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# The Loss of Liberty in a Military Context.

## Summary Proceedings in the British Armed Forces.

By

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## PREFACE

I should like to record my thanks to those who have assisted me with this project. Major-General M.H.F. Clarke, Director of Army Legal Services, spent a number of hours with me discussing matters of military law and accompanied me during my visit to the Military Corrective Training Centre at Colchester. He also arranged for me to discuss issues with Lt. Col. Peter Verge, SO1 PS2 at the Ministry of Defence. Colonel Verge provided very helpful comments and supplied me with statistical material.

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Liverpool
10 January 1993.

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**1. Introduction.**

The development of military law in the Army and in the Royal Navy has taken quite different paths. Section 9 of the Bill of Rights 1688 directed that 'The raising or keeping of a standing army within the Kingdom in time of peace, unless it be with the consent of Parliament, is against law.' Parliamentary consent to the keeping of a standing Army and the enforcement of discipline within it was shown by an annual Act of Parliament until the passing of the Army Act 1955, when this process was placed on a quinquennial basis. The Royal Navy was never subject to this particular regime and the Royal Air Force, created in 1918, fell broadly into line with the Army. The present position is that each Service is governed by a separate Act of Parliament, The Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. All three are now subject to quinquennial review and will expire unless continued by an Armed Forces Act for a further period of five years. This process is preceded by the establishment of a Select Committee of the House of Commons on the Armed Forces Bill, the last being in 1991. Although the function of the Select Committee is to consider the terms of the Bill, it does, in practice, often range very widely over the whole field of military justice. The workings of the Select Committee have been likened to a naval refit. A Government minister commented that 'Once every five years we take the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 out of the legislative waters and let the experts swarm all

over them, tapping here and prodding there, to consider whether any provisions need amendment, strengthening or scrapping.'

It is now proposed to consider summary disposal in the Army (with which the Royal Air Force is virtually identical) and then to draw comparisons with the procedure of summary trial in the Royal Navy.

**2. Summary Disposal in the Army.**

Section 5 of the Armed Forces Act 1976 altered the powers of a commanding officer to dispose of a case summarily by increasing, subject to certain safeguards, the maximum award of detention from 28 to 60 days and the amount of a fine from 14 to 28 days' pay. The reasons given to the Select Committee[1] were that the

> 'increases now proposed should result in a reduction in the number of courts-martial, since certain cases which at present go to court-martial could be dealt with more appropriately at summary level. That in turn would mean a speedier and less cumbersome disposal, in the form of summary dealing, in a larger number of cases; would achieve a reduction in expense and an easing of the administrative burden which courts-martial entail; and would avoid for a larger number of accused the greater stigma which attaches to a conviction by court-martial.'[2]

There was some opposition to this move. A memorandum submitted to the Select Committee argued against the proposed increase in

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[1] Special Report from the Select Committee on the Armed Forces Bill, 1975-76, H.C.429, p.2.

[2] It was anticipated that this proposal would reduce the numbers of courts-martial in Germany by about 100 each year (about 10% of the total), ibid p.21.

the powers of a commanding officer on the following grounds. Such a change, it was argued, would remove important legal safeguards from the individual serviceman (such as would operate if he were to be tried by court-martial), could not be justified by administrative savings, would produce no benefit for the individual serviceman by loosening stigma and would be contrary to the principles of natural justice.[3]

**2.1 The Present System.**

Once an allegation that an offence has been committed by a person subject to military law has been made his commanding officer is required to investigate it within 48 hours of becoming aware of the charge.[4] He may dismiss the charge, despite the fact that it could only be tried by court-martial, order a stay of further proceedings on the charge, deal with it summarily or remand the accused for trial by court-martial.[5] It should be noted that the commanding officer's powers will vary according to the rank of

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[3] Ibid, p.152, submission from Richmond and Barnes Constituency Labour Party. In paragraph 10 of the submission the conclusion is drawn that, 'the proposals run counter to current trends both in society at large and in the armed forces of our NATO allies with whom our forces are in close contact. Given widely held beliefs of the kind current in our society on participation and workplace democracy, we feel the present proposals to increase summary powers are inadequate and will lead sooner or later to invidious comparisons and discontent in the Services.'

[4] This is the combined effect of S.76 Army Act 1955 and Rule 4 Rules of Procedure (Army) 1972. The latter requires the soldier to be in arrest but this term covers open or closed arrest, S.225 Army Act 1955. See generally, Manual of Military Law, Part I,12th edn.,1972, Chapter II.

[5] Sections 77 and 78(2) of the Army Act 1955. Where he remands an accused for trial by court-martial a commanding officer may order a summary or abstract of evidence (see Rule 7 Rules of Procedure (Army) 1972) to be taken.

the accused. He cannot deal summarily with anyone higher in rank than an NCO.[6] An appropriate superior authority may deal summarily with warrant officers and all ranks up to and including major and all civilians who are subject to military law.[7] A commanding officer may delegate to subordinate commanders power to deal summarily with certain charges.[8]

The Army Act 1955 places a limit on the types of charge that may be dealt with summarily.[9] In addition to military offences a

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[6] Section 77(2) of the Army Act 1955.

[7] Sections 77(1) and 82(2) of the Army Act 1955 and Rule 20 of the Army Summary Jurisdiction Regulations 1972. Rule 17 designates those officers who may be act as appropriate superior authorities. They include, in addition to those senior officers having power to convene a court-martial, a major-general or brigadier, depending on the rank of the accused. An officer of the rank of lieutenant colonel or above cannot be dealt with summarily.

[8] Section 82(3) of the Army Act 1955 and Rule 8 of the Army Summary Jurisdiction Regulations 1972. The subordinate commander,(typically a company commander) can remand an individual case for hearing by the commanding officer, award a punishment (limited by Rule 16 of the 1972 Regulations to punishments that do not involve detention or to a fine greater than 7 day's pay).

[9] See S.83 of the Act and Rules 11 (NCO's and soldiers), 18 (officers and warrant officers dealt with by appropriate superior authority) and 20 (civilians dealt with by an appropriate superior authority) of the 1972 Regulations. Rule 11, for instance, includes offences by, or in relation to sentries (S.29), failure to attend for duty (S.29A), takes any vehicle, etc, abandoned by the enemy otherwise than for the public service (S.30(3)),insubordinate behaviour (S.33), disobedience to lawful commands (S.34),obstruction of provost officers (S.35),disobedience to standing orders (S.36), absence without leave (S.38), failure to report or apprehend deserters or absentees (S.39), malingering (S.42(1)),drunkenness (S.43), fighting, threatening words (S.43A), damage to , loss of public or service property (S.44), offences in relation to aircraft or aircraft material (S.44A),interference with equipment, messages or signals (S.44B), misapplication and waste of public or service property (S.45), offences in relation to issues and decorations (S.46), certain billetting offences (S.47), inaccurate certification (S.50), certain offences in permitting escapes (S.54), resistance to arrest (S.55), escape from confinement

person who may be dealt with summarily may be tried for a criminal offence under S.70 of the Army Act 1955 provided the offence is listed in Schedule I to the Army Summary Jurisdiction Regulations 1972. Listed offences include, common assault, various offences under the Road Traffic Act 1988, taking a conveyance (or pedal cycle) without the consent of the owner under S.12 of the Theft Act 1968, destroying or damaging property (except by fire) under the Criminal Damage Act 1971 where the amount of damage does not exceed #600, unlawful possession of a controlled drug under S.5(2) of the Misuse of Drugs Act 1971, theft under S.1(1) of the Theft Act 1968 and making off without payment under S.3(1) of the Theft Act 1978 where the payment required or expected does not exceed #50.

Section 78 of the 1955 Act sets out the punishments that may be 'awarded' by a commanding officer. These are detention for a maximum of 60 days, if the accused is a private soldier; a fine not exceeding 28 day's pay; a severe reprimand where the accused is an NCO; stoppages of pay and minor punishments authorised by the Defence Council.[10]

Once an accused has been dealt with by way of summary proceedings

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(S.56), unauthorised disclosure of information (S.60), making false statements on enlistment (S.61), certain offences in relation to the making of false documents (S.62), ill-treatment of those of inferior rank (S.65), attempts to commit military offences (S.68), conduct to the prejudice of good order and military discipline (S.69) and criminal offences (S.70).

