Scales of Natural Justice in a Military Summary Trial: A Critical Analysis with Special Reference to Sri Lanka

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Abstract - The military is considered as a society of its own with their codes of conduct and rules applying in a different manner from their civilian counterpart. It aims to maintain strict discipline in the military system itself, ready to fight a war when the country is facing a threat. When it comes to the military justice system, it is also built upon the notion of maintaining strict discipline within the military system, where swiftness and efficiency of justice is considered as a paramount concern. The military justice system consists of two main mechanisms which are introduced to achieve this end, which includes a Court Martial and a Summary Trial. While a Court Martial is more of an ordinary mechanism of delivering justice as we find within the civilian society, except for the fact that only persons subjected to military law are brought before them, a Military Summary Trial is something which is unique and distinctive as the commanding officer concern is given a wide variety of power and discretion in conducting and delivering an appropriate judgement in such a trial. By employing a doctrinal approach founded in the qualitative methodology, this research endeavours to critically comment on the applicability of natural justice in conducting such a trial and whether tilting the balance of those scales could be justified within the military justice system. The results revealed that, while the military justice system is both unique and distinct from what you would find in a civilian society, lowering down the scales of natural justice even within a Military Summary Trial cannot be entertained, and therefore, the existing procedures require a revision to maintain the scales of natural justice unstilted at whatever occasion.

Keywords—justice, military law, summary trial

I. INTRODUCTION

The most important characteristic of a military unit is that it is a unit consisting of people who would be on most occasion fighting a war to protect the very existence of a nation. To be effective, and something more than a collection of individuals with weapons, a unit must be commanded. Commanders are responsible for achieving the unit's objective, a function that requires them to ensure that subordinates will do as they are told. This is more than window-dressing; there can be heavy legal consequences for failure to comply. Under the law of war (the body of international law, also known as the law of armed conflict, or international humanitarian law, that among other things defines war crimes), where certain standards are expected of military combatants, it can be seen that, with greater power comes greater responsibility in ensuring that wars are fought according to the rules of combat. The main responsibility for the actions or omissions of the combatants therefore, becomes the immediate responsibility of the commanding officer and hence it is required to have a firm control and grip on the things, specifically, where a commander can in some circumstances be penalized for the misconduct of his subordinates (Fidell, 2016).

Military law as a system of law, being applicable to those who serve in an army fighting to protect the very existence of a nation should be made fit to achieve that purpose. Therefore, Shanor and Houge identifies two broad purposes which are expected of military law. One is to enhance command and control to make a band of fighters into a more effective force; the other is to reduce the exposure of civilian noncombatants to the harsh consequences of war (Shanor & Houge, 2013). In line with these requirements, Military law has evolved to govern a distinct society of warriors whose primary function is fighting or preparing to fight wars. War necessarily involves killing and destroying property, both activities that are legally privileged under international and domestic law. Finer argues that, in a democratic country, the primary function of the armed forces is to fight and win wars (Finer, 1962). Since the environment in which armed forces work in is distinctively different from that of their civilian counterparts, even the administration of justice in

relation to the armed forces must also be separate from the traditional methods of administrating justice. However, that is not to say that, neither the standards nor the scales of justice should be lower to military personnel. While there have been arguments for adhering with a stricter sense of liberalism within the military setting by lowering the scales of justice for people subjected to military law, in the discourse of human rights, such have been neglected and thrown out (Hyman, 1981). For example, in the case of (Hulangamuwa and Others v Balthazar, 1986) it was pointed out that, a man who enlisted as a soldier did not cease to be a citizen and did not forego his civil rights except to the extent expressly covered by the military law.

People who are subject to military law should also enjoy justice as it is enjoyed by their respective civilian counterparts. Justice should embrace fairness and fairness must be for all whether military or not. It is difficult to conceive of an effective armed force, particularly one which is deployed in the furtherance of its government's policy, without a separate system of justice or at least a system which acknowledges the unique nature of military service. Appreciating and understanding the military context is essential to the administration of justice in the military in peace or armed conflict or at home or abroad (Duxbury, 2016). As the military discipline is a *sine qua non* for maintaining a military which is ready to protect its motherland at all cost, the notion of justice as found in the civilian society may sometimes not best suite the requitements of the military. However, this being said, it is also paramount to state the fact that while there is some flexibility which may be legitimized, the military justice system should have its own laws and regulations to control its military personnel, while adhering to the minimum standards of justice and fairness. Therefore, the concept of a fair trial should become a paramount concern in any military proceeding which is undertaken by the military which has an affect on the rights and privileges of the military personnel.

