect on the future promotion of the accused (see in this regard OJAG at 23). An admonition on the other hand is available as sentence for all ranks, is recorded on the accused’s formal disciplinary record and is taken into consideration as a previous conviction at subsequent trials of the accused. An admonishment is given where the mitigating factors indicate that the trial itself is sufficient punishment and he does not deserve a more severe punishment (see *Manual of Service Law* (2011) 1(2) at 1-13-43 and 1-13-44). An admonition closely resembles the reprimand given by the South African military courts. The US military makes a distinction between admonitions and reprimands similar to the British Military (see Morris at 158).

³²⁰ Section 297 of the Criminal Procedure Act.

and the sentence should therefore not be too serious.³²¹ This punishment finalises the case without burdening the accused more than what has already been done in terms of the trial.

Although the Criminal Procedure Act provides that a caution and discharge will “have the same effect of an acquittal”, it does not mean that the accused is acquitted of the charges but that³²²

...one should not understand “acquittal” to mean what it normally does, but that it should be interpreted in such a way that the *extenuation* the legislature intended to bring about by this provision is given effect to. This implies that “acquittal” should not be interpreted as meaning that the accused walks free as if she has not been convicted to all intents and purposes...and as such “acquittal” may be accepted as a conviction...

However, although caution is a sentence, it cannot be seen as a punishment since it does not contain any additional element of discomfort for the accused.³²³

Although the sentence of a reprimand is similar to a caution, the MDSMA does not provide that the reprimand can be seen as an ‘acquittal’ as is the case of the Criminal Procedure Act. There is no doubt that it is regarded as a sentence and is taken into consideration as a previous conviction. It is however, as is a caution, not a punishment since it adds no discomfort for the accused. Anecdotal evidence as well as the experience of the author has shown that when sentencing an accused to a reprimand, most military judges merely pronounce the sentence as: “You are hereby sentenced to a reprimand” and then discharge the accused. No actual reprimand is given. Consequently the

³²¹ Terblanche (2007) at 389; Krugel & Terblanche at 803; Kruger at 28-89; *S v Magidson* 1984 (3) SA 825 (T) at 833F (a caution and discharge is the least severe sentence that can be imposed); *R v Glynn* 1951 (4) SA 4 (T) at 6F.

³²² Terblanche (2007) at 390-391; *R v Keschner* 1961 (3) SA 309 (A) at 313E; *S v Erasmus* 1970 (4) SA 400 (NC).

³²³ Terblanche (2007) at 392.

opinion expressed after completion of the trial by spectators is often that nothing happened to the accused.

6.3 Court orders

After announcement of the sentence and the decision on implementation of the suspended sentence the court announces and records its decision on any court orders that are to be made.³²⁴ These orders are compulsory under certain circumstances and should be taken into consideration when the sentence is imposed.³²⁵ Whether this is in fact the case with the military courts could not be determined. Since the CSMJ and CMJ cases are not published it cannot be ascertained what the military judges' reasons for imposing specific sentences are and no CMA judgments were found in this regard.

6.3.1 Forfeiture of full pay³²⁶

The court must order that the offender forfeits full pay for the period which the offender was:

1. Absent without leave or absent due to desertion and subsequently convicted by the court;³²⁷
2. Detained or in custody pending his trial and then subsequently sentenced to imprisonment;³²⁸

³²⁴ Section 95 of the MDSMA authorises military courts to order deductions from or forfeitures of pay when imposing any sentence as is authorised in terms of the MDC.

³²⁵ See also Terblanche (2007) at 381; *Attorney-General, Transvaal v Steenkamp* 1954 (1) SA 351 (A) at 357A.

³²⁶ Section 128(1) of the MDC.

³²⁷ Section 128(1)(a) of the MDC. In terms of s 128(3) of the MDC, when a member of the SANDF goes on AWOL, his full pay will be withheld as from the date upon which he went AWOL or on desertion until such time as it is established whether he must forfeit his pay in terms of ss 128(1) or (2) of the MDC. This stoppage of pay is a personnel action that is taken after a member has been AWOL for a period of 72 hours. This is to prevent possible losses to the state. It is often the reason why a member returns from AWOL - he did not receive his salary. This money will be paid back to the accused in the event that he is found not guilty (see s 128(4) of the MDC). The calculation of the amount to be forfeited is done in terms of r 110 of the MDSMA. Any absence of six hours or less is not taken into account and a period of 24 hours is deemed to be one day.

3. Detained or in custody pending his trial and was sentenced to detention and then discharged from the SANDF;³²⁹
4. Where he is serving a sentence of imprisonment³³⁰
5. Is serving a sentence of detention where the detention is linked to a sentence of discharge from the SANDF;³³¹
6. In hospital as a consequence of a contravention of section 18(b) MDC;³³²
7. Detained by the South African Police Service for an offence of which he has been convicted by a competent court;³³³
8. Absent from duty as a prisoner of war (POW) because of his own willful act or omission;³³⁴
9. Released on bail or on his own recognisance by a civilian court but subsequently failed to return to duty³³⁵
10. Voluntarily serving the enemy;³³⁶
11. Not on duty where the Chief SANDF ordered the accused not to return to duty.³³⁷

³²⁸ Section 128(1)(b)(i) of the MDC.

³²⁹ Section 128(1)(b)(ii) of the MDC.

³³⁰ Although the offender will normally be discharged from the SANDF where he is sentenced to imprisonment, the exception created by ss 54(7)(b) and 59(5)(b) of the Defence Act 42 of 2002 must be kept in mind. A member of the SANDF's service will be terminated when sentenced by a civilian court to imprisonment without the option of a fine. Where he was sentenced to a fine with imprisonment as default for non payment of the fine, he will not automatically be discharged from the SANDF and will therefore forfeit pay for the period he is imprisoned.

³³¹ Section 128(1)(d) of the MDC. Usually an accused will still receive part of his salary when serving a sentence of detention (see the discussion on s 128(2) of the MDC below). However, if the detention is coupled to a sentence of a discharge he forfeits full pay for the period of detention. Notice should be taken of the CMA's opinion on imposing a sentence of detention coupled with a discharge (see *S v Khoza* (CMA 82/2001) discussed above). It is consequently doubtful whether an accused will receive such a sentence in future and this s 128(1)(d) of the MDC may become obsolete.

³³² Section 128(1)(e) of the MDC. A contravention of s 18 of the MDC refers to the offence of malingering. In terms of s 18(b) of the MDC malingering is committed where the accused maims or injures himself with the intention of avoiding service and the prescribed punishment is imprisonment for a maximum of five years. If the accused is found guilty of this offence he will forfeit full pay for the period that he had to hospitalised as a consequence of his actions.

³³³ Section 128(1)(f) of the MDC.

³³⁴ Section 128(1)(g) of the MDC.

³³⁵ Section 128(1)(i) of the MDC. Where the accused fails to return to duty the accused is in fact on AWOL and must forfeit pay for the period absent.

³³⁶ Section 128(1)(h) of the MDC.

6.3.2 Forfeiture of part of pay³³⁸

When the accused is sentenced to any sentence other than imprisonment or detention coupled to a discharge, the accused will forfeit one-third of his pay if he is married, a widower or is divorced and maintains a child for the period he was held in custody or was under arrest before his trial. This deduction is also made where the accused serves a sentence of detention which is not coupled to a discharge.³³⁹

If the accused is unmarried with no dependents he will forfeit two-thirds of his pay for the period he was in custody or under arrest pending his trial. The forfeiture is also applicable for the period for which he is serving a sentence of detention. The serious financial consequences of a sentence of detention is clear – not only is the accused's salary reduced to the bottom scale of that of a private, he also loses a considerable portion, either one-third or two-thirds, of the salary that is left, for the period he is serving detention which can be up to two years.

Of concern is the provision in the MDC that the General Officer Commanding of the SANDF³⁴⁰ may remit the whole or a portion of any forfeiture ordered by the

³³⁷ Section 128(1)(j) of the MDC. This provision also applies to individuals who have been convicted but are awaiting appeal or review of their case. In terms of s 42 of the MDSMA the Chief SANDF may order a person not to return to duty during any period subsequent to that person appearing before a civilian or military court as an accused, or if he has been convicted by the court and intends appealing the conviction or applying for review of the case where the CSANDF is of the opinion that it would be in "the interest of the good governance or reputation of the South African National Defence Force, or in the interest of justice". Written notice must be given to the accused and he must be given the opportunity to make representations in this regard.

³³⁸ Section 128(2) of the MDC.

³³⁹ Where an accused is unmarried but maintains a child, he will also forfeit one-third of his salary. The child must however be registered on the personnel administration (Persol) system of the SANDF before the court will accept that child as a dependent. To be registered as a dependent of a single father, DNA tests must be done to prove paternity.

³⁴⁰ Section 1 of the MDC defines the General Officer Commanding as "the chief military executive officer of the South African Defence Force, and in *section one hundred and twenty-*

court in terms of section 128 of the MDC³⁴¹ if he is of the opinion that the forfeiture, taking into consideration the nature of the offence, will result in undue hardship for the accused. This would result in a serious interference by the executive in the sentencing jurisdiction of the military court.³⁴² Although section 128 of the MDC is a court order, and not a sentence, it forms part of the sentence that is imposed by the court and as such is a judicial act. If the executive can interfere after the sentence has been imposed it could be regarded as executive interference with the military judiciary and therefore this provision is contrary to the ideal of judicial independence of the military courts. This provision seems to be a vestige of the previous court martial system where “the convening authority [had] the power to confirm or vary convictions and sentences imposed by the ordinary court martial.”³⁴³ It is doubtful whether this provision would stand constitutional scrutiny in terms of the current legal order.

6.3.3 Deductions from pay in terms of section 129 of the MDC

Whenever an accused is convicted of an offence that results in any loss or damage to public property or property belonging to an institution of the State³⁴⁴, the court must also place the accused under deduction of pay to the amount of the loss or the damage.³⁴⁵ In the event that the court finds that the accused

eight includes the officer commanding any portion of the South African Defence Force on service beyond the borders of the Republic.”

³⁴¹ Section 133 of the MDC.

³⁴² See in this regard *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C). Although the decision was rendered prior to the implementation of the MDSMA, it is submitted that the arguments raised regarding executive interference and the court’s independence remain relevant to s 133 of the MDC. The court held (at para 11) that “[i]t invites arbitrary interference by an executive official with the due process of an ordinary court martial. No democratic society will tolerate a system whereby the executive is given the power to interfere with the judicial process in any court, thereby tainting its independence.”

³⁴³ *Freedom of Expression Institute v President, Ordinary Court-Martial* 1999 (2) SA 471 (C) para 20.

³⁴⁴ This would, for example, include property belonging to the mess or regimental fund. Any payment deducted from the accused’s salary for the loss of or damage to property belonging to an institution will be paid over to the particular institution (see s 129(1)*bis* of the MDC).

³⁴⁵ In *S v Bartman* (CMA 21/2009) the CMA held that “a military court needs to make an order in terms of Section 129 [of the] MDC to empower the State to lawfully deduct the loss owing to the SANDF from an accused’s pay as the loss resulted from a crime the accused committed.” This does not include damage caused to military vehicles due to negligent driving, ie a contravention

acted negligently rather than willfully, the court may order that the accused pay a reduced amount for the losses or damages incurred.

In the event where more than one person has been found guilty, the court must make an order that all the accused be placed under deduction of pay in order to ensure that the amount is completely recovered from them “jointly or severally”.³⁴⁶

Where the accused is convicted of contravening section 24 of the MDC³⁴⁷ for the negligent loss, damage or destruction of property, kit or arms issued to him “for personal use in the execution of his duties”, the court must order that it be replaced or repaired and that the costs involved be recovered from the accused.³⁴⁸

6.3.4 Restitution or confiscation of property

If an accused is convicted of theft or an offence where he is found in possession of unlawfully obtained property, the court may order that the accused return the property to the lawful owner.³⁴⁹

Where the accused has used any “weapon, instrument or other article produced to the court” in the execution of any offence and he is convicted of

of s 28(a) of the MDC. Such damage will be recouped from the accused by the State Attorney’s office. However, where an accused causes damage to a vehicle while on an unauthorised trip, which would amount to a charge in terms of s 27(1) of the MDC, the court must make an order in terms of s 129(1) of the MDC to recover the damage to the vehicle (see in this regard *S v Ngako* (CMA 165/2002)).

³⁴⁶ Section 129(2) of the MDC; *S v Mjoli* (CMA 70/2005) where the loss to the state was divided equally between the two accused.

³⁴⁷ This section creates a reverse onus on the accused in that the accused is presumed to have acted negligently if the state proves that the equipment was issued to the accused and is no longer in his possession.

³⁴⁸ Section 129(3) of the MDC. Where the accused is sentenced to cashiering, dismissal or discharge with ignominy or discharge from the SANDF, the court will not make an order in terms of s 129(3) of the MDC if the equipment becomes the property of the accused in terms of the regulations.

³⁴⁹ Section 148(1) of the MDSMA.

that offence, the court may order the weapon or instrument forfeited to the state where it sees fit to do so.³⁵⁰

6.3.5 Victim compensation

With the current focus on restorative justice and the rights of victims, the SANDF should take notice of the imposition of service compensation orders imposed by British military courts.³⁵¹ Such orders are not given as court orders but are seen as sentences imposed in conjunction with other sentences. The importance of this punishment not only lies in the compensation of the victim but in the fact that it “also emphasises to the offender the full personal consequences of his actions.”³⁵²

When the court sentences an accused to repay damages to the victim, the financial effects of the punishment are taken into consideration when considering whether to combine this order with other punishments as well. Where the court considers the imposition of a fine and a service compensation order but the accused is financially unable to pay both, preference is given to the service compensation order.³⁵³ There is no limit to the amount that may be imposed by the court martial, but the damages or loss must be proven. The maximum amount that can be awarded by a summary hearing is one thousand pounds, depending on the severity of the loss or damage.³⁵⁴ Damages may be difficult to quantify and may vary between judges and commanding officers. Therefore the court is given comprehensive guidelines regarding the awarding of damages.³⁵⁵ The court may still exercise its discretion and use its judgment

³⁵⁰ Section 148(2) of the MDSMA.

³⁵¹ These orders are made where the accused before a British military court is found guilty of any offence that caused personal injury, loss or damage to the accused (see *Manual of Service Law* (2011) 1(2) at 1-13-46).

³⁵² *Manual of Service Law* (2011) 1(2) at 1-13-46.

³⁵³ *Manual of Service Law* (2011) 1 (2) at 1-13-48.

³⁵⁴ *Manual of Service Law* (2011) 1(2) at 1-13-44.

³⁵⁵ *Manual of Service Law* (2011) 1(2) at 1-13-47. The guidelines given are in accordance with the Criminal Injuries Compensation Scheme awarded by civilian courts. Where the injury is a graze which is accompanied with some pain for a few days, an award of between 50 and 75

when awarding damages. The recovery of the money as ordered is handled the same way as the recovery of a fine. The amount must be paid over to the victim and where the accused is ordered to pay in installments, the victim will receive his money in installments.³⁵⁶

This may be an important aspect to consider since the SANDF is not the only party or sector of the community that is affected by military offences. It is submitted that victims, especially civilian victims, should be compensated for damages caused by military offenders.

pounds can be made depending on the size. A black eye can be awarded 100 pounds and a simple, small uncomplicated fracture between 1000 and 3000 pounds.

³⁵⁶ *Manual of Service Law* (2011) 1(2) at 1-13-45.

CHAPTER 7

MILITARY APPEALS AND REVIEW – A FINAL SAY ON SENTENCING

7.1 Introduction

The processes of appeal and review exist to prevent wrongful convictions and inappropriate sentences.¹ This is true for both the civilian and the military courts. It is regarded as a constitutional right, forming part of the fair trial rights, without which justice cannot be said to be done.² Criminal proceedings, which include sentencing, are only completed once the review and appeal process has been completed.³ Through review the court can better judge the factual conclusions reached, enhancing the fairness of the proceedings as well as achieving consistency and thereby equality before the law.⁴

7.2 Review and appeal: the general principles

The processes and principles regarding review and appeal are governed by the common law, various legislative provisions as well as the Constitution which makes the framework in which it operates rather complicated.⁵ The following is a general overview of the general principles applicable to appeal and review as applied in the civilian courts.⁶

¹ Currie I & De Waal J *The Bill of Rights Handbook* 5 ed (2005) at 789; *S v Twala (South African Human Rights Commission Intervening)* 1999 (2) SACR 622 (CC); *S v Steyn* 2001 (1) SA 1146 (CC); Du Toit E *et al Commentary on the Criminal Procedure Act* (1997) at 30-1.

² *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229C-D.

³ Steytler N *Constitutional Criminal Procedure* (1998) at 392.

⁴ Steytler (1998) at 393.

⁵ Terblanche S S *A Guide to Sentencing in South Africa* (2007) at 407.

⁶ The principles of appeal and review in the civilian courts are discussed briefly only as far as it is deemed of assistance in placing military appeal and review in its proper context. For a full discussion on appeal and review see Kruger A *Hiemstra's Criminal Procedure* (2008) at Chapter 30; Du Toit *et al* at Chapter 30; Joubert J J (ed) *Criminal Procedure Handbook* 9 ed (2009) at Chapters 20-21.

7.2.1 Differences between appeal and review

Although appeal and review provide an aggrieved litigant with the opportunity to have the matter reassessed by a higher authority, there are distinct differences between these two processes.⁷ The main difference is that they serve different purposes.⁸ Where the complaint is against the result of the trial proceedings, the appropriate remedy is one of appeal and where the method of the trial proceedings are attacked by the accused, the matter should be referred to review.⁹

It is trite that during the appeal process the appellant is bound by the four corners of the record and the court must confine itself to these facts. Review, on the other hand, can refer to matters not appearing on the record of the proceedings. Evidence may be lead and generally review will be done, *inter alia*, where the court exceeded its jurisdiction,¹⁰ where the judge was biased,¹¹ a gross irregularity occurred¹² or inadmissible evidence was received by the trial court.

During an appeal the attack on the finding or sentence is confined to grounds set out in the notice of appeal¹³ but during a review the attack on the finding or sentence is brought in terms of the High Court's review authority prescribed by

⁷ Kruger at 30-4; Du Toit *et al* 30-1, 30-23.

⁸ Carnelley M "The South African Military Court System – Independent, Impartial and Constitutional?" (2005) 33(2) *Scientia Militaria* 55 at 74.

⁹ *S v Mwambazi* 1991 (2) SACR 149 (NM) at 151g-h; *S v Block* 2011 (1) SACR 622 (NCK) at para 14; Terblanche at 407; Carnelley at 74; Kruger at 30-4; Du Toit *et al* at 30-1; Joubert at 334-335.

¹⁰ *Langerman v Alport* 1911 CPD 376; *Mratsho v Rickert* 1949 (3) SA 1127 (E); *S v Siwela* 1981 (2) SA 56 (T) at 59A; *S v Mwambazi* 1991 (2) SACR 149 (NM) at 152a.

¹¹ See *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC).

¹² Whether a gross irregularity occurred would depend on the circumstances of the case. In *SA Motor Acceptance Corp (Pty) Ltd v Venter* 1963 (1) SA 214 (O) the court held that a judicial officer making an order against the party without giving him the opportunity of being heard would constitute a gross irregularity. See also *Pitso v Additional Magistrate, Krugersdorp* 1976 (4) SA 553 (T); *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 2147 (C); *S v Chukwu* 2010 (2) SACR 29 (GNP); *S v Le Grange* 2009 (1) SACR 125 (SCA); *S v Block* 2011 (1) SACR 622 (NCK).

¹³ However, in *Legal Aid Board v The State* 2011 (1) SACR 166 (SCA) the court held that if a ground of appeal was of sufficient merit to warrant consideration, the court can allow the party to argue those grounds even though it was not set out in the grounds for appeal.

the Supreme Court Act and the Criminal Procedure Act.¹⁴ An appeal must also be brought within the prescribed time limits whereas a review is not subject to a time limit although the courts have indicated that the review must be brought within a reasonable time.¹⁵

In practice, however, the distinction is not as clear and it is not always possible to separate the merits from the rest of the case.¹⁶ It is further complicated by the existence of administrative review and appeal, which are briefly discussed below.

7.2.2 Judicial review

7.2.2.1 The High Court's inherent review authority

The High Court of South Africa has always had an inherent jurisdiction to review matters originating from an inferior court. Over time judicial review became legislated and the question arose whether the High Court should rely on its inherent jurisdiction, which originated from common law, or whether it should exercise only a statutory authority.¹⁷

The Supreme Court Act authorises the local and provincial divisions of the High Court to review all cases from “inferior courts” within the area of their jurisdiction.¹⁸ The court has interpreted this as meaning that the High Court may

¹⁴ Section 24(1) of the Supreme Court Act 59 of 1959; ss 302, 304(4), 305, 306 and 309(3) of the Criminal Procedure Act 51 of 1977 (see Kruger at 30-5).

¹⁵ Kruger at 30-4; *R v Mbokazi* 1958 (3) SA 742 (N); *S v Mayo* 1974 (4) SA 325 (R); *Kader v Assistant Magistrate, Cape Town* 1954 (3) SA 648 at 656H (“[a]lthough there is no fixed time limit, review proceedings must, having regard to the circumstances of each particular case, be taken within a reasonable time”).

¹⁶ Hoexter *C Administrative Law in South Africa* (2007) at 106.

¹⁷ Kruger at 30-5; Terblanche at 408. The answer to this question is important for the purpose of establishing whether the military accused has a right to appeal or review to the High Court of South Africa. This matter is discussed in para 7.6 below.

¹⁸ Section 19(1)(a)(ii) of the Supreme Court Act. An “inferior court” is defined in s 1 of the Supreme Court Act as “any court (other than the court of a division) which is required to keep a record of its proceedings, and includes a magistrate or other officer holding a preparatory examination into an alleged offence.”

only review cases from lower courts in terms of authority granted by legislation.¹⁹ However, section 19(3) of the Supreme Court Act retains the High Court's existing powers in terms of the common law.²⁰ In those instances not covered by sections 19(1)(a) and (3) of the Supreme Court Act, the High Court may rely on its inherent jurisdiction. Since the advent of the Constitution the courts, in deciding whether they have authority for review in terms of the common law or statute, must also keep in mind that section 173 of the Constitution has broadened the inherent jurisdiction of the High Courts, allowing them to protect and regulate their own processes and to develop the common law, taking into account the interests of justice within the context of the values of the Constitution.²¹

7.2.2.2 Grounds for review of criminal proceedings

The South African law generally recognises various forms of review.²² These are, *inter alia*, review of proceedings from a lower court, from another tribunal,²³ automatic review and reviews provided for by specific legislation.²⁴

The grounds for review are to be found in section 24 of the Supreme Court Act²⁵ and section 304 of the Criminal Procedure Act. Section 24(1) provides that, *inter alia*, an absence of jurisdiction on the part of the court, bias, malice or corruption

¹⁹ Kruger at 30-5; Du Toit *et al* at 30-2; *Sefatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A) at 833E (“[a] superior court – including this court – is a creature of statute, and it is not correct to state, as a general proposition, that it has a jurisdiction which is general and unlimited unless cut down or forbidden by law”).