[10] An appropriate superior authority can make the following awards in respect of a warrant officer or an officer: forfeiture of seniority (except in the case of a warrant officer), fine (on the same terms as a private soldier), severe reprimand or reprimand, stoppages of pay, see S.79 of the 1955 Act. An appropriate superior authority may only fine a civilian up to a maximum of #100, S. 209(3)(b).

he cannot be tried by a civilian court for that offence or substantially the same offence.[11] The effect of this is that a 'conviction' by a commanding officer has the same status in law as that of a criminal court and will be notified to the Criminal Record Office. There is, unlike a conviction by a criminal court, no appeal to any court within the military legal system or to a civilian court. Unlike the finding of a court-martial the 'award' of a commanding officer is not subject to confirmation.[12] It therefore stands with only the possibility of review by a

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[11] Section 133 Army Act 1955. Nor may he be tried under the 1955 Act if convicted by a civilian court, S.134. A summary award is of the same standing for the purposes of the rehabitation of offenders as a conviction by a criminal court, Rehabilitation of Offenders Act 1974. Summary disposal does not, however, constitute criminal proceedings for the purposes of the Police and Criminal Evidence Act 1984 (which gives an accused his pre-trial rights and deals with the admissibility of confessions and improperly obtained evidence), nor under the Criminal Justice Act 1988 (dealing with a number of issues of evidence). This is, it is suggested, a significant matter since summary disposal under the Service Discipline Acts (the 1955 Acts and the Naval Discipline Act 1957) is the only form of criminal proceedings under English law where the 1984 and 1988 Acts do not apply. The reason for this is that in summary disposal the rules of evidence do not apply (see note 15 below).

[12] Court-martial findings and sentence are, in the Army and the Royal Air Force, but not in the Royal Navy, subject to confirmation by the confirming officer (usually the convening officer), Ss.107 and 110 of the Army Act 1955. Section 107(2) provides that 'A finding of guilty or a sentence of a court-martial shall not be treated as a finding or sentence of the court until confirmed'.The powers of a confirming officer, which are extensive and are similar to those possessed by the Courts-Martial Appeal Court (Courts-Martial (Appeals) Act 1968, a civilian court) on appeal from a court-martial, are contained in SS.109 and 110 of the Army Act 1955. Quaere whether this procedure would comply with the judgment of the Supreme Court of Canada in R. Genereux (1992) 88 DLR (4th) 110 in so far as it may indicate that a court-martial is not an independent and impartial tribunal.

superior military authority,[13] who may quash the finding if a mistake of law is found in the proceedings or a substantial injustice to the accused has occurred. In addition, an annual document check carried out by the Manning and Record Office could discover and quash any illegal award.

**2.2 Procedure at Summary Disposal.**

Where a commanding officer proceeds to hear a case himself prosecution witnesses will give evidence orally and can be cross-examined by the accused, who, in turn, may give evidence. He may also call witnesses in his defence. Normally the evidence is not given on oath, although the commanding officer may direct that it should be, but, in any event, the accused has the right to make an unsworn statement.[14]

The procedure exhibits many features quite different from trial by court-martial or, indeed, in the Crown Court. The laws of evidence do not apply[15] and judicial knowledge is expressly

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[13] Section 115 of the Army Act 1955. One example of review would be where the commanding officer failed to offer the accused the right, in an appropriate case, to elect trial by court-martial. The Special Report from the Select Committee on the Armed Forces Bill, Session 1985-86, H.C.170, listed the following under the title, External Control [of summary dealing]: Record officers check awards to see if lawful, Document Inspection Team inspect awards, Annual inspection of unit checks awards, All soldiers can have interview with reviewing officer, Check on records by reviewing and confirming officers, Morale and intelligence.

[14] Rule 8 Rules of Procedure (Army) 1972.

[15] Section 99 of the Army Act 1955, which provides that 'the admissibility of evidence to be observed in proceedings before courts-martial shall...be the same as those observed in civil courts in England.' This section has not been applied to summary disposal, see Manual of Military Law, op cit., note 4 above, at p. 394.

reserved for trial by court-martial.[16] The detailed rules of evidence, designed to protect an accused, such as those concerning the admissibility of a confession[17], hearsay or the accused's previous record[18] will therefore have no formal application. The privileges that apply to witnesses at court-martial do not apply in a summary disposal[19] and, in theory, there is therefore no privilege against self-incrimination.[20] The accused is not legally represented at a summary disposal, although there is no statutory or other provision to prevent this.[21] There was discussion in the 1991 Select Committee on the

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[16] Section 99(3) of the Army Act 1955. It is, however, hard to accept that a commanding officer would not take judicial knowledge, even though he may not recognise it as such. One particular danger here is of a commanding officer relying on his own specialist knowledge without making this known to the accused for the purpose of challenge.

[17] See note 11 above.

[18] One Commanding officer told the 1976 Select Committee (note 1 above) that 'I know a man's family background and his medical background and I know when he is unsettled. If there are circumstances which lead me to be more lenient than a court-martial because I have the overall background they appreciate this.'ibid at para. 547.

[19] Section 100 of the Army Act 1955. This could be applied to summary disposal but has not been.

[20] Section 99(1) of the Army Act 1955. In theory, therefore, a prosecution or defence witness (if these are accurate labels since the proceedings are considered not to amount to a trial or to be adversarial in nature) could be ordered to answer a question despite the fact that the answer might tend to incriminate him. Were he then to confess this confession may be admissible in court-martial proceedings against him, providing S.76 of the Police and Criminal Evidence Act 1984 (which applies in courts-martial) is not contravened. It would, in theory, be admissible in summary proceedings against the former witness, who could not rely on the 1984 Act.

[21] Rule 79 of the Rules of Procedure (Army) 1972 directs that lawyers may appear as counsel at a court-martial.

Armed forces Bill[22] as to the adoption of the practice current in the Royal Navy of appointing an 'accused's friend' in summary proceedings.[23]The Army were reluctant to permit the 'accused's friend' to cross-examine prosecution witnesses. The reason advanced to the Select Committee for this variation in procedure was that

> 'During summary proceedings the accused already has the right to cross-examine prosecution witnesses. Were we to allow the "accused's friend" to do so additionally, then summary justice becomes summary trial. This can easily lead to relatively straightforward cases becoming long and complicated to no purpose. Furthermore, because there is no prosecutor at summary proceedings the commanding officer would have to be advocate for the prosecution witnesses and adduce evidence to balance that adduced by "the accused's friend".[24]

The Army has now introduced a scheme to permit an accused at a summary disposal to be assisted by an Advising Officer (AO). The authorisation for this new procedure states[25] that 'the AO will normally be an officer or senior rank who knows the accused and, in practice, will probably be his platoon or equivalent

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[22] Special Report, Session 1990-91, H.C.179, at paras.406-409.

[23] This followed a recommendation of the 1986 Select Committee.

[24] Evidence of Major General Stone at para. 408.

[25] See Appendix A. The accused must be offered the services of an AO and, if he refuses, this must be recorded in the form attached to the Appendix.

commander.' Legal officers and those below the rank of sergeant are excluded from acting in this capacity. It may be noted that the AO is 'to act in the interests of the accused to the best of his ability...the AO is not a form of defence lawyer...His responsibility is to assist the accused in the interests of justice as follows:

a. Advise the accused before and at the hearing, for example about military law procedure, whether to give evidence or call witnesses or whether to elect for trial by court-martial.

b. During the hearing, if the accused so wishes, make a statement about the accused's background or in mitigation of punishment before the CO/ASA announces his award.'

This procedure does not permit the AO to cross-examine witnesses although the accused may do this himself.[26]

Whilst an accused soldier may call witnesses for the defence[27] he cannot compel their attendance. A commanding officer may order a person under his command to attend as a defence witness but no such power exists in relation to a civilian, although it does in respect of trial by court-martial.[28]

At a summary hearing the accused does not plead to the charge, a factor that clearly distinguishes it from all other forms of criminal proceedings and may lead to the blurring of the

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[26] Rule 8(b) of the Rules of Procedure (Army) 1972

[27] Rule 8(d) Rules of Procedure (Army) 1972.

[28] Rule 91(2) Rules of Procedure (Army) 1972. Civilians may be punished for certain offences in relation to courts-martial, such as by failing to comply with a summons of attendance, S.101 of the Army Act 1955.

fundamental principle that a man is presumed innocent until proved guilty according to law.[29] On the other hand, the accused is able to see the measure of the case against him. Moreover, he may then be offered the opportunity to elect trial by court-martial instead of accepting the commanding officer's award if the latter considers the accused is guilty and he intends to award detention or a fine.[30] The opportunity to elect trial by court-martial is offered <u>after</u> a statement, if any, by the Advising Officer about the accused's character and personal circumstances and after the commanding officer has consulted the accused's service record. At this stage the accused may take the view that a finding of guilt is imminent and that if he elects to be tried by court-martial he will run the risk of a more severe penalty. If, however, he wishes to challenge further the case against him he must elect since there is, as indicated above, no appeal against the finding of a commanding officer.[31]

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[29] <u>Woolmington v. DPP</u> [1935] A.C. 462, 'No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained,' <u>per</u> Viscount Sankey LC. Article 6(2) of the European Convention on Human Rights 1950 directs that 'Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.'

[30] Section 78(5) of the Army Act 1955 provides that 'where the commanding officer considers that the accused is guilty and if the charge is dealt with summarily will award a punishment [of detention or a fine] the commanding officer shall not record a finding until after affording the accused an opportunity of electing to be tried by court-martial.' If the accused elects trial by court-martial the commanding officer will remand the accused for trial.