II. RESEARCH PROBLEM

Military justice system is created in such a manner that, while justice must be done, it needs to be done swiftly and efficiently as prolonging with delivery justice may hamper the main military objective of protecting the frontiers of a nation. While this being said, one must not also forget about the fact that, while military personnel belong to a separate class of society, they should not be deprived of the basic and most fundamental of rights granted to their civilian counterparts. Therefore, this paper amis at finding out whether, *there could be any justification for tilting the scales of natural justice in conducting a military summary trial*.

III. RESEARCH QUESTIONS

This paper endeavours to find answesr to the following research questions in particulat.

1) What is the existing law on conducting a military summary trial in Sri Lanka?

2) How the notion of natural justice is utilized in a military suimmary trial?

3) Whether the scales of natural justice be tilted in a military context?

IV. RESEARCH OBJECTIVES

The research objectives of this study are as follows.

1) To explain the the existing law on conducting a military summary trial in Sri Lanka.

2) To critically evaluate the notion of natural justice as utilized in a military suimmary trial.

3) To critically comment on the issue of tilting the scales of natural justice in a military summary trial.

V. RESEARCH METHODOLOGY

This reasreach is conducted using the qualitative methodology where the doctrinal approach is followed. It uses statues, regulations and decided case law as primary sources and books and journal articles written on the subject as secondary sources.

VI. THE MILITARY JUSTICE SYSTEM IN SRI LANKA

The British military justice system, conceived with the aim of 'disciplining' a mercenary force after the 1857 Mutiny, is the progenitor of the military legal systems of the South Asian countries including Sri Lanka. The military justice system in Sri Lanka is for the most part governed by three separate Acts which include, the Army Act No 17 of 1949 (as amended), the Navy Act No 34 of 1950 (as amended) and the Air Force Act No 41 of 1949 (as amended). The main objective of all these Acts is to provide for and the raising of their respective forces. It is to be mentioned that the respective armed forces Acts only apply to people who are subject to military law. According to section 34 of the Army Act No 17 of 1949, a person subject to military law includes, all officers and soldiers of the Regular Force and all such officers and

soldiers of the Regular Reserve, Volunteer Force, or Volunteer Reserve, as are deemed to be officers and soldiers of the Regular Force. In the case of (Hulangamuwa and Others v Balthazar, 1986), the Supreme Court opined that a civil court has restrictions upon itself in applying civilian law to persons who are subject to military law by stressing out that, the complaint made before the Court related to an issue concerning military discipline and was a military matter cognizable by the Military Authorities which had exclusive jurisdiction to deal with the matter and a civil court was precluded from questioning or inquiring into those proceedings.

As mentioned above since military discipline is a *sine qua non* in the whole military system, it becomes a part of the military justice system as well. Unlike in a civilian context the justice system in the military has to be swift and it should also be fair. The success of the military justice system would therefore rest on the balancing of these twin pillars of swiftness and fairness. In the Sri Lankan context, the military justice system contains two main adjudication processes which includes a Summary Trial[1] and a Court Martial[2]. In addition to this, the court of inquiry[3] and board of inquiry[4] functions as fact finding missions where the reports of such bodies and the recommendations therein may be used in latter proceedings such as a Summary Trial or a Court Martial.

VII. NOTION OF A FAIR TRIAL

The basic characteristics of a free society is the unbiased treatment accorded persons accused of crime. It is imperative that the individual be respected in his unique capacity; it is equally necessary that the integrity of society remain above reproach when it turns its enormous force and power to the task of apprehending and convicting criminals. Society can be said to be vindicated when, and only when, a just conviction is reached after all substantive and procedural rights of the accused are honored from the moment of his apprehension, through his detention, to the conduct of his trial in an impartial manner. This notion of justice is also true regarding the military as well. While the military may be considered as a separate unit from the civilian society, still it is a part of the broader fabric of the 'society' which includes both the civilian society and the military society.

When people first spoke of a fair trial, they meant a trial that was roughly "free from blemish," reflecting a meaning of fair that was in use until the nineteenth century. A fair trial might be described as a long trial or a trial in which all evidence was allowed to be heard, or a trial in which a deaf witness was not excluded from giving evidence or an impartial and attentive trial. It was the integrity of the process that delivered a fair trial so that judges spoke of "the fair trial of the action" or "a fair trial of the question which should decide everything between the parties." This "free from blemish" meaning of fair trial became obsolete in the nineteenth and twentieth centuries and was replaced by a new meaning implying "procedural fairness," based on a "check list approach," where questions are asked against a set of rights of a party in the trial A fair trial can be defined as a a trial conducted in all material things in substantial conformity to law (Langford, 2009). Further, in the case of (Goldstein v. United States, 1933), it was held that a fair trial is a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. Being impartial means being indifferent as between the parties. It means that, while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror.