²⁰ *S v Zungu* 1984 (1) SA 376 (N) at 379H.

²¹ *Hansen v Regional Magistrate, Cape Town* 1999 (2) SACR 430 (C) at 433e-f; Du Toit *et al* at 30-2. The court further held that the concept of “the interests of justice” is a wider concept than provided for in terms of ss 19(1)(a) and (3) of the Supreme Court Act, the provisions on which the decision in *Sefatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A) was based.

²² Kruger at 30-5; Joubert at 328; *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 114-116; Du Toit *et al* at 30-3.

²³ These reviews refer to common law reviews. See *Hira v Booysen* 1992 (4) SA 86 (A) at 93A-94A for the position of common law review.

²⁴ Kruger at 30-5.

²⁵ Read with r 53 of the Uniform Rules of Court providing for the procedures to be followed for review by a lower court. These rules are applicable to all reviews, including those done in terms of common law jurisdiction (see the Uniform Rules of Court; Kruger at 30-7; Du Toit *et al* 30-3).

on the part of the presiding officer, a gross irregularity during the proceedings or the admission of inadmissible evidence or rejecting admissible evidence are considered grounds for review. The Criminal Procedure Act provides even vaguer criteria, in that a matter can be taken on review if the conviction and or sentence are “not in accordance with justice”.²⁶ These provisions should be read together and are so wide that they cover virtually every possible infringement.

This is especially true since the advent of the Constitution. Reviews must be judged in accordance with the fair trial rights and the courts must now adhere to the general “spirit and purport” of the Bill of Rights.²⁷ If anything the constitutional application of fair trial rights now requires an even broader interpretation of section 24 of the Supreme Court Act and section 304 of the Criminal Procedure Act.²⁸ Consequently the court is not limited to the proceedings during the trial in considering the review. It may take cognisance of matters outside the proceedings. The ultimate goal of review, when applying the values proposed in the Bill of Rights, is to determine the fairness of the proceedings. Acting in the “interests of justice” means that the court may take trial-related as well as extraneous factors into consideration.²⁹

7.2.2.3 Scope of irregularity

Irrespective on which grounds the review is done, not just any irregularity necessarily leads to the vitiation of the proceedings. The requirement for the setting aside is a broad one that “the proceedings are in accordance with

²⁶ Kruger at 30-9.

²⁷ Section 35(3)(a)-(o) of the Constitution; Kruger at 30-6.

²⁸ *S v Block* 2011 (1) SACR 622 (NCK) at para 16.

²⁹ *S v Block* 2011 (1) SACR 622 (NCK) para 18; *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) para 46 (the “interests of justice” is “a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned. But while its strength lies in its sweep, that is also its potential weakness. Its contents depend on the context and applied interpretation”).

justice.”³⁰ The test to be applied in this regard is whether the court of review is of the opinion that the remaining evidence which was not affected by the irregularity still constitutes proof beyond a reasonable doubt.³¹ Potential prejudice is not sufficient. The irregularity must in fact lead to a failure of justice.³²

The advent of the Constitution introduced the fair trial rights of the accused as a factor to consider. Any irregularity must now be judged with reference to the accused’s right to fair trial.³³ The constitutional context has not, however, changed the test applied by the court for the setting aside of the finding or the sentence. The question is still whether a reasonable trial court would have convicted the accused despite the irregularity.³⁴ Not all irregularities are sufficient to result in an unfair trial. Irregularities vary in nature and degree.³⁵ Kruger identifies two categories of irregularities from common law.³⁶ The first is a “general category”. The question in this instance is whether the evidence and the credibility of the findings remain unaffected by the irregularity.³⁷ The court must establish whether the irregularity deviated from the procedural rules, principles and formalities necessary for credible evidence. Such irregularities only lead to setting aside a finding where it leads to a failure of justice due to serious

³⁰ Kruger at 30-9.

³¹ Kruger at 30-9; *S v Tuge* 1966 (4) SA 565 (A) at 568F-G.

³² Kruger at 30-9; *Du Toit et al* at 30-24; *S v Gaba* 1985 (4) SA 734 (A) at 750G. However, in *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) the court was prepared to interfere in incomplete proceedings where a gross irregularity has caused or is likely to cause prejudice to the applicant. In this instance potential prejudice was sufficient but it must be considered against the fact that this related to incomplete proceedings where it is still possible to prevent the prejudice.

³³ Section 35(3) of the Constitution; *S v Coetzee* 1995 (2) SACR 742 (C); *S v Chukwu* 2010 (2) SACR 29 (GNP) para 8.

³⁴ *S v Chukwu* 2010 (2) SACR 29 (GNP) at 29g; *S v Mkhise*; *S v Mosia*; *S v Jones*; *S v Le Roux* 1988 (2) SA 868 (A) at 872G where the court held that the “enquiry is whether it is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be fatal to the proceedings.”

³⁵ *S v Le Grange* 2009 (1) SACR 125 (SCA) paras 29-30; *S v Naidoo* 1962 (4) SA 348 (A) 354D; Kruger at 30-11 for examples of irregularities.

³⁶ Kruger at 30-10.

³⁷ In *S v Naidoo* 1962 (4) SA 348 (A) at 354D the court referred to this category as “irregularities of a lesser nature.” See also *S v Le Grange* 2009 (1) SACR 125 (SCA) para 30.

prejudice of the accused.³⁸ The second category is the “exceptional category”, where the irregularity is so fundamental and serious that it leads to a failure of justice *per se*, which voids the trial *ab initio*.³⁹ Such an irregularity is also referred to as a gross irregularity.⁴⁰ Such cases will be set aside without referring to the merits of the case. The accused may be tried again.

7.2.2.4 Powers of the court of judicial review

After consideration of the review, the High Court has wide powers regarding the ratification of the conviction and sentence on review.⁴¹ The court may confirm or change the finding, confirm, change or set aside a sentence or a court order, correct the proceedings of the magistrate’s court or substitute the finding or sentence of the trial court with one that it should preferably have given. The court may also deal with the matter in the manner as ordered by the High Court.

Section 304(2) of the Criminal Procedure Act does not authorise the review court to impose a heavier sentence on review. The review court may change a conviction in terms of one statute to a conviction in terms of another statute as long as it does not prejudice the accused.⁴² But where the offender was given an incompetent sentence, the review court can replace it with the correct sentence, even if the new sentence is a more severe sentence.⁴³ Although the review court may substitute the sentence it is preferable, in light of the accused’s right to a fair trial, that the matter should rather be referred back to the trial court for sentencing, giving the accused the opportunity to respond.⁴⁴

³⁸ Du Toit F “Onreëlmattighede in die Strafproses: Is ‘n Absolute Klassifikasie Moontlik?” (1996) 1 *Stell LR* 85 at 85; Kruger at 30-10; *S v Naidoo* 1962 (4) SA 348 (A) 354F; *S v Mkhise*; *S v Mosia*; *S v Jones*; *S v Le Roux* 1988 (2) SA 868 (A) at 871G.

³⁹ *S v Mkhise*; *S v Mosia*; *S v Jones*; *S v Le Roux* 1988 (2) SA 868 (A) at 871F where the court refers to such irregularities as “fatal irregularities”; *S v Naidoo* 1962 (4) SA 348 (A) at 354D-F; Du Toit at 86; Kruger at 30-10.

⁴⁰ *S v Le Grange* 2009 (1) SACR 125 (SCA) para 30.

⁴¹ Section 304(2)(c) of the Criminal Procedure Act; Kruger at 30-21; Du Toit *et al* at 30-16A.

⁴² Kruger at 30-24; Du Toit *et al* at 30-16B.

⁴³ Kruger at 30-24; Du Toit *et al* 30-16B, 30-38.

⁴⁴ Du Toit *et al* at 30-16B.

7.2.3 Judicial appeal

In terms of the Criminal Procedure Act any person who has been convicted of an offence by any lower court may appeal to a High Court with the necessary jurisdiction against his conviction, sentence or court order.⁴⁵ The accused may appeal against any sentence. An acquittal is final and cannot be appealed.⁴⁶

The Criminal Procedure Act however only provides for an appeal from a lower court as well as from the High Court.⁴⁷ For the purpose of this thesis only appeal from the lower court is discussed, being the appropriate forum for consideration of appeal from a military court. However, in terms of section 1 of the Criminal Procedure Act a “lower court” means “any court established under the provisions of the Magistrate’s Courts Act, 1944.” Any tribunal or court other than that defined in the Magistrate’s Courts Act can consequently not be regarded as a “lower court” for purposes of appeal and provision must be made in other statutes for such a court or tribunal to gain the right to appeal to the High Court.⁴⁸

7.2.3.1 The powers of the court of appeal

The High Court derives its authority to hear appeals from both the Supreme Court Act and the Criminal Procedure Act. The Supreme Court Act provides that the local and provincial divisions of the High Court has jurisdiction to hear appeals within their area of jurisdiction.⁴⁹ It may further hear evidence regarding the appeal or it may return the case to the trial court to lead further evidence.

⁴⁵ Section 309 of the Criminal Procedure Act; Du Toit *et al* at 30-16B. Although the court found in *S v Steyn* 2001 (1) BCLR 52 (CC) that a lower court cannot be treated the same as the High Courts and that a requirement for leave to appeal from the lower court is an infringement on the accused’s right to a fair trial in terms of s 35(3)(o) of the Constitution, ss 309B and 309C of the Criminal Procedure Act were amended and came into operation on 1 January 2004 (see Kruger at 30-31; Du Toit *et al* at 30-22). All persons now require leave to appeal.

⁴⁶ Kruger at 30-45.

⁴⁷ See ss 309 and 316 of the Criminal Procedure Act respectively.

⁴⁸ Kruger at 30-32(1). See further the discussion at para 7.6.2 below.

⁴⁹ Section 19(1)(a)(i) of the Supreme Court Act.

Any finding or court order can be confirmed, changed, set aside or substituted with another appropriate finding.⁵⁰ This should not be read as giving the High Court the authority to change an acquittal into a conviction.⁵¹

The wide authority of the High Court on appeal also includes the authority to impose a more severe sentence or finding.⁵² The court of appeal can substitute a finding on a lesser offence with the more serious main charge. Under the circumstances the court may then increase the punishment to reflect the appropriateness of the sentence. The court of appeal has two options in this regard. It may set aside the sentence and remit the case to the trial court to exercise its discretion on sentence anew or the court of appeal may substitute the sentence of the court *a quo* with its own sentence.⁵³ It may be preferable to remit the matter to the trial court for reconsideration of sentence so that the accused may receive the opportunity to address the court in this regard where it will “better serve the interests of justice.”⁵⁴

The court of appeal has the same powers as those conferred on the review court by the Criminal Procedure Act.⁵⁵ The court of appeal is further entitled to increase the sentence imposed by the trial court where the case is brought on appeal on the grounds of the finding, sentence or both.⁵⁶

7.2.3.2 Principles applied by the court of appeal

The principles which the court should apply in considering an appeal was comprehensively set out in *S v Dhlumayo*⁵⁷ and remain relevant today.⁵⁸ The

⁵⁰ Section 22 of the Supreme Court Act.

⁵¹ Kruger at 30-45; *S v van der Walt* 1963 (2) SA 525 (T) at 527C.

⁵² Section 309(3) of the Criminal Procedure Act; s 310 of the Criminal Procedure Act (where the state appeals against the sentence); Kruger at 30-51.

⁵³ *Director of Public Prosecutions, Transkei v Dubo* 2011 (1) SACR 191 (ECM) para 11.

⁵⁴ *Director of Public Prosecutions, Transkei v Dubo* 2011 (1) SACR 191 (ECM) para 15.

⁵⁵ See the discussion on s 304(2) of the Criminal Procedure Act at 7.2.2.4 above.

⁵⁶ Section 309(3) of the Criminal Procedure Act.

⁵⁷ *S v Dhlumayo* 1948 (2) SA 677 (A).

⁵⁸ See also Kruger at 30-45; Du Toit *et al* at 30-37.

court held that with an appeal the accused is entitled to a re-hearing otherwise the right to appeal is illusory.⁵⁹ It must however be kept in mind that the trial court has an advantage over the appeal court since it saw and heard the witnesses whilst the appeal court does not have the opportunity to observe the demeanour of the witnesses. For this reason the appeal court is reluctant to reject the findings of the trial court. It is therefore seldom that the appeal court can be in as good a position to assess the witnesses as the trial court.⁶⁰ It will only reject the trial court's assessment of the evidence where it is of the opinion that the trial court's assessment is wrong.⁶¹

It is sometimes possible for the appeal court to be in as good a position as the trial court in drawing inferences from the facts. Where there is no misdirection on the part of the trial judge, the appeal court assumes that his inferences are correct and the appeal court will only interfere where it is of the opinion that the trial judge's inferences are incorrect.

The court of appeal may find a misdirection to have occurred when the reasons put forward by the trial judge are unsatisfactory or if certain facts or probabilities have been overlooked.⁶² Under such circumstances the court of appeal could disregard the trial court's finding on facts and come to its own conclusion. However, the appeal court should not approach the record with the expectation that something not mentioned in the record means that the trial court did not consider it.

The mere fact that the trial court might have been misdirected on a point of law does not mean that the appeal will be successful. The conviction could be

⁵⁹ See also *S v Leve* 2011 (1) SACR 87 (ECG) (where the court confirmed that this principle is a fundamental rule of appeal); *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648E; *Du Toit et al* 30-37.

⁶⁰ See also *S v Francis* 1991 (1) SACR 198 (A) at 204c-f; *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645; *S v Leve* 2011 (1) SACR 87 (ECG) para 8.

⁶¹ *Kruger* at 30-45.

⁶² *S v Hanekom* 2011 (1) SACR 430 (WCC) para 30.

upheld if the court of appeal is of the opinion that, despite the misdirection, the guilt of the accused was still proven beyond a reasonable doubt.⁶³

These principles apply to the court's power on interfering with sentences as well. The court of appeal does not interfere with the trial court's sentencing jurisdiction lightly.⁶⁴ The trial court has the advantage of seeing and hearing the witnesses and the appeal court will not easily differ from the trial court's assessment of the facts. In *Director of Public Prosecutions, Transkei v Dubo*⁶⁵ the court held that

[a] mere difference between the sentence imposed by the trial court and the sentence the appeal court would have imposed, is not a sufficient ground for interference with the sentence of the trial court. The difference between the two sentences must be of such a nature and degree that it appears that the trial court exercised penal discretion unreasonably.

This should not be interpreted as if the court of appeal is hesitant to interfere in the sentencing discretion of the trial court where it is of the opinion that the trial court did not exercise its sentencing discretion properly.⁶⁶ In *S v Di Blasi*⁶⁷ the court held, in setting aside a sentence it deemed too lenient, that "the sentence imposed by the learned Judge [is] shockingly inappropriate" and in *Attorney-General, Eastern Cape v D*⁶⁸ held that

"[i]n not properly weighing up the relevant factors the trial magistrate clearly misdirected himself which entitles the court to interfere with the sentence on

⁶³ *S v Dhlumayo* 1948 (2) SA 677 (A).

⁶⁴ Du Toit *et al* at 30-39. In *S v Salzwedel* 1999 (2) SACR 586 (SCA) the appeal court increased the sentence imposed where the trial court had overestimated the personal circumstances of the accused and underestimated the seriousness of the offence. In *S v Sadler* 2000 (1) SACR 331 (A) the court substituted direct imprisonment for the suspended sentence imposed by the trial court where it found that the original sentence was inappropriate and contrary to the interests of justice.

⁶⁵ *Director of Public Prosecutions, Transkei v Dubo* 2011 (1) SACR 191 (ECM) para 7; Du Toit *et al* at 30-39; *S v Anderson* 1964 (3) SA 494 (A) at 495G-H.

⁶⁶ *Director of Public Prosecutions, Transkei v Dubo* 2011 (1) SACR 191 (ECM) para 14.

⁶⁷ *S v Di Blasi* 1996 (1) SACR 1 (A) at 10f.

⁶⁸ *Attorney-General, Eastern Cape v D* 1997 (1) SACR 473 (EC) at 478a-b; Du Toit *et al* at 30-39; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) paras 13-14.

appeal...the sentence imposed by the magistrate is shockingly inappropriate and the leniency of the sentence imposed has, in my view, given rise to a miscarriage of justice.”

7.3 Administrative review and appeal

Some of the processes prescribed in terms of military criminal justice show substantial similarities with administrative decisions. In fact it is possible that a trial before a Commanding Officer would have been seen as an administrative action, had it not been for the MDSMA declaring this forum to be a court for purposes of military law. As a result it might be useful to briefly consider the basic principles involved in review and appeal of administrative decisions.

7.3.1 Administrative review

Administrative review allows a higher authority to reconsider administrative decisions and actions.⁶⁹ An administrative appeal (or review) is an appeal from one administrative official to another.⁷⁰ Administrative action entails “the use of public powers or the performance of public functions”⁷¹ and refers in general to “the conduct of public administration.”⁷² The application of administrative law is very wide, mainly because of the extent of government powers and activities.⁷³ Generally, administrative action certainly includes the implementation of policy and the making of adjudicative decisions. The latter, which could involve administrative judicial acts, often amount to processes quite similar in nature to

⁶⁹ Hoexter C *Administrative Law in South Africa* (2007) at 63.

⁷⁰ Hoexter C & Lyster R in Currie I (ed) *The New Constitutional and Administrative Law: Volume Two: Administrative Law* (2003) at 37.

⁷¹ Hoexter (2007) at 9; Currie & De Waal (2005) at 653.

⁷² Hoexter (2003) at 3. Public administration refers to the public service or employees of all government departments. This would include the SANDF.

⁷³ See Hoexter (2007) at 10 where she states that “[a]s the state attempts to secure social justice, the executive branch assumes immense power and the functions of the modern administration acquire an enormous capacity to affect the rights and liberties of the people.”

disciplinary trials. However, this is not the place to go into the difficulties of determining the exact nature of administrative actions.⁷⁴

Where action is classified as administrative in nature it will be subject to section 33 of the Constitution, as well as the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which gives effect to the rights set out in section 33.⁷⁵ Section 33 gives every individual the right to procedurally fair administrative action and the provisions in the PAJA provides more detailed guidelines on the procedures to be followed before administrative action is taken to make sure that the action taken is procedurally fair.⁷⁶

Administrative action can be reviewed either by a court or by a higher administrative authority. The legality of the administrative action is reviewed by the High Court and assessing the merits of the action is the responsibility of the executive.⁷⁷

The types of review discussed above in the context of judicial review also apply to administrative review.⁷⁸ Hoexter elaborates on the “traditional” forms and includes constitutional review allowed in terms of the Bill of Rights and judicial review “in the administrative-law sense” governed by the PAJA.⁷⁹ Constitutional review refers to the power of the court to declare any type of legislation or state

⁷⁴ See, in this regard, Hoexter (2007) at 167-168; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) paras 141, 143; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) paras 82, 203, 205 and 219; Van Wyk D “Administrative Justice in *Bernstein v Bester* and *Nel v Le Roux*” (1997) *South African Journal on Human Rights* 249 at 255; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 34; *Despatch High School v Head, Department of Education, Eastern Cape* 2003 (1) SA 246 (CKH) para 19. These issues become more and more pertinent, because of the establishment of more and more tribunals by the executive (Hopkins K “Some Thoughts on the Constitutionality of “Independent” Tribunals Established by the State” (2006) 27 *Obiter* 150 at 152).

⁷⁵ See in this regard Currie & de Waal (2005) at 644, 647-650.

⁷⁶ Currie & De Waal (2005) at 665; s 3 of the PAJA.

⁷⁷ Hoexter (2007) at 61.

⁷⁸ Hoexter (2007) at 108 discusses the same types of review as discussed at para 7.2.2 above. See specifically the discussion on “special statutory review” which application is the same as when applying judicial review.

⁷⁹ Hoexter (2007) at 109.

conduct invalid due to an infringement of a right in terms of the Bill of Rights.⁸⁰ Administrative judicial review refers to the power of the courts to set aside administrative decisions or rules on the basis of section 33 of the Constitution and the PAJA.⁸¹

7.3.2 Administrative appeal

Administrative appeals are, broadly speaking, governed by administrative law.⁸² Such appeals differ from judicial appeals in that the person or entity deciding the appeal will step into the shoes of the original administrative body and consider the matter anew. In this manner administrative appeals are regarded as an internal check on the justice and correctness of the decision.⁸³ There are several examples of administrative appeal bodies responsible for administrative appeals.⁸⁴ Hoexter mentions internal appeals from tribunal decisions to a superior departmental official or the relevant Minister, appeals to a national control body where the administrative system acts under the auspices of that body, appeals to an administrative tribunal specifically created to hear administrative appeals, and appeals to special courts presided over by judges and expert assessors. Finally, it is usually also possible to approach the ordinary courts.

7.4 Appeal and review in terms of military law

The aim of the MDSMA is, *inter alia*, to ensure a fair military trial and an accused's access to the High Court of South Africa.⁸⁵ To give substance to this right the defence legislation now provides for a process of military appeal and review. Two processes are relevant in this regard. The one involves Review

⁸⁰ Hoexter (2007) at 108.

⁸¹ Hoexter (2007) at 109.

⁸² Hoexter (2007) at 107.

⁸³ Hoexter (2007) at 63.

⁸⁴ Cf Hoexter (2007) at 65-66.

⁸⁵ Section 2(c) of the MDSMA.

Counsel, which includes the Director: Military Judicial Reviews and the other involves the CMA. The Review Counsel and the Director: Military Judicial Reviews are responsible for reviews. The CMA has powers of review and appeal. A brief history on military appeals and review is discussed below followed by an overview of the general principles applicable to military appeal and review.

7.4.1 Military review and appeal: A short history

Although a right to review existed, no provision was made for any appeal process, either within the military or to the civilian courts.⁸⁶ The military review process provided for could not be regarded as a constitutionally sound procedure. Different levels of review existed. At the lowest level was the convening authority, then review at the level of the various Chiefs of Staff and finally, at the highest level review by the Council of Review. The convening authority was “any person empowered by warrant to convene courts martial.”⁸⁷ He was usually an officer higher in rank to the commanding officer of the unit, in command of a formation, usually of the rank brigadier⁸⁸ or above. The convening authority, in effect the entity deciding on proceeding with the charges against the accused, was also the reviewing authority who had to determine whether a conviction and/or sentence imposed by the court martial he had convened should be upheld.⁸⁹ The finding and sentence of the court martial could not be executed before confirmation by the convening authority.⁹⁰ Where the convening authority exercised its discretion to vary the finding or the sentence, the changed finding or

⁸⁶ *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 15 and 20; Tshivhase A E “Transformation of Military Courts” (2009) *SA Public Law* 450 at 453; van der Westhuizen H “An Introduction to the Military Courts in South Africa and Some Recommended Changes” (1994) *African Defence Review* 18 at 20. See also the now repealed s 107 of the Defence Act 44 of 1957 which stated that “[t]here shall be no appeal from the finding or sentence of a military court, but nothing in this Act shall be construed as derogating from the right of any division of the Supreme Court of South Africa to review the proceedings of a military court.”