[31] An accused is entitled a period of up to 24 hours to make up his mind about whether to elect trial by court-martial, Queen's Regulations For The Army 1975, 6.051A. He may withdraw his election (and thereby indicate hs willingness to accept the award of his commanding officer) at any time before the trial

Unlike court-martial proceedings the public have no right to attend a summary hearing even where an accused is charged with a criminal offence.[32]

Whether judicial review would lie in respect of the decision of a commanding officer is an open question. No such case has come directly before the courts and any judicial comment is therefore in the nature of obiter dicta. In R.v. Deputy Governor of Camphill Prison, ex.p. King[33]Griffiths LJ took the view that judicial review 'goes to review the decision of an inferior court but not to review that of the commanding officer or headmaster.' This view, it is suggested, assumes that the commanding officer, like the headmaster, is merely dealing with disciplinary offences. It is axiomatic that a headmaster, a chief fire officer, a prison governor and a senior police officer have no statutory powers to hear and convict a subordinate of a criminal offence. Only the commanding officer has this power and there would appear to be no adequate reason why its exercise should not be the subject of judicial review. Indeed, the High Court has recently been prepared to review the decisions of confirming officers in respect of court-martial proceedings and this would suggest that the attitude of the Court has swung in favour of a greater willingness to review proceedings within the military

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begins, Queen's Regulations, 6.088, although only with the permission of the convening officer once he has been remanded for trial.

[32] Compare S.94 of the Army Act 1955.

[33] [1985] Q.B. 735. See also Ex Parte Fry [1954] 2 All ER 118,119 where Lord Goddard stated that it was 'Undesirable for the civil courts to interfere with the commanding officer's powers to deal with certain disciplinary offences in the orderly room.'

legal system.[34] To this may be added the fact that since there is no opportunity for errors of law to be corrected on appeal the justification for judicial review becomes stronger.

A soldier may make a complaint against his commanding officer under S.181 of the Army Act 1955[35] and this could result in any award of punishment being rescinded if it had been improperly made. Since, however, the soldier will have had an opportunity to accept his commanding officer's award or to elect trial by court-martial there may be little scope for the complaint procedure to operate. The position in the Royal Navy, where the election is made at the commencement of proceedings should be compared.

**2.3 Procedure in the Royal Navy.**

The Royal Navy use the term, summary trial, rather than summary hearing or disposal to characterise non-court-martial proceedings. Where the charge is one that is sufficiently serious

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[34] R.v.Staff Officer (Discipline) Ex p. Evans (1984) Unrep. Lexis transcript; R.v.Air Commodore Gover, Ex p. Ravenscroft (1992) Unrep. Lexis transcript.

[35] Section 181(2). Further details are found in Queen's Regulations 1975, 5.204, para.(c) of which states that 'Alternatively, all ranks may bring such grievances to the notice of a senior visiting officer, and such an opportunity is to be given at least once annually.' The former JAG, James Stuart-Smith, explained the procedure as follows: 'he complains to the next chap up who would be the brigadier. If he does not get satisfaction from the brigadier he can go to the divisional commander, and if he does not get satisfaction he can go to the corps commander, so it goes all the way up till finally it arrives at the Defence Council,' Select Committee on the Armed Forces Bill 1985-86, para.733. In R.v.Army Board of the Defence Council, Ex p. Anderson [1991] 3 WLR 42 the applicant invoked the procedure of S.181(1) of the 1955 Act on the ground that he had been subjected to racial discrimination. He considered that at all levels, from his commanding officer upwards, his complaint had not been properly dealt with. The High Court in granting judicial review considered that the Army Board of the Defence Council had, itself, acted improperly.

to warrant trial by court-martial but might also be dealt with summarily the accused is able to elect between the two where the possible punishment is one of disrating, detention or stoppages.[36] The election is offered, unlike in the Army and the Royal Air Force, before any formal evidence is given. If the sailor elects summary trial he is required to plead to the charge, another important difference, and upon a plea of not guilty the trial proceeds in typical form with the accused being represented by his Divisional Officer or other friend.[37] The punishments that may be awarded by a Royal Naval commanding officer are more extensive than those available to his counterpart in the other Services.[38] The more serious punishments are imprisonment (up to 3 months), dismissal, detention (up to 3 months) and disrating. A sailor sentenced to imprisonment will be committed to the nearest civilian prison while one sentenced to detention will be committed to the Royal Naval Detention Quarters at Portsmouth or to the Military

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[36] Manual of Naval Law, 1981, 0818.2.

[37] It will be recalled that the precedent of enabling a sailor to have the support of an 'accused's friend' led to this procedure being adopted in the other Services. The procedure is set out in the Manual of Naval Law at para. 0802. It enables the sailor to request the assistance of 'any officer or other person in his ship whose assistance is reasonable available. If no such request is made, it is the duty of the Divisional Officer or such other officer as the commanding officer may detail, having regard to the requirements of the case, to advise the accused at all stages. The officer or other person assisting the accused may exercise on his behalf the accused's right to cross-examine witnesses for the prosecution, to examine witnesses for the defence and to make a statement in mitigation of punishment...If the accused at any time requests the assistance of a civilian lawyer (which request is not to be granted in summary proceedings)[ the commanding officer should consider whether trial by court-martial is more appropriate].

[38] A commanding officer may not try an officer.

Corrective Training Centre at Colchester.

There is no appeal from a summary trial, although a convicted sailor may initiate the complaints procedure[39], which may be significant since he will have elected at the start of the trial, unlike his Army or Royal Air Force counterparts. Findings or sentence are subject to review by superior Naval authorities.[40] These differences in summary proceedings between the Army and the Royal Air Force on the one hand and the Royal Navy on the other have been made the subject of comment in successive Select Committees on quinquennial Armed Forces Bills and the Royal Navy has been required to justify its greater powers of punishment.[41]

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[39] See Manual of Naval Law, para.1301. 'There have been few complaints to the Admiralty Board against summary conviction or sentence and only small numbers exercise the option of trial by court-martial (an average of 8 per year during the period 1986-1989 inclusive). The second Sea Lord's Personnel Liaison Team, during its Navy wide visits and both formal and informal discussions with ratings, hears many forthright comments but has no record of any concerning the Commanding Officer's powers of punishment,' Special Report from the Select Committee on the Armed Forces Bill (note 22) p.131-132. In the same Report, at p.135, some impression is given of those who, upon leaving the Army, commented unfavourably on discipline. In a similar survey in the Royal Navy 4-5% commented that there was too much discipline and that this was for them a major factor in their decision to leave. One of the difficulties in comparing attitudes, or statistics, relating to the three services is that often they are drawn up following similar, but not identical, procedures.

[40] Section 72(1) of the Naval Discipline Act 1957; para. 1302 of the Manual.

[41] The 1976 Select Committee (see note 1 above) requested the Ministry of Defence to explain the justification for these greater powers at each quinquennial review. In the Select Committee, 1990-91, the reasons given were that it was rarely practicable to hold courts-martial at sea; there are some 30-40 each year. The memorandum states (at p.131) 'If the summary powers of naval commanding officers were reduced to those of the Army and RAF, the annual number of ratings' courts-martial would increase, possibly to over 300. Inevitably this would entail frequent delays in the administration of justice in many cases and...the ship would normally have to continue its programme with

**2.4 The Award of Detention Following Summary Proceedings.**

It will be recalled that a commanding officer may award detention in the Army and in the Royal Air Force for a maximum period of 60 days. If he wishes to award between 28 and 60 days he must follow the procedure known as extended detention. This requires a summary or abstract of evidence, the written permission of higher authority and the commanding officer to satisfy himself that the accused does not dispute the material facts or dispute that those facts constitute the offence charged.[42] In the Royal Navy the maximum period of detention is 3 months, the extended detention safeguards not being applicable. In addition, a commanding officer may impose a period of imprisonment.

There were 6,414 offenders dealt with summarily in the Army in 1991, 5,013 in the Royal Air Force and 515 in the Royal Navy. Of these the figures of those sentenced to detention were 3,474; 213; 257 respectively. Thus, it would appear that in the Army 54% of those dealt with summarily receive an award of detention whilst the comparable figures for the Royal Air Force and the Royal Navy are 4% and 50%. No-one was sentenced to imprisonment as a result of a summary trial in the Royal Navy in 1991. The full tables of statistics are attached as Appendix B.[43] It seems

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disciplinary problems unresolved.' Two alternatives, of flying the necessary personnel to the UK or operating a separate system for those stationed ashore were both rejected as impracticable. See also the Select Committee 1985-86 (note 13) at p.228.

[42] The commanding officer should also seek advice from Army Legal Services (AGC (ALS)). See Rule 11A Rules of Procedure (Army) 1972 for the details of this procedure.