The notion of a fair trial rests on the twin pillar of listening to both the parties to a dispute and being unbiased, which is often coined under the two Latin maxims of *audi alteram partem* and *nemo judex in causa sua*. These are often referred to as principles of natural justice. They are termed as principles of natural justice due to the fact that, these requirements have been developed by the judiciary in their own sphere of judicial activism so as to ensure a fairness in the procedure which is adopted in hearing a case before them. Even in the absence of a requirement to conduct a fair trial, it has become an absolute necessity to conduct a proceeding in which an accused person is put on trial with the possibility of being convicted and punished.

While it has become somewhat difficult to define what is a fair trial, the idea of a right to a fair trial has found its place in almost all of the major human rights treaties. The idea of a fair trial can be traced back to the Roman Empire in the days of the twelve tables

[1] Part VIII of Army Act No 17 of 1949
[2] Part IX of Army Act No 17 of 1949
[3] Army Court of Inquiry Regulations 1952
[4] Navy (Board of Inquiry) Regulations

and the Magna Carta which in 1215 introduced a right to a jury. Article 10 of the United Nations Declaration of Human Rights declares that, everyone 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. Article 10 does not make any difference as to the status of an individual, that is to say whether the right to a fair trial is only available to a civilian and not to a person who is subjected to military law. Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) also recognizes a right to a fair trial. Again, it does not distinguish between military personnel subjected to military law and those who are not. Article 6 of the European Convention on Human Rights also recognizes a right to a fair trial, going to the extent in having the right to be provided with the services of an interpreter where an accused has difficulty in understanding the charge made against him (Massey, 2015)

The notion of a fair trial, while being a precarious creature, difficult of being properly defined has found its place as a major fundamental right in all most all of the international treaties, regional treaties and other instruments dealing with human rights. It is included under Chapter III of the 1978 Constitution of the Socialist Republic of Sri Lanka, where Article 13 in general deals with the rights of an accused to have a fair trial. Article 13 (3) declares that, any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court. While the said Article 13 (3) grants the right to any person to have a fair trial, Article 15 (8) of the Constitution specifically provides that, there may be some restrictions placed upon this right, where the accused belongs to the Armed Forces in the interest of national security. Therefore, it can be argued that, the Constitution has itself provided some flexibility in adopting a slightly different set of standards and guidelines when it comes to maintaining the discipline and integrity of the Armed Forces.

VIII. NOTION OF A FAIR TRIAL IN A MILITARY SUMMARY TRIAL

Summary trials are a critical part of the military justice system. They are designed to provide speedy justice where the nature of the offence and the circumstances in which it was committed are best addressed quickly. In Canada the formal purpose of summary proceedings 'is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency in time of peace or armed conflict'[5]. Similarly, Chris Griggs states in the context of New Zealand that 'the purpose of summary trials is to provide commanders with a method of dealing expeditiously and simply with less serious disciplinary infractions, whether they be in New Zealand, at sea or in an overseas operation' (Griggs, 2006). Michael Gilbert puts it even more crisply when he says that 'the summary court-martial is valuable when a military member needs to be taught a swift lesson that will serve as a message to others about to fall off the precipice of good order and discipline (Gilbert, 1996)

According to the provisions of the Military Acts (Army, Navy and Air Force), the commanding officer has a major role to play in maintaining order and discipline within his unit, and therefore is vested with the power of proceeding with a summary trial and deal with certain matters of misconducts by persons who are subjected to military law, to keep the discipline and the integrity of the armed forces. Hence, in explaining the applicability of the standards of a fair trial in a military summary trial, provisions of the Army Act No 17 of 1949 will be utilized as a reference point, since the other two Acts dealing with the Navy and the Air Force are almost identical.

Section 40 (3) of the Army Act provides that, where a Commanding Officer has the power to deal with an accused, where the punishment involved is a minor one in nature, he can ask the accused whether he wishes to be tried summarily or to be tried at a district court martial, and take action accordingly. While it can be argued from the beginning that, the selection is vested with the accused in deciding whether to proceed with a summary trial or to be heard in a district court martial, in practice, the choice made by the accused will often be influenced by the attitude of the commanding officer as deciding to proceed with a district court martial may become costly, since a district court martial has a greater power of punishment which is not enjoyed by a commanding officer sitting at a summary trial. In the case of (Mendis v Commander of the Army, 2001) the Court held that, according to Section 40(1) and 42 of the Army Act it is clear that in the case of a non-

[5] Queen's Regulations and Orders for the Canadian Forces, vol. II, ch. 108, r. 108.2.

warrant officer it is not necessary to hold a formal inquiry under the Army Act or to hold a Court Martial, since there is a clear discretion granted by Statute to hold summary trial and punish a soldier by reverting him to the lower rank. This clearly illustrates the magnitude and the overwhelming power granted to a commanding officer when it comes to taking actions against accused army personnel who are below a certain rank.