⁸⁷ Section 1 of the MDC (now repealed).

⁸⁸ The rank of brigadier is now known as the rank of brigadier general.

⁸⁹ *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 20.

⁹⁰ Sections 96, 98 and 106 of the MDC (now repealed); Anderson G C *The Legal Classification of Military Tribunals as Courts of Law* (1988) at 123.

sentence was regarded as the finding and sentence of the court *a quo*.⁹¹ Although the accused was afforded the opportunity of making representations to the convening authority regarding his finding and sentence, the prosecution was not afforded the same opportunity.⁹²

After confirmation by the convening authority, court martial decisions were subject to an automatic review at various levels. The level of review depended on the level of the convening authority.⁹³ Decisions by general and ordinary courts martial convened by chiefs of staff were reviewed automatically by the Chief of Staff Personnel who forwarded the case with his comments for final decision by the Chief of the Defence Force.⁹⁴ In practice this meant that the record of proceedings was forwarded to the military law officer at the office of the Chief of the Defence Force in the Adjutant General's office. The MDC refers to the Adjutant General in this regard but the relevant functions were taken over by the Chief of Staff Personnel.⁹⁵ Ordinary courts martial convened by convening authorities other than chiefs of staff were automatically reviewed by the Chief of Staff and then forwarded to the Chief of Staff Personnel for further review.⁹⁶ In practice the record of proceedings was forwarded to the military law officer at the office of the Chief of the Arms of Service, such as the Chief of the Air Force. The accused could also make representations to the relevant convening authority.⁹⁷

The accused could further apply for review by the Council of Review, which was the highest reviewing authority within the SANDF.⁹⁸ Where the accused brought

⁹¹ Section 116 of the MDC (now repealed). The convening authority could not vary the finding or sentence to the detriment of the accused (see s 101(1)(d) of the MDC (now repealed)).

⁹² Section 100 of the MDC (now repealed).

⁹³ Sections 64-65A of the MDC (now repealed).

⁹⁴ Section 109 of the MDC (now repealed).

⁹⁵ Anderson at 125.

⁹⁶ Sections 108 and 110 of the MDC (now repealed).

⁹⁷ Section 111 of the MDC (now repealed).

⁹⁸ Section 112 of the MDC; r 99 of the MDC (now repealed). For the procedure see r 99 of the MDC. The accused had to apply for review within a period of three months after his conviction. In terms of the transitional provisions in the MDSMA, s 44(1) provides that "every Council of Review established and constituted by the Minister of Defence under section 145 of the Code

such an application the prosecution was given the opportunity to also make representations to the Council of Review. The MDC provides that the chairman of the Counsel could be a Supreme Court judge, although this was not a fixed requirement.⁹⁹ Sentences of cashiering, discharge with ignominy, dismissal from the SANDF and imprisonment for a period of longer than three months were subject to automatic review to the Counsel of Review.¹⁰⁰ Such sentences were not submitted for review to any convening authority.¹⁰¹ The Counsel of Review had the same powers as the other reviewing authorities, except where the accused applied for review the Counsel of Review had the authority to increase his sentence.¹⁰² Any finding, sentence or court order that was confirmed or varied by the Council of Review was regarded as being the finding or sentence made by the trial court.¹⁰³

The review process was not necessarily the final say of the process. The MDC authorised the General Officer Commanding of the SADF to mitigate, remit or to commute any sentence that was imposed on an offender.¹⁰⁴ This is as clear an example of executive interference as can be found in the previous defence legislation.

The application of this review process negates the doctrine of separation of powers and judicial independence. The executive, in the guise of the convening authority, was involved in instituting prosecutions as well as reviewing the trial. Where the independence of the judiciary was suspect, as was the case with courts martial, an independent review of the case may at least have provided some guarantee of independence and justice. This is not possible if reviews are conducted by the executive and there is no further avenue of appeal.

prior to the commencement of this Act, shall be deemed to have constituted and established as a Court of Military Appeal under this Act.”

⁹⁹ Section 145 of the MDC (now repealed).

¹⁰⁰ Section 103 of the MDC (now repealed) and Anderson at 126.

¹⁰¹ Rule 98(4) of the MDC.

¹⁰² Section 115(4) of the MDC (now repealed).

¹⁰³ Section 116 of the MDC (now repealed).

¹⁰⁴ Section 117 of the MDC (now repealed).

As explained previously, the MDSMA has brought about radical changes to the military review process since 1999. Review authority was removed from the sphere of the commanders and placed under the jurisdiction of a military Review Council.¹⁰⁵ Review Council are law officers in the SANDF who are appropriately qualified and who hold a law degree.¹⁰⁶ They are assigned to their function by the Adjutant General and there is no requirement, as is the case with the military judges, that they should have any experience as a practicing attorney or advocate or in the administration of criminal or military justice. The only requirement is that they perform their functions competently.¹⁰⁷ Review Council answers to the Director: Military Judicial Reviews.

The Director: Military Judicial Reviews must be an appropriately qualified officer holding a degree in law and must be of the rank of at least a colonel. He must possess at least five years experience as a practicing attorney, advocate or in the administration of criminal or military justice. He is assigned to his post in the same way as the other directors, eg Director: Military Judges.¹⁰⁸ Military judicial reviews form a separate directorate from the military judges.

Where once there was no military appeal court, now the legislation provides for a Military Court of Appeal, being the highest military court in South Africa.¹⁰⁹ At first glance it would seem as if the principles founded by the common law and

¹⁰⁵ Section 26(1) of the MDSMA.

¹⁰⁶ Appropriately qualified means "including the passing of a departmental course in military law" (see s 1 of the MDSMA).

¹⁰⁷ Section 26(2) of the MDSMA.

¹⁰⁸ See ss 13(1) and (2)(b) of the MDSMA

¹⁰⁹ Section 6(3) of the MDSMA; Tshivhase A E "Military Courts in a Democratic South Africa: An Assessment of their Independence" (2006) *New Zealand Armed Forces Law Review* 98 at 108; Tshivhase (2009) at 455; *Borman v Minister of Defence* 2007 (2) SA 388 (C) para 14; Kruger at 30-32(1).

constitutionalised in the Constitution¹¹⁰ now find application in defence legislation concerning review and appeal.¹¹¹

All acquittals and discharges of an accused by the military courts are final and not subject to review. Every finding of guilty, sentence imposed or court order made is subject to the review procedures prescribed by the MDSMA.¹¹² Section 25 of the MDSMA provides that

[e]very person subject to the Code who is convicted and sentenced by a military court has the right to automatic, speedy and competent review of the proceedings of his or her trial to ensure that any proceedings, finding, sentence or order is either valid, regular, fair and appropriate, or remedied.

Each accused therefore has the right to an automatic and speedy review of his case.¹¹³ The accused may also apply for the review of his trial proceedings to the CMA.¹¹⁴ A perusal of the MDSMA shows that only the right to and the processes of review are addressed in the relevant sections. Section 25 refers to the “right to review of trial” and section 34 of the MDSMA only addresses reviews, although the heading to the section refers to both appeal and review. The only clear reference to an appeal authority is found in the section addressing the powers of the CMA.¹¹⁵ Because the MDSMA confers “full appeal and review competencies” on the CMA, it is submitted that the procedures and regulations regarding reviews apply *mutatis mutandis* to matters of appeal before the CMA as well as those serving before the Director: Military Judicial Reviews.¹¹⁶

¹¹⁰ Section 35(3)(o) of the Constitution (“[e]very accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court”); *Steyn v Minister of Defence* [2004] JOL 13059 (T) para 4.

¹¹¹ Section 25 of the MDSMA read with ss 8 and 34 of the MDSMA.

¹¹² Carnelley at 61; Tshivhase (2006) at 124; s 34(1) of the MDSMA.

¹¹³ Tshivhase (2006) at 124; Tshivhase (2009) at 459.

¹¹⁴ Section 34(5) of the MDSMA.

¹¹⁵ Section 8(1) of the MDSMA.

¹¹⁶ Section 34(3) of the MDSMA. This matter is discussed in para 7.5.2 below.

A general discussion on military appeals and reviews follows before the specific problems with regard to military reviews and appeals are addressed. Although the legislation makes no discernable distinction between these two processes, the two are separated for the discussion as far as possible.

7.4.2 Military review

Of the different forms of review military review can best be described as a “wider form of statutory review.”¹¹⁷ This type of review invests the courts with wider powers of review and a court conducting such a review “possesses not only the powers of a court of review in the legal sense, but it has the functions of a court of appeal...”¹¹⁸ This type of review is not unlimited but is subject to the specific statutory provision as well as “the nature and the extent of the functions entrusted to the person or body making the decision under review.”¹¹⁹ Military reviews also have some comparable features with the automatic review process in terms of section 302 of the Criminal Procedure Act although the military process differs markedly from the civilian review process with regard to the entity responsible for the review.

Military convictions can follow one of two paths in the process of review, namely automatic review by review counsel or automatic review by the CMA.

7.4.3 Automatic review by review counsel

All guilty findings, whether at a CODH, CSMJ or CMJ, are subject to review by Review Counsel, except where the accused has been sentenced to imprisonment (including suspended imprisonment), cashiering, discharge with

¹¹⁷ Hoexter (2007) at 108; Kruger at 30-5.

¹¹⁸ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 117; *Nel v The Master* 2005 (1) SA 276 (SCA) para 23.

¹¹⁹ *Nel v The Master* 2005 (1) SA 276 (SCA) para 23.

ignominy and dismissal or discharge from the SANDF.¹²⁰ The accused is informed of this right to review upon the completion of his trial.¹²¹

The accused is informed that he can make written representations to the relevant review counsel.¹²² He has 14 days in which to make the representations if he is not satisfied with the finding or the sentence.¹²³ The implication of this section is that the accused must act swiftly if he is of the opinion that the trial court did not handle the trial in accordance with justice since the sentence, except for the exceptions in terms of section 34(2) MDSMA,¹²⁴ is of immediate effect.¹²⁵ Where the accused cannot submit his representations within 14 days the local representative of the Adjutant General may extend the period up to 28 days.¹²⁶ If the accused fails to comply with the extended period for submission, he is barred from furnishing any written representations. The matter is still reviewed, but without the benefit of the accused's representations.¹²⁷ Although 14 days may not seem sufficient, the actual review of the case only starts once Review Counsel receives the transcriptions of the trial which is approximately 14 days after the trial. Since the accused has 14 days from when the review starts, the accused in actual fact has more time to make the written representations.

A person assigned as Review Counsel exercises his powers within the area of jurisdiction to which he has been assigned by the Adjutant General.¹²⁸ In terms of statutory review powers the review authority may only exercise those powers conferred on it in terms of legislation and although statutory review powers are

¹²⁰ Rules 71(2) and 71(3)(c) of the MDSMA.

¹²¹ Rule 58(12)(b)(ii) of the MDSMA; s 33(7) of the MDSMA.

¹²² This is similar to the civilian automatic review where an accused may submit a written statement with the record of proceedings which replaces the formal affidavits required in terms of s 24 of the Supreme Court Act.

¹²³ Section 34(7) of the MDSMA.

¹²⁴ Imprisonment, suspended imprisonment, cashiering, discharge with ignominy, dismissal or discharge from the SANDF.

¹²⁵ Section 118 of the MDC.

¹²⁶ Section 34(8) of the MDSMA.

¹²⁷ See *S v Hola* (CMA 05/07).

¹²⁸ Section 26(2) of the MDSMA.

generally wide, the statute may also limit the review powers of an entity.¹²⁹ The review powers of military Review Counsel at Legato level are limited. He may only uphold the finding and sentence. Any further power must be exercised by the Director: Military Judicial Reviews. When Review Counsel receives the trial documentation on automatic review he will peruse the documentation. If he is satisfied that justice was done he will uphold the finding. No evidence is lead at the CODH and therefore no assessment can be made on the merits of the case.¹³⁰ With review from a CSMJ or CMJ on the other hand, evidence is recorded by the court *a quo* and an assessment on the merits can be done. The test applied in deciding whether the review will succeed is wider than a mere absence of irregularities. This is the same test applied in the civilian courts.¹³¹

Where Review Counsel is not satisfied that the finding, sentence or the court order are in accordance with real and substantial justice he must submit the proceedings together with his view on the matter to the Director: Military Judicial Reviews who has the authority to set the finding, sentence or court order aside.¹³² The Director has the same powers as the CMA regarding the review of cases.¹³³ The MDSMA does not distinguish between the powers of review and those of appeal and therefore confirms the contention that this is the type of review where the court “has powers of both appeal and review with the additional power, if required, of reviewing new evidence...”¹³⁴

¹²⁹ *Nel v The Master* 2005 (1) SA 276 (SCA) para 23 where the court held that “[a] statutory power of review may be wider than the ‘ordinary’ judicial review...but it may also be narrower, ‘with the court being confined to particular grounds of review or particular remedies.’”

¹³⁰ Typically a finding will be set aside where there is a splitting of the charges or where the charge, as formulated on the charge sheet does not disclose an offence, such as where the prosecutor failed to provide sufficient detail in the charge sheet and the trial officer accepted that charge sheet.

¹³¹ Kruger at 30-9.

¹³² Section 34(3) of the MDSMA read with r 71(3) of the MDSMA; Tshivhase (2009) at 460; Carnelley at 75. The concerns regarding the review process by a non-judicial entity are discussed below at para 7.5.2.

¹³³ Section 26(2) read with s 8 of the MDSMA.

¹³⁴ *Nel v The Master* 2005 (1) SA 276 (SCA) para 23.

7.4.4 Automatic review to the CMA

Whenever an accused is sentenced to imprisonment (including suspended imprisonment), cashiering, discharge with ignominy or dismissal or discharge from the SANDF the proceedings are forwarded to the CMA on automatic review.¹³⁵ None of these sentences may be executed before they have been confirmed by the CMA.¹³⁶

In these cases the review counsel merely acts as a “post office”. It receives the record of proceedings from the trial and forwards it to the Director: Military Judicial Reviews for submission to the CMA.¹³⁷ Automatic review to the CMA is also done subject to the statutory power of review authorised in terms of the defence legislation.¹³⁸

7.4.5 Referral to the CMA by the Director: Military Judicial Reviews

Where military Review Counsel is of the opinion that a finding, sentence or court order should not be upheld, he refers the matter to the Director: Military Judicial Reviews who will exercise his powers in terms of the MDSMA.¹³⁹ The Director may however, instead of exercising his powers, refer the matter to the CMA for decision.¹⁴⁰ Where he decides to refer the matter to the CMA he must notify the Adjutant General of his decision.¹⁴¹ It is not clear why this is required but it may create a further opportunity for executive interference.

¹³⁵ Rule 71(1) MDSMA; s 34(6) MDSMA.

¹³⁶ Section 34(2) of the MDSMA.

¹³⁷ Rules 71(3)(a) and 74 of the MDSMA.

¹³⁸ See the discussion at para 7.4.8 below for an overview of the CMA’s power during review.

¹³⁹ Section 34(3) of the MDSMA read with r 73 of the MDSMA.

¹⁴⁰ See *S v Lepota* (CMA 07/2008) where the Director: Military Judicial Reviews referred the matter to the CMA and did not himself exercise his powers in terms of s 34(3) of the MDSMA.

¹⁴¹ Rule 73(a) of the MDSMA.

7.4.6 Application by the offender for review or appeal to the CMA

The MDSMA does not specifically make provision for the accused to appeal his case to the CMA. The Act only provides for an application of review to the CMA.¹⁴² It is however submitted that the process of appeal is by necessary implication included.¹⁴³

The accused must apply for the judicial review or appeal of his case within six months after the date of his conviction and must specify the grounds for which the relief is sought in his application.¹⁴⁴ If the accused does not submit the application within the six month period, the CMA may condone a late application no later than two years after the date of the conviction. The application must show good cause for the lateness of the application and must also contain the grounds on which review is sought.¹⁴⁵ The mere notice of intention to bring an application is not sufficient to bar prescription. The application must be lodged in time and must contain proper grounds for appeal or review. Successful grounds for review would for example be the existence of a gross irregularity during the trial proceedings resulting in a miscarriage of justice or preventing the accused from receiving a fair trial.¹⁴⁶ The inability of the offender to pay the page fees for the records cannot be used as good cause for condonation.¹⁴⁷ Successful grounds for appeal would result in the CMA interfering with the finding or sentence of the court *a quo*.

Where the application for condonation indicates a reasonable prospect of success the court will more likely grant the application and grant the accused leave to appeal. In *S v Zulu*¹⁴⁸ the accused applied for condonation and requested that the conviction and sentence be set aside on a number of technical

¹⁴² Section 34(5) of the MDSMA read with r 72 of the MDSMA; Carnelley at 75.

¹⁴³ Section 8 of the MDSMA provides for full review and *appeal* powers of the CMA.

¹⁴⁴ Rule 72(1) of the MDSMA.

¹⁴⁵ Rule 72(2) of the MDSMA.

¹⁴⁶ *S v Magwa* (CMA 208/2001); *S v Shandu* (CMA 029/2005)

¹⁴⁷ *S v Hola* (CMA 05/07).

¹⁴⁸ *S v Zulu* (039/2004).

grounds. The accused did not apply for appeal on the merits of the case. The matter was however brought to the CMA more than two years after conviction and the application for condonation could not be granted. The court stated, however, that it “did consider the applicant’s appeal on its merits. The court found no prospect of success in appeal and therefore the application for condonation would have been refused in any case.” In *S v Pheko*¹⁴⁹ the applicant failed to show good cause for not complying with the prescribed time limits and the review was not granted because there was “no prospect of success on the merits of the case”. In an appeal against sentence the CMA found that one of the grounds for a successful consideration of condonation includes a reasonable prospect of success, but found no such prospect for reduction of the sentence in that instance.¹⁵⁰

However, if the accused brings the application for condonation after expiration of the two year period, the CMA no longer has jurisdiction to hear the matter. The accused will have to apply for review to the High Court of South Africa and comply with their rules and procedures.¹⁵¹ Whether the High Court of South Africa will entertain such a late application on review would depend on the circumstances of the case. The High Court holds that although there is no fixed time limit to review proceedings in civilian courts, review must be taken within a reasonable time. Where “there is either no explanation or an unsatisfactory explanation – having regard to the circumstances, the Court will not exercise its discretion in favour of an applicant for review”.¹⁵²

It should be noted that the MDSMA makes no distinction between appeal and review in terms of the time limits attached to the applications to the CMA whereas the civilian courts do make this distinction.

¹⁴⁹ *S v Pheko* (CMA 209/2000).

¹⁵⁰ *S v Martin* (CMA 01/07).

¹⁵¹ *S v Holo* (CMA 05/07).

¹⁵² *Kader v Assistant Magistrate, Cape Town* 1954 (3) SA 648 (C) at 656H.

7.4.7 CMA procedures in the application for appeal and review

On receipt of the application the Director: Military Judicial Review provides the accused with a copy of the record of proceedings necessary for drawing up the heads of argument containing his representations to the CMA.¹⁵³

Any application to the CMA is submitted through the office of the review counsel. He attaches his view on the matter and forwards it to the Director who, with the inputs from the prosecution, submits the case to the CMA.

The CMA has wide powers in considering appeals, in certain respects a wider power than the High Court of South Africa. In allowing the CMA to hear argument, and receive further evidence and affidavits, the MDSMA provides for appeal in the wide sense which may include a complete re-hearing and re-determination of the merits of the case.¹⁵⁴ Where the civilian courts are limited to deciding an appeal within the four corners of the record of proceedings, the CMA is not so limited. The CMA can even hear further oral evidence under oath.¹⁵⁵

The CMA considers all evidence heard, if applicable, “in private” at a time and at a place fixed by the Adjutant General in consultation with the Chairperson of the

¹⁵³ Rule 72(3) of the MDSMA. Rule 72(3) read with r 72(5) creates an anomaly – the accused must pay a certain amount for a copy of the record of proceedings containing the information required to draw up proper heads of argument (see *S v Holo* (CMA 05/07). If he cannot access the information he cannot comply with either 72(1) or (2) of the MDSMA. Proper grounds for review cannot be argued on a lack of information. The CMA will only grant condonation if the accused can show reasonable grounds for the review. The CMA, however, still found in that very same case that a lack of funds and therefore no record of proceedings, do not prevent the accused from keeping to the time limit because he would gain access to the records free of charge once he has complied with rr 72(1) or (2) of the MDSMA, which he is unable to do in the first place due to lack of funds. On the one hand the court finds that a proper application must be submitted before condonation can be considered. On the other hand the court finds that the accused’s inability to obtain access to the information required for a proper application does not prevent the accused from complying with the court’s requirements. It is not clear why the legislator requires payment for the record of proceedings which the accused will receive free of charge in any event once the application is brought. Providing a copy free of charge in the first place may in fact assist the accused in exercising his right to appeal and review as well as a fair trial.

¹⁵⁴ This form of appeal was identified in *Tickly v Johannes* 1963 (2) SA 588 (T) at 590F-591A.

¹⁵⁵ Rule 74 of the MDSMA.

CMA.¹⁵⁶ It is not clear why the legislature makes use of the words “in private” but it is submitted that within this context it should be interpreted as “closed proceedings.” Once the CMA has made its decision it is recorded and endorsed by the members of the court and the Director informs all relevant parties of the result.¹⁵⁷

7.4.8 Powers of the CMA on appeal and review

The CMA has full appeal and review powers with regard to any trial conducted by a military court.¹⁵⁸

The court may decide to uphold the finding and the sentence or to change the sentence imposed by the court *a quo*. Where a matter serves before the CMA on automatic review, the court may not increase the punishment of the accused. The CMA may only increase punishment in those instances where the accused brought the matter on appeal or review.¹⁵⁹ This has also been a long standing practice in the civilian courts.¹⁶⁰

A civilian court may either increase the sentence *mero motu* or on application from the prosecutor. In the military only the first instance is applicable. The defence legislation does not allow the prosecution counsel to appeal a sentence. Although it is a rule of practice to inform the civilian appellant of a possible increase in sentence, this is also not done by the CMA.¹⁶¹

¹⁵⁶ Rules 75 and 77 of the MDSMA.