[43] Statistics for the Royal Marines are tabulated separately. It may be noted that of the 460 offenders dealt with summarily, 29 (or 6%) were sentenced to detention.

clear that in the Royal Air Force detention as a punishment at only 4% is out of line with the Army and the Royal Navy. In the Royal Air Force 59% received a reprimand or minor award and 37% a fine, whereas in the Army only 12% and 26% respectively did so. In 1991 of the 224 Army and Royal Air Force members awarded a period of detention in the Military Corrective Training Centre by their commanding officers 108 were for periods of between 7 and 28 days and 116 were for between 29 and 60 days. A period of extended detention was awarded in 58% of cases of absence without leave /desertion and the comparable figures for other offences were as follows: 50% dishonesty; 18% disobedience; 76% drugs offences; 27% violence. Of the total numbers of those sentenced to detention in the Army and the Royal Air Force, 24 or 11% were women.[44]

The conditions under which detention is to be served are governed by the Imprisonment and Detention (Army) Rules 1979.[45] An award of up to 28 days is normally served in the unit guardroom (unit detention room) and for longer periods, in the Military Corrective Training Centre at Colchester (MCTC). Some parts of

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[44] The last three sentences contain restricted information made available to the author, who compiled the percentage figures. Most service personnel awarded less than 29 days detention will serve it in a unit detention room, although the figures quoted in the text illustrate that some will serve their time in the Military Corrective Centre at Colchester. Statistics of those dealt with summarily are also set out on pp. 143 and 144 of the Special Report of the Select Committee on the Armed Forces Bill 1990-91, HC 179. These show merely the numbers dealt with in the years 1986-1989 for the offence of drunkenness (S.43 Army and the Air Force Acts 1955, S.28 Naval Discipline Act 1957) and for offences in addition to drunkeness.

[45] S.I. 1979 No.1456. Similar rules govern the Royal Air Force. These are the The Imprisonment and Detention (Air Force) Rules 1980. In the Royal Navy they are the Naval Detention Quarters Rules 1973, S.I.1973 No.270.

the 1979 Rules apply only to the military corrective training centres (of which there is only one, at Colchester) whilst other parts apply to this and to unit detention rooms.[46]

The aim of the MCTC is set out in Rule 34, 'to hold under restriction those soldiers who have been awarded military sentences of detention and to provide the facilities, instruction and guidance whereby-

(a) those soldiers under sentence who are to return to normal military service after completing their sentence will improve their service efficiency, discipline and morale and will determine to become better soldiers;

(b) those soldiers under sentence who are to be dismissed from Her Majesty's forces should enhance their potential for self-sufficiency and responsible citizenship.'[47]

There are three stages of training with soldiers joining Stage I subject to no privileges and progressing through Stage II to Stage III when privileges are increased.[48] This regime applies to both A and D wings. A wing is reserved for those who are to be retained in the service and D wing for those to be dismissed following completion of their sentences. A soldier will be locked in at night in Stage I, confined at night (although not locked in his room) in Stage II and suffer no restrictions during Stage

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[46] See, for example Part VIII of the Rules.

[47] The corresponding Rule in The Naval Detention Quarters Rules 1973 is Rule 4. This states that, 'The purpose of the training and treatment of men under sentence in detention quarters is to improve their service efficiency, discipline and morale and to establish in them the will to become better ratings.'

[48] See Rules 35-42 of the 1979 Rules.

III, apart from his presence at the MCTC.[49] Since a change in Ministry of Defence policy whereby servicewomen are no longer dismissed the service on being found guilty of an offence, they are now sent, like their male counterparts, to MCTC where separate accommodation has to be provided.[50]

The Detention Rules also provide that on admission the private property of a soldier is to be retained in private custody (Rule 55) and he is to be searched (Rule 55). He is to be housed in a room of at least 17 cubic metres for each soldier (Rule 56), he is to carry out work or training for not more than 9 hours each day and for not less than 6 hours, except on Sundays and public holidays (Rule 59), his letters may be scrutinised, although not to his legal adviser (Rule 68), any visit authorised must be within the sight and hearing of a member of the staff of MCTC (Rule 69), he may be subject to close confinement (Rule 90), to mechanical restraint (Rule 91). Upon the award of a period of detention a soldier's pay will cease to be payable but he may be credited with small sums of money relating to productive work,

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[49] See Special Report from the Select Committee on the Armed Forces Bill 1985-86, HC 170, pp.212-223 and Rule 41 of the 1979 Rules, 'He shall be allowed the following privileges:

(a) free and unescorted movement within the limits laid down by the commandant except when detailed for any parade or duty.'

He may also be permitted to leave the camp and to visit the nearest town, Colchester, for a restricted number of hours each week. He will be ordered not, e.g. to visit public houses.

[50] See Special Report of the Select Committee on the Armed Forces Bill 1990-91, HC 179, at p.174. The accommodation for all detainees is of a very high standard and is generally comprised of dormitaries of about six or eight beds. Separate cell accommodation is available but is reserved, normally, for those convicted by court-martial who have been sentenced to imprisonment but who are awaiting confirmation of the finding and sentence.

upon which he can draw for necessaries in MCTC, the cash balance being paid to him upon his release.[51]

All the Rules cited above apply also to unit detention rooms except the earnings scheme whereby a soldier will be credited with sums of money for productive work.

3. Detention as a Deprivation of Liberty.

It is proposed to discuss first the liberty possessed by a soldier not subject to any form of disciplinary proceedings and then to consider the effect on his liberty of an award of detention by his commanding officer.

**3.1 Soldier not Subject to Disciplinary Proceedings.**

Liberty is defined in the Oxford English Dictionary as 'freedom from captivity, imprisonment, slavery, or despotic control...the right or power to do as one pleases.' A person who enters into a contract of service will normally accept certain restrictions on his movement within the hours stipulated in the contract, as a quid pro quo, in part, for the payment of wages to him.

In the armed forces of the United Kingdom and of Canada, military service is entered into voluntarily. In all cases that have been brought by members of the armed forces before the European Commission or Court of Human Rights the petitioner has been a conscript. This distinction should, it is argued, be kept

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[51] Rule 114 of the 1979 Rules and see the Special Report from the Select Committee on the Armed Forces Bill 1985-86 at p. 216, 'payment is for cleaning materials, washing and shaving kit, stamps and stationery, cigarettes and sweets.' The loss of pay is a considerable hardship, depending upon the length of the period of detention and especially where the soldier is married. If sentenced by a court-martial to the maximum period of detention of 2 years the soldier concerned will, in effect, be performing military duties for this period for no pay other than the small sums payable to buy necessaries.

in mind since the jurisprudential status of an agreement voluntarily entered into must be different from a situation where the law compels military service.[52]

What does the British soldier agree to when entering upon military service? He is not formally employed under a contract of service that could be enforced in the courts and to which legislation concerning employment rights attaches. He is, instead, employed under the royal prerogative and can be dismissed at will.[53] . He has no right to resign.[54]

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[52] Article 4(3)(b) of the European Convention on Human Rights 1950, Cmd. 8969, excludes military service from the category of forced or compulsory service. It has been argued that by failing to invoke the procedures for conscientious objector status, a conscript agrees to military service. Thus, Mr. Fawcett, the Principal Delegate to the Commission said, 'Those who have to appear in the office from 9 a.m. to 6 p.m. are in detention (sic), if you like. And the fact that this is generally voluntarily as distinguished from compulsory military service can be met by the argument that in many Convention countries, military service can be escaped by conscientious objection,' Case of Engel and Others Eur. Court H.R., Series B, No. 20, p.275.

[53] China Navigation Co. Ltd. v. A. G. [1932] 2 K.B. 197; Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 W.L.R. 117; Leaman v. R. [1920] 3 K.B. 663; see generally, Cowan, Armed Forces of the Crown (1950) 66 L.Q.R. 478. A soldier may be discharged administratively even though acquitted by a court-martial or a civil court. This action may be taken where the facts are undisputed and 'call into question the integrity, character and trustworthiness of the person concerned,' Special Report from the Select Committee on the Armed Forces Bill 1990-91, H.C. 179, p.134, Supplementary Memorandum from MoD on administrative action.

[54] Hearson v. Churchill [1892] 2 Q.B. 144. This case involved an officer. Other ranks are enlisted for a definite period 'provided Her Majesty shall no longer require your services,' see Manual of Military Law, Part II, 10th edn. (1989), p. 2-14. See also The Army Terms of Service Regulations 1986, S.I. 1986 No. 2072, regulations 6 and 7 of which give the right to a recruit to determine his service under limited conditions depending on his age at recruitment. The very limited right of minors to leave the armed forces under the terms of these regulations has been the subject of comment during the various Select Committees on the Armed Forces Bills. See, for instance,

The soldier is, of course required to comply with military law. Indeed, this forms part of the 'X factor' taken into account by the Armed Forces Pay Review Body, to compensate the servicemen for conditions that are not required of civilian employees. Section 34 of the Army Act 1955 makes it an offence for 'any person subject to military law... whether wilfully or through neglect, [to] disobey any lawful command (by whatever means communicated to him.'[55] The Manual of Military Law states that a command will be a lawful one if it does not contravene English or international law and can be justified by military law. It explains this in the following passage:

> 'A superior has the right to give a command for the purpose of maintaining good order or suppressing a disturbance or for the execution of a military duty or regulation or for a purpose connected with the welfare of troops. He has no right, however, to take advantage of his military rank to give a command which does not relate to military duty or usage or which has for its sole object the attainment of some private end.'[56]

Examples are given of unlawful commands. These include an order

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1990-91, H.C. 179 at p. 156, Memorandum submitted by AT EASE. A response from the Ministry of Defence is at p. 158 and a table setting out the terms and conditions of service for those under 21 in other NATO countries is at p.147.
For the right to terminate service by an adult soldier see Army Act 1955 (PartI) (Regular Army)(No.2) Regulations 1986, Schedule 2. A soldier may 'buy himself out' or be permitted to leave for 'compelling circumstances'.

