

THE SOUTH AFRICAN MILITARY COURT SYSTEM – INDEPENDENT, IMPARTIAL AND CONSTITUTIONAL?

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Introduction

“...whatever the practice in former times, a modern code of military discipline cannot depend on arbitrary decision-making or the infliction of savage punishments, nor can it depend on inherited habits of deference or gradations of class distinction. Such a code must of course reflect the hierarchical structure of any army and respect the power of command. But an effective code of military discipline will buttress not only the respect owed to their leaders by those who are led but also, and perhaps even more importantly, the respect owed by leaders whom they lead and which all members of a fighting force owe to each other.”¹

The Constitution of the Republic of South Africa makes provision for a defence force that is structured and managed as a disciplined military force.² Even prior to the Constitution, to ensure discipline in the military, the South African Military Law had been developed and the military court system has been recognised

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¹ *R v Spear; R v Boyd; R v Williams* [2002] UKHL 31 18 July 2002 par 4 (here after referred to as *Spear* judgment). See in general Labuschagne, JMT. 1991. Sosiale stratifikasie en die strafregtelike effek daarvan op menslike outonomie. *Stellenbosch Law Review*, 21(2): 252-263.

² Section 200(1) of Act 108 of 1996 (here after referred to as *Constitution*).

by the Constitutional Court.³ This military criminal justice system has been created with a separate system of courts hearing matters pertaining to the usual, as well as other special statutory offences; and with a similar, but separate, investigative procedure, prosecuting authority, and court procedure.⁴

This system of criminal justice is based mainly on the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA) as read with its Rules of Procedure⁵ and the Military Discipline Code (MDC)⁶, and is aimed at the maintenance of discipline essential for a fighting force that is necessary in peacetime as it is in wartime.⁷ James noted already in 1975:

“The ultimate objectives of the military in time of peace is to prepare for war... 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 and instil discipline in those who they command. In doing so there must be correction and the punishment of individuals...”⁸

³ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 1 SA 1 (CC) par 31 (here after referred to as the *Potsane* judgment).

⁴ For a general discussion on the historic background of military law, see Oosthuizen, MM. 1990. Die geskiedkundige agtergrond van die militêre reg. *THRHR*, 53:211-224. Oosthuizen (1987:86) refers to the broad and narrow definitions of military law (Oosthuizen, MM. 1987. *Militêre reg en tersiêre regsopleiding*. *Obiter*, 82-91). This article focuses on the narrow discipline orientated definition, also referred to as the criminal law for persons in uniform. See also Botha, CJ. 1994. ‘Jungle Justice’ and Fundamental Rights: Military Courts in a Future Constitutional Dispensation. *SA Publikereg / Public Law*; 313-321.

⁵ Government Notice R747 in Government Gazette No 20165 of 11 June 1999 (here after referred to as the *Rules*).

⁶ First Schedule to the Defence Act 44 of 1957.

⁷ The provisions of the MDC were amended and the MDSMA promulgated after a challenge to the constitutionality of the previous rules, as contained in the then applicable Defence Act 44 of 1957 and MDC. See *President, Ordinary Court Martial v Freedom of Expression Institute* 1999 4 SA 682 (CC); and *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 2 SA 471 (C).

⁸ James, BV. 1975. Canadian Military Criminal Law: An Examination of Military Justice. *Chitty's Law Journal* 23: 120 - 123 as cited with approval in the *Potsane* case and *S v Tsotsi* 2004 2 SACR 273 (E) at 276G-H (here after referred to as the *Tsotsi* judgment).

Although a soldier becomes subject to this system, he does not cease to be a citizen and his rights, as a citizen, remains relevant, albeit in amended form.⁹ But, whatever legislation is applicable; it must still be interpreted in light of the supreme law of the country, the Constitution.¹⁰

This article focuses on the independence and impartiality of the military courts as evaluated against section 34 of the Constitution and with reference to foreign jurisprudence. Another issue noted is whether the military system meets the constitutional requirements for accused and detained persons and the right to a fair trial, as set out in section 35 of the Constitution;¹¹ and further includes the two reported court challenges to the MDSMA: firstly, the challenge to the constitutionality of the separate prosecuting authority; and secondly, the judgment on the post-trial possibilities of review or appeal where a person, who has been found guilty by a military court and sentenced, is dissatisfied with the court's decision.

Military courts – independent and impartial ?

“Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to the state of mind or attitude of the tribunal in respect of the issues and the parties in a particular matter. The word ‘impartial’ connotes absence of bias, actual or perceived. The word ‘independent’ reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.”¹²

⁹ A full discussion of this point falls outside the scope of this article and is the focus of further research.

¹⁰ Any law or conduct inconsistent with the Constitution is invalid (s 2).

¹¹ Many other constitutional rights could have been included in the article such as the rights to dignity and privacy, the prohibition on cruel, inhumane and degrading treatment and punishment, but have been excluded for practical reasons.

¹² Le Dain J in *Valente v The Queen* [1985] 2 S.C.R. 673 685 as cited with approval in *Sv Généreux* (1992) 88 DLR (4th) 110 (SCC) par 37 (here after referred to as *Généreux*).

Introduction

The Constitution confirms the principle of a separation of powers between the legislature, the executive and the judiciary. An independent judiciary is crucial to ensure that the law is enforced without fear and favour and it has been found, by the Constitutional Court, to be in itself a constitutional principle and norm which goes beyond, and lies outside, the Bill of Rights. Judicial independence is thus not subject to the section 36-limitation clause in the Constitution.¹³ This independence of the judiciary depends on objective conditions that ensure that the exercise of judicial power is not directed or influenced by others.¹⁴ The Canadian case of *R v Généreux*¹⁵ puts it well: to secure judicial independence, no outsider, be it the government, pressure groups, individuals or even another judge, should interfere in fact or attempt to interfere with the way in which the judge conducts his case and makes his decisions.