¹⁵⁷ Rules 77(1) and (2) of the MDSMA. There is no Constitutional requirement that appeals should be heard in open court (see *S v Pennington* 1997 (4) SA 1076 (CC); Snyckers F & Le Roux J “Criminal Procedure: Rights of Arrested, Detained and Accused Persons” in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) at 51-184; Steytler (1998) at 396.

¹⁵⁸ Section 8 of the MDSMA; Carnelley at 73.

¹⁵⁹ In *S v Hola* (CMA 05/07) the CMA held that in order to prevent frivolous applications by the accused, the court installed the *caveat* that the Court may, in the interests of justice, increase the sentence of a lower military court if of the opinion that the sentence of the court *a quo* was too lenient.

¹⁶⁰ Terblanche at 412; Kruger at 30-51.

¹⁶¹ Kruger at 30-51; *S v Ndizima* 2010 (2) SACR 501 (ECG) para 4.

In light of comments by the CMA regarding sentences imposed by the military courts *a quo* which are considered to be too lenient, it is submitted that consideration should be given to allowing the prosecution to appeal the sentence of an accused. In *S v Nel*¹⁶² the CMA upheld a sentence of dismissal on automatic review from the SANDF which the court regarded as “very lenient”. They opined that “a more severe sentence would not have been out of order”. In *S v Kanu*¹⁶³ the court regarded the fine and suspended sentence as “shockingly inappropriate” as it was too lenient.¹⁶⁴ The court did not agree that the court *a quo* had properly considered all the aggravating factors during sentencing. As the matter came before the CMA on automatic review the court could not intervene and impose a more severe sentence. The court remarked that

[m]ilitary courts have to remember that they are the guardians of the values and good character in the SANDF. Military criminals can be seen as the “enemy” that destroys the organisation from within. Military courts should not err by being too lenient when they impose sentences for crimes committed in the organisation. By doing so, they actually leave a message to soldiers and offenders that the military law has “lost its teeth” and that the guardians of the law will tolerate the ongoing spree of violence against fellow soldiers within the organisation by ensuring military criminals of a continued career in the SANDF.

A R600 fine for the unauthorised use of a military vehicle in *S v Ngako*¹⁶⁵ was seen as “lenient in the extreme and cannot be regarded as conducive to military discipline.” It is therefore submitted that it would be in the interest of justice to allow the prosecution to appeal sentences in such cases. It should be kept in mind that the court held that the right to a fair trial includes fairness to society as well. The court should therefore be empowered to rectify a miscarriage of justice, also where a sentence is deemed to be too lenient.¹⁶⁶

¹⁶² *S v Nel* (CMA 077/2001).

¹⁶³ *S v Kanu* (CMA 17/2010).

¹⁶⁴ See also *S v Bene* (CMA 15/2009).

¹⁶⁵ *S v Ngako* (CMA 165/2002).

¹⁶⁶ *S v Soday* 1994 (2) SACR 810 (C) followed with approval in *S v Ndizima* 2010 (2) SACR 501 (ECG) para 8.

Where the court is in agreement that the finding or sentence is not in accordance with real or substantial justice, the court may refuse to uphold the finding and set the sentence aside. It may further substitute a finding with any other finding supported by the evidence. It may however not substitute the finding with a more serious one, even if it would have been more appropriate under the circumstances.¹⁶⁷ The CMA may further correct any error in the finding, sentence or the court order or refer a matter back to the trial court to rectify the error.¹⁶⁸

7.5 The current application of military appeal and review: Some concerns

The general principles of military appeal and review do not clearly explain the type of appeal or review in fact followed by the military courts and review authorities. The following is a summary of the military appeal and review avenues, followed by the concerns created through the application of these processes.

7.5.1 The current application of military appeal and review: A summary

7.5.1.1 Military appeal

The South African law mainly distinguishes between two types of appeals – appeals from lower courts of law to higher courts of law and administrative appeals falling within administrative law.¹⁶⁹ The question here is which form of appeal does the military appeal represent?

¹⁶⁷ Section 8(3) of the MDSMA provides that any benefit of the doubt must be given to the offender with respect to any finding, sentence or order.

¹⁶⁸ Section 8(2) of the MDSMA. See *S v Taylor* (CMA 165/2001); *S v Masiko* (CMA 166/2001); *S v Leepile* (CMA 025/2002) as examples where the sentence was not correctly formulated and the wording was rectified by the CMA.

¹⁶⁹ Hoexter (2007) at 107.

Any accused who is not satisfied with the finding, sentence or court order made by the military court *a quo* may apply for an appeal to the CMA.

It has been argued that proceedings before the CSMJ and CMJ are regarded as criminal proceedings and, despite certain concerns regarding the independence of the military judges at these forums, these military courts can be considered ordinary courts for the purposes of the Constitution.¹⁷⁰ Proceedings conducted by these courts are therefore classified as judicial proceedings. Since the CMA is also regarded as an ordinary court in terms of the Constitution, an appeal from the CMJ or CSMJ to the CMA is considered an appeal from a lower (military) court of law to a higher (military) court of law.

The situation of an appeal from a CODH is at first glance not as clear as that of the CMJ. It has been argued earlier that the CODH cannot be considered an ordinary court in terms of the Constitution.¹⁷¹ However, taking into account the brief discussion on administrative action above, it is clear that the CODH does not conduct administrative actions. It was submitted that the CODH should be classified as a court *sui generis* and as such conduct judicial proceedings, albeit not of a criminal nature.¹⁷² Consequently an appeal from the CODH can be considered a judicial appeal from a lower military court *sui generis* to a higher (military) court of law.

7.5.1.2 Military reviews

The South African law distinguishes between various forms of review.¹⁷³ As with the question posed above it must be established which form of review is applicable to the military courts.

¹⁷⁰ See ch 4 at para 4.2.3 and 4.3.3.2 above.

¹⁷¹ See ch 4 at para 4.4 above.

¹⁷² For a discussion on administrative functions versus judicial functions see again *Nel v Le Roux* 1996 (3) SA 562 (CC).

¹⁷³ Hoexter (2007) at 108-109; *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 117.

The first form identified is the review of a decision by an inferior court. This is governed by section 24 of the Supreme Court Act. Reviews within the military law environment are not governed by the Supreme Court Act or the Criminal Procedure Act. This form of review is therefore not applicable to reviews conducted from one military court to another. It will however be applicable in those instances where a military accused applies for the review of his case to the High Court of South Africa.¹⁷⁴

A second form of review is that of common law review where the court conducts the review in terms of its inherent authority to do so.¹⁷⁵ Military courts are creatures of statute and as such have only those powers provided by the enabling legislation. They do not possess inherent powers of review.

Although reviews may reach the reviewing authority through automatic review, it is submitted that the military courts' reviewing authority is not exactly the same as the civilian equivalent. Automatic review authority is usually wide, similar to an informal appeal and not only limited to irregularities. It usually gives the court a wide jurisdiction regarding the review.¹⁷⁶ This form of review does not adequately explain the limited review jurisdiction of the Review Counsel at the Legsato level. The military courts are also not restricted to automatic reviews.

Judicial review in the constitutional sense does not find application in the military courts. Although all courts must consider the Bill of Rights in their decisions, the military courts cannot declare any type of legislation or state conduct unconstitutional. Since it is argued that the proceedings before the military courts do not constitute administrative action, military review cannot be classified as judicial review in the administrative law sense.

¹⁷⁴ Kruger at 30-6; Du Toit *et al* at 30-3; *van Duyker v District Court Martial* 1948 (4) SA 691 (A); *Wessels v General Court Martial* 1954 (1) SA 220 (ODP).

¹⁷⁵ Hoexter (2007) at 108; Kruger at 30-5.

¹⁷⁶ Kruger at 30-15; Du Toit *et al* at 30-6

Reference is however made to a wider form of statutory review.¹⁷⁷ In this instance the legislature confers a statutory power of review on the reviewing authority. This is sometimes a wider power of review than the ordinary one with many similarities to appeal.¹⁷⁸ As mentioned earlier, military courts are creatures of statute with the powers provided by the legislation. The legislation may give the reviewing authority wide powers of review¹⁷⁹ or it may limit the powers of the review authority, as is the case of Review Counsel at Legsato level.¹⁸⁰ It is submitted that reference to reviews in terms of military law refers to this type of statutory review.

A matter can serve before a military review authority in one of two ways: (1) in terms of automatic review as determined by the legislature and (2) referral to the CMA by the Director: Military Judicial Reviews.

All guilty findings in a military court are subject to automatic review. The review authority is largely determined by the sentence imposed by the military court. All sentences of imprisonment (including suspended imprisonment), cashiering, discharge with ignominy and dismissal or discharge from the SANDF are referred to the CMA on automatic review. All other sentences are referred to Review Counsel at the relevant Legsato.

Military review done by the CMA, for the same reasons mentioned above with regards to appeals, can be regarded as a judicial review. The concern lies with the review done by Review Counsel and the Directory: Military Judicial Reviews. Two aspects are of concern:

1. The non-judicial review of the military court proceedings; and

¹⁷⁷ Kruger at 30-5; Hoexter (2007) at 108; *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 117.

¹⁷⁸ Hoexter (2007) at 109.

¹⁷⁹ Section 8 of the MDSMA.

¹⁸⁰ Section 34(3) of the MDSMA.

2. The constitutional right to review by a “higher court”.

7.5.2 Non-judicial review of military court proceedings

All guilty findings, even those in a CSMJ where the senior military judges preside, are subject to review by Review Counsel at the level of the Legato.¹⁸¹ In terms of the defence legislation Review Counsel need no criminal or military law experience to be assigned as Review Counsel. Yet they have the authority to review the decisions of the most experienced military judges.

Although their powers of review are limited to confirming guilty findings, the same cannot be said about the Director: Military Judicial Reviews. The Director: Military Judicial Reviews has the same powers of review as the Court of Military Appeal.¹⁸² Since the review authority is extremely wide this in effect means that the Director: Military Judicial Reviews has appeal and review authority.¹⁸³ The MDSMA provides that the Director may “exercise in those proceedings, the powers conferred on a Court of Military Appeals by this Act.”¹⁸⁴ The powers that are conferred on the CMA are set out in the MDSMA which states that¹⁸⁵

[a] Court of Military Appeals shall exercise full appeal and review competencies in respect of the proceedings of any case or hearing conducted by any military court...

¹⁸¹ For an explanation on the qualifications and appointment of Review Counsel and the Director: Military Judicial Reviews see at para 7.4.1 above.

¹⁸² Section 34(3) of the MDSMA.

¹⁸³ In *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 230A-C the court found that the CMA in fact exercises review powers that are wider than the power of the High Court when it sits on an appeal (see also Carnelley at 76). Consequently the same can be said of the Director: Military Judicial Reviews.

¹⁸⁴ Section 8(1) of the MDSMA; Tshivhase (2009) at 460. The Director: Military Judicial Reviews therefore exercises powers similar to a higher court of appeal when he cannot be seen as such a court.

¹⁸⁵ Section 8(1) of the MDSMA.

These powers include the hearing of argument or further evidence, either by means of affidavit or oral evidence.¹⁸⁶ After hearing additional evidence the Director may uphold the finding and sentence, refuse to uphold the finding and set the sentence aside, substitute a finding with one supported by the evidence as a competent alternative verdict, or where the finding is upheld, the Director may vary the sentence.

In exercising these wide powers of review, Review Counsel holds a lot of power over the trial court. It may, *inter alia*, set aside and substitute findings or sentences imposed by more experienced military judges. This is in spite of the fact that review counsel does not form part of the military judiciary. They exercise powers that are similar to those of the CMA in spite of the fact that they are not a court of law. Since the review of cases still form part of the accused's trial the review by a non-judicial entity such as the Review Counsel and their Director poses some concerns in light of the accused's constitutional right to a fair trial before an independent and impartial tribunal.

As discussed in Chapter 4 above, independence and impartiality is not only a reference to the *de facto* independence and impartiality of the military court. Perceptions play an important role.¹⁸⁷ Review counsel at all times form part of the executive. When not conducting reviews the function of the Director: Military Judicial Reviews is purely administrative.¹⁸⁸ His authority to interfere with the finding and sentence of the military court can arguably be perceived as executive interference.

This is even more pronounced in the case of CODH. The CODH can at best be seen as a court *sui generis*. It does not entitle an accused to the wider protection

¹⁸⁶ Rule 74 of the MDSMA.

¹⁸⁷ See ch 4 at para 4.2.1.4 above.

¹⁸⁸ A perusal of the responsibilities of the Director: Military Judicial Reviews in terms of s 26(3) of the MDSMA clearly shows his involvement in the administrative functions of review counsel. He must ensure that review counsel perform their functions properly, must determine review policy in consultation with the Chairman of the CMA as well as issue policy directives to be used during the review process.

provided by section 35 of the Constitution. It is only in highly exceptional cases that the matter will be considered by the CMA¹⁸⁹ and the Director: Military Judicial Reviews will generally be the final level of review for this court.¹⁹⁰

Concerns were raised by the Ministerial Task Team regarding the Director: Military Judicial Review's power to set aside proceedings and sentences imposed by military courts by means of powers similar to those of the CMA.¹⁹¹ Review by a non-judicial authority is however not a concern unique to the South African military justice system.

7.5.2.1 Non-judicial review of military cases: An international perspective

The question of the independence of the courts martial system following an automatic review of convictions by a non-judicial entity served before the European Court of Human Rights (ECHR). In *Morris v The United Kingdom*¹⁹² the ECHR stated with reference to a non-judicial reviewing authority that

[t]he authority was empowered to quash the applicant's conviction and the sentence imposed by the court martial. More importantly, it had powers to reach any finding of guilt which could have been reached by the court martial and to substitute any sentence which would have been open to the court martial, not being in the authority's opinion more serious than that originally assessed. Any

¹⁸⁹ A perusal of all CMA decisions from 1999 to January 2011 failed to produce one CODH case heard before the CMA.

¹⁹⁰ The accused is allowed to apply for the review of his hearing before the CODH to the High Court of South Africa but considering the level of the trial, the accused's lack of legal representation at this forum and the costs involved in a High Court application, it is submitted that it would be extremely unlikely for such a scenario to occur. It may be argued that the accused pleaded guilty at the disciplinary hearing and would therefore not have concerns regarding the finding of the case. It must however be kept in mind that matters regarding irregularities in procedure and sentence may still be relevant in this context.

¹⁹¹ Ministerial Task Team *Report by Ministerial Task Team on the Transformation of the Military Legal System* (2005) at 48. They suggest that once the review counsel or Director: Military Judicial Reviews is of the opinion that the finding or sentence should not be upheld, the record of proceedings should be forwarded to the CMA for review instead of the Director exercising such review powers.

¹⁹² *Morris v United Kingdom* (2002) 34 EHRR 1253 para 74.

substituted verdict or sentence was treated as if it had been reached or imposed by the court martial itself.

In these circumstances, strikingly similar to the South African situation, the ECHR held that such a review conducted by a non-judicial reviewing authority is contrary to the international concept of the independence of the courts.¹⁹³ The court did not accept that the infringement was vitiated by the fact that the existence of this review was in the best interests of the soldiers or that an essentially fair procedure was followed by the authority in conducting the review.

Subsequently, however, the House of Lords came to a different conclusion than the ECHR and found in *R v Spear; R v Boyd; R v Saunby*¹⁹⁴ that although a reviewing authority seems anomalous since a binding decision by a court cannot be changed in another way than by a superior appellate court, a review within the system could only be advantageous to the accused since the reviewing authority could not substitute the finding or sentence with a more serious one.¹⁹⁵ It was further argued that the rights of the accused to appeal to a court of law should be regarded as a safeguard against a non-judicial reviewing authority.

In *Cooper v The United Kingdom*¹⁹⁶ the ECHR once again considered, *inter alia*, whether the accused's right to a fair trial by an independent and impartial tribunal was violated by the application of automatic review to a reviewing authority.¹⁹⁷ The court held that due to the automatic nature of the review to the reviewing authority, such authority formed part of the process at the end of which the finding and sentence became final.¹⁹⁸ At this time the British reviewing authority had similar powers as the South African Review Counsel. The court found that

¹⁹³ *Morris v United Kingdom* (2002) 34 EHRR 1253 para 75.

¹⁹⁴ *R v Spear; R v Boyd; R v Saunby and Other Appeals* [2002] 3 All ER (D) 1074.

¹⁹⁵ *R v Spear; R v Boyd; R v Saunby and Other Appeals* [2002] 3 All ER (D) 1074 para 13; Carnelley at 63. Tshivhase (2006) at 124 agrees that automatic review works to the advantage of the accused.

¹⁹⁶ *Cooper v The United Kingdom; Grieves v United Kingdom* (2004) 39 EHRR 8.

¹⁹⁷ Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁹⁸ *Cooper v The United Kingdom; Grieves v United Kingdom* (2004) 39 EHRR 8 para 129.

where the final say in the case lies with an appellate court, the non-judicial review of the trial would not breach the independence of the judiciary.¹⁹⁹

7.5.2.2 Non-judicial review: Application in South African military courts

Review Counsel and the Director: Military Judicial Reviews, as discussed above, is not a court of law. It is not listed in the MDSMA with the various military courts.²⁰⁰ The Director, in reviewing the sentences of the military courts does not create binding precedent. The CMA remains the highest military court, binding all military courts below it.²⁰¹ Yet, the Director, as a non-judicial entity may change the military court's findings and sentences.

Review by the Review Counsel and the Director results in a non-judicial entity exercising wide review powers conferred on it by statute. This is a clear breach of the doctrine of separation of powers and the independence and impartiality of the military judiciary. The independence of the courts is governed by section 165 of the Constitution.²⁰² This section lies outside of the Bill of Rights and is therefore not subject to limitation in terms of section 36 of the Constitution. The powers given Review Counsel in terms of the MDSMA can therefore not be used to limit the constitutional requirement of an independent court, even if one could argue the justifiable governmental requirement in support of a disciplined force.

Although the right to appeal is provided to all accused, in practice very few military trials reach the CMA. For most trials Review Counsel or the Director is the last stop in the trial process. Having a non-judicial entity with such powers over the military judiciary is a constitutional untenable situation and cannot be justified. Although this matter has not reached the Constitutional Court it is

¹⁹⁹ *Cooper v The United Kingdom; Grieves v United Kingdom* (2004) 39 EHRR 8 para 133.

²⁰⁰ Section 6(1) of the MDSMA.

²⁰¹ Section 6(3) of the MDSMA.

²⁰² See the discussion on the independence of the court in ch 4 at para 4.2.1.3 above.

submitted that the functions of Review Counsel will not withstand constitutional scrutiny. A possible alternative is discussed below.²⁰³

7.5.3 The right to review or appeal to a higher court

The right to review or appeal is constitutionalised and section 35(3)(o) of the Constitution provides that

- (3) Every accused person has a right to a fair trial, which includes the right –
 (o) of appeal to, or review by, a higher court.

The meaning of the right to appeal and review is not immediately clear since, according to Steytler, the rules and procedures of appeals and reviews are not constitutionalised by section 35(3)(o).²⁰⁴ He identifies the core elements that can be afforded constitutional status in terms of section 35(3)(o) as a reconsideration of a court decision by a higher court, a reconsideration on the merits of the case on facts or law, a hearing of the appeal or review upon completion of the case and the exercising of the right within a reasonable time.²⁰⁵ The right is further limited to a one-level appeal or review and the accused must be informed of his rights in this regard.²⁰⁶

Military courts must comply with these constitutional elements of a right to review or appeal. Section 25 of the MDSMA seems to echo the constitution in that it affords any accused convicted in a military court the right to an “automatic, speedy and competent review of the proceedings.” Section 25, however, only confers a right of review on a military accused. It is notably silent on the right to appeal. It is however submitted that the MDSMA cannot take away an accused’s constitutional right to appeal and the MDSMA’s silence in this regard should not be construed as an attempt to do so. Section 25 further fails to specify the right

²⁰³ See at para 7.8 below.

²⁰⁴ Steytler (1998) at 393.

²⁰⁵ Steytler (1998) at 394.

²⁰⁶ Steytler (1998) at 394.

to review is to a higher court. In fact, no reviewing authority is specified by this section. The question is whether the MDSMA complies with the constitutional requirement of a right to review or appeal.

A comparison between the military appeal and review process and Steytler's analysis above brings the following to light – at first glance the military process seems to comply with all of these requirements. Both the Director: Military Judicial Reviews and the CMA exercise full appeal and review powers. Appeals and reviews are only heard upon completion of the case. Time limits imposed upon the accused ensure that the application is brought within a reasonable time.²⁰⁷ The CMA or Review Counsel provides the one level appeal and review process and the accused is always informed of these rights upon completion of his trial.²⁰⁸

The concern regarding the powers of the Director: Military Judicial Reviews with regard to the review of military trials has been discussed above. Two further concerns become apparent in the comparison:

1. Exercise of the right within a reasonable time; and
2. Reconsideration of the proceedings by a higher court.

7.5.3.1 Exercise of right within a reasonable time

Compliance with the time limits by the accused does not create much difficulty. The MDSMA clearly provides the time periods.²⁰⁹ Where the accused attempts to submit an appeal or review outside the limits provided, the CMA cannot hear the matter and the accused has to apply to the High Court of South Africa for review.

²⁰⁷ For a discussion on the time limits applicable to military appeal and review see at para 7.4.3 above.

²⁰⁸ See r 58(12) of the MDC regarding trials before the Court of a (Senior) Military Judge and r 68(9) of the MDC regarding trials by the CODH.

²⁰⁹ See at para 7.4.6 above.

These time limits are placed on the accused to give effect to his right to a speedy trial and to expedite the process of appeal and review.²¹⁰ One would consequently expect the courts to complete an accused's appeal or review within a reasonable time. The problem with the older CMA cases, however, lies with the time between the date of the conviction and the date that the matter is heard by the CMA. The CMA does not sit permanently but on an *ad hoc* basis, previously about two to three times a year. A limited number of cases can then be heard. In proceedings that the accused was sentenced to imprisonment, cashiering, discharge with ignominy and dismissal or discharge from the SANDF, the long time may not necessarily be detrimental to the accused *per se* since the sentence cannot be executed until the CMA has confirmed the finding and sentence and the accused consequently remains in the employ of the SANDF until completion of the review.

The long period between conviction and execution of the sentence may however be detrimental to the administration of justice. It would also violate the provisions of section 25 of the MDSMA which should ensure a "speedy and competent review ... to ensure that any proceedings, finding, sentence or order is valid, regular, fair and appropriate, or remedied." Since the sentences mentioned above cannot be executed before confirmation by the CMA, members who should no longer be in uniform or who should be in prison are employed for the further period it takes the CMA to hear the matter. This has a negative impact on morale on the unit because justice is not seen to be done and the accused, knowing that they may lose their employment at any time when the CMA provides feedback, is not motivated to act in the best interest of his employer. Such members are also not able to deploy operationally, placing unwarranted strain on manpower.