[55] A breach of standing orders is properly charged under S.36 of the 1955 Act. The main difference is that it will need to be proved under S.36 that the soldier knew of the order or it was one which he might reasonably be expected to know.

[56] Manual of Military Law, Part I, op.cit.p. 296.

to a soldier to exercise his officer's dog or to take part in private theatricals. An example of a lawful command would be where an order is given, 'to attend a medical officer or to attend a hospital for examination, or to submit to treatment (even involving anaethesia or the performance of surgery, which includes inoculations and other injections)...provided what is done is considered by the medical authorities concerned to be necessary to restore or maintain the efficiency of the individual and is reasonable in his case having regard to all the circumstances.'[57]

Although a soldier may be given a command that can be justified under S.34 of the Army Act 1955 a problem that might arise is whether any steps may be taken to enforce a command where the soldier refuses to comply with it. Under English law it would be difficult to justify the use of force to compel the soldier to perform it (such as to prevent him from leaving a room, sentry box or military camp). He could, of course, be arrested for failing to obey the order.

On enlistment the soldier is required to sign a certificate which states that,

'You must realise that in joining the Services you will be entering a disciplined Service which has to have different requirements from those in civilian life. You will for instance be liable for duty at any time of the day or night seven days a week...You should be fully aware of things like this so that there is no doubt in your mind that there

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[57] Ibid.

are aspects of life in the Service that make it basically very different from civilian life.'[58]

This voluntary assumption of a military obligation to obey lawful commands, drawn as widely as it is, and to be available for duty on the terms specified above illustrates that military service is sui generis. It is not, however, a form of volenti non fit injuria in which the soldier consents to any form of treatment that might be meted out to him by superior military personnel.[59] It has been shown that recently the civilian courts have permitted judicial review even of the decisions of a convening officer[60] and that alternative relief may be available, albeit in limited form, from the Court-Martial Appeal Court. In addition, a soldier, like a civilian, may be able to sue for false imprisonment if restraint is complete. Thus, in Jenkins v. Shelley a chief petty officer sued the captain of his ship for false imprisonment in sentencing him to detention for 42 days in respect of a charge of disobedience. Hallett J., in finding for the defendant, took the view that the captain had acted within his jurisdiction but that if he (the captain) had exceeded it

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[58] This is extracted from a restricted document, made available to the author.
There is currently before the House of Commons a Trade Union Reform and Employment Rights Bill, which is likely to apply to members of the armed forces. It provides for the granting of the following rights to employees, employment particulars, to claim unfair dismissal, to have written particulars of any terms and conditions of service relating to hours of work (including any terms and conditions relating to normal working hours).

[59] Warden v. Bailey,(1811) 4 Taunt. 64,84 (argument of Serjeant Lens, a soldier is not 'an outcast from the law').

[60] See note 34.

liability would have followed.[61] It may be noted that the High Court was prepared to accept that, had the captain acted outside his jurisdiction[62], the detention imposed would have amounted to false imprisonment. It would be but a short step to accept that this would also amount to a deprivation of liberty within the context of the European Convention on Human Rights since it involved detention.

The tort, or indeed, the crime, of false imprisonment does not require a 'stone prison.' Coleridge J. in Bird v. Jones[63] took the view that 'A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only, it may itself be moveable or fixed: but a boundary it must have.' The boundary of the restraint may cover a large area, Re Mwenya[64] or, indeed it might involve a person being prevented from moving from where he is.[65] The confinement of a soldier to

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[61] [1939] 1 All E.R. 786. The authority relied on was Heddon v. Evans(1919) 35 T.L.R. 642.

[62] By, for example, sentencing an officer to summary detention. In McC. v. Mullan [1985] A.C. 528, magistrates were held liable in damages for false imprisonment when they sentenced a juvenile to a form of detention without complying with their statutory obligations to inform him of his right to legal aid.

[63] (1845) 7 Q.B. 742.

[64] [1960] 1 Q.B. 241 the plaintiff was confined to an area of 1,500 square miles (to remain in the district of the Chief Mporokoso). The issue of false imprisonment did not, in fact, form part of the final decision in this case.It was concerned with whether habeas corpus from the English courts to Northern Rhodesia.

[65] Herd v. Weardale Steel Coal and Coke Co. Ltd. [1915] A.C. 67, where the plaintiff was a miner who wished to be brought to the surface before his allotted time, which request was refused by his employers. The House of Lords held that he had not been falsely imprisoned, although he was clearly 'imprisoned' in the mine. The reason given was that the employer was under no further obligation than that provided in the contract of employment.

his barracks would appear, therefore, to amount to a complete restraint and imprisonment. The imprisonment must, however, be unlawful. It will not be unlawful if the restraint is a necessary consequence (or a reasonable condition) of a contract. Thus the coal miner may lawfully be required to remain in the mine until the time when his contract requires him to be brought to the surface[66] or the passenger to remain in the train until it arrives at a station[67] or the sailor to remain on board his ship until it reaches port. Nor would it be unlawful if it is imposed under powers granted directly or indirectly by statute. The soldier may be lawfully ordered to remain in a particular place, such as a military camp or a sentry box, under pain of punishment under S.34 of the Army Act 1955 if he disobeys.[68] This type of order is not, however, that much different from an order given by a civilian employer where the work done may be similar to that performed by service personnel. Apart from ships at sea or aircraft in flight it is a feature of military service that any restraint may be required for a longer period than that required of a civilian employee, who is usually only required to work within stipulated hours. Moreover, where the nature of the

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[66] See note 65.

[67] Herd v. Weardale etc. (see note 65), at p.71, per Lord Haldane.

[68] There would, of course, be a requirement to show that the order was, of itself, a lawful one, in that it must not be contrary to law and must be given for a military purpose. It is suggested that it is logical to accept that a soldier may be subjected to a total restraint in the same way as a civilian but that the lawful justification for doing so is greater in the case of the soldier. The particular circumstances of military service are therefore considered under the lawful justificatiions for the restraint. Thus a soldier confined to barracks would be 'imprisoned' but a lawful justification would exist for it.

civilian occupation is one that normally operates for 24 hours a day the employer will meet this with a shift system. In the armed forces of the United Kingdom trade unions are not permitted[69] and there can therefore be no 'negotiations' concerning terms and conditions of employment.[70] Whilst military efficiency may call for a soldier to be replaced after a certain time by another to carry out, for instance, a guard duty, there will be no legally enforceable obligation to do so.

A minor punishment that may be awarded to a private soldier involves a 'restriction of privileges'. This involves extra fatigue duties of up to 4 hours on Saturdays, Sundays and public holidays and 3 hours on other days and to answer an evening roll call. The latter must, however, be completed so as to enable the soldier to be able to return to his quarters by 2359 hours. An officer cadet may be awarded a restriction of cadet privileges requiring him to remain for the currency of the award (up to 28 days) within the establishment grounds. The importance of the word 'privileges' is important in this context. It is discussed further below.

A single soldier has no right to live off the base. Queen's Regulations state that, 'Single officers and soldiers may be required to live in single public quarters in the interests of operational readiness, unit and personal security, man management

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[69] Although they are in the armed forces of the following NATO countries: Belgium, Denmark, Germany, Luxembourg, Netherlands, Norway, source, Special Report from the Select Committee on the Armed Forces Bill 1985-86, HC 170, p. 162.

[70] An attempt to do so may amount to mutiny, R. v. Grant [1957] 1 WLR 906. It should be remembered that a soldier may invoke the complaints procedure under S.181 of the Army Act 1955, discussed above.

and discipline.'[71] Married officers or soldiers will normally be entitled to a married quarter but this may be denied if the commanding officer 'considers that for any reason it would be contrary to the interests of the Service to allot a married quarter.'[72]

**3.2 Soldier Subject to Disciplinary Proceedings.**

What characterises the disciplinary treatment of a soldier is the fact that he will be treated differently from other soldiers of the same rank in his unit who are not subject to disciplinary proceedings. It will be recalled that he may be awarded detention by his commanding officer. During the period of the 'award' he will not be paid or be required to perform his normal military duties if he is detained in a unit guardroom (or unit detention room). Queen's Regulations state that, 'Whereas detention served at a military corrective training centre is intended to be remedial and to return a man to his unit a better soldier in every way, unit detention, due to the absence of appropriately qualified staff and adequate facilities, tends to be solely punitive in effect.'[73] He will be locked in at night.

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[71] Queen's Regulations for the Army, 1975, para. 5.666. Consideration may, however, be given to requests for officers and soldiers to live out, ibid. at para. 5.666 b. Public quarters includes officers' and sergeants' messes and barrack rooms.