The question to be asked is whether the South African Military Court system adheres to the requirements of independence and impartiality. To answer this, it must be determined what makes a court independent. Steytler notes that the principles of judicial independence are defined by (1) security of tenure;¹⁶ (2) security of salary and pension; and (3) administrative (also called institutional) independence.¹⁷ The South African courts have accepted these principles although the application thereof in fora other than the courts has been less strict.¹⁸ This article will use this test, as well as the opinions expressed in foreign jurisprudence, to decide whether the military courts in South Africa can be regarded as independent.

¹³ *Van Rooyen v The State* 2002 5 SA 246 (CC) par 35.

¹⁴ Steytler, N. 1998. *Constitutional Criminal Procedure*. Durban: Butterworths, 260 (here after referred to as *Steytler*).

¹⁵ par 38.

¹⁶ The aim of security of tenure is a fixed appointment or appointments until date of retirement and thereby safeguarding removal in a discretionary and arbitrary manner (Steytler 1998: 261).

¹⁷ See *Généreux* par 83 where the same test was used arising from the case of *Rex v Valente* [1985] 19 C.R.R. 354 (SCC). See also Labuschage, JMT. 2000. Regterlike onafhanklikheid en die vraagstuk van objektiewe regspleging. *SA Publikereg / Public Law*, 15: 208-213.

¹⁸ *De Lange v Smuts NO* 1998 3 SA 785 (CC); *SANDF Union v Minister of Defence* 2004 4 SA 10 (T); *Expression Institute v President, Ordinary Court Martial* 1999 2 SA 471 (C); and *Van Rooyen v De Kock NO* 2003 2 SA 317 (T). See discussion of the last mentioned case by Labuschage, JMT. 2004. Grondwetlike riglyne vir onafhanklike regspleging. *THRHR*, 67:315-318.

The South African Military court system

General

The MDSMA defines a “military court” as one of the following: a Court of Military Appeals (CMA), the Court of a Senior Military Judge, the Court of a Military Judge and the Commanding Officer’s Disciplinary Hearing.¹⁹ The composition of the various courts and period of appointments of the presiding officers are set out in the MDSMA as well as each court’s jurisdiction over persons, offences and with regard to sentencing.²⁰ Section 19 specifically states that every military judge must exercise his authority independently and subject only to the Constitution and the law and without fear, favour or prejudice.

It is notable that in the South African military legal system the judges fall under the Director: Military Judges which are separate from the other three divisions headed by various Directors: one each for Military Prosecutors, Military Defence Counsels and Military Judicial Reviews.²¹ All these are distinct from one another and also from the office of the Adjutant General,²² generally referred to as Legatsos, *inter alia* 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.²³

Composition, appointment and removal

The CMA is composed of firstly, one or three judges, serving or retired, secondly a legally qualified Permanent Force member, and lastly one person experienced in exercising command in the field.²⁴ Appointments may be made on a part-time basis and may include members of the Reserve Force.²⁵ The appointment of any judge is made by the Minister of Defence on recommendation of the Adjutant General of a fit and proper person with the required legal qualifications.²⁶ Their

¹⁹ MDSMA (s 1). The Commanding Officer’s Disciplinary Hearing is disregarded for purposes of the article, as is the Board of Inquiries (MDC (s 136)).

²⁰ MDSMA (chapter 2).

²¹ MDSMA (s 13(1)). All the role players take an oath before commencing duty (s 18(1)).

²² MDSMA (s 27). It is the duty of this office to *inter alia* recommend the various appointments of the Directors, the military judges and senior military judges and assign the other role players in the military court system (MDSMA (s 14)). The Adjutant General is appointed in terms of the MDSMA (s 27).

²³ MDSMA (s 28).

²⁴ MDSMA (s 7(1)).

²⁵ MDSMA (s 7(5) and 7(8) respectively).

²⁶ MDSMA (s 14). S 13(2) notes that senior military judge or military judge must be appropriately qualified by holding a degree in law.

terms of appointment (assignment) are either fixed or coupled to a specific deployment, operation or exercise.²⁷ The Minister, acting upon the recommendation of the Adjutant General, may also remove a person from the function assigned to him for the reason of that assignee's incapacity, incompetence or misconduct, or at his own written request.²⁸ The CMA may hear appeals and reviews and it is important to note that a finding may include the possibility to substitute any finding of the court of first instance that the record supports.²⁹

With regard to the other military courts, the compositions are as follows: a Court of a Senior Military Judge consists of an officer of a rank not below that of colonel or its equivalent and with not less than five years' experience³⁰ and a military assessor.³¹ Where the charge is one of murder, treason, rape or culpable homicide committed beyond the borders of the Republic, or is a contravention of section 4 or 5 of the Code,³² the court consists of three senior military judges under the presidency of the senior of those judges.³³ Appointment and removal are the same as with the CMA.

A Court of a Military Judge consists of an officer of not less than field rank³⁴ and with not less than three years experience³⁵ and a military assessor.³⁶ Appointment and removal are the same as with the CMA.

²⁷ MDSMA (s 15). This is different from the American system of random selection for their court martial appointments. See discussion in Saunders, JP. April 2000. *The Emperor's New Clothes: Developments in Court-Martial Personnel, Pleas and Pre-Trial Agreements and Pre-Trial Procedures. Army Lawyer*: 14 at 15.

²⁸ MDSMA (s 17).

²⁹ Section 8. See discussion *supra*.

³⁰ The experience required is as a practising advocate or attorney of the High Court of South Africa, or five years' experience in the administration of criminal justice or military justice (MDSMA (s 9(1)(a))).

³¹ MDSMA (s 9(1)(a)).

³² MDC (s 4) refers to offences endangering the safety of forces and MDC (s 5) to offences by a person in command of troops, vessels or aircraft.

³³ MDSMA (s 9(3)).

³⁴ Field rank is defined as any rank not lower than that of major or any equivalent rank (sec 1 of MDC).

³⁵ The experience refers to experience as a practising advocate or attorney of the High Court of South Africa or three years experience in the administration of criminal justice or military justice (MDSMA (s 10)).

³⁶ MDSMA (s 10).