²¹⁰ In *S v Thobakgale* 1998 (1) SACR 703 (W) the civilian court discussed and found the imposition of time limits and the requirements for condonation for late applications constitutional. See also Snyckers & Le Roux (2002) at 51-183.

In *Zulu v Minister of Defence*²¹¹ a decision of the CMA was brought before the High Court on review. The military court *a quo* sentenced the accused to discharge from the SANDF on 29 May 2001. The CMA only heard the matter on 7 July 2004 at which stage it confirmed the finding and sentence.²¹² A perusal of the CMA record indicates that no record of service (DD28) was attached, making it highly unlikely that the CMA had any indication of the previous record of the accused at its disposal. The CMA judgment only contained the personal particulars of the accused, identified the presiding military judge, the prosecution counsel and the defence counsel. The offences on which the accused was convicted were listed without further detail and the sentence given. A short paragraph indicated that “after perusal of record of proceedings and after hearing counsel the Court is satisfied that the findings and sentence are in accordance with real and substantial justice and they are accordingly upheld.” No reasons were given.²¹³ Regarding the application for review to the High Court, Mojabelo J commented that “I cannot help observing that the period of over three years that lapsed from the initial decision to the date of hearing of the review/appeal is inordinately long.”²¹⁴

All other sentences are, however, effective immediately, which means that if the CMA takes an inordinately long period to complete the review or appeal the accused can for example have served the period of detention imposed by the trial court before the CMA hear the matter. In administering the court roll, cases where more severe punishments are imposed, such as imprisonment, cashiering or discharge, are given priority.²¹⁵ Since all punishments except those in terms of section 34(2) of the MDSMA are of immediate effect this may result in severe prejudice to the accused sentenced to a supposedly less severe punishment where the sentence is executed before the review is completed.

²¹¹ *Zulu v Minister of Defence* 2005 (6) SA 446 (T).

²¹² *S v Zulu* (CMA 039/2004).

²¹³ It should be noted that prior to the decision of the court in *Zulu v Minister of Defence* 2005 (6) SA 446 (T) a large number of similar examples exist with no reasons given for finding and sentence.

²¹⁴ *Zulu v Minister of Defence* 2005 (6) SA 446 (T) para 5.

²¹⁵ *S v Hola* (CMA 05/07).

A perusal of CMA judgments indicates on average a lapse of between 10 and 20 months between the date of conviction and date of the CMA judgment. Various examples exist but the following two will suffice: On 24 June 2003 the accused was convicted and sentenced to dismissal from the SANDF. Being one of the more serious punishments in terms of priority on the CMA court roll, the matter served before the CMA only on 6 March 2006 where the sentence was varied to a fine of R6000.²¹⁶ On 17 January 2004 another accused was sentenced to three months effective imprisonment and discharge with ignominy from the SANDF. This, once again being a high priority case, only served before the CMA on 6 March 2006 where the sentence was varied to a fine of R400.²¹⁷ Apart from the lapse in time between the date of conviction and the date of the CMA judgment a further concern is the huge discrepancy between the sentence imposed by the court *a quo* and the sentence substituted by the CMA. Long periods before confirmation and the serious disparity between sentences of the trial courts and the CMA are not in the interest of justice. One of the main justifications for a separate military justice system, as mentioned earlier, is the ability to complete trials in less time than civilian courts thereby enforcing swift justice. Seen in this context the CMA did not succeed in its aim.

This matter does however appear to be resolved. In 1999 a moratorium was placed on all military trials because of the invalidation of the courts martial system.²¹⁸ Offenders continued committing offences, wrongly believing that they could not be charged and once the MDSMA was promulgated, the new military courts had a tremendous backlog to work through. At that time the CMA only convened two to three times per year and it took a number of years to complete the outstanding appeals and reviews. Since fairly recently, however, the CMA has started convening on average every two months. It now appears that the time between conviction and the decision by the CMA averages only two to four

²¹⁶ *S v Mogoai* (CMA 01/2006).

²¹⁷ *S v La Meyer* (CMA 02/2006).

²¹⁸ See *Freedom of Expression Institute v President, Ordinary Court Martial 1999* (2) SA 471 (C).

months.²¹⁹ This may be due to a variety of reasons. The huge backlog created by the 1999 moratorium on military trials has been resolved. There has also been a sharp decrease in cases brought before the CMA. Where the CMA heard over 200 cases per year in early 2000, they now only have approximately 50 cases to review per year. Since long-term AWOL cases of more than 30 days are now administratively discharged fewer cases with serious consequences are tried by the military courts.²²⁰ Review Counsel opines that some military judges are currently also imposing more lenient sentences. The last effective imprisonment reviewed by the Review Counsel at Legساتو Cape Town, for example, was a case of cashiering and 12 months' imprisonment in 2005.²²¹

7.5.3.2 Reconsideration of the proceedings by a higher court

The only criteria required in terms of section 35(3)(o) of the Constitution for compliance with the accused's right to appeal and review is that the review should be done by "a higher court".²²² This refers to a court that is higher on the judicial hierarchy and which can bind the lower courts.²²³ In the context of the military judiciary only decisions by the CMA bind the military courts as it is seen as the highest military court.²²⁴ In *Mbambo v Minsiter of Defence*²²⁵ the court held that the right to appeal or review by a higher court does not mean the right to appeal or review to the High Court of South Africa. The accused has the right of appeal to or review by a higher court that has been properly established in terms of section 166(e) of the Constitution.²²⁶ Seen in the light of *Potsane*²²⁷ where the court held that the MDSMA "introduced an hierarchical system of courts staffed by legally trained military officers and, at the higher levels,

²¹⁹ Informal discussions with Review Counsel.

²²⁰ Section 135 of the MDC; s 103(1) of the Defence Act 42 of 2002.

²²¹ *S v Siwali* (CMA 34/2006).

²²² Steytler (1998) at 394; Currie & De Waal (2005) at 789.

²²³ Steytler (1998) at 394; Currie & De Waal (2005) at 789.

²²⁴ Section 6(3) of the MDSMA.

²²⁵ *Mbambo v Minsiter of Defence* 2005 (2) SA 226 (T).

²²⁶ *Mbambo v Minsiter of Defence* 2005 (2) SA 226 (T) at 229I.

²²⁷ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) para 10.

presided over and even wholly staffed by fully pledged High Court judges”, the CMA is a “higher court” within the hierarchy of the military courts, thereby complying with section 35(3)(o) of the Constitution.²²⁸

The same can however not be said regarding the non-judicial level of review of Review Counsel and the Director: Military Judicial Reviews. The Director performs a purely administrative function, yet is given the powers of a court of appeal.²²⁹ Where the accused does not apply for further appeal or review to the CMA, the Director: Military Judicial Reviews is the final level of review. The Director: Military Judicial Review cannot be seen as a “higher court” for purposes of section 35(3)(o) of the Constitution and therefore this avenue of review does not satisfy the accused’s constitutional right to appeal and review.²³⁰

Although the same process of review is followed with regard to the CODH, this argument may not be relevant to these cases. Since an accused at this forum does not qualify as an accused before a criminal court, the rights to a fair trial in terms of the Constitution, of which section 35(3)(o) forms part, do not apply as it would in the case of trial by military judges. However, the process must at least be fair and provide a form of appeal and review against a decision by the commanding officer to ensure that the procedures were just and fair in compliance with the minimum constitutional requirements for such action. Apart from the constitutional concern regarding the reviewing authority as a non-judicial entity, review by Review Counsel, read with section 25 of the MDSMA, may in fact comply with the minimum requirements of fair procedures regarding the aspect of review.

²²⁸ *Steyn v Minister of Defence* [2004] JOL 13059 (T) para 11.

²²⁹ See the discussion on review at para 7.4.3 above. For the powers and functions of the Director: Military Judicial Review see s 26(3) of the MDSMA.

²³⁰ See *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229G where the court held that “[s]ection 35(3)(o) of the Constitution provides that the right to appeal must be to “a higher court”. Similarly the review must be to a higher court.”

7.6 The right to review and appeal to the High Court of South Africa

Does the fact that the CMA satisfies the constitutional requirement of appeal and review by a “higher court” prevent the accused from applying to the High Court of South Africa for appeal and review? Despite this question receiving attention by the High Court, there is no clear answer to what the current state of affairs entails.

7.6.1 Review and appeal to the High Court from the military court: A brief history

In terms of the common law an accused before a military court did not have the right to appeal to a civilian court. The position has been summarised in the following terms:²³¹

I have no doubt that this Court, as a Civil Court, has no power to intervene in matters which concern military conduct and purely military law affecting the rules and regulations prescribed for the guidance of officers and their military discipline, I am entirely in accord with what WILLIS, J. said in the case of *Dawkins v Lord Rokeby*. These are his words: ‘It is clear that, with respect to those matters placed within the jurisdiction of the military forces, as far as soldiers are concerned, military men must determine them....With respect to persons who enter into military state, who take Her Majesty’s pay, who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do, by a compact which is intelligible, and which requires only this statement of it to the consideration of anyone of common sense, become subject to military rule and military discipline....They are subject to a test of law which is different from that administered in civil courts.’

This dictum might create the impression that no civilian court had any authority to reconsider the findings and sentences of military courts. This does not however,

²³¹ Juta JP in *Union Government and Fisher Appellants v West Respondent* 1918 AD 556 at 567, referring with approval to *In re Mansergh* (1 B. & S. 400).

reflect the full picture. As early as 1900 it was confirmed that the Supreme Court has jurisdiction to review the proceedings of a court martial.²³² In *Union Government and Fisher v West*²³³ the question before the court was whether the Supreme Court could review the proceedings of a trial and subsequent conviction by a commanding officer of a soldier for an offence in terms of the MDC on the grounds that it constituted a decision by an inferior court.²³⁴ The court held that it had an inherent right to review cases and that proceedings of courts martial were subject to review by higher civilian courts. The common law review jurisdiction was based on the military courts acting outside of their jurisdiction or in an irregular manner.²³⁵

The common law position clearly shows that the Supreme Court had review jurisdiction over military courts. It must however be kept in mind that these decisions were taken at a time when the military justice system did not allow for a CMA. Although the Council of Review generally performed a similar function, the current system of appeal and review was not available to the aggrieved accused. With a constitutionally sound military justice system in place and a CMA exercising extensive appeal and review powers the question posed is whether the High Court of South Africa would still have review authority over the military courts. If after considering the common law, the High Court's statutory powers and the Constitution, and the High Court retaining such powers of review, can it be said that the accused before a military court now also has the *right* to such review?

In consideration of these issues the right to appeal or review from a military court to the High Court of South Africa will be discussed in relation to three aspects:

²³² *Umbilini and Bantomo v General Officer Commanding also H.A. Jacobs v G.O.C.* (1900) 21 NLR 86 at 88 and later confirmed in *van Duyker v District Court Martial* 1948 (4) SA 691 (A).

²³³ *Union Government and Fisher Appellants v West Respondent* 1918 AD 556.

²³⁴ *Union Government and Fisher Appellants v West Respondent* 1918 AD 556 at 559.

²³⁵ *Union Government and Fisher Appellants v West Respondent* 1918 AD 556 at 561; *Wessels v General Court Martial* 1954 (1) SA 220 (E); *Mocke v Minister of Defence and Others* 1944 CPD 280 at 285.

1. whether an accused has the right to appeal a decision from the CSMJ, CMJ or CMA to the High Court of South Africa;
2. whether an accused has the right of review by the High Court of South Africa against a decision by the CSMJ or CMJ; and
3. whether an accused has the right of review by the High Court of South Africa following a decision by the CMA.

7.6.2 The right to appeal to the High Court of South Africa

The right to appeal from a military court to the High Court of South Africa has served before the High Court on more than one occasion. The courts seem to have reasonable consensus that there is no right of appeal from the military courts to the High Court.

The Criminal Procedure Act provides that the High Court has jurisdiction over any person convicted of an offence by a lower court and that person may appeal such conviction.²³⁶ A “lower court” is defined in the Criminal Procedure Act as “any court established under the provisions of the Magistrate’s Court Act, 1944.”²³⁷ A military court is established in terms of the MDSMA and not the Magistrate’s Court Act. It can therefore not be seen as a “lower court” for the purposes of the High Court’s appeal authority. In *Steyn v Minister of Defence*²³⁸ it was argued on behalf of the applicant that an accused person convicted by a military court would have access to the High Court on the grounds of an appeal from a lower court to a higher court.²³⁹ The court, however, held that there is no provision in the legislation for an appeal to the High Court against the finding of

²³⁶ Section 309(1) of the Criminal Procedure Act; Kruger at 30-31; Du Toit *et al* at 30-23; Joubert at 357.

²³⁷ Section 1 of the Criminal Procedure Act.

²³⁸ *Steyn v Minister of Defence* [2004] JOL 13059 (T).

²³⁹ *Steyn v Minister of Defence* [2004] JOL 13059 (T) para 5.

the CMA.²⁴⁰ It held that the accused had his opportunity to appeal to the CMA and that all decisions by the CMA are final.²⁴¹ *In casu* the court held that there is no right to review or appeal against the decision of the CMA, since the decision of one judge cannot be taken on appeal by another judge.²⁴²

The status of appeals from the military court to the High Court was subsequently confirmed in *Mbambo v Minister of Defence*.²⁴³ The issue surrounding the right to appeal was considered based on two aspects, namely (1) whether the accused had an additional right, apart from the right to appeal to the CMA, to appeal from the CMJ and (2) whether the MDSMA gives the accused the right to appeal against a decision of the CMA.²⁴⁴ The court confirmed that an accused may only apply for reconsideration of his case on appeal where legislation provides for the right to appeal. If no such provision is made then no right to appeal exists.²⁴⁵ This rule must however be interpreted in light of the constitutional imperative that common law rules must be developed in order to “promote the spirit, purport and objects of the Bill of Rights”.²⁴⁶ Although the accused before the military court, is recognised as an accused for the purposes of section 35(3) of the Constitution and therefore entitled protection of his right to appeal and review, the court held that section 35(3)(o) of the Constitution does not enshrine the right to appeal in a technical sense but rather “the right to the meaningful reconsideration by a higher court of a conviction and sentence.”²⁴⁷ This means that²⁴⁸

²⁴⁰ *Steyn v Minister of Defence* [2004] JOL 13059 (T) para 7. The court also referred to *S v Pennington* 1997 (4) SA 1076 (CC) at 1086H where the Constitutional Court found that “[a]t common law a court has no jurisdiction to hear an appeal against a decision of another court. It can only do so if that authority is conferred on it by the statute under which it is constituted and then it must function in terms of that statute.”

²⁴¹ *Steyn v Minister of Defence* [2004] JOL 13059 (T) para 12.

²⁴² *Steyn v Minister of Defence* [2004] JOL 13059 (T) para 13.

²⁴³ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T).

²⁴⁴ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 2311.

²⁴⁵ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 228F; *S v Pennington* 1997 (4) SA 1076 (CC) at 1086H.

²⁴⁶ Section 39(2) of the Constitution; *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229A-B.

²⁴⁷ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229C-D; Carnelley at 76.

²⁴⁸ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229F-G.

the common-law rule (that a right of appeal only exists if there is a statutory provision for it) does not limit the right enshrined in s 35(3)(o) of the Constitution provided that, if an accused person has no statutory right of appeal, there must be a right of review amounting to a meaningful reconsideration of the conviction and the sentence.

Since the MDSMA provides a constitutionally sound military court hierarchy, section 35(3)(o) is satisfied if “an accused person has the right to the meaningful reconsideration of his conviction and his sentence by a higher court within the military court hierarchy.”²⁴⁹

Although the second aspect of whether an appeal from the CMA to the High Court is possible did not serve before the court, the court opined that the MDSMA does not provide for it and it would therefore not be possible.²⁵⁰

In light of the court’s decision regarding a separate military justice system in *Potsane*²⁵¹ read with section 200(1) of the Constitution, it is found that an appeal from the CSMJ or CMJ to the CMA would therefore comply with the constitutional right to appeal.²⁵² The court found that military appeals should be conducted by military courts and states that²⁵³

While a civil court such as the High Court may be in as good a position as any to ensure the regularity of the proceedings of military courts, the military courts are better able to ensure that the SANDF’s constitutional obligation to maintain discipline is fulfilled. In particular, military courts are better suited to judge the seriousness of offences in military context. Accordingly, a military court system that ensures military discipline with the High Court ensuring that it is done

²⁴⁹ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 230A.

²⁵⁰ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 234A; Carnelley at 76.

²⁵¹ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

²⁵² See also the subsequent confirmation in *Zulu v Minister of Defence* 2005 (6) SA 446 (T) para 23; *Borman v Minister of Defence* 2007 (2) SA 388 (C) para 10.

²⁵³ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 233F-I; Carnelley at 77.

regularly and constitutionally better fits in the Constitutional scheme of the defence force than one whereby the civil courts have full power to interfere on appeal with decisions of the military courts. This is even more so if regard is had thereto that the court of military appeals has full review and appeal powers and may be approached by any person convicted in a military court. There is no need for soldiers to have the choice of an appeal forum, a choice the other citizens do not ordinarily have.

One should however also take cognisance of the court's decision in *Moriana and Others v Minister of Defence*²⁵⁴ where the applicants brought the constitutionality of the court martial proceedings as well as the sentence imposed by the court martial on appeal. The court did not address the constitutional questions raised since, at the time of the appeal *in casu*, the issues had already been addressed in the *Freedom of Expression Institute*²⁵⁵ decision. The proposed MDSMA was also under discussion at that time. The court did however dismiss the appeal on sentence due to the fact that the application held no merit in this regard. Of note is that the appeal was not dismissed because the appellant did not have the right to appeal to the High Court. There is no indication in the judgment that the court considered the question of whether they had the jurisdiction to hear the appeal and by implication it would seem that if the application had merit, the court would have considered it.

Nevertheless, apart from the above anomaly, the courts are in agreement that an accused before a military court does not have any right to appeal to the High Court of South Africa. The same can however not be said of the right to review.

²⁵⁴ *Moriana v Minister of Defence* [2004] JOL 12476 (T).

²⁵⁵ *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C).

7.6.3 The right of review by the High Court against a decision by the CSMJ or CMJ

The High Court's inherent jurisdiction to review matters from inferior courts was broadened by section 24 of the Supreme Court Act.²⁵⁶ These grounds find application before the military courts as well.²⁵⁷ These grounds would include instances where the inferior court did not have the required jurisdiction over the accused. In *S v Dippenaar*²⁵⁸ the CMA reviewed the matter of a warrant officer who was tried by a CMJ without the preliminary investigation being done in contravention of section 29(3)(f) of the MDSMA. The CMA held that without the preliminary investigation the court had no jurisdiction over the accused and therefore acted *ultra vires*. The court declared the proceedings null and void *ab initio*.

An allegation of the presiding officer's bias may also constitute grounds for review. In *Mönnig*²⁵⁹ the accused applied for review to the Supreme Court on the grounds that the trial officer presiding over the court martial was biased and should have recused himself. The court held that the right of recusal is a rule of natural justice to ensure the accused receives a fair trial.²⁶⁰ The court found grounds on which the trial officer at the court martial should have recused himself. Since military courts are "in substance a court of law...the propriety of its proceedings should be judged by the normal standards pertaining to a court of law."²⁶¹ The irregularity was "fundamental and irreparable" and was set aside.

Where a gross irregularity occurred the court may also exercise their review jurisdiction. As discussed earlier, irregularities generally fall within one of two

²⁵⁶ See the discussion on the grounds for review at para 7.2.2.2 above; Terblanche at 408; Kruger at 30-7.

²⁵⁷ Kruger at 30-8.

²⁵⁸ *S v Dippenaar* (CMA 38/2004).

²⁵⁹ *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A).

²⁶⁰ *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) at 491E-F.

²⁶¹ *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) at 490A-B.

categories.²⁶² The first category refers to rights, principles and formalities that are not adhered to. The negation of these rights only results in the setting aside of the conviction or sentence if the irregularity causes serious prejudice to the accused. In *S v Hoffman*²⁶³ the CMA held that the accused was not afforded a “realistic opportunity to consult with new counsel” or with the appointed military counsel. The findings and sentence were set aside. The second category refers to rights, principles and formalities which are regarded as being fundamental to due process. A negation of these rights would result in an injustice *per se* and the case will be declared null and void *ab initio*. This was the case in *S v Prins*²⁶⁴ where the accused was tried without the required preliminary investigation. The court regarded this as a “gross irregularity” and the finding and sentence was set aside. In *S v Magwa*²⁶⁵ the trial court failed to follow proper court procedures in that the prosecutor did not lead any evidence in respect of the charges after certain formal admissions were made by the accused. The court failed to explain the accused’s rights to him and did not give the defence an opportunity to apply for an acquittal or lead any evidence. The CMA held that the accused did not receive a fair trial and the finding and sentence were set aside.

The admittance of inadmissible evidence or the rejection of admissible evidence may further lead to the court exercising its review authority. In *S v Ngwane*²⁶⁶ the court *a quo* relied on hearsay evidence for a conviction of theft of state property. The CMA set the finding on that charge aside.

In spite of statutory regulation of reviews by the High Court, the courts have always held onto their inherent powers of review. It is however stated that these powers of review should be used sparingly.²⁶⁷ If any of the grounds mentioned above are present before the military courts of the first instance, the High Court

²⁶² Du Toit at 85,86 and 91; Kruger at 30-10.

²⁶³ *S v Hoffman* (CMA 058/2005).

²⁶⁴ *S v Prins* (CMA 117/2003).

²⁶⁵ *S v Magwa* (CMA 208/2001).

²⁶⁶ *S v Ngwane* (CMA 096/2001).

²⁶⁷ Terblanche at 408; *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) at 119H; *Singh v Dickenson* 1960 (1) SA 87 (N) at 88A.

may exercise its jurisdiction. In *Van Duyker v District Court Martial*²⁶⁸ the court classified military courts as statutory tribunals and held that where they acted in excess of their powers either in conviction or sentence, the Superior Court should have the required jurisdiction to set aside the conviction or sentence. In *Wessels v General Court Martial and Another*²⁶⁹ it was found that military courts did not stand in any different position from any other statutory body regarding the High Court's right to review. The High Court has a right to review the proceedings before a court martial where it acted outside its jurisdiction or acted in violation of its rules of procedure.²⁷⁰

This inherent power of the High Court to review proceedings of the military courts did not however create a *right* to review by the High Court. The court held that the Defence Act of 1957 did not create an automatic right of review to the High Court. It held that "*Art 107...bewaar daardie magte wat 'n Hooggeregshof mag hê om sekere verrigtinge te hersien. Dit skep geen hersieningspligtigheid nie.*"

²⁷¹ Did the situation remain the same under the new constitutional dispensation?