[72] The ultimate decision is to be made in the Ministry of Defence, ibid. at para. 5.661 e. There would appear to be nothing contained in Queen's Regulations to govern the position where a married officer or soldier wishes to live in private rented or owned property instead of a married quarter. The fundamental principle, however, that he may be required to live on base is likely to be the deciding factor.

[73] At para. 5.202 b(1).

Where he spends the period of detention in the MCTC it might be argued that he is performing military duty in the same way as a soldier who fails a particular course of training is required to re-take the course. A soldier under sentence in A wing has a very full programme of military duties of a type similar to that experienced during initial military training. In both cases he is being treated differently from others of the same rank as himself and the training is remedial in character. In the former case, however, the soldier will not receive or be credited with his normal pay and, it has been shown, he will be locked in at night (either in his room or in the block) during stages I and II of the detention programme.

A soldier awarded restriction of privileges by his commanding officer may be employed on extra fatigue duties of up to a maximum of 4 hours a day and to answer an evening roll call. It can hardly be said that during the currency of the award (up to 14 days) he is deprived of his liberty. An officer cadet, on the other hand, may be awarded restriction of cadet privileges for up to 28 days during which he will not be permitted to leave the military establishment except on duty or on compassionate grounds.[74]

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[74] Queen's Regulations for the Army 1975, para. 6.074 a(2). other punishments include stoppage of leave (not exceeding 28 days), stoppage of dining out leave, extra drills.
It should also be noted that a soldier subject to open arrest is confined to barracks (except while on duty or with special permission). One subject to close arrest will normally serve it in the guardroom. He will not be required to perform his normal military duties. An officer under close arrest may serve a period in the officers' mess, guarded by his fellow officers. Since a soldier under arrest is not one under sentence of detention he will continue to receive his pay, Queen' Regulations 1975, 6.018. Close arrest must be considered a deprivation of liberty, despite the non-withdrawal of the soldier's pay. This can be

It is suggested that the treatment of a soldier will go beyond that required of him by reason of his obligation to obey military law and the particular circumstances of military service if:

(a) he is treated differently from other members of his unit of the same rank as himself and;

(b) he is not credited with his gross pay (before any deductions) at a level received before the particular form of treatment began, following the award of his commanding officer or the finding and sentence imposed by a court-martial and;

(c) he serves an award of detention at a military corrective training unit or in unit detention rooms, both subject to the Imprisonment and Detention (Army) Rules 1979 (or the other Services equivalents).[75]

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distinguished from the imposition of detention following an award made by the commanding officer or a finding and sentence of detention made by a court-martial.

[75] The intention of the author here is to avoid any distinction that turns upon whether the soldier is required to perform his normal military duties. It may be difficult, in some circumstances, to define what these are since a soldier will be required to obey all lawful commands and he may be held back for additional training and will, in consequence, be treated differently from his fellow soldiers. For a soldier serving time in the MCTC and who is to be returned to his unit on completion of the award it may be difficult to avoid the conclusion that he is receiving additional training <u>to make him a better soldier</u>, see regulation 34 of the Imprisonment and Detention (Army) Rules 1979, outlining the aim of the MCTC.It would not seem to make any difference how long the soldier had already served in the Army. It is not uncommon in various professions for a person of some seniority found to be performing below an acceptable standard to be required by the professional body concerned to undergo further training. This might be described as 'basic' if it involves a course studied previously. Where the soldier is to be dismissed from the Army at the end of his period of detention the aim of MCTC is to enhance his 'potential for self-sufficiency and responsible citizenship,'<u>ibid</u>, regulation 34(b). It can hardly be said that during his detention this category of soldier is performing <u>military</u> duties. He is, for example, segregated (in

**3.3 The Jurisprudence of the European Court of Human Rights.**

The European Convention on Human Rights 1950 makes little mention of military service. Article 4 recognises that compulsory military service is a feature of the armed forces of many States and directs that it is not to be considered as forced labour. The intention of those who drafted the Convention must have been to bring military institutions as well as civilian ones within its ambit and, it must be assumed, States accepted this upon ratification. Only one State, France, entered a reservation to the effect that its military disciplinary procedures were not to be governed by the Convention.[76]

Article 5 provides that '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-

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D wing) from those to be returned to their units (A wing) and the training cycles reflect this, see Special Report from the Select Committee on the Armed Forces Bill 1985-86, HC 170 at p. 215. This indicates that A wing concentrate on drill, PT, weapon handling, live firing, map reading, first aid and NBC while those in D wing are taught brickwork, woodwork, painting and decorating, MT, animal husbandry, gardens/estate and take part in outside work parties.

[76] Quoted in The Case of Engel and others, Eur Court HR, Series B No 20, p.201. The reservation was dated 3 May 1974 and the translation was given ibid as follows, 'The Government of the Republic...makes a reservation in respect of Articles 5 and 6... to the effect that those Articles shall not hinder the application of the provisions governing the system of discipline in the armed forces contained in...,determining the general legal status of military servicemen, nor of the provisions of Article 375 of the Code of Military Justice.'

compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

Article 6 provides in part, 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

An interpretation of the phrase, 'deprivation of liberty' in Article 5 of the Convention was given by the European Court of Human Rights in the Dutch case of Engel and others (1976).[77] Engel was punished by his company commander for absence without leave. He made a complaint to the complaints officer, who after hearing the parties, amended the penalties to three days light arrest and two days strict arrest.[78] Engel subsequently appealed to the Supreme Military Court in The Hague arguing that he had been deprived of his liberty within the meaning of Article 5 of

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[77] Eur Court HR, Series A, Vol.22, Judgment of 8 June 1976, (1979-80) 1 E.H.R.R. 647. See also Rowe, (1991) 94 Mil. Law Rev. 99, 120-132; Andrews, (1975-76) Eur. Law Rev. 589; (1976-77) B.Y.I.L. 386. In a U.N. study (U.N. doc. E/CN 4/826 Rev. 1, 1964/5) quoted in Engel and others, Eur Court HR, Series B, No.20, at p.33, a loss of liberty occurs by, 'confining a person to a certain place...and under restraints which prevent him from living with his family or carrying out his normal occupation or social activities.'

[78] The original penalties had been 4 days light arrest , 3 days aggravated arrest and 3 days strict arrest. The reason for the separate penalties was that there were 3 absences following closely after one another.

the Convention. The Court upheld the decision of the complaints officer and took the view that Article 5.1(b) [set out above] justified the decisions made in respect of him. The other applicants were van der Wiel, de Wit, Dona and Schul.

Van der Wiel had been sentenced to a period of three months in a disciplinary unit for breaches of military discipline. The complaints officer confirmed this punishment and the applicant subsequently appealed to the Supreme Military Court, which reduced it to 12 days aggravated arrest.

Both Dona and Schul were sentenced to three months in a disciplinary unit for writing material which, it was alleged, undermined military discipline.[79] After the complaints officer had confirmed the punishments the applicants appealed to the Supreme Military Court, which in turn, upheld the committal to a disciplinary unit. The Court considered that this punishment did not involve a deprivation of liberty within Article 5. It explained that,

> 'disciplinary units constituted part of the general military service, being established with a view to subjecting a serviceman to a more rigorous discipline by imposing, where required, greater limitations on his liberty...serving in a disciplinary unit was simply another way of performing military service and was calculated to develop the servicemen's (sic) character and military skill

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[79] It should be remembered that trades unions are permitted in the Dutch armed forces (see note 69). Engel was, in fact, at the relevant time a candidate for the post of vice-president of the servicemen's association, the V.V.D.M.. The journal of the association, 'Alarm' was the medium in which Dona and Schul wrote their pieces which led to the disciplinary action against them.

and also to promote his adaption to military life.'[80]

In the alternative, the Supreme Military Court took the view that committal to a disciplinary unit could be justified within Article 5.1(b) of the Convention.[81]

Light arrest involved remaining in the camp while on and off duty; aggravated arrest required the soldier to remain, in addition, in a punishment room (which is not locked) during his off duty hours. In both cases the soldier is required to perform his normal military duties. Strict arrest involved the soldier being placed in a cell in solitary confinement for the whole period of the sentence.[82]

The European Commission concluded that light arrest did not involve a deprivation of liberty since,

> 'the greater freedom of movement which military personnel normally have in the evenings or during weekends seems to be based on a general idea of tolerance in order to give to soldiers the possibility of returning to their homes for family and social reasons. It does not, however, amount to a right of members of the armed forces to absent themselves

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[80] Engel and others Eur Court HR, Series B No 20, p. 24.

[81] The Court also took the view that Article 6 was inapplicable since it only applied to the dtermination of a criminal charge. It will be noted that subsequently, the European Court in this case considered that if the punishment for what a State might call a disciplinary offence was sufficiently onerous it could come within Article 6. In other words, the European Court was not prepared to accept that a State could, by its determination of whether an offence was a disciplinary or a criminal one, also determine whether Article 6 applied or did not.