Finality of finding and sentence

The finding of a military court is final and subject only to the appeal and review procedures provided for in the legislation to the CMA.³⁷ Section 97 of the MDC states that a finding of not guilty is not subject to confirmation and is effective when announced in an open court. There is no suggestion in the legislation that confirmation of a sentence is required by another person or institution where a person is found guilty in a military court.³⁸

The next section of this article deals with several foreign judgments and notes how these courts deal with the issue of independence in the military court system.

Foreign decisions

It is not uncommon for military courts worldwide to use military personnel and the arguments relating to the lack of independence in the military courts are, therefore, not unique. It has been argued³⁹ that as military personnel operate within a rank structure that is inter-connected, and as the military court is broadly controlled from within this structure, there can be no true independence of a military court from the structure itself. The distinction between the administrative, prosecuting, and judicial authority is not clear enough, as persons within the military system also appoint the members of the court. The only way, in which a military court could be independent from the military as an institution, is to be totally separated from each other.⁴⁰

³⁷ See discussion in par 5.

³⁸ There is reference in the MDC to a person awaiting confirmation of his sentence, but it is presumed that a subsequent legislative change removed this requirement (s 121(4)). Rule 69(1) provides that every finding, whether a conviction or an acquittal, sentence or order by a military court must, as soon as possible after the announcement thereof, be promulgated either on parade according to the custom of the service or in the manner that the accused's commanding officer may direct, and be published in unit orders. This is however not a confirmation of the sentence and serves a publication purpose only.

³⁹ *Morris v The United Kingdom* (Application no 38784/97) dated 26 May 2002, par 39-47 (here after referred to as *Morris*). <http://cmiskp.echr.coe.int> (Accessed 26 April 2005); *Généreux* par 58.

⁴⁰ For a discussion of the American legal situation, see Burrell, RB. 2000-May. Recent Developments in Appellate Review of Unlawful Command Influence. *Army Lawyer*, 1; and Fulton, MN. 2003-June. Never have so many been punished so much by so few: examining the constitutionality of the new special court-martial. *Army Lawyer*, 1.

Another argument is the lack of security of tenure by a presiding officer that also generally fulfils other legal duties within the system.⁴¹ A few foreign cases highlight the problems.

The judgements referred to hereunder relate mainly to section 6§1 of the European Convention of Human Rights:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial* tribunal established by law...”⁴²

In the 1997 matter of *Findlay v United Kingdom*⁴³ the European Court of Human Rights (ECHR) held that the misgivings of the accused about the independence and impartiality of the general court martial were objectively justified. These concerns centred on the various roles played by the so-called convening officer. He was prosecutor, but at the same time the person appointing the members of the court martial. These presiding members were subordinate in rank to him and thus fell within his chain of command. This officer also had the power to dissolve the court martial before or during the trial and any verdict and sentence was not effective until ratified by him.⁴⁴ The role of the convening officer was perceived to interfere with the independence of the court-martial system. The court martial had, objectively, the appearance of being unfair and did not accord with the principle that justice must be seen to be done.⁴⁵ This case was fundamental to a legislative change in the United Kingdom.⁴⁶

⁴¹ In *Généreux* it was argued that as the judge, after serving as a presiding officer, returns to his normal legal duties and that there is no guarantees that his career would not be affected by decisions he made in favour of the accused. The court found that this was not sufficient to be construed as a lack of institutional independence (par 119).

⁴² My italics. Other international documents also contains a similar provision, including s 14 of the International Covenant on Civil and Political Rights and s 11(d) and (f) of the Canadian Charter of Rights and Freedoms.

⁴³ 25 February 1997 Reports of Judgments and decisions 1997-I no 30. This judgment was followed in the cases of *Moore & Gordon v The United Kingdom* (Application numbers 36529/97 and 37393/97) dated 29/09/1999 and *Smith & Ford v The United Kingdom* (Application numbers 37475/97 and 39036/97 dated 29/09/1999. <http://cmiskp.echr.coe.int> (Accessed 26 April 2005).

⁴⁴ *Morris* par 60 (pp 281-82 §§ 74-78 of the *Findlay* case).

⁴⁵ Roger, APV. 2002. The Use of Military Courts to Try Subjects. *International and Comparative Law Quarterly* 51: 967 at 977 (here after referred to as *Roger*).

⁴⁶ This matter lead to the adoption of the Armed Forces Act, 1996 that commenced on 1 April 1997. For a discussion see *Roger* 2002: 978.

The later case of *Morris v The United Kingdom* in the same court challenged the (amended) British court-martial system. Morris alleged that he was denied a hearing before an independent and impartial tribunal on account of various structural defects in the court-martial system.⁴⁷ He was a soldier in the British Army and was charged with being absent without leave contrary to the legislation, resulting in his dismissal from the army and nine months detention. As his application for a review was refused, and as his application for leave for appeal denied, he approached the ECHR for relief. On principle, the court noted that the composition and appointment period of a military court are some of the aspects in deciding whether the court is independent or not. Other factors it took into consideration included the existence of statutory and other guarantees against outside pressures and whether the body presents an appearance of independence.⁴⁸ Morris was, however, not on the facts successful on any of these points.

Where the ECHR did however find that the independence of the court martial was questionable, was with the fact that a non-judicial authority automatically reviews all convictions and sentences. This authority could overturn any guilty finding, and also make a finding of guilt which could have been reached by the court martial and could substitute any sentence which would have been open to the court martial, not being more serious than the sentence originally passed. The court considered the fact that the review was conducted by a non-judicial authority as contrary to the principle of independence of the court. The court was not convinced by the argument that the existence of the review served the interests of the convicted soldiers or by the essentially fair procedure followed by the authority when conducting the review.⁴⁹

In a subsequent House of Lords decision on these facts, it was however noted that a review within the system cannot work otherwise than to the advantage of the accused. The reviewing authority cannot substitute the conviction for a more serious offence, nor can it substitute a sentence for one that is more severe. The House of Lords disagreed with the ECHR and found that it was difficult to

⁴⁷ Other arguments included that his hearing was not fair due to the actions of the prosecuting authorities and his own defending council. These arguments are not relevant for this discussion.