In evaluating a military accused's right to review to the High Court the following constitutional provisions must be kept in mind:²⁷²

Section 35(3)(o) of the Constitution which provides that

- (3) Every accused person has a right to a fair trial, which includes the right –
 (o) of appeal to, or review by, a higher court.

Also of importance is section 173 of the Constitution stating that Higher Courts

²⁶⁸ *Van Duyker v District Court Martial* 1948 (4) SA 691 (A) at 695.

²⁶⁹ *Wessels v General Court Martial* 1954 (1) SA 220 (E) at 221.

²⁷⁰ See also *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) at 495A-B.

²⁷¹ *S v Kloppers* 1986 (1) SA 657 (T) at 658D-E where the court referred to the now repealed s 107 of the Defence Act 44 of 1957.

²⁷² Terblanche at 409; Kruger at 30-6; Du Toit *et al* at 30-2.

have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

The core elements of the constitutional right to review as discussed above must also be considered. An accused is entitled to a court decision by a higher court, which constitutes a one-level review, to a reconsideration on the merits of the case, on a hearing of review upon completion and the exercise of this right within a reasonable time. The accused must also be informed of this right in order to exercise it. At the completion of his trial, the accused before a military court is, *inter alia*, informed of the right to approach the High Court of South Africa for relief.²⁷³ Since an accused does not have the right to appeal to the High Court the question is what “right to relief” is referred to? In *Mbambo*²⁷⁴ the court held that section 33(7)(c) of the MDSMA merely directs the military court to inform the accused of the existing rights that he may have. Since the right to appeal to the High Court does not exist, this cannot be one of the rights explained to the accused. The MDSMA does not create the right to appeal. Section 33(7)(c) therefore refers to other rights that the accused may have and on which he may approach the High Court, apart from the right to appeal. This right to approach the High Court for relief in section 33(7)(c) would then be a “right of review amounting to a meaningful reconsideration of the conviction and the sentence.”²⁷⁵

In an application to the High Court for bail pending an application to review the proceedings in a military court, the High Court held that superior courts have always had an inherent jurisdiction to enable them “to function with justice and good reason.”²⁷⁶ This is further augmented by a constitutionally entrenched

²⁷³ Section 33(7)(c) of the MDSMA read with r 58(12)(f) of the MDSMA applicable to proceedings before the CSMJ and CMJ and r 68(9)(d) of the MDSMA applicable to proceedings before the CODH.

²⁷⁴ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 232 B and G.

²⁷⁵ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229D.

²⁷⁶ *S v Tsotsi* 2004 (2) SACR 273 (E) para 5.

inherent power to protect and regulate their own processes and to develop the common law in terms of section 173 of the Constitution. The court stated that²⁷⁷

[t]he inherent jurisdiction of the Superior Courts, now bolstered by the power to uphold the founding values of the rule of law and constitutional supremacy, as well as the remedial powers granted them by s 38 and s 172 of the Constitution, enables them to review all exercises of public power, including exercises for public power by military courts.

Therefore, although the Criminal Procedure Act, the Defence Act, the MDC and MDSMA do not make any provision for the granting of bail to military accused by a superior court, the court held that the legislation does not contain any ouster clause either and that the High Court does in fact have the inherent jurisdiction to grant bail.²⁷⁸ The court held that “the superior courts exercise a supervisory jurisdiction over [a military courts] that is similar in all material respects to the supervisory jurisdiction that they exercise over magistrates courts.”²⁷⁹ According to Carnelley this dictum supports the contention that the accused has a right to review to the High Court.²⁸⁰

7.6.4 The right to review by the High Court against a decision by the CMA

In spite of a tradition of accepting that the High Court has review authority over inferior courts, it was subsequently found in *Steyn v Minister of Defence*²⁸¹ that an accused has no right to review against a decision by the CMA. This was not addressed in *Mbambo*²⁸² where the court held that the High Court has the power to review proceedings from a military court of the first instance – being the CSMJ and CMJ - but left the question open on whether the High Court may review the

²⁷⁷ *S v Tsotsi* 2004 (2) SACR 273 (E) para 6.

²⁷⁸ *S v Tsotsi* 2004 (2) SACR 273 (E) para 6.

²⁷⁹ *S v Tsotsi* 2004 (2) SACR 273 (E) para 12.

²⁸⁰ Carnelley at 77.

²⁸¹ *Steyn v Minister of Defence* [2004] JOL 13059 (T).

²⁸² *Mbambo v Minister of Defence* 2005 (2) SA 226 (T).

proceedings of the military court once the CMA has confirmed the conviction and sentence.²⁸³

*Zulu v Minister of Defence*²⁸⁴ again raised the issue of the right to review from proceedings before the CMA. The court held that the *Steyn*²⁸⁵ decision was not binding authority on the question whether the court could review proceedings from the CMA since the judge's opinion was *obiter* as the question was not before the court for consideration. The matter was also left open in the *Mbambo*²⁸⁶ decision. The court referred to Van Winsen, Cilliers and Loots *Herbstein and Von Winsen The Civil Practice of the Supreme Court of South Africa* at 938 where it is stated that²⁸⁷

[s]ubject to statutory limitation or modification in a particular case, a Superior Court has an inherent right to review proceedings of any body or tribunal on which statutory duties are imposed, without the necessity of any special machinery or review created by Legislature. This form of review has consequently been termed "review under the common law". The mere creation of a statutory right of review or appeal does not oust the Court's inherent jurisdiction to review unless it is excluded expressly or by necessary implication.

Since a clear objective of the MDSMA is to "ensure a fair military trial and an accused's access to the High Court of South Africa" Mojapelo J consequently finds that any provision deemed to exclude access to the jurisdiction of the High Court will have to be clear and explicit.²⁸⁸

The Chairman of the CMA is a High Court judge appointed by the Minister.²⁸⁹ It is contended that the decision of one judge cannot be reviewed by another

²⁸³ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 234B-C.

²⁸⁴ *Zulu v Minister of Defence* 2005 (6) SA 446 (T) para 24.

²⁸⁵ *Steyn v Minister of Defence* [2004] JOL 13059 (T).

²⁸⁶ *Mbambo v Minister of Defence* 2005 (2) SA 226 (T).

²⁸⁷ *Zulu v Minister of Defence* 2005 (6) SA 446 (T) para 26.

²⁸⁸ *Zulu v Minister of Defence* 2005 (6) SA 446 (T) para 28.

²⁸⁹ Section 7(1) of the MDSMA.

judge.²⁹⁰ The court further qualifies this contention in *Zulu v Minister of Defence*²⁹¹ regarding the reviewability of a judge's decision to limit it to those instances where the judge exercises his judicial function in the capacity of a High Court judge. In instances where such a judge acts or sits in another capacity, such as Chairman of the CMA, the judge is not acting in his capacity as High Court judge and his decision may become reviewable.²⁹² The court's conclusion *in casu* was therefore that the High Court does have the power to review proceedings from the CMA.

Because of the contradictory decisions in *Steyn*²⁹³ and *Zulu*,²⁹⁴ the subsequent matter of *Tsoaeli v Minister of Defence*²⁹⁵ was referred to a full bench of the Transvaal Provincial Division to decide on whether a judge of the High Court sitting as a chairperson of the CMA can be taken on review to the High Court of South Africa.

The court held that although the decision of a High Court judge acting in his capacity as judge is not reviewable, there is no general rule stating that the decision of a High Court judge is not reviewable regardless of the capacity in which he is acting.²⁹⁶ Section 19(1)(a)(ii) of the Supreme Court Act²⁹⁷ provides that the High Court has the power to review the proceedings from all inferior courts within its jurisdiction and the court finds that the CMA falls within the definition of an "inferior court" and is therefore subject to review in terms of section 19(1)(a)(ii).²⁹⁸ The court held that the CMA does not qualify as a "Court of a Division" of the High Court because although it is composed of High Court judges, it is not the composition of the court or the identity of the presiding officer that determines the status of the court. The status of the court is determined by

²⁹⁰ See also *Steyn v Minister of Defence* [2004] JOL 13059 (T) para13.

²⁹¹ *Zulu v Minister of Defence* 2005 (6) SA 446 (T).

²⁹² *Zulu v Minister of Defence* 2005 (6) SA 446 (T) para 34-35.

²⁹³ *Steyn v Minister of Defence* [2004] JOL 13059 (T).

²⁹⁴ *Zulu v Minister of Defence* 2005 (6) SA 446 (T).

²⁹⁵ *Tsoaeli v Minister of Defence; Kholomba v Minsiter of Defence* [2006] JOL 17034 (T).

²⁹⁶ *Tsoaeli v Minsiter of Defence; Kholomba v Minsiter of Defence* [2006] JOL 17034 (T) at 5.

²⁹⁷ Act 59 of 1959.

²⁹⁸ *Tsoaeli v Minister of Defence; Kholomba v Minsiter of Defence* [2006] JOL 17034 (T) at 6.

the Constitution from which all courts derive their power and status. The system of South African courts is established in section 166 of the Constitution where section 166(a)-(d) provides for the Constitutional Court, the Supreme Court of Appeal, the High Courts and the Magistrate's Courts. Courts not mentioned in these subsections are established in terms of section 166(e), including military courts established in terms of the MDSMA, being an Act of Parliament. There is nothing in any Act that gives the military courts the same status as that of the High Court. Therefore the CMA can only be an inferior court, irrespective of its composition.²⁹⁹ The court consequently held that the High Court has the power to review the proceedings of the CMA, including those proceedings where a judge of the High Court presides over that court.³⁰⁰

It would seem clear from the above discussion that the High Court has the power to review proceedings from all the military courts, irrespective of whether the decision was reached by the CSMJ, CMJ or CMA. However, all these decisions were reached in the Transvaal Provincial Division but in *Borman v Minister of Defence*³⁰¹ the Cape Provincial Division came to a different conclusion. The court held that although the High Court possesses the power to review proceedings from the CSMJ, it does not have the power to review a decision of the CMA after a confirmation of the conviction and sentence on automatic review.³⁰² Although not clearly stated, the reasoning adopted by the court is that the CMA, unlike the CSMJ which is regarded as a court of the first instance, cannot be regarded as an inferior court. Review by the High Court is therefore not possible.

²⁹⁹ *Tsoaeli v Minister of Defence; Kholomba v Minister of Defence* [2006] JOL 17034 (T) at 7.

³⁰⁰ *Tsoaeli v Minister of Defence; Kholomba v Minister of Defence* [2006] JOL 17034 (T) at 7.

³⁰¹ *Borman v Minister of Defence* 2007 (2) SA 388 (C).

³⁰² *Borman v Minister of Defence* 2007 (2) SA 388 (C) para 15.

7.6.5 The current status of the right to appeal and review to the High Court

It can safely be said that the courts agree that in the absence of legislation specifically providing for the right to appeal decisions from the military courts to the High Court, no such power of appeal exists. The courts are generally also in agreement that the High Court has the inherent right to review decisions from the CSMJ and CMJ as a court of the first instance.

The matter of the right to review a decision of the CMA however remains problematic. Decisions between the Transvaal and Cape Provincial Divisions differ. It would not be fair to say that military cases heard within the jurisdictional area of the Transvaal Provincial Division would have the right to such a review and those within the jurisdictional area of the Cape Provincial Division would not have such a right. It must also be kept in mind that an offence committed in Cape Town can be tried by a military court in Pretoria. Due to the operational requirements of the SANDF the military courts are not bound by area in terms of their jurisdiction. The CMA is also not bound by jurisdictional area and can sit at any place within or outside the borders of the Republic.³⁰³ It is therefore of importance that clarity is reached on whether a right to review of decisions by the CMA exists. This matter has not yet served before the Constitutional Court. There is a *lacuna* in the defence legislation in this regard. It creates uncertainty and is not in the interest of justice. When a military judge is compelled to inform an accused that he has the right to approach the High Court for relief, what is he explaining to the accused? Should he explain to the accused that by approaching the CMA for review, he is possibly excluding his right to a review by the High Court? Would this be in the interest of the accused when the courts are generally in agreement that it is better that the military courts handle appeals and reviews within their own hierarchy?³⁰⁴ This matter should be addressed by the MDSMA.³⁰⁵

³⁰³ Section 7(4) of the MDSMA.

³⁰⁴ See *Borman v Minister of Defence* 2007 (2) SA 388 (C) para 10; *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 233G-I; *Steyn v Minister of Defence* [2004] JOL 13059 (T) para

Although appeal by the CMA alone complies with the constitutional requirement of the right to appeal to a “higher court”, it is submitted that consideration should be given to allowing an accused the right to appeal a decision by a military court to the High Court of South Africa. This must be done in terms of express provisions in the MDSMA. Such an amendment would do much to alleviate any possible concern regarding perceptions of bias by the military courts.

7.7 Appeal and review procedures in military law: A brief comparative study

South Africa’s issues regarding the appeal and review procedures in military courts are by no means unique. Various other jurisdictions have over time faced similar challenges. A brief discussion follows on the appeal and review procedures followed in the British and American military courts. In the discussion two aspects are highlighted – the review of military trials by non-judicial entities and a military accused’s right to appeal to the civilian appeal courts.

7.7.1 The British military appeal and review procedures

The process of review and appeal followed by the British military courts depends on the type of military trial. Where an accused was found guilty in a summary hearing (the British equivalent of the CODH) the matter may be referred for review to the Summary Appeal Court³⁰⁶ and in the case of a court martial the matter may be referred to the Court Martial Appeal Court for either appeal or review.³⁰⁷ The Court Martial Appeal Court is discussed below in relation to military appeals.

11; *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

³⁰⁵ This would bring the *de facto* situation in line with the aim of the MDSMA as stated in s 2(c) to ensure “an accused’s access to the High Court of South Africa.”

³⁰⁶ Section 141(1) of the Armed Forces Act 2006; Ministry of Defence *Manual of Service Law* (2011) 1(2) at 1-15-4.

³⁰⁷ Section 272 of the Armed Forces Act 2006; *Manual of Service Law* (2011) 2 at 2-31-2.

British military review procedures

7.7.1.1 Summary Hearing Review

Before submission to the Summary Appeal Court all summary hearings are submitted for automatic review.³⁰⁸ One of the purposes of the review is to determine if any reasons exist for referring the finding, sentence or order by the summary hearing to the Summary Appeal Court.³⁰⁹ These types of reviews are also seen as an opportunity to identify disciplinary trends and may assist in achieving “a common approach to summary findings and punishments...within the services as a whole.” Review of the summary hearing is usually carried out by reviewing officers who have no legal qualification and who do not perform any judicial function. Their review powers are restricted in that they may only rectify minor typographical errors that hold no disadvantage for the accused. If the error is disadvantageous to the accused or is substantial, the reviewing officer must refer the matter to the Summary Appeal Court for decision.³¹⁰ Their review authority is limited to instances such as whether the correct procedures were followed or a reasonable punishment imposed. Where they are of the opinion that a possible error in law occurred, they must refer the matter to the Summary Appeal Court for decision. No time limit is placed on the review although the efficacy of the review will be undermined if there is a substantial delay between the summary hearing and the review.³¹¹

The actions that may be taken by the reviewing officers are limited. They may review the finding and sentence by confirming, *inter alia*, that the offence was capable of being heard by summary hearing, consider the legality of the

³⁰⁸ Section 152(1) of the Armed Forces Act 2006.

³⁰⁹ *Manual of Service Law* (2011) 1(2) at 1-15-4. Review by the reviewing authority also takes place in instances where an activation hearing was held for the implementation of a suspended sentence of detention. Reference throughout to the reviewing authority is however limited to review of summary hearings.

³¹⁰ *Manual of Service Law* (2011) 1(2) at 1-15-4; s 152(7) of the Armed Forces Act 2006 read with r 17 of the Armed Forces (Summary Appeal Court) Rules 2009.

³¹¹ *Manual of Service Law* at 1-15-5.

punishment and whether the punishment imposed was appropriate considering the rank of the accused and the seriousness of the offence.³¹²

Whenever the reviewing officer refers a matter to the Summary Appeal Court, it is deemed as if the accused had brought the matter on appeal.³¹³

British military appeal procedures

The British military justice system makes provision for two types of military appeal courts: the Summary Appeal Court and the Court Martial Appeal Court.

7.7.1.2 Summary Appeal Court

The purpose of the Summary Appeal Court is to hear appeals from summary hearings. Proceedings from summary hearings are referred to the Summary Appeal Court either by the review officer, as discussed above, or on application by the accused within 14 days of completion of his summary hearing.³¹⁴ The accused may appeal against the sentence alone or the finding and the sentence, in which case the Director of Service Prosecutions may decide to contest the appeal.³¹⁵ The Summary Appeal Court is a permanent court and may sit anywhere within or outside the borders of the UK.³¹⁶ The appeal is presided over by a judge advocate³¹⁷ and the approach followed is of an inquisitorial nature.³¹⁸

³¹² *Manual of Service Law* at 1-15-6.

³¹³ *Manual of Service Law* at 1-15-9; s 152(8) of the Armed Forces Act 2006.

³¹⁴ Section 141(2) of the Armed Forces Act 2006; Rowe P "A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court" (2003) 8 *Journal of Conflict and Security Law* 201 at 205.

³¹⁵ Section 141 of the Armed Forces Act 2006; *Manual of Service Law* (2011) 2 at 2-27-3.

³¹⁶ Section 140(2) of the Armed Forces Act 2006 and *Manual of Service Law* (2011) 2 at 2-27-3.

³¹⁷ This is a civilian judge acting as a military judge. The judge advocate is assisted by two lay members consisting of two officers or an officer and a substantive warrant officer. No member of the court may be junior in rank to the accused (see *Manual of Service Law* (2011) 2 at 2-27-4; s 142 of the Armed Forces Act 2006; Rant J W & Blackett J *Courts-Martial, Discipline, and the Criminal Process in the Armed Services* 2 ed (2003) at 17; Rowe (2003) at 204).

³¹⁸ *Manual of Service Law* (2011) 2 at 2-27-4.

7.7.1.3 Contested hearings before the Summary Appeal Court

In contested hearings the Director Service Prosecutions contests the appeal against the finding and the matter is heard before a judge advocate and two lay members.³¹⁹ There is a rehearing of the charge against the accused in open court.³²⁰ The appellant and the Director Service Prosecutions are each given one opportunity to address the court regarding the case.³²¹ The Summary Appeal Court may confirm the finding, set it aside or substitute it with a finding on another charge supported by the evidence.³²² Whenever a finding is set aside, the sentence must also be set aside.

When rehearing evidence regarding the sentence, the Summary Appeal Court may confirm the punishment, set it aside or substitute it with another punishment, provided that the substituted punishment is one that the hearing officer who awarded the original punishment was authorised to impose and may not be more severe than the original sentence.³²³

7.7.1.4 Uncontested hearings before the Summary Appeal Court

Where the Director Service Prosecutions does not contest the appeal, the finding against which the appeal is based will be set aside.³²⁴ The matter will be heard by a judge advocate sitting alone, without the two lay members and he may set aside the finding and sentence without a hearing.³²⁵

³¹⁹ The judge advocate may terminate the proceedings with the lay members where he is of the opinion that it is in the interests of justice to do so or where one of the lay members is unable to continue to attend the proceedings (see *Manual of Service Law* (2011) 2 at 2-27-8; Rule 32 of the Armed Forces (Summary Appeal Court) Rules 2009).

³²⁰ *Manual of Service Law* (2011) 2 at 2-27-8. The court will only be closed and held *in camera* where the judge advocate is of the opinion that it is in the interests of justice to do so. The judge advocate also decides on the time and the place the Summary Appeal Court will sit.

³²¹ *Manual of Service Law* (2011) 2 at 2-27-12.

³²² *Manual of Service Law* (2011) 1(2) at 1-15-11; (2011) 2 at 2-27-14.

³²³ *Manual of Service Law* (2011) 1(2) at 1-15-11.

³²⁴ Rule 20 of the Armed Forces (Summary Appeal Court) Rules 2009, Rowe (2003) at 205.

³²⁵ *Manual of Service Law* (2011) 1(2) at 1-15-11; (2011) 2 at 2-27-5; r 20 of the Armed Forces (Summary Appeal Court) Rules 2009.

7.7.1.5 Appeal against sentence alone

When an appeal is brought before the court on sentence alone the court may either confirm the punishment or set it aside and award a substituted punishment.³²⁶ The substituted sentence must be one that is in the power of the officer who originally imposed the sentence and it may not be harsher than the original one imposed.³²⁷

The court will consist of the judge advocate and two lay members. In such appeal cases the Director Service Prosecutions must address the court on the facts of the case. Where there are any disputed facts, the court may try any issue of fact. The judge advocate may then instruct the Director Service Prosecutions to give evidence or call witnesses and the Director and the appellant may adduce evidence with leave from the court.³²⁸ The court will close to consider the facts and the decision and reasons for the decision are announced in open court.

The appellant may call any witness in mitigation of punishment and may also address the court in person.³²⁹ Where the appellant wishes to hand in documents or written reports he may do so without strict compliance with the rules of evidence.³³⁰ The court then closes to consider sentence and the decision and the reasons are announced in open court.³³¹

³²⁶ *Manual of Service Law* (2011) 1(2) at 1-15-12; (2011) 2 at 2-27-15; s 147(3) of the Armed Forces Act 2006.

³²⁷ Section 147(3)(b) of the Armed Forces Act 2006.

³²⁸ *Manual of Service Law* (2011) 2 at 2-27-12.

³²⁹ Rule 87 of the Armed Forces (Summary Appeal Court) Rules 2009.

³³⁰ *Manual of Service Law* (2011) 2 at 2-27-11; r 87 of the Court Martial Appeal Court Rules 2009.

³³¹ Rule 88 of the Armed Forces (Summary Appeal Court) Rules 2009.

7.7.1.6 Court Martial Appeal Court

This court hears appeals from court martial proceedings. The Court Martial Appeal Court was established in 1951 and is regarded as a superior court of record.³³² This court consists of two to three judges from the civilian Court of Appeal (Criminal Division) and they sit in the High Courts of Justice.³³³

An appeal to the Court Martial Appeal Court may reach the court in one of three ways – either by means of an application by the Attorney General, referral by the Criminal Cases Review Commission or by application from the person convicted by the court martial.

7.7.1.7 Application for review of unduly lenient sentences

The Attorney General may also request leave to appeal³³⁴ to the Court Martial Appeal Court where he is of the opinion that the sentence or order imposed on the accused is too lenient.³³⁵ The application is brought where the court martial “erred in law as to its powers of sentencing” as long as the sentence imposed is not a mandatory sentence.³³⁶ The accused is informed so that he may make representations.³³⁷ If the Attorney General is successful the Court Martial Appeal Court may set the sentence aside and substitute it with any other sentence.³³⁸

³³² The Court Martial Appeal Court was established by the Courts-Martial (Appeals) Act 1951 (see *Manual of Service Law* (2011) 2 at 2-31-2); s 1 of the Court Martial (Appeals) Act 1968.