[82] See Articles 8, 9 and 10 of the Dutch Military Discipline Act 1903, set out in Engel and others, op. cit. note 77 at p.141-142. Officers sentenced to light or to strict arrest are permitted to serve the term in their own homes.

from camp during off-duty hours.'[83]

The Commission also concluded that aggravated and strict arrest did constitute a deprivation of liberty. It spoke of the former in the following terms.

> 'The Commission observes that a soldier undergoing the punishment of "aggravated arrest" is confined, during his free time, to a particular locality where he is otherwise not normally to be found when performing his duties. He is thus deprived of his liberty and it is irrelevant, in this connection, that there may be others in the punishment room with him, that the room may not be locked, and that he may receive visitors if he has the company commander's written permission. What matters is the element of confinement in addition to the normal obligation of remaining within the confines of the camp.'[84]

On the basis of its reasoning, as outlined above, the Commission found no difficulty in accepting that strict arrest and committal to a disciplinary unit involved a deprivation of liberty within Article 5 of the Convention.

The European Court of Human Rights confirmed the decisions of the Commission, except in respect of aggravated arrest. It considered that a deprivation of liberty required more than mere

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[83] Ibid. at p. 60.

[84] Ibid. at p.61. The Commission was not prepared to accept the purported distiction, suggested by the Government of the Netherlands, between a'deprivation of liberty' and a 'restriction of liberty', the former only being prohibited by the Convention, unless justified.

restrictions upon liberty of movement[85] which were, in any event, a normal part of military service. The majority of the Court took the view that,

> 'Military service does not on its own in any way constitute a deprivation of liberty...it is expressly sanctioned in Article 4(3)(b). Wide limitations upon

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[85] For the full reference see note 77, at p. 58. The arguments of the Netherlands Government (as the defendants) were as follows. It was accepted that the Convention was applicable to members of the armed forces; 'the Convention is not conceived in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent.' Persons belonging to such groups as the military, prisoners, persons on board sea-going vessels are essentially limited in their freedom to go where they wish or to act as they wish, these restrictions being greater than those of the ordinary citizen and are imposed by the authorities in charge not by a court in order to enforce discipline. The Convention should not be construed in such a way that authorities in charge are forbidden to impose disciplinary measures. Disciplinary measures in armies protect the organisation and ensure its proper functioning in the general interests of society. None of the sentences imposed constitute a deprivation of liberty. This can only occur when the conditions of the individual are fundamentally changed. This is the case when a free person is imprisoned. This is not the case when a prisoner is confined to a solitary cell, or when a soldier is confined to barracks or to a cell in the barracks. Fundamentally a soldier is to a great extent restricted in his liberty by virtue of his being a member of a military institution which by its very nature requires its members to be restricted in their freedom of movement. The criterion [to determine a deprivation of liberty] should be whether the requirements of military service entail a particular regime being applied to the member of the military concerned. Light arrest merely involves the withdrawal of a privilege of being able to leave the camp and aggravated arrest is merely a more severe form of light arrest. Strict arrest could under certain circumstances be regarded as a rigorous way of teaching discipline to a particularly recalcitrant member of the military, a severe form of military training, entailing confinement to a special location in the barracks. Since sa soldier committed to a disciplinary unit performs military duty and is restricted during off-duty hours in much the same way as under aggravated arrest, the same conclusion should follow, that neither is a deprivation of liberty. The above is drawn from the Memorial of the Government of the Netherlands, Engel and others, Eur Court HR, Series B, No.20, pp.157-162.

> freedom of movement...are entailed by reason of specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5...The bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians.'[86]

The Court stressed that restrictions 'that clearly deviate from the normal conditions of life within the armed forces would come within Article 5. To determine this a whole range of factors need to be taken into consideration, for example, the nature, effects and manner of execution of the penalty or measure in question.'[87]

On this view, neither light arrest nor aggravated arrest amounted to a deprivation of liberty within Article 5 of the Convention. The former was within the 'ordinary framework of military life'[88], the servicemen was not locked up and he was able to perform his normal military duties. It was the fact that in aggravated arrest the soldier was not locked in while confined to a special room during his off duty hours that led the Court to take a different view from the Commission over this type of arrest. The confinement came within the 'normal conditions of life within the armed forces.' Strict arrest and confinement to a disciplinary unit, both of which involved the soldier being locked in and unable to perform his normal military duties,

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[86] Ibid. at p.59.

[87] Ibid.

[88] Ibid. at p. 61.

amounted to a deprivation of liberty.[89]

Judge Vilhjalmsson dissented on the issue of aggravated arrest. He considered that this punishment did involve a deprivation of liberty since servicemen undergoing this form of punishment were not allowed the same freedom of movement as other servicemen.'These restrictions', he said, 'deviate clearly from the usual conditions of life within the Netherlands armed forces.' This view, he thought, was strengthened by its purpose, which was clearly punitive.[90]

One further argument put forward by the applicants was that all soldiers were not treated equally. Officers could not be sentenced to aggravated arrest or be committed to a disciplinary unit. There was, it was argued, a breach of Articles 5 and 14[91]

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[89] The concept of 'normal military duties' has been discussed, see note 75. Since a soldier serving a period of strict arrest is locked in a cell by day and night whereas one serving a punishment of committal to a disciplinary unit is able to perform military training during the day the position might be reached that the latter is not considered to be a deprivation of liberty. The criterion of normal military duties cannot, by itself, therefore provide the test as to whether a soldier has been deprived of his liberty. Nor can the criterion be whether the soldier is locked in at night. A civilian prisoner serving time in an open prison is clearly deprived of his liberty even though he is not locked in a room at night. Soldiers under sentence at MCTC and placed within stage III of the programme are, it is argued' deprived of their liberty despite not being locked in at night and being able to leave the camp for up to 7 hours in one week.

[90] Ibid. at p.57. Judges Verdross and Bindschedler-Robert thought that Article 5 was, in any event, not infringed. The former stated (at p.48) that 'The 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.'

[91] 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language...or other status.'

taken together. The Court rejected this argument on the basis that different ranks bore different responsibilities. It went on to conclude that,

> 'While only privates risked committal to a disciplinary unit, they clearly were not subject to a serious penalty threatening the other members of the forces, namely reduction in rank.'[92]

Where a deprivation of liberty is made out this will need to be justified within the terms laid down by Article 5. The Court was not prepared to take the view espoused by the Supreme Military Court in the Engel Case that a deprivation of liberty might be justified in the military context by Article 5.1(b), outlined above. To do so

> 'would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration...it would justify, for example, administrative internment to compel a citizen to discharge, in relation to any point whatever, his general obediance to the law.'[93]

The principles set out in the case of Engel and others have been

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[92] Ibid. at p. 31.

[93] Ibid. at p.28. The other main issue raised was whether the committal to the disciplinary unit, imposed by a company commander, could be justified by Article 5. It clearly could not since it was not imposed by a court under Art. 5.1(a) and Art. 5.1(b) did not apply. The problem was solved by the effect of Dutch military law which had the effect of suspending the sentence once an appeal had been made to the Supreme Military Court. When the sentence was confirmed by this Court, Dutch law treated it as a new sentence. It therefore complied with Article 5.1(a) of the Convention.

followed by the Human Rights Committee in 1989.[94] The applicant, a Finnish infantryman, was sentenced to 10 days of close arrest involving confinement in the guardhouse without performance of military duties for being absent without leave. He stated that he was locked in a cell 2 x 3 metres furnished only with a camp bed, a small table, a chair and a dim electric light. He was only allowed out of his cell to eat, go to the toilet and to take fresh air for only half an hour each day. He was not permitted to talk to anyone else. The Human Rights Committee concluded that the applicant had been deprived of his liberty within the terms of Article 9(4) of the 1977 Covenant. It stated its view as follows:

> 'The Committee acknowledges that it is normal for individuals performing military service to be subjected to restrictions in their freedom of movement...Furthermore, the Committee agrees that a disciplinary penalty or measure which would be deemed a deprivation of liberty by detention, where it to be applied to a civilian, may not be termed such when imposed upon a servicemen. Nevertheless, such a penalty or measure may fall within the scope of application of article 9...if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal

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[94] Communication No. 265/1987, Antti Vuolanne v. Finland, Report of the Human Rights Committee, General Assembly, Official Records: Forty-Fourth Session, Supplement No.40 (A/44/40) at p. 249. The Human Rights Committee was established by Article 28 of the International Covenant on Civil and Political Rights, 1977. See gererally, D. McGoldrick, The Human Rights Committee, its Role in the Development of the International Covenant on Civil and Political Rights, (1991) Oxford Univ. Press. Dr. McGoldrick is a member of the Faculty of Law at the University of Liverpool.