⁴⁸ *Morris* par 58. Some reservations were expressed about the possibility of command influence (Roger 2002: 978).

⁴⁹ *Morris* par 75. In the USA an argument has been made out for the abolishment of the automatic appeal: Lippert, JD. 2004. Automatic appeal under UCMJ Art 66: time for a change. *Military Law Review*, 182:1.

understand how the role of a reviewing authority can undermine or reduce its independence or impartiality.⁵⁰

The *Morris* case referred to two other matters: *Engel v The Netherlands*⁵¹ where the ECHR found that the Dutch Supreme Military Court, comprising of two civilian judges and four military officers, was an independent and impartial court and noted that "...the Convention will only tolerate such courts as long as sufficient safeguards are in place to guarantee their independence and impartiality."⁵² In the Netherlands the appointment of the military members was usually the last in their careers and they were not under the command of any higher authority or under a duty to account for their decisions to the service establishments.⁵³ In *Incal v Turkey*⁵⁴ the ECHR identified certain other safeguards for independence and impartiality – that the military judges should have the same training as their civilian counterparts and enjoyed the same constitutional safeguards. Aspects that the courts identified that made their independence questionable were the inter-connectiveness of the military system as the presiding servicemen were subject to army discipline and assessment reports; that their appointments were made by administrative authorities, and that their terms of office was only four years and subject to renewability.⁵⁵

In *R v Spear; R v Boyd*⁵⁶ the ECHR, and the House of Lords subsequently, dismissed the argument that the permanent presidents on a court martial violates the principles of independence and impartiality; their training was appropriate, their appointment not threatened by arbitrary removal and their operation outside the ordinary chain of command. This was a confirmation of the *Campbell & Fell v United Kingdom*⁵⁷ finding that the irremovability of the judges during their terms of office must in general be considered as a corollary of their independence, although the absence of a formal recognition of such irremovability does not in itself imply a lack of independence, provided that it is recognised in fact and that other guarantees are present.

⁵⁰ *R v Spear; R v Boyd; R v Williams* (2002) par 13.

⁵¹ Judgment of 8 June 1976, Series A no 22 as cited in *Morris* par 38.

⁵² *Morris* par 59.

⁵³ *Morris* par 68.

⁵⁴ 9 June 1998, Reports 1998-IV pp 1571-72 § 67 as cited in *Morris* par 65.

⁵⁵ pp 1572 § 68 as cited in *Morris* par 65.

⁵⁶ [2001] Court of Appeal, Criminal Division (England and Wales) and [2002] UKHL 31 18 July 2002 respectively.

⁵⁷ 28 June 1984, Series A no 80 p 40§ 80 as cited in *Morris* par 68.

The Canadian Supreme Court, in *R v Généreux*,⁵⁸ confirmed firstly that where the presiding officer does not have security of tenure the requirement of independence is not met as there was no objective guarantee that his career as military judge would not be affected decisions tendered in favour of the accused rather than the prosecution.⁵⁹ Secondly, doubt was cast where the appointments were made in-house with close ties between the members.⁶⁰ The judgment was not unanimous and the dissenting judge disagreed with the argument that a judge cannot be free from arbitrary interference from the executive merely because the executive appointed him. He stated that this fact is not enough to secure a violation of the principle of independence.⁶¹

The two most recent cases heard before the ECHR were *Cooper v The United Kingdom and Grieves v The United Kingdom*.⁶² Both cases related to the independence and impartiality of court-martials: the first of the RAF and the other the Royal Navy. In *Cooper* the court firstly rejected the argument that service tribunals could not, by definition, try criminal charges against service personnel and be consistent with the requirements of independence and impartiality.⁶³ Secondly, the court stated that there was no reason to doubt the genuineness of the separation of the prosecuting, convening and adjudicating roles in the court martial process or the independence of the decision-making bodies from the chain of command, rank or other service influence.⁶⁴ Thirdly, there were no grounds for questioning the independence of the Air Force judge advocate as he was a civilian, appointed by a civilian. It was noted that the presence of a civilian with such qualifications and such a central role in the court martial proceedings constituted one of the most significant guarantees of the independence of the proceedings.⁶⁵ Fourthly, with regard to the ordinary members, the court found their *ad hoc* appointment and general junior rank did not in itself undermine their independence, as there were safeguards against outside pressures, namely the presence of the other judges and a prohibition on reporting on members' judicial decision-making and the briefing notes distributed to

⁵⁸ [1992] 1 SCR 259. In this case a new trial was ordered because of the lack of independence of the previous tribunal (par 106).

⁵⁹ It was argued that a person might not want tenure, as it would cut him off from other promotion opportunities in his career (*Généreux* par 134).

⁶⁰ *Généreux* par 107.

⁶¹ *Généreux* par 182.

⁶² Application 48843/99 and 57067/00 respectively dated 16 December 2003. <http://cmiskp.echr.coe.int>. (Accessed 26 April 2005) (here after referred to as *Cooper & Grieves* respectively).

⁶³ *Cooper* par 110.

⁶⁴ *Cooper* par 115.

⁶⁵ *Cooper* par 117.

the members.⁶⁶ As with the *Morris* case, the court referred to the anomalous feature of the non-judicial review authority and their rights to interfere with findings made. However, the court found that the role of the reviewing authority did not undermine the independence of the court-martial, as the final decision in the proceedings always would lie with a judicial body.⁶⁷ The court concluded that the proceedings were not unfair and did not constitute a violation of Art 6§1.