³³³ *Manual of Service Law* (2011) 2 at 2-31-2; Rant & Blackett at 294.

³³⁴ Section 273(4) of the Armed Forces Act 2006; r 56 of the Court Martial Appeal Rules 2009.

³³⁵ Section 273(1) of the Armed Forces Act 2006 read with part 9 of the Court Martial Appeal Court Rules 2009.

³³⁶ Section 273(6) of the Armed Forces Act 2006.

³³⁷ Rule 57 of the Court Martial Appeal Court Rules 2009.

³³⁸ Section 273(5) of the Armed Forces Act 2006; *Manual of Service Law* (2011) 2 at 2-31-5. This power is similar to the power of the Director of Public Prosecutions in South Africa to appeal a too lenient sentence but it is not afforded to the Director: Military Prosecution Counsel of the SANDF.

7.7.1.8 Referral by the Criminal Cases Review Commission

The Criminal Cases Review Commission is an independent public (civilian) body that has the power to refer cases to an appropriate court of appeal to be heard.³³⁹ The Commission reviews possible miscarriages of justice in criminal cases, heard at the Magistrate's court or Crown Court, including courts martial, in England, Wales and Northern Ireland, brought to their attention by the accused. The Commission may refer matters to the Court of Military Appeal on the finding or sentence of a court martial with or without the application by the person to whom it relates.³⁴⁰ Whenever a matter is referred by the Commission, the matter is treated as if the accused applied for the appeal. The Commission will only refer a case to the Court Martial Appeal Court where there is a real chance that the conviction or sentence will not be upheld.³⁴¹ Cases may be referred where an argument or evidence was not raised during the proceedings, where an argument on a point of law or information was not raised during sentencing or the appeal was dismissed or leave to appeal was refused.

7.7.1.9 Application by person convicted by court martial

An accused may only appeal to the Court Martial Appeal Court with the leave of the court.³⁴² The accused may appeal the finding or the sentence, except where a mandatory sentence is imposed.³⁴³

Where the Court Martial Appeal Court hears an appeal on finding, the appellant will only be successful with the appeal if the Court is of the opinion that the finding made by the court martial was "unsafe". In all other instances the appeal

³³⁹ *Manual of Service Law* (2011) 2 at 2-35-5; Schedule 11 to the Armed Forces Act 2006.

³⁴⁰ *Manual of Service Law* (2011) 2 at 2-35-5.

³⁴¹ *Manual of Service Law* (2011) 2 at 2-15-6.

³⁴² Rule 46 of the Court Martial Appeal Court Rules 2009; s 9 of the Court Martial (Appeals) Act 1968; Rant & Blackett at 295.

³⁴³ *Manual of Service Law* (2011) 2 at 2-31-3; s 8(1) of the Court Martial (Appeals) Act 1968.

will fail.³⁴⁴ Where the Court sets the finding aside, the accused will be treated as if he had been acquitted by the court martial. The Court may authorise a retrial on the same or different charges than those of which the accused had been convicted.³⁴⁵ It is however up to the Director Service Prosecution to decide whether a retrial would be appropriate.³⁴⁶

Where the appeal is directed at the sentence, the Court Martial Appeal Court may substitute the sentence with any other sentence it deems appropriate and may not impose a more severe sentence than the one originally imposed.³⁴⁷ The substituted sentence generally takes effect at the time that the court martial imposed the sentence, unless ordered otherwise by the Court Martial Appeal Court.³⁴⁸ Upon dismissal of the application the court may order that the sentence imposed must begin to run anew from the day on which the court dismissed the application if the court holds the opinion that the application has been frivolous.³⁴⁹

The prosecution may appeal a ruling of a judge advocate at a court martial. In the event of the prosecution being unsuccessful in its appeal, the accused is acquitted of the charges to which the ruling relates. Proceedings will then continue against the other charges not subject to the appeal. If the prosecution is successful the Court Martial Appeal Court may confirm, reverse or change any ruling to which the appeal relates.³⁵⁰

³⁴⁴ *Manual of Service Law* (2011) 2 at 2-31-3; Rant & Blackett at 297.

³⁴⁵ Section 20 of the Court Martial (Appeals) Act 1968.

³⁴⁶ *Manual of Service Law* (2011) 2 at 2-31-3.

³⁴⁷ *Manual of Service Law* (2011) 2 at 2-31-3; Rant & Blackett at 298; s 16A of the Court Martial (Appeals) Act 1968.

³⁴⁸ *Manual of Service Law* (2011) 2 at 2-31-4; s 17 of the Court Martial (Appeals) Act 1968.

³⁴⁹ Section 11(2) of the Court Martial (Appeals) Act 1968.

³⁵⁰ *Manual of Service Law* (2011) 2 at 2-31-4.

7.7.1.10 Appeal to the Supreme Court

Apart from the various options within the military structures for review and appeal, the accused as well as the Director Service Prosecutions may appeal to the Supreme Court against any decision of the Court Martial Appeal Court.³⁵¹

The accused and the Director Service Prosecutions may only approach the Supreme Court with leave from the Supreme Court or the Court Martial Appeal Court. Leave is only granted where the Court Martial Appeal Court certifies that “a point of law of general public importance is involved in the decision and it appears to the Court or the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.”³⁵²

An application for leave to appeal to the Supreme Court must first be brought to the Court Martial Appeal Court within 28 days from the date of the decision that is to be appealed. Where the Court Martial Appeal Court holds that the point of law is of general public importance but finds that it should not be considered by the Supreme Court, the appellant may apply to the Supreme Court for leave to appeal within 28 days of the Court Martial Appeal Court’s refusal.³⁵³ Where the Court Martial Appeal Court holds that the point of law is not of general importance, no further appeal action can be taken to the Supreme Court.³⁵⁴

7.7.1.11 The British system: A summary of the issues

The important aspects highlighted for purposes of the South African situation are summarised as follows:

³⁵¹ Section 39 of the Court Martial (Appeals) Act 1968; s 274(1) of the Armed Forces Act 2006; r 63 of the Court Martial Appeal Court Rules 2009; *Manual of Service Law* (2011) 2 at 2-31-8.

³⁵² *Manual of Service Law* (2011) 2 at 2-31-8; s 274(2) of the Armed Forces Act 2006.

³⁵³ *Manual of Service Law* (2011) 2 at 2-31-8. An extension of the 28 day time limit may be granted by either court to allow the applicant to make the application.

³⁵⁴ *Manual of Service Law* (2011) 2 at 2-31-8.

The British military justice system does make provision for an automatic non-judicial review of the summary hearing. This review is however extremely limited. The non-judicial reviewing authority can be compared to the South African Review Counsel at Legato level. Where Review Counsel opines that the finding should not be upheld it refers the matter to a further non-judicial entity – the Director: Military Judicial Reviews. The British non-judicial reviewing authority however refers the matter to a court for decision.³⁵⁵ Courts martial are not subjected to the same non-judicial level of review. Such reviews are conducted by a Court Martial Appeal Court, fully staffed by civilian judges under the control of the civilian judiciary. This is a clear guarantee of judicial independence.

Military accused are also given the opportunity to appeal to the civilian Supreme Court, although the grounds for leave to appeal are limited to “points of law of general public importance”. Where the Court Martial Appeal Court does not grant the accused leave to appeal, the accused may approach the Supreme Court directly for leave to appeal. South African military accused have no right to appeal to the High Court of South Africa, even where a case may be of “general public importance.”

7.7.2 American appellate review procedures

The American military justice system provides extensively for the review of court martial proceedings, but only to those individuals sentenced to death, punitive discharge and to more than one year’s confinement.³⁵⁶ These cases are referred to the various military appellate courts on automatic review. For any other conviction it is extremely difficult to apply for the successful review of his case. Such an accused is generally only entitled to review by the convening authority

³⁵⁵ The argument followed in *Cooper v The United Kingdom; Grieves v United Kingdom* (2004) 39 EHRR 8 must be kept in mind where the court held that review by a non-judicial entity is not contrary to an accused’s rights where a court of appeal has the final say.

³⁵⁶ Cox W T *Report on the Commission on Military Justice* (2009) at 6.

and the judge advocate. Only in very rare circumstances will the Judge Advocate General refer a case for appellate review.³⁵⁷

American military review procedures

7.7.2.1 Review by the convening authority

The British system of very limited review authority can be contrasted with the very wide jurisdiction of the convening authority in the US military justice system. The US military do not have permanent military courts and courts martial are convened on an *ad hoc* basis. Certain commanders are authorised to convene such courts martial and it is known as the “convening authority”. Prosecutorial discretion lies with the convening authority and he decides at which forum to prosecute the accused.³⁵⁸ This convening authority is then the same individual who, after completion of the court-martial, is responsible for the first level of review of the case.³⁵⁹ This state of affairs is however not seen as interference by the executive in the context of the US Armed Forces. Byrne postulates that³⁶⁰

[w]ith the “spotlight” of his unit’s men on him, the commander has to administer military justice at the highest ethical and moral level. His decisions directly affect morale, good order, and discipline in his command.

³⁵⁷ The Judge Advocate General may refer a case for appellate review on the grounds of matters of law in terms of Art 69(d) of the Uniform Code of Military Justice (UCMJ) (see Cox (2009) at 6).

³⁵⁸ Byrne E M *Military Law* 3 ed (1981) at 91-92.

³⁵⁹ This is similar to the system followed in South Africa prior to 1999 that resulted in the decision in *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 15 where the court found this system to be unconstitutional, *inter alia*, due to the fact that the prosecutor has no discretion to withdraw charges without the consent of the convening authority and at para 20 where the convening authority “has the power to confirm or vary convictions and sentences imposed by the ordinary court martial...”

³⁶⁰ Byrne at 89.

This position still holds true today. It was opined that the commander (as convening authority) carries out functions³⁶¹

from appointing the Article 32 investigating officer; selecting the court members (and maybe the trial counsel); deciding which witnesses to bring in for trial;...deciding who gets immunity; [to] whether the finding should be approved.

Essex further states that this comprehensive involvement in the judicial process by the commanding officer, who is in fact a non-judicial entity, does not violate the independence of the trial since the “convening authority is bound by law to act fairly and impartially.”³⁶²

No sentence by any court martial may be executed if it has not been approved by the convening authority.³⁶³ Once the sentence is approved it must be executed. This does not include a sentence of dishonourable or bad-conduct discharge, the dismissal of a commissioned officer, cadet or midshipman or a sentence of death. Such cases automatically follow a further review procedure. The convening authority performs the initial review of the case and may take any action with regard to the finding or the sentence which he deems appropriate. Any action taken is done in his sole discretion and is seen as an integral part of his command prerogative.³⁶⁴

When exercising his discretion the Convening Authority must consider recommendations by his Staff Judge Advocate or legal officer as well as any representations made by the accused. He may also, apart from the record of the trial and the personnel records of the accused, consider *any* matter he deems

³⁶¹ Essex T & Pickle L T “A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2011):”*The Cox Commission*” (2002) 52 *Air Force Law Review* 233 at 247.

³⁶² Essex & Pickle at 246.

³⁶³ Rule 1113 of the Rules for Court- Martial (RCM); *Manual for Courts-Martial United States* (2008) at II-150.

³⁶⁴ *Manual for Courts-Martial* at II-150; RCM 1107; art 60(c)(1) of the UCMJ. The Convening Authority does not review the case for legal errors or the existence of sufficient evidence for a guilty finding (see RCM 1107).

relevant. This includes matters outside the record that may be adverse to the accused of which the accused has no knowledge. It is only required that he informs the accused accordingly and affords him the opportunity to make representations in this regard.

Once he has considered the finding and sentence he may, once again within his sole discretion, change the finding of guilty on any charge to a guilty finding on any lesser charge, set aside any finding of guilty and then either dismiss the charge or direct a retrial of the case.³⁶⁵ Where the convening authority is of the opinion that a retrial is impractical, he may dismiss the charges. This power is not only limited to this first review. Where the Court of Criminal Appeal, presided over by appellate military judges, or the Court of Appeals for the Armed Forces, presided over by five civilian appellate judges, orders a retrial, the convening authority may dismiss the charges where he is of the opinion that a retrial is impractical.

He is further not required to give reasons for or explain his decision to order or not to order a retrial.³⁶⁶ He may vary a sentence for any reason, or without giving any reason, may mitigate the sentence or change the sentence to a different one as long as it does not increase the severity of the punishment.³⁶⁷

After review by the convening authority, the matter may be referred for further review and appeal to the office of the judge advocate or the Court of Criminal Appeals.

³⁶⁵ Art 60(3)(a) and (b) of the UCMJ.

³⁶⁶ *Manual for Courts-Martial* at II-151; RCM 1107(c). The convening authority takes swift, decisive action when exercising his review authority. There is consequently no need for a further review, allowing the convening authority with the means to correct errors swiftly, thereby ensuring discipline and complying with mission requirements.

³⁶⁷ RCM 1107(d). Where the sentence is mandatory, the prohibition on a more severe sentence is not applicable (see art 60(e)(2)(c) of the UCMJ). The convening authority must approve a sentence which is appropriate to the offence and the accused. When the convening authority is considering a mandatory sentence, he may even approve a lesser sentence (see *Manual for Courts-Martial* at II-151).

7.7.2.2 Review by the Court of Criminal Appeals

Where the case includes a sentence of death, a bad conduct discharge, a dishonourable discharge, dismissal of an officer or confinement of more than one year which has been approved by the convening authority, the case is automatically reviewed by an intermediate Court of Criminal Appeals³⁶⁸ There are four Courts of Criminal Appeals – the Army Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, the Air Force Court of Criminal Appeals and the Coast Guard Court of Criminal Appeals. These courts are composed of appellate military judges.³⁶⁹ They review the submitted cases for legal errors, factual sufficiency and the appropriateness of the sentence imposed by the court martial.³⁷⁰ The Court of Criminal Appeals may only review findings and sentences that have been confirmed by the convening authority. The court may further only confirm those findings of guilty found to be correct in terms of law or fact and such determination must be made on the basis of the whole record, in effect conducting an appeal and not a review.³⁷¹ The court generally has the same powers as the convening authority regarding varying of the sentence, although it may not suspend any part of the sentence. The court may however reduce the period of suspension prescribed by the convening authority.³⁷²

³⁶⁸ Clerk of the Court *The United States Court of Appeals for the Armed Forces Brochure* (2009) at 4; Inspector General United States Department of Defense *Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy* (2010) at 7-8; RCM 1203(b); Morris L J *Military Justice: A Guide to the Issues* (2010) at 115; Lederer F I & Hundley B S “Needed: An Independent Military Judiciary – A Proposal to Amend the Uniform Code of Military Justice” (1994) 3 *William & Mary Bill of Rights Journal* 629 at 643.

³⁶⁹ RCM 1203(a). For the composition of the court and qualifications of the judges see Art 66 of the UCMJ

³⁷⁰ *Court of Appeals Brochure* at 4.

³⁷¹ RCM 1201. According to Morris at 116 the Court of Criminal Appeals have wider jurisdiction in considering appeals than the civilian appeals court since Art 66 of the UCMJ gives the court the authority to “look behind the record and evaluate whether the lower court properly evaluated the evidence...” The civilian courts are usually limited to question whether legal error occurred and have to confirm a case where no legal error occurred although the court believes that the jury’s finding are not sufficiently supported by the evidence.

³⁷² RCM 1203.

In reconsidering a case, the Court of Criminal Appeals must weigh all the evidence, may judge the credibility of the witnesses and determine all contested questions of fact, but must do so while keeping in mind that the court martial in fact saw and heard all the evidence.³⁷³ The Court can only hold a finding or sentence of a court martial as incorrect on the grounds of error in law if the error materially prejudices the substantial rights of the accused.³⁷⁴ Where the court sets aside the finding or sentence, it may order a retrial or reassess the sentence where appropriate. A retrial will not be ordered where the court finds insufficient evidence for a guilty finding. The matter will be referred back to the convening authority for retrial but where the convening authority is of the opinion that a retrial is impractical he may dismiss the charges.³⁷⁵

Decisions by the Court of Criminal Appeals only bind the relevant arm of service to which the court is attached. This may result in different interpretations by the various service criminal appeal courts and lead to the creation of the Court of Appeals for the Armed Services whose rules and decisions bind all the services.³⁷⁶

7.7.2.3 Review by the Judge Advocate

In all other instances not falling under the automatic jurisdiction of the Court of Criminal Appeals, cases are referred from the convening authority to the office of the Judge Advocate General and each arm of service has regulations in terms of which their judge advocates will review the cases.³⁷⁷

³⁷³ RCM 1203.

³⁷⁴ Art 59(a) of the UCMJ.

³⁷⁵ RCM 1203(c)(2).

³⁷⁶ Morris at 116.

³⁷⁷ *Court of Appeals Brochure* at 4; RCM 1112. Since there is no appellate review for findings of summary courts-martial, the Judge Advocate will review all summary courts-martial as well as special courts-martial proceedings, excluding sentences of bad conduct discharge or confinement of more than one year. He will also review general courts martial and special courts martial where the accused waived his right to appellate review in terms of RCM 1110. Before an accused waives his right to appellate review he has the right to consult with legal counsel and all waivers must be in writing (see Art 61 of the UCMJ; Morris at 118).

The Judge Advocate may review courts martial decisions to determine whether the relevant court martial had jurisdiction over the accused or the offence in cases where the court martial guilty finding is approved by the convening authority. He may determine if the charges and specifications constitute an offence and may consider the legality of any sentence imposed. He must also respond in writing to any allegation of error that is alleged in writing by the accused.³⁷⁸

Upon completion of the review the Judge Advocate will refer the record of proceedings back to the convening authority with general court martial jurisdiction over the accused and may recommend that certain action must be taken.³⁷⁹ The convening authority may then either approve or disapprove the findings or sentence in part or as a whole. He may remit, commute or suspend any sentence or order a retrial on the finding, the sentence or both except where the Judge Advocate found insufficient evidence to support a finding of guilty.³⁸⁰ Where the Judge Advocate who reviewed the case indicated that corrective action is required as a matter of law and the convening authority does not take action that is at least as favourable to the accused as that recommended by the Judge Advocate, the Judge Advocate may forward the record of the trial and his review to the Judge Advocate General for further review.³⁸¹ Such a referral results in a mandatory review by the Judge Advocate General who may then set aside or vary the finding, the sentence or both on the grounds of newly discovered evidence, fraud on the court martial, a lack of jurisdiction over the accused or the offence, an error that is prejudicial to the substantive rights of the accused or with regard to the appropriateness of the sentence.³⁸²

³⁷⁸ RCM 1112(d); Art 64(a)(1) of the UCMJ.

³⁷⁹ RCM 1112(e); Art 64(b)(1) of the UCMJ.

³⁸⁰ RCM 1112(f).

³⁸¹ RCM 1112(g).

³⁸² RCM 1201(b)(2); art 64(c)(3) of the UCMJ.

7.7.2.4 Review by the Court of Appeals for the Armed Forces

After review by the Judge Advocate or the Court of Criminal Appeals the matter may be referred to the Court of Appeals for the Armed Forces.³⁸³ Matters are referred to the Court of Appeals for the Armed Forces³⁸⁴ where a sentence of death was imposed,³⁸⁵ where the Judge Advocate refers cases reviewed by the Court of Criminal Appeals and all cases reviewed by the Court of Criminal Appeals where the accused applies for review on good cause with leave from the Court of Appeals for the Armed Forces.³⁸⁶ The review authority of the Court of Appeals for the Armed Forces is limited to questions of law.³⁸⁷

The Court may only review findings and sentences that were confirmed by the convening authority and were subsequently either confirmed or set aside as incorrect in law by the Court of Criminal Appeals.³⁸⁸ Once the Court of Appeals for the Armed Forces reaches a decision, it may direct the Judge Advocate General, where appropriate, to return the record to the Court of Criminal Appeals for further proceedings as may be in accordance with its findings. The court may also direct the Judge Advocate General to return the record to the convening authority where the matter is completed and who is then instructed to take appropriate action in accordance with the Court's decision. This does not include cases where the decision of the Court is subject to review by the Supreme Court or where further action is required by the Secretary or the President, such as

³⁸³ *Court of Appeals Brochure* at 4; art 67 of the UCMJ; RCM 1203(c)(2). This is the final court for most of the military convictions (see Morris at 117).

³⁸⁴ RCM 1204(a); art 67(a) of the UCMJ. For the composition of the court see art 67(a) of the UCMJ.

³⁸⁵ RCM 1203(c)(3).

³⁸⁶ Article 67(a) of the UCMJ. Where the accused has a right to apply to the Court of Appeals for the Armed Forces for review, the accused is supplied with a copy of the Court of Criminal Appeals' decision with an endorsement informing the accused of his right to apply for review (see RCM 1203(d)(2)). The accused may apply for review on any matter except where the case was referred to the Court of Criminal Appeals by the Judge Advocate General in terms of RCM 2101(b)(1), where the Court of Criminal Appeals set aside the sentence and where the accused was sentenced to death. Review of a death sentence is mandatory and the accused need not apply for review.

³⁸⁷ Article 67(c) of the UCMJ; RCM 1203(c)(1).

³⁸⁸ Articles 67(d) and (e) of the UCMJ.

death penalty cases. Where the Court ordered a retrial and the convening authority finds a retrial impractical he may dismiss the charges.³⁸⁹

American military appeal

7.7.2.5 Appeal to the Supreme Court of the United States

The accused does however have the right to approach the Supreme Court of the United States on appeal regarding a case under the Uniform Code of Military Justice.³⁹⁰ Decisions of the Court of Appeals for the Armed Forces may only be reviewed by the Supreme Court by a writ of *certiorari* which is a decision by the Supreme Court to hear an appeal from a lower court.³⁹¹ This is allowed where the Court of Appeals for the Armed Forces conducts a mandatory review in death penalty cases or where the appellant is granted leave to appeal. Where the Court of Appeals for the Armed Forces do not grant leave to review or appeal, the Supreme Court may be approached through an application of collateral review, for example on an application for a writ of *habeas corpus*³⁹² but may not review the action of the Court of Appeals for the Armed Forces in refusing to grant the leave to appeal.³⁹³

The Supreme Court accepts very few military cases on appeal, and has only done so for specific purposes, usually to make a specific point regarding an important aspect of the military judicial system.³⁹⁴

After the Supreme Court has completed its review, the matter is referred back to the office of the Judge Advocate General who will either forward the matter to the

³⁸⁹ RCM 1204(c).

³⁹⁰ RCM 1205.

³⁹¹ See the definition at <http://www.techlawjournal.com/glossary/legal/certiorari.htm>; Morris at 117.

³⁹² *Court of Appeals Brochure* at 5.

³⁹³ RCM 1205.

³⁹⁴ Morris at 117-118 indicates that in the past 25 years, out of about 250 applications by the defence, the Supreme Court has only granted a writ of *certiorari* in nine cases.