Sections 42-44 deals with the procedure that is to be adopted at a summary trial. According to section 42, where a person subjected to military law who is below the rank of a lieutenant-colonel or a warrant officer who has decided to be tried summarily for an offence to which he has become an accused, the commanding officer who gave the option of deciding on whether to deal with the accusation leveled at the accused summarily or through a court martial now has the opportunity of hearing the accusation made against the accused. This does not comply with the broader notion of a fair trial, as there is an obvious possibility of a biasness, since the same commanding officer who brought the charge against the accused is now sitting on judgement over the accused.

Commonsense would be sufficient to point out the problem with such a procedure, whereas the commanding officer would be somewhat compelled to prove and punish the accused, who has been brought before a summary trial by the commanding officer himself. It would be highly unlikely that a commanding officer after framing the charges to be dealt at a summary trial would be less convinced of the guilt of an accused who is to appear before him, where the commanding officer himself has the right and the power to decide upon the guilt of the accused. Since the charge was brought up by the commanding officer himself, there would hardly be any circumstance in which the accused will be released as framing the charge, deciding the charge and giving out the punishment are all handle by the commanding officer. Therefore, summary trials are essentially the sole domain of commanding officers because they act as both prosecutors and judges. This blurring of roles (in which a person is both prosecutor and judge) is normally prohibited in civilian law because it contravenes requirements of fairness and rules against bias.

As the commanding officer plays a dual role of a prosecutor and a judge, it would be impossible think of any unbiasedness. Biasness means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open (Massey, 2015). Hence it would be clear that, being the prosecutor in a summary trial, the commanding officer would obviously be prejudiced by being the judge who is going to decide on the case, and he would be absolutely be prejudiced by the fact that, if he fails to convict the accused as a judge in which he is also the prosecutor, it would go against his own ego in all most all occasions.

While biasedness is an inherent part of a summary trial where the commanding officer is both the judge and the jury, one has to also inquire into the ability of an accused to be heard before a verdict is pronounced against him. Hence, giving a fair hearing is a must. Thus, one of the objectives in giving a fair hearing is to make sure that an arbitrary decision would not be taken against the accused where his life or property is at jeopardy, before giving such an accused to present his version of the events which made him an accused in the first place. The idea of a fair hearing is coined under the Latin maxim of *audi alteram partem* which requires that a person must be given an opportunity of defending himself. However, this is not just limited to giving the accused a hearing, it must be a fair hearing, which also included rights such as, having legal representation, calling and cross-examining witnesses, having reasons for the decision, knowing of the nature and the extent of the charges made against the accused beforehand and getting an equal opportunity in presenting the case.

Section 42 (a) provides that, the commanding officer conducting the summary trial can even acquit the accused even before hearing the evidence. This certainly is a red light when it comes to the possibility of a fair hearing, as the commanding officer has the power and the ability to dismiss the case without any hearing, wherefore a hearing given to an accused would also not be something similar to a hearing given to a civilian. Summary trial procedure adopted in a military setting does not allow the accused to be represented by a counsel, whereas he is afforded that luxury in a court martial, with the warning that, if convicted, punishments may be much severe as a

court martial has the power to pronounce the death penalty as well.[6]

The accused is allowed to call in witnesses at a summary trial, and the evidences are recorded following the rules of evidence used in an ordinary court of law. However, as the accused is not allowed any legal representation, examining a witness and then to question their credibility when a witness is introduced against him would be left to the accused himself, which is more or less useless since in most cases the accused would lack the required knowledge and skills of a legal practitioner who would have always been a better choice.

IX. CONCLUSION

While it is clear that the notion of a fair trial does not find itself in a military summary trial when compared to a trial in which a civilian is tried, one has to also look at the justification which may be provided in adopting such a stringent procedure. Article 15 (8) it self does allow to deviate form the rights granted under the fundamental rights concerning armed forces, which also includes a deviation from right granted under Article 13 that deals with the right to a fair trial of an accused. While the military justice system is oriented at achieving military discipline by providing swift justice, this swiftness could also bring about harsh outcomes. The only option which is available is not to get rid of the military summary trials by pointing its inability to carry out a fair trial, but by introducing new measures as we find in New Zealand[7], where a summary trial is held before a presiding officer who is not the commanding officer that has brought the charge against the accused armed personnel. The reason being that, while respecting the right to a fair trial of all individuals is important, protecting the nation at the cost of a fair trial is far more important since, without the existence of a country, nothing else would stand in its absence, not even a fair trial.

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[6] Section 49 (2) (b) of the Army Act No 17 of 1949 gives a General Court Martial to pronounce the death penalty

[7] Armed Forces Discipline Amendment Act (No 2) 2007 (NZ) s. 115.