In *Grievés* the court noted the differences between the Navy and the Air Force systems. Of relevance here is that the post of Permanent President did not exist in the Navy and that the President of each court-martial is appointed for each court-martial convened. The court considered *inter alia* that the absence of a full-time permanent president, with no hope of promotion and no effective fear of removal and who was not subject to report on his judicial decision-making, deprived the Royal Navy courts-martial of an important contribution to the independence of an otherwise *ad hoc* tribunal.⁶⁸ The second issue related to the fact that unlike in the Air Force, where the Judge Advocate is a civilian working full time for the Judge Advocate General, himself a civilian, the Royal Navy judge advocates, when not sitting in a court martial, carries out regular naval duties and are appointed by a naval officer, the Chief Naval Judge Advocate. Although the court found that this could not necessarily be seen as interference in the independence of the court-martial, the lack of a civilian in the pivotal role deprived the navy of a significant guarantee of independence.⁶⁹ The court found that Mr Grievés's misgivings about the independence and impartiality of his court martial could be considered to be objectively justified, making it unfair and in violation of Art 6§1.⁷⁰

Evaluation

It has been submitted that the composition of the CMA is in accordance with the principles of independence and impartiality.⁷¹ The aim of this section is to re-evaluate this statement in light of the foreign decisions as it is submitted that the independence of the military court judges, with the exception of the CMA, is not be above reproach in light of the test for independence discussed above.

⁶⁶ *Cooper* par 119-126.

⁶⁷ *Cooper* par 133.

⁶⁸ *Grievés* par 75 as read with par 89.

⁶⁹ *Grievés* par 82-83.

⁷⁰ *Grievés* par 91. The other arguments raised in this matter are ignored for the purposes of this article.

⁷¹ See Labuschagne, JMT. 2003. Onafhanklike en onpartydige regspleging in militere verband. *Obiter*. 24(2): 479-489.

Security of tenure

The first (and second) issue is security of tenure (as read with the second requirement of security of salary and pension) in that there should not be the possibility of arbitrary removal of a presiding officer or changing of benefits.⁷² If the *Incal* matter is followed (where the court found that a four-year renewable term renders the system non-independent), it could be argued that the South African military judicial system may not be regarded as independent, as the appointments are not permanent but for fixed periods or coupled with specific operations. In consideration of the *Campbell & Fell* and *Spear & Boyd* matters (were the possible removal of the presiding officers might point up non-independence), the South African system might also fall short. Lastly, the 'objective guarantee' required in *Généreux* that the career of a military judge might not be affected by the decision he makes, does also not exist in the South African system and may be interpreted as the military courts not being independent. Having said this, it might be argued that there are guarantees within the South African system to make the system independent: some separation of powers of the various role-players; training; review by a judicial authority to mention a few. In conclusion, it is submitted that it might be expedient to change the compilation of the courts to either include a permanent member (as in *R v Spear; R v Boyd* and *Cooper*) or alternatively a civilian (as in *Cooper*) to appoint members so as to prevent any challenges in this regard.

With regard to temporary appointments, Steytler argues that the temporary appointment of judicial officers (in civilian courts), while essential for the effective functioning of the courts, is often at odds with the carefully crafted rules securing the independence of the judiciary as there is a possibility that the temporary employees would be induced to execute their judicial function to the liking of the appointing authorities. It can, according to him, create an objective perception that independence is lacking. The Constitutional Court in the *First Certification* judgment however found that an acting appointment of a judge is adequately protected in the Constitution.⁷³ Can it similarly be argued that a temporary appointment of a military judge therefore is also adequately protected by the Constitution?

⁷² The focus in this section is on the security of tenure only.

⁷³ *In re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC). See Steytler 1998: 125-132. Steytler (1998: 132) argues that the same can be said about acting appointees in the lower courts.

Institutional/administrative independence

With regard to the third requirement of administrative independence the guidelines by the foreign courts are especially helpful in as far as it relates to the close link between the members of the military courts and the military itself. In *Findley* it was argued that there should be a clear distinction between the persons administrating the process and the prosecuting authority. In the South African system there seems to be some distinction, although it might be argued that there is not a clear separation between the administrative and managerial aspects on the one side and the judicial powers on the other side – especially by the Adjudant General who makes recommendations regarding the appointment of judges; and the Director: Military Judges who has both administrative and judicial functions. This area may have to be addressed in future. The military prosecuting authority in South Africa can however not dissolve the court as it could in the *Findley* matter. The court in the *Findley* case also found that the fact that there was a requirement to ratify the judgment of the court, suggested that the court was not independent. There is no such requirement in the current South African system.

The ECHR judgement of *Morris* found the review by a non-judicial authority to be questionable. As is discussed later, there is an automatic review by a judicial body in the South African system.⁷⁴ However, the fact that the reviewing authority could amend the finding of the court martial was seen, in *Morris*, as an indication that the court is not independent. On this point the House of Lords disagreed, as did a subsequent ECHR decision in *Cooper*.⁷⁵ The South African law is similar on this point in that a CMA may substitute the finding of the court with any finding which the evidence on record supports beyond a reasonable doubt. It is argued that the position taken in the House of Lords and the *Cooper* decisions is to be preferred in the light of the compilation of the South African CMA. This position seems to have been endorsed by the South African court in the *Mbambo* case.⁷⁶

Finally, one can only agree with the conclusion reached by Fay.⁷⁷

“In a military organisation ... 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

⁷⁴ S 13(2)(b) of the MDSMA.

⁷⁵ *Cooper* par 133.

⁷⁶ 230A-C. See 5.2 hereunder.

⁷⁷ Fay, JB. 1975. Canadian Military Criminal Law: An Evaluation of Military Justice. *Chitty's Law Journal* 23: 228 at 248 as cited with approval in *Généreux* (par 64).

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 could only be achieved by such severance), the advantage of independence of the judge 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.”

It is submitted that the South African military justice system in essence provides for an independent judiciary and that the mix of military and judicial expertise is essential for the proper adjudication of these matters. Small changes in the composition of the lower military courts could remove any possible challenge based on lack of independence.

Impartiality

“To assess impartiality ... the appropriate frame of reference is the ‘state of mind’ of the decision-maker”.⁷⁸

When determining the impartiality of the military court, the ECHR in *Morris* looked at two specific aspects: firstly, that the court must be subjectively free from personal prejudice and bias; and secondly, it must be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt as to its impartiality.⁷⁹ The court eventually found that the mere fact that the appointment of the members of the court martial was made within the military system was not reason enough to doubt its impartiality.⁸⁰

In the South African scenario the rules of natural justice, similar to the above requirements, determine that there should not be actual bias or apparent bias.⁸¹ In the case of *Mönnig v Council of Review*⁸² the three accused were employed

⁷⁸ *Généreux* par 38.