Secretary or the President, if required, or will instruct the convening authority to take action in accordance with the Supreme Court's decision.³⁹⁵

7.8 Conclusion

The non-judicial review of military trials, especially by the Director: Military Judicial Reviews is an untenable situation in terms of the South African Constitution. The automatic review of military trials is not to the disadvantage of the accused and it is therefore submitted that the process should be retained. However, the reviewing authority should be vested in a court, higher in status than the CSMJ and CMJ. Consideration should be given to the model of the United States regarding the intermediate Court of Criminal Appeals that lies between the Convening Authority and the Court of Appeals for the Armed Services. Such an intermediate court in the South African context can be charged with the function of reviewing all guilty findings, from the CODH, the CSMJ and the CMJ. Submitting all reviews, both from the CODH and military court environment to the CMA will place too much of a burden on the court roll of the Court of Military Appeal where preference is given to more serious cases.³⁹⁶ Since the CMA only sits on an *ad hoc* basis, their time is better suited to attending to more serious appeals and review. A lower level Court of Military Review, staffed by military judges appointed as review judges with the appropriate experience would address these concerns. All guilty findings can then be reviewed by such a court, taking the place of the Director: Military Judicial Reviews.

On the question of whether military accused should have access to the High Court of South Africa the following should be noted. Since most military trials are only reviewed by the Review Counsel or at most the Director, it is submitted that

³⁹⁵ RCM 1205(b).

³⁹⁶ See *S v Holo* (CMA 05/07) where the CMA stated that cases where more serious sentences were imposed such as effective imprisonment and dismissal or discharge from the SANDF are given priority on the CMA court roll.

the military appeal and reviews procedures do not comply with section 35(3)(o) of the Constitution. If the review procedures are amended, providing for an appellate review court as suggested above, it will address this constitutional concern. However, there are other jurisdictions that allow an accused various levels of review and appeal, specifically appeal from the military courts to the civilian Supreme Courts.

Although the Constitution only requires one level up for review or appeal it is not argued that an accused should have an unlimited automatic right to appeal a decision by the military court³⁹⁷ It is submitted that the defence legislation should provide an accused the opportunity to appeal to the High Court in those instances where it may be in the interest of justice to do so. Such instances may include important military law questions or, as is the case in Britain, where it is a matter of general public importance.³⁹⁸

³⁹⁷ Currie & De Waal (2005) at 789; *S v Pennington* 1997 (4) SA 1076 (CC).

³⁹⁸ Limiting the grounds for leave to appeal would provide adequate safeguards against frivolous applications to appeal (see *S v Rens* 1996 (1) SA 1218 (CC); Currie & De Waal (2005) at 789).

CHAPTER 8

SUMMARY AND RECOMMENDATIONS

8.1 Introduction

The research in this thesis concentrates on three main themes: (1) the status of the military courts, (2) military sentences, and (3) military appeals and reviews. Only those aspects which potentially raise constitutional concerns and their proposed solutions or recommendations are summarised here.

8.2 The status of the military courts

The status of the military courts is discussed with reference to judicial independence and the accused's constitutional right to a fair trial.

8.2.1 Judicial independence

The judicial independence of the military courts is evaluated against the constitutional requirement that all courts have to be "independent and subject only to the Constitution and the law."¹ Judges are required to be independent and impartial. In considering the independence of the courts the aspects of substantive or institutional² and personal independence are investigated. Both forms of independence are required before a court is considered independent for constitutional purposes.

For institutional independence it is required that the judiciary be independent from the executive and the legislature. A lower standard of independence suffices for the lower courts.³ Military courts are regarded as courts established

¹ Section 165(2) of the Constitution; see ch 4 at para 4.2.1.

² See ch 4 at para 4.2.1.4.

³ See *van Rooyen v The State* 2002 (9) BCLR 810 (CC) paras 27-28.

in terms of the Constitution. The MDSMA provides for the independence of the military judiciary. However, actual independence is not quite what it should ideally be. The judiciary must also be perceived to be independent. Two concerns are raised in this regard: (1) the appointment of serving members of the SANDF as military judges, and (2) the role of the Adjutant General.

8.2.1.1 The appointment of military judges

The Chairperson of the CMA is a high court judge, appointed by the Minister of Defence. The Ministerial Task Team opines that the appointment by the Minister should not be seen as executive interference and regards the Chairperson of the CMA as independent and impartial.

The military judges appointed to the CSMJ and CMJ are senior officers in the SANDF. This creates an institutional link between the military judges and the SANDF. As they are part of the executive because of their employment as public officials, this creates a concern about the military judges' independence. The Ministerial Task Team suggests that civilian judges should be appointed to counter the perception of bias. This approach is followed by the British military courts in that full-time civilian judges are appointed to the military courts. It is however submitted that the appointment of civilians as military judges is not necessarily the best solution since it may result in a loss of understanding of the unique nature of the military justice system. Safeguards do exist for the protection of the integrity of the military courts under military judges. These judges must be legally qualified, they are required to take an oath of office and the integrity of the trial process is protected through the process of appeal and review.

8.2.1.2 The role of the Adjutant General

Even though the appointment of military members as judges does not necessarily undermine the independence of the military judiciary, the role of the Adjutant General in the administrative processes of the military courts is cause for concern. The responsibility for its administrative processes rightly belongs with the military judiciary, yet the MDSMA does not provide the judiciary with the authority to administer its own processes. As a senior officer of the SANDF appointed by the Minister, the Adjutant General forms part of senior management and therefore the executive. Yet he plays a prominent role in the appointment of military judges. In terms of the MDSMA appointments are made by the Minister on the recommendation of the Adjutant General and this may interfere with the independence of the judiciary. It is submitted that the defence legislation should be amended to provide for an independent body or selection committee to oversee the selection and appointment of the military judges. To this effect the Canadian military judicial selection committee may serve as example.

It is further provided that no functionaries within the military legal division can be appointed by the Minister without the recommendation of the Adjutant General. He is also responsible for the planning of the court roll and decides which cases are to be heard before which CMA in the event of the Minister appointing more than one CMA. This state of affairs may negatively influence the perception of independence of the military courts. It is submitted that the administrative responsibilities of the Adjutant General as they pertain to the military judiciary should lie with the Director: Military Judges. Currently the institutional independence of the military judiciary should be able to withstand constitutional scrutiny as long as the Adjutant General's involvement is limited to the administrative support of the military judiciary. However, the proposal for the appointment of a civilian administrator to take over the administrative functions of the Adjutant General in this regard should be welcomed and should address the concerns adequately.

Personal independence of the military judiciary refers to the aspects of selection and appointment, security of tenure and the financial independence of the military judges⁴

The MDSMA does not provide for a fixed period of appointment for CMA judges. Although it does provide for a fixed period of appointment for CSMJ and CMJ judges, military judges are in fact not *appointed* as military judges. They are appointed as military legal practitioners and are then assigned to the function of military judge by the Adjutant General. The MDSMA does not specify the duration of this assignment but the practice is that current assignments must be renewed annually. It is submitted that despite the short period of assignment, military judges do in fact have security of tenure because of their appointments as officers in the SANDF. They will consequently have security of tenure for the duration of their contract of employment with the SANDF. Such employment contracts are usually renewed every ten years. It is further submitted that a fixed period of assignment for any duration of time does not necessarily guarantee the judges' independence and impartiality – at the end of the period the danger of aiming to please their employer exists, irrespective of how long their assignment was.

The removal of military judges does not comply with constitutional requirements, since the MDSMA does not make any provision for a formal procedure affording a military judge a fair hearing upon removal from his post. In addition, there is insufficient provision for an independent body to oversee the removal of a military judge. Currently this prerogative lies exclusively with the Minister, who is to act on the recommendation of the Adjutant General. It is proposed that the independent committee recommended above in connection with the appointment of military judges should also be utilised with respect to removal of such judges.

⁴ See ch 4 at para 4.2.1.5.

Although no provision is made for the separate remuneration of military judges, it is submitted that the remuneration adjustments and promotions as governed by the Personnel Management Code for law officers provide sufficient protection to guard against arbitrary interference by the executive.

Although there is clearly room for improvement, in general the CMA, CSMJ and CMJ appear to be adequately protected so that they can be regarded as sufficiently independent and impartial to comply with the Constitution.

8.2.2 Fair trial criteria and the military courts

The trial must be conducted in a fair and just manner. To this end the accused is entitled to certain fair trial rights.⁵ Fair trial rights, however, only apply to an “accused before criminal proceedings.”⁶ Although an accused appearing before a CSMJ and CMJ can be regarded as an “accused before criminal proceedings” the same does not apply to an accused appearing before a CODH.

Subsequently certain fair trial rights are examined and it was found that an accused before a military court is sufficiently informed of the charges, has sufficient time and facilities to prepare a defence, receives a public hearing and has the right to choose and to be represented by a legal practitioner of his choice.

The conclusion reached regarding the status of the military courts is therefore that the CMA, CSMJ and CMJ can be regarded as ordinary courts for the purposes of conducting criminal trials and affording accused persons their right to a fair trial.⁷ The CODH cannot be considered a court of law and at this level there is a real concern of executive interference. It was however found that the voluntary nature of the accused's choice to submit to the jurisdiction of the CODH

⁵ See s 35(3) of the Constitution; ch 4 at para 4.2.2.

⁶ See ch 4 at para 4.2.3.

⁷ See ch 4 at para 4.4.

and his right to appeal and review alleviates the concern. It can therefore be stated that the CODH does follow fair trial procedures and that the military accuseds' rights are sufficiently protected at this forum.

8.3 Military sentences

Military sentences are evaluated in terms of the relevant procedural aspects as well as the current military punishments available to the military courts.

8.3.1 Procedural aspects regarding sentencing

Although the military courts' sentencing discretion is generally respected, parity in sentencing is regarded as an important aspect with the potential to influence the sentencing discretion of the military courts.⁸ Parity in sentence is however made difficult by the lack of available military court judgments. No CSMJ or CMJ judgments are published and the CMA judgments are only of limited assistance. In many instances reasons for differences in sentences are not provided, making it very difficult for later military courts to apply the sentencing principles in their decisions. The format of publication is further not user-friendly, hampering its application. It is suggested that the implementation of sentencing guidelines, such as those followed by the British military justice system, would address the requirements set by the CMA for parity in sentencing. This would be particularly helpful at the forum of the CODH.

The distinction between different rank groups in the SANDF as it applies to sentencing has raised some concerns regarding the equal treatment of offenders in the military.⁹ An evaluation of section 9 of the Constitution shows that a distinction could be made between formal and substantive equality. In determining whether a provision discriminates against an individual it must firstly

⁸ See ch 5 at para 5.3.

⁹ See ch 5 at para 5.7.1.

be determined whether the provision discriminates or merely differentiates between individuals. Then it is considered whether a rational basis exists for the differentiation. Finally, if the differentiation is regarded as unfair discrimination it must be determined whether the limitation clause of the Constitution can justify the unfair discrimination.

The two main concerns with regard to differentiation in military sentences are (1) the fact that officers are sentenced to cashiering or dismissal and other ranks to discharge with ignominy or discharge from the SANDF, and (2) the difference in punishment depending on the rank and the seniority of the accused and the victim.

It is found that the difference between cashiering versus discharge with ignominy and dismissal versus discharge from the SANDF is merely in name and not in substance. There is no discernable difference in the treatment between officers and other ranks in the execution of these sentences. It is further found that when evaluating the difference in treatment of officers and other ranks as it relates to punishment, the unique hierarchical structure of the military and the need for discipline must be kept in mind. The need for a disciplined force would therefore constitute a legitimate governmental purpose for the different treatment of the different ranks.

8.3.2 Military punishments

All the sentences listed in section 12 of the MDSMA were evaluated¹⁰ such as imprisonment, discharge or dismissal from the SANDF, reduction in rank, reduction in and seniority and fines but only certain sentences raise possible concerns.

¹⁰ See ch 6.

8.3.2.1 Imprisonment

Although imprisonment is a sentence that may be imposed in the military court, it is not clearly defined in the defence legislation. It is further unclear whether it includes all six forms of imprisonment found in the Criminal Procedure Act. It was found that military courts may only impose determinate and life imprisonment. The CMJ is limited to a maximum period of two years whereas the CSMJ is only limited by the penalty clause provided for the specific offence. Although the MDSMA does not specifically provide for life imprisonment, it was found that the CSMJ may in fact impose life imprisonment as a sentence. The military courts do not have the authority to impose any indefinite period of imprisonment since only a “superior court or a regional court” has the power to declare any person a dangerous or habitual criminal. Since the military courts are not authorised to impose correctional supervision, imprisonment which could result in correctional supervision is also not within the authority of the military court. Periodical imprisonment is imposed to allow an offender to retain his employment. As soon as a military offender is sentenced to imprisonment by a military court he is discharged from the SANDF and therefore periodical imprisonment is not a viable form of imprisonment.

Of the different forms of imprisonment, determinate imprisonment is the form usually imposed by the military courts. It is however not an appropriate sentence to impose for a disciplinary offence. In the military context imprisonment should therefore only be imposed for serious criminal offences. Where a sentence of imprisonment is justified, the nature of criminal offences in the military seldom justifies a long term of imprisonment.

Imprisonment as a sentence has serious consequences for the military offender. An officer sentenced to imprisonment must also be sentenced to cashiering and a non-commissioned to discharge with ignominy. This means that the offender’s employment is terminated. The sentence of imprisonment will not commence

immediately upon being announced in open court. It is subject to automatic review by the CMA and will only be executed once the CMA confirms the finding and sentence. The accused must be kept in custody pending finalisation of the review but since the CMA only sits on an *ad hoc* basis it may take up to 18 months for the review to be finalised. This may result in a gross violation of his rights but the MDSMA provides that the local representative of the Adjutant General may release the accused pending the finalisation of his trial, subject to certain conditions specified for his release.

Military members sentenced to imprisonment must serve their sentence at a prison of the Department of Corrections and consequently the release policy of the Department of Corrections applies. It is however provided by the MDSMA that where an accused is already serving a sentence of imprisonment, the new sentence only commences after expiration of the first sentence. Imprisonment can be wholly suspended for a maximum period of three years.

8.3.2.2 Cashiering

The sentence of cashiering means the “dishonourable dismissal of an officer” from the SANDF.¹¹ The concerns identified are not with the actual dismissal of the officer or the dishonourable nature of the discharge. It lies with the mandatory nature of the sentence for specific offences and the implementation of the sentence.

Cashiering is mandatory under two circumstances:¹² (1) when an officer is found guilty of conduct unbecoming an officer,¹³ and (2) when an officer is sentenced to any term of imprisonment. Section 32 of the MDC leaves the court with no discretion to deviate from the sentence of cashiering. No mitigation, aggravation or the culpability of the offender has any influence on the prescribed sentence,

¹¹ See ch 6 at para 6.2.2.

¹² See ch 6 at para 6.2.2.1.

¹³ Section 32 of the MDC.

which may result in the arbitrary imposition of the sentence disproportionate to the seriousness of the crime and the blameworthiness of the offender. It is submitted that the legislation be amended to remove cashiering as the only available punishment for the contravention of section 32 of the MDC and allows the court to exercise its sentencing discretion.

It is found above that the manner in which the cashiering is executed infringes the offender's right not to be treated in a cruel, inhuman or degrading manner.¹⁴ Since all punishments undermine human dignity to some degree, the right to dignity should also be considered when evaluating cashiering as a sentence. Cashiering is a shaming punishment regarded as "stigmatization shaming" and as such it would probably not withstand constitutional scrutiny. Since the ultimate goal of cashiering is to sever the employ of the offender in a way that expresses the community's condemnation of the offender's behaviour, it is submitted that this aim could be achieved equally simply by dismissing the offender from the SANDF. A perusal of comparative jurisdictions in Britain, Canada and America show that dismissal with disgrace is an acceptable punishment in the military but nowhere is it still executed in a public humiliating way. It is therefore argued that the sentence should be retained as a dishonourable discharge provided that the concerns regarding its execution are addressed.

8.3.2.3 Detention

The purpose of imposing a sentence of detention is to give the offender the opportunity to rehabilitate and remain in the employ of the SANDF.¹⁵ The maximum period of detention that the court may impose is two years. Because of the serious consequences of loss of rank, seniority and salary, it is not a sentence that is lightly imposed by the military courts. As was the case with

¹⁴ See ch 6 at para 6.2.2.2.

¹⁵ See ch 6 at para 6.2.5.

imprisonment, a person sentenced to detention must also be kept in custody pending the review of his case but may be released by the local representative of the Adjutant General pending finalisation of the review. A sentence of detention also continues to run even where the accused ceases to be subject to the MDC during the time of serving his sentence. The sentence is served in the detention barracks.

The sentence of detention is investigated because of concerns regarding the lack of implementation of the UN Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Optional Protocol to CAT (OPCAT).¹⁶ The main problem is the fact that the detention barracks are not subject to any oversight and inmates' recourse are limited to an internal complaints procedure. Although the treatment of inmates at the detention barracks does not constitute cruel, inhuman or degrading treatment or punishment, the SANDF must comply with its responsibility to have an independent oversight body. Since no current policy exists in the SANDF regarding the treatment of inmates in terms of CAT and OPCAT, it is suggested that the SANDF utilises the SAPS documents in drawing up appropriate policy documents. It is further proposed that the SANDF use the Judicial Inspectorate of Prisons to act as an independent oversight body for the detention barracks. Only minor changes need to be made to the defence legislation and the mandate of the Judicial Inspectorate of Prisons.

A further potential problem is the use of solitary confinement as provided for by the regulations of the detention barracks. The regulations provide for disciplinary solitary confinement which may only be imposed as a court sentence. These regulations are contrary to the defence legislation which does not make provision for solitary confinement as a punishment at all. The regulations however further provide that the superintendent of the detention barracks may conduct a trial, but since the ranks of the commanding officers at the detention barracks are not

¹⁶ See ch 6 at para 6.2.5.7.

senior enough they will in fact not have the jurisdiction to try an offender at a CODH as provided for by the regulations. Apart from a trial by CSMJ, CMJ and CODH, no other military forum has the jurisdiction to try the offender. Solitary confinement is therefore not a punishment authorised in terms of the defence legislation and is currently not in use.

It is further submitted that detention as a punishment is under-utilised. With minor changes to the legislation to alleviate the harsh consequences of loss of rank and seniority, detention can be of valuable assistance in the disciplinary rehabilitation of military offenders. The policy framework provided for the detention barracks by the military police agency in 2006 should be implemented as a matter of urgency. The rehabilitation and skills development programmes followed by the MTCT Colchester should be benchmarked for the successful implementation of relevant training provided by the detention barracks.

8.3.2.4 Field punishment

It is recommended that field punishment as a sentencing option be removed from the list of options since its main components of “extra duties” and “punishment drill” are adequately provided for in other sentences.¹⁷

8.3.2.5 Fines

A fine is the sentence most frequently imposed by military courts. The maximum fine that can be imposed by the CODH is R600 and for the CSMJ and CMJ it is R6000. Although a fine should act as a deterrent it is doubtful whether a fine imposed by the military courts is sufficiently severe to be seen as a real deterrent. The difficulties experienced by the civilian environment in collecting fines are not experienced by the military environment. Military fines are deducted

¹⁷ See ch 6 at para 6.2.6.2.

from an offender's salary in terms of section 130 of the MDC and where requested by the offender, the fine may be deducted in installments.

8.3.2.6 Confinement to barracks

Confinement to barracks may be imposed on any offender of the rank of private for a maximum period of 21 days. The punishment mainly consists of being restricted to the unit lines, forfeiting recreational facilities, punishment drills and standing inspection. Concerns were consequently raised whether this sentence complies with the objectives of the UN Convention against Torture.¹⁸ This sentence is most effective when imposed on single living-in members who are undergoing training. It must further be evaluated within its military context. In an operational as well as the training environment military members are routinely restricted in their movements or given extra duties to do. A high premium is also placed on the discipline of soldiers. It is consequently found that confinement to barracks cannot be seen as cruel, inhuman or degrading punishment in the military context.

Therefore, although there are many concerns raised, the study on military sentences has shown that many of these concerns are based more on the apparent than any real infringement of the accused's rights. The concerns that do appear legitimate can be addressed with minor legislative amendments.

8.4 Military appeal and review

Two processes are available to the military offender who is not satisfied with his trial. The matter can be taken either on appeal or on review. In terms of the review of a military trial the review authority of Review Counsel and the Director: Military Judicial Reviews was specifically investigated in two respects: (1) the

¹⁸ See ch 6 at para 6.2.11.

non-judicial review of the military court proceedings,¹⁹ and (2) the constitutional right to review by a “higher court.”²⁰

The Director: Military Judicial Reviews does not form part of the military judiciary yet he exercises full appeal and review authority over cases decided by the military courts. In fact, he has the same powers as a CMA. The Director: Military Judicial Reviews forms part of the executive. The situation is therefore that a person forming part of the executive has appeal and review powers over the military judiciary.²¹ It is submitted that the review function of the Director: Military Judicial Reviews will not withstand constitutional scrutiny. It is suggested that consideration be given to a model similar to the American Court of Criminal Appeals that will have the authority to review all findings by the CODH, the CSMJ and the CMJ.²² Such a court could be referred to as a Court of Military Review, staffed by military judges, taking the place of the Director: Military Judicial Review.

In terms of the right to appeal and review the Constitution provides for the right to review to a higher court. Neither Review Counsel not the Director: Military Judicial Reviews could be seen as a higher court. Therefore review done by the Review Counsel and the Director which is not subsequently considered by the CMSA, does not comply with the fair trial right of appeal and review to a higher court. The solution of creating a Court of Military Review should address this concern.

The question is investigated whether a military accused has the right to review and appeal to the High Court of South Africa.²³ There is no right to appeal from the military courts to the High Court of South Africa. There is no inherent right to appeal to the High Court and the defence legislation does not make any such

¹⁹ See ch 7 at para 7.5.2.

²⁰ See ch 7 at para 7.5.3.

²¹ See ch 7 at para 7.5.2.2.

²² See ch 7 at para 7.7.

²³ See ch 7 at para 7.6.

provision. The High Court of South Africa does have inherent review powers with respect to the cases heard by the CSMJ and CMJ as courts of the first instance. On the question whether the High Court has the power to review cases heard by the CMA there are however different decisions.²⁴ The Transvaal Provincial Division found that the High Court does have the jurisdiction to review a case from the CMA but the Cape Provincial Division held that the High Court does not have such a right. This creates a problem since no clear answer exists. It is submitted that the defence legislation be amended to address this *lacuna*. It is further submitted that specific provision should be made for the right of the accused to appeal to the High Court of South Africa. This would be in line with other comparable jurisdictions such as Britain and the United States. Such a right would address any lingering concerns and perceptions regarding the perceived bias of the military judiciary.

²⁴ See ch 7 at para 7.6.5.

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