⁷⁹ *Findlay* 244-245; *Morris* par 58; *R v Spear*; *R v Boyd*; *R v Williams* (2002) par 8.

⁸⁰ *Morris* par 103.

⁸¹ Burns, Y. 2003. *Administrative Law under the 1996 Constitution*. 2nd edition. Durban: Butterworths Lexis Nexis: 172-173. For a discussion of a USA case dealing with allegations of bias and the independence of their military courts including mechanisms on how to resolve such issues, see Baum, JH & Barry, KJ. 1989. United States Navy-Marine Corps Court of Military Review v Carlucci: A Question of Judicial Independence. *Federal Bar News and Journal* 36: 242.

in the Communication Operations Department (Comops) that was at the time involved, with the sanction of higher authority (although this was later denied by counsel), in a covert operation designed to vilify and discredit the End Conscription Campaign organisation (ECC), an organisation whose proclaimed objectives were to achieve an end to conscription into the South African Defence Force (SADF) as it then was and to oppose militarisation.⁸³ The accused, when they learned about the campaign, were ‘morally outraged’ as it was aimed at a legitimate organisation and the means employed according to them both illegal and immoral. They decided to expose the operation and drafted a document setting out the relevant information and describing the SADF’s intelligence system. When the accused were found in possession of the documentation, they were charged with having conspired to disclose SADF documentation and information classified as secret or confidential, to unauthorised persons.⁸⁴

The accused argued that the court martial could not be impartial as all the members of the court martial consisted of high-ranking SADF officers that would be placed in an intolerable position, as they have to decide an issue, which required them to pronounce upon the legitimacy of a highly sensitive project, which had been initiated and directed by other high-ranking officers.⁸⁵ The court noted that the question to ask is whether an independent and objective observer would think that the court martial, initiated and directed by military personnel was truly impartial. The court set the decision aside as there was a high risk of an unfair hearing and found that a reasonable lay observer would gain the impression that there is a real likelihood that the presiding officer was biased.⁸⁶ In terms of legislation, the civil courts and military courts enjoyed concurrent jurisdiction with regard to MDC offences and the trial was to be brought before a civilian court.⁸⁷

It should, however, be borne in mind that the facts in this case were unique and the arguments used in this matter would not be applicable to the average serviceman prosecuted for an offence under military law. Another case that might be useful in a military scenario is the case of *Ciki v Commissioner of Prisons*,⁸⁸ relating

⁸² 1992 3 SA 482 (A).

⁸³ *Mönnig* 488C-E.

⁸⁴ *Mönnig* 488E-H.

⁸⁵ *Mönnig* 490G-I.

⁸⁶ *Mönnig* 492F-G.

⁸⁷ *Mönnig* 493B-C. See s 105 Defence Act 44 of 1957 and *S v Tsotsi* 2004 2 SACR 273 (E) 277 C-D.

⁸⁸ 1992 2 SA 269 (E). See discussion by Labuschagne, JMT. 1993. *SA Publikereg / Public Law*, 157-159.

to hearings of warders by superior officers, where the court found that where bias flows from form or manner of procedure prescribed by the legislation, applicants cannot complain thereof as such bias is unavoidable within the dictates of the legislation: bias is accordingly not institutional or departmental because it is unavoidable. However, the reasonable suspicion of bias test still needs to be applied and where the test is satisfied, a decision of a presiding officer refusing to recuse himself can and will be set aside.⁸⁹

Impartiality in the military system is specifically addressed by rule 35 of the MDC⁹⁰ that makes provision for the recusal of a military judge and assessors in certain instances: where the presiding judge or the assessor (a) is, or during a trial becomes, related to any accused or the complainant by affinity or consanguinity in the first or second degree; (b) has, or during a trial gains, such knowledge concerning the facts of the case to be heard by the court that his or her decision is likely to be prejudiced thereby; (c) bears any accused, or during a trial develops towards any accused, such animosity as is likely to prejudice his or her decision; or (d) signed as a witness on the accused's election to be heard at a commanding officer's disciplinary hearing. The rules further create an opportunity for the accused to object to any judge or assessor and provides for the procedure to deal with such a request.⁹¹

It is submitted that problems relating to a lack of impartiality are adequately catered for in the military legislation. Lastly, it should be noted that impartiality must be assessed on the facts.⁹²

Independent military prosecuting authority – constitutional?

The only South African constitutional challenge to the MDSMA related specifically to the separate prosecuting authority contained within the Act: *Minister of Defence v Potsane*.⁹³ The constitutional attack was not against the separate

⁸⁹ *Ciki* 272. See also *Dumbu v Commissioner of Prisons* 1992 1 SA 58 (E).

⁹⁰ See also rule 78 for the recusal of a member of the CMA.

⁹¹ Rule 36.

⁹² *S v Jaipal* (Constitutional Court) unreported case number CCT 21/04 dated 18 February 2005; and *Jaipal v S* [2004] 3 All SA 409 (SCA). See also Bertelsman, E; Walker, C & Meyer, L. 2004. *Criminal Procedure in the Magistrate's Court*. Loose-leaf issue 3. Durban: Butterworths Lexis Nexis: 1-30 (here after referred to as Bertelsman).

⁹³ 2002 1 SA 1 (CC).

military justice system, nor the hierarchical structure of the military courts, but only directed against one component, namely the prosecuting branch.⁹⁴

The argument was that section 179 of the Constitution created the office of the National Director of Public Prosecutions (NDPP) and vested in them exclusive prosecutorial authority.⁹⁵ To have a separate military Director of Prosecutions, it was argued, is unconstitutional and in conflict with this section as well as an unjustified infringement of the equality rights guaranteed in section 9 of the Constitution.⁹⁶

The court disagreed and found, on a historical reading of the section, that although section 179 speaks of a ‘single authority’ it did not intend to mean ‘exclusive’ or ‘only’, but meant to denote a singular ‘one’.⁹⁷ The court further noted that there were insurmountable problems for the NDPP if it was to control the prosecution within the military context as well, as the two prosecuting authorities serve fundamental different public objectives. Military discipline is not about punishing crime or maintaining and promoting law, order and tranquillity in society, but about having an effective military force capable and ready to protect the territorial integrity of the country and the freedom of its people.⁹⁸ The decision to prosecute in a military scenario is more influenced by *inter alia* policy considerations, interpersonal relationships, and morale efficiency. It would be unfair for a civilian prosecutor to take such a decision – for both the prosecutor and the accused and that is clearly not what section 179 intended.⁹⁹

The court lastly found that the differentiation between soldiers and civilians is not an infringement of their rights to equality, but the differentiation was rationally connected to the legitimate governmental purpose of establishing and maintaining a viable military justice system. The differentiation was, therefore, not unfair discrimination within the meaning of section 9(1) of the Constitution. In short, the court found the challenged sections to be constitutional.¹⁰⁰

⁹⁴ *Potsane* par 4.

⁹⁵ S 179(1) reads: “There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament ...”

⁹⁶ *Potsane* par 3.

⁹⁷ *Potsane* par 26.

⁹⁸ *Potsane* par 38.

⁹⁹ *Potsane* par 40-41.

¹⁰⁰ *Potsane* par 44.

Constitutionality of the military criminal justice system: the rights of arrested, detained and accused persons

Du Plessis J in *Mbambo v Minister of Defence*¹⁰¹ found that an accused person charged in terms of the military criminal justice system is an accused as envisaged in the Constitution.¹⁰² The Bill of Rights-rights must thus be present within the military criminal justice system for the MDSMA and related legislation to be constitutional. It is submitted that on the face of it the military legislation expressly adheres to the constitutional requirements as set out in section 35(1)–(3) of the Constitution.¹⁰³ There is only one omission in that the military legislation does not expressly provide for the right to silence except in relation to preliminary investigations.¹⁰⁴ From a clarity point of view it would be preferable for the legislation to be amended to expressly include the right to silence, although it is submitted that as this right cannot, on constitutional grounds, be excluded, it must currently be read into the legislation.

Post-trial procedures

Internal military review and appeal procedures

Court of Military Appeal (CMA)

The CMA exercises full appeal and review competencies in respect of the proceedings of any case or hearing conducted before a military court. This court may, after due consideration of the record of the proceedings and representations submitted to it or argument heard by it (a) uphold the finding or the finding and the sentence; (b) refuse to uphold the finding and set the sentence aside; (c) substitute for the finding any finding which the evidence on record supports beyond a reasonable doubt and which could have been brought on the charge as a competent alternative verdict by the military court, or any other law; or (d) if it has upheld the finding, or substituted a finding, vary the sentence.¹⁰⁵

¹⁰¹ 2005 (2) SA 226 (TPD) (here after referred to as *Mbambo*).

¹⁰² *Mbambo* 229D-E.

¹⁰³ A full discussion of this section falls outside the scope of the article and is the focus of further research.

¹⁰⁴ S 30(4)(e) of the MDSMA.

¹⁰⁵ MDSMA (s 8).

This competency of the CMA is in line with section 35(3)(o) of the Constitution which states that every accused person has the right to appeal to, or to be reviewed by a higher court.

Difference between an appeal and a review

From the outset it should be noted that there is a distinct difference between an appeal and a review as they serve different purposes. A review is generally about an irregularity and based on one of four grounds: absence of jurisdiction of the court; interest in the cause, bias, malice or corruption on the part of the presiding officer; gross irregularity in the proceedings; or an admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.¹⁰⁶ An appeal is generally applied for where the person is dissatisfied with his/her conviction and/or sentence.

MDSMA procedure

Chapter 6 MDSMA,¹⁰⁷ dealing with post-trial procedures, *prima facie* makes provision for both review and appeal procedures with the heading “Appeal and Review”.¹⁰⁸ In terms of section 33(7), when a military court has convicted and sentenced an accused, it must inform him of (a) the review authority to whom the record of proceedings will be submitted for review and of the accused's right to submit written representations to that authority within the time limits prescribed in this Act or in a rule of the Code; and (b) his or her right to approach a Court of Military Appeals for relief. This subsection implies a right to appeal to the CMA. However, in all these sections the legislation refers to “review” of a decision only. Not once, apart from the heading, is the right to “appeal” expressly provided for in the MDSM A. The review powers are however wide enough to include both an appeal and a review – to the same body and in terms of the same procedure.

Every person who is convicted and sentenced by a military court has the right to the 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.¹⁰⁹ Three possibilities exist.

¹⁰⁶ Section 24(1) of the Supreme Court Act 59 of 1959.

¹⁰⁷ This chapter must be read with chapter 13 of the Rules.

¹⁰⁸ The Act contains specific provisions regarding the detention of the accused pending the review of his case, not relevant for current purposes (ss 9 – 11).

¹⁰⁹ Section 25. There is no right of review where a person is acquitted (s 34(1)). It is interesting to note that in the UK for the year 2000, there were 455 cases reviewed, 107 after petition and the remaining 348 without petition. In the petition cases 19 sentences were mitigated and three quashed. In the non-petition cases, five were mitigated and three overturned. (*R v Spear*; *R v*

Firstly, there is an automatic review to a CMA of every sentence of imprisonment, including a suspended sentence of imprisonment, cashiering,¹¹⁰ discharge with ignominy,¹¹¹ dismissal or discharge.¹¹² In both these cases reasons must be furnished in writing.¹¹³

Secondly, any sentence imposed for a lesser offence and every order made by a military court is subject to the process of review by a review counsel. The Review Counsel may uphold the finding and the sentence, but where it is of the opinion that the finding or sentence should not be upheld¹¹⁴, the record is submitted, together with his or her views on the case, to the Director: Military Judicial Reviews, who may either exercise the powers conferred on a CMA or refer the case to a CMA.¹¹⁵

Thirdly, an offender may also apply for the review of the proceedings of his or her case by a CMA.¹¹⁶

In all these cases, a convicted person may furnish the reviewing body with written representations, which together with the record of proceedings, must be considered by such review authority.¹¹⁷

Boyd; R v Williams (2002) par 28). In South Africa, the statistics are as follows for 2002: of the 210 reviewed cases, 82 were mitigated and 10 partially or totally overturned.

¹¹⁰ Cashiering is not defined in the various statutes, but is a form of dishonourable discharge of officers where a person is stripped of his rank and medals. The sentence is historically executed on the parade ground or another venue determined by the Officer Commanding. The constitutionality of this punishment is debatable.

¹¹¹ Discharge with ignominy is the equivalent of cashiering imposed on persons from privates to warrant officers although cashiering is executed on the parade ground whilst a discharge with ignominy is executed in an office. The constitutionality of the punishment is also debatable as it is submitted that it might be an infringement of the right to dignity of a person as provided for in s 10 of the Constitution.

¹¹² Section 34(2). The sentence will not be executed until the review has been completed (Rule 71(1)). This rule overruled the decision in *Els v Minister van Verdediging* 1980 SA 984 (O).

¹¹³ Section 34(4) and Rule 71(2).

¹¹⁴ This is also applicable where it is requested by the Director: Military Judicial Reviews.

¹¹⁵ Section 34(1) and (3). Every acquittal or discharge of an accused shall be final pending the outcome of the review.

¹¹⁶ Section 34(5). The request must be made within certain time limits and in the prescribed manner (rule 72). When an offender has been convicted by a military court, the presiding judge or commanding officer must as soon as possible after the completion of the trial submit the record of the trial's proceedings to a review counsel or to the Director: Military Judicial Reviews where applicable (s 34(6)).

¹¹⁷ Section 34(7). These representations must be made within 14 days after the announcement of sentence. This period may be extended to up to 28 days where it is deemed to be impractical

Mbambo v Minister of Defence

In the case of *Mbambo* the court found that the CMA has review powers that are wider than that of the High Court when it sits on appeal. The CMA does not only reconsider cases before it on the record of the proceedings, but has a wider power to allow further evidence. The court found that the offender has a right, in terms of the Constitution, to the meaningful reconsideration of his conviction and his sentence by a higher court than the one that convicted and sentenced him in the first place. This was provided for in the procedures contained in the Act.¹¹⁸ The conclusion was thus that the MDSMA is constitutional in that it allows for both appeal and review procedures as required by the Constitution.

Appeal to the High Court?

Another question raised in *Mbambo* was whether there exists a further right to appeal and/or review to the High Court, outside the military criminal justice system – either from the military court of first instance or from the CMA?

The facts were as follows: Mbambo, an officer in the SANDF, was convicted by a military court for assaulting a superior officer.¹¹⁹ The sentence imposed was one of cashiering. The matter was automatically referred to the CMA for review. They upheld the sentence. He then noted an appeal to the High Court against his conviction and sentence. The question before the court was whether there was a further right to appeal to the High Court, as there is no express provision for such a right of appeal in terms of MDSMA. On the other hand it was argued that such a right to appeal should be read into the MDSMA in light of section 35(3)(o) of the Constitution which gives every accused person a right to a fair trial, including a right to appeal to, or review by, a higher court.¹²⁰

The court noted the general rule that for a right of appeal to exist, it must be provided for by statute. If there is no such statutory right provided for, no right to appeal exists.¹²¹ This rule must however be interpreted in light of the Constitution as the supreme law of the country. In addition, and in terms of section 33(7)(c), when a

by the local representative of the Adjutant General (s 34(8)). Further argument and evidence may also be required (rule 74).

¹¹⁸ *Mbambo* 230A-C.

¹¹⁹ The conviction related to an offence under s 9(1)(b) of the Intimidation Act 72 to 1982 as well as a contravention of MDC (s 15).

¹²⁰ *Mbambo* 228A-F.

¹²¹ *Mbambo* 228G-229B.

military court has convicted and sentenced an accused, it must inform him of his or her right to approach the High Court for relief at his or her own cost. However, the court found that there is no express provision for an *appeal* from a military court to the High Court and that such a right cannot be inferred. The court expressly noted that the military courts are in a better position to ensure military discipline and there is already a right to a meaningful reconsideration within the military system.¹²² There is no need for soldiers to have the choice of an appeal forum.¹²³

Review to the High Court?

It should be noted from the outset that the court in *Mbambo* refrained from expressing any view as to whether the High Court has the jurisdiction to review the proceedings of the court of first instance or the CMA.¹²⁴ It is submitted that there should be a possibility that the High Court may be approached with a review application.¹²⁵ This submission seems to be supported by the *Tsotsi* case where the High Court granted bail to a person pending his review application to the High Court of the decision of the military court.¹²⁶ The court noted that the High Court exercised a supervisory jurisdiction over the military courts similar to the supervisory power it exercised over the magistrates' courts.¹²⁷

Conclusion

From the above discussion it is concluded firstly that the military courts can in general be regarded as independent and impartial although, with small changes, any doubt with regard to independence could be eradicated. Secondly, it is submitted that the rights entrenched in section 35 of the Constitution have been adequately included in the military legislation. Thirdly, although it has been held that there is no right to appeal to the High Court from the military courts, review to the High Court has not been, and should not be, excluded.

¹²² *Mbambo* 230A-C.

¹²³ *Mbambo* 233G-H. See also *Bodenstein v Magistrate, Ventersdorp* 1922 TPD 355.

¹²⁴ *Mbambo* 235E-F. The old authorities were not ad idem on this point. See *Umbilini & Bantomo v General Officer Commanding*; *HA Jacobs v General Officer Commanding* 1900 NLR 86 and *Mocke v Minister of Defence* 1944 CPD 280. See, however, *Union Government & Fischer v West* 1918 AD 556.

¹²⁵ Rule 59(12)(f) makes provision for an approach to the High Court. If this does not refer to an appeal, the only other possibility is a review application.

¹²⁶ 2004 2 SACR 273 (E). This was so even though the court is not given such powers in the legislation. In this case the court did not, on the facts, grant the applicant bail.

¹²⁷ *Tsotsi* 282 B-C.