> conditions of life within the armed forces...In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of the execution of the penalty or measure...'[95]

**3.4 The Effect of Being a Volunteer.**

All the cases discussed above have involved conscripts and it may be that a volunteer is less likely to make a complaint about his treatment than a conscript but the principles set out above would apply equally to him. The mere fact of joining the armed forces does not, by itself, affect a soldier's rights under the European Convention on Human Rights. It will be recalled that under English military law a soldier dealt with by his commanding officer has the right to elect trial by court-martial where the award that will be made involves detention or a loss of pay. Suppose he agrees to be dealt with by his commanding officer and elects not to be tried by court-martial. Does this avoid the consequences of Article 5 of the European Convention? The answer would appear to be in the negative. In Engel and others the European Court of Human Rights declared that liberty in a democratic society was too important to be waived and that 'detention might violate Article 5 even though the person

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[95] Ibid. at pp.256-7. No citation of Engel and others, or indeed of any other decision, is made by the Committee. It took the view that the sentence imposed was served in the same way as a prisoner would and approached in length the shortest prison sentence available under Finnish law. This sentence was, perhaps, equivalent to strict arrest in Engel and others terms.

concerned might have agreed to it.'[96] Rights and freedoms granted by the Convention are not therefore negotiable.[97].

**4. Conclusions.**

This Report has attempted to define the limits of the 'normal conditions of life within the armed forces' of the United Kingdom. It has been suggested that a deviation from these normal conditions would occur where a soldier is treated differently from those of the same rank as himself in the same unit, where his normal gross pay (before deductions) ceases to be payable and where he is treated in a way governed by the Imprisonment and Detention (Army) Rules 1979. Where these conditions are met it is suggested that a soldier will have been deprived of his liberty, even though he had volunteered for military service and can be credited with knowledge that he will be liable to such treatment if he is in breach of military law and even although he will receive extra pay (the X factor) for assuming this

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[96] Quoting from De Wilde, Ooms and Versyp Cases, Judgment of 18 June 1971, Series A, No 12, p.36. See also Pfeifer and Plankl v. Austria Eur Court HR, Series A, No. 227, Judgment of 25 February 1992; (1992) 14 EHRR 692, Para 38-39 (purported waiver of the right to disqualify judges was ineffective because it was made in the absence of counsel). Were a soldier to be permitted to consent to being deprived of his liberty two consequences would follow. First, a major freedom (non-deprivation of liberty) would be denied to him and there would be no need to justify this other than by showing that he consented to it. Secondly, the European Commission or Court would require strong evidence that he had, in reality, consented. It would seem to follow from the Pfeifer and Plankl case, above, that legal advice would, as a matter of law, be required at the point where the deprivation of liberty was ordered, at summary disposal.

[97] An analogy may be draw with the Geneva Conventions of 1949 concerning the wounded and sick , shipwrecked, prisoners of war and civilians. Article 7 of the Third Convention (prisoners of war) provides that 'Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention...'

obligation.[98] Moreover, the fact that he has consented to the detention by not electing trial by court-martial will be irrelevant.

The suggested criteria for assessing whether a deprivation of liberty has occurred of whether the soldier is continuing to perform his normal military duties or whether his treatment deviates from the normal conditions of life in the armed forces are, it is argued, both unsatifactory. One soldier serving a period of detention in a cell will be deprived of his liberty equally with a fellow soldier serving his term in a military corrective unit. It has been argued that the fortuitous factor of each being locked in at night cannot be the sole determining factor since some soldiers undergoing corrective training may not be locked in at night where they have reached the final stage of the training.

In the British armed forces there is no equivalent to the Dutch aggravated arrest. A British soldier may, as a result of disciplinary proceedings, be confined to a military establishment for up to 28 days[99] but he does not suffer any loss of pay during this period. He is not therefore deprived of his liberty. Were the law to be changed so that this confinement could lawfully be ordered for a much longer period the length of the

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[98] It must also be assumed that he will know, upon volunteering for military service, that he may be dealt with in a way quite different from the civilian in his relations with his employer. Breach of military law also includes a breach of the criminal law (under S.70 of the Army Act 1855) where applicable.

[99] Only if he is an officer cadet, Queen's Regulations for the Army 1975, para.6074 a(2). A private soldier may be awarded loss of privileges but this does not involve him in being confined to barracks, except when carrying out extra fatigue duties, ibid., para.6073 c.

award. would become a relevant factor. Suppose a soldier is lawfully confined to a military establishment for a period of 12 months, during which he performs his ordinary military duties, is not locked in at night and receives his normal pay. On the one hand it might be argued that the order to remain is a lawful order since it is permitted by statute and it serves a military purpose, the disciplining of the soldier to make him perform his duties more effectively. On the other hand, the length of the confinement might be argued to be excessive in order to achieve any useful purpose, since in an all volunteer army a soldier who is clearly unsuitable may be dismissed at any time. It is suggested that the length of a particular confinement of a soldier may result in a loss of liberty to him.[100] If a particular length of time of confinement to a military establishment has to be selected, it is suggested that 28 days should be the limit. Any greater period makes it difficult for a soldier to conduct those of his affairs that relate purely to his private life.

When he is awarded detention by his commanding officer he has, it has been shown, been deprived of his liberty. He cannot, in consequence, carry out the activities and responsibilities involved in his life gua private citizen. He is therefore in a position little different from the civilian prisoner.

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[100] This result would also seem to follow from the decision of the European Court in Engel and others. Although the Court seemed to consider the fact that aggravated arrest did not involve the soldier being locked in at night, the period involved, 12 days (in the case of de Wit), was short. Had it been longer, even although de Wit was not locked in at night, the decision might have been different. It should be remembered that the Commission considered that aggravated arrest was, in the circumstances, a deprivation of liberty.

The soldier is different from the civilian. In 1946 the Lewis Committee thought that 'In the matter of legal safeguards, citizens should be no worse off when they are in the Forces than in civil life unless considerations of discipline or other circumstances make such a disadvantage inevitable.'[101] The courts recognise the need to enforce discipline in the armed forces and that to some extent a soldier must subordinate the rights he had as a civilian to the requirements of his military organisation. When he is deprived of his liberty, in the context of military service, his civil, as opposed to his military rights have been effected. The European Convention on Human Rights then can treat him as it would a civilian.

[101] Report of the Army and Air Force Court-Martial Committee, Cmnd. 7608, para. 138. Note also Burdett v. Abbott (1812) 4 Taunt. 401, 405; 'It is highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman,' per Sir James Mansfield CJ.

# THE ADVISING OFFICER

## GUIDELINES FOR THE REVISED PROCEDURES AT SUMMARY HEARINGS BEFORE A COMMANDING OFFICER OR APPROPRIATE SUPERIOR AUTHORITY WITH THE ATTENDANCE OF AN "ADVISING OFFICER".

EFFECTIVE FROM 1991

### INTRODUCTION

1. In accordance with the recommendation of the House of Commons Select Committee the decision has been taken to allow an accused appearing at summary hearings before a CO or ASA to be assisted by an "Advising Officer" (AO).

2. The requirement to offer the services of an AO is mandatory and an AO is to be provided in every case unless an accused renounces his right to such assistance in writing. A specimen form for renouncing the right to an AO is at Appendix 1 to this Annex.

### SELECTION AND ELIGIBILITY

3. The AO will normally be an officer or senior rank who knows the accused and, in practice, will probably be his Platoon or equivalent commander. However, the accused may choose another person in his sub-unit though that person is under no obligation to help if he does not wish to do so. If necessary the CO is to appoint a suitable officer to act as the AO.

4. Where two or more are charged in relation to the same incident, it would clearly be sensible for all the accused to be advised by the same AO providing there is no conflict of interests between them. However each accused may have a different AO if they so wish. This may be cumbersome in some Joint Units with accused Service personnel prefering an AO from their own parent Service, but in the interests of justice it has to be allowed.

5. The AO of an accused serviceman must be a serviceman from the same unit as the accused.

6. To assist an accused, a subordinate commander should advise him of the requirement for an AO if his case is remanded for the CO. The CO should do the same when remanding an accused for an ASA.

### EXCLUSIONS

7. The following are excluded from acting as an AO:

a. A subordinate commander, [redacted] previously heard the case against the accused.

b. Any person who has been personally involved in advising the CO about the case.

c. Legal officers.

d. A serviceman or woman below the rank of sergeant or equivalent rank.

e. Witnesses as to fact.

CIVILIANS

8. Civilians who are subject to the Army Act 1955 and are accused of an offence should be advised of their right to an AO prior to appearing before an ASA. A civilian, who is a Crown Servant, may act as the AO though it should be explained to the accused that it may be preferable to have an officer or senior rank since he can better advise on the military procedures.

THE ROLE OF THE AO

9. The AO, whether selected or nominated, is to act in the interests of the accused to the best of his ability. However, it must be emphasised that the AO is not a form of defence lawyer. He is purely acting in the capacity of an adviser and his responsibility is to assist the accused in the interests of justice as follows:

a. Advise the accused before and at the hearing, for example about military law procedure, whether to give evidence or call witnesses or whether to elect for trial by court-martial.

b. During the hearing, if the accused so wishes, make a statement about the accused's background or in mitigation of punishment before the CO/ASA announces his award.

COURTS-MARTIAL

10. The appointment of an individual as AO for summary proceedings does not preclude that individual from being appointed defending officer if the accused is remanded for trial by court-martial, providing the AO is an officer. Where an NCO or WO has been appointed AO initially, an officer will have to be appointed as defending officer at court-martial.

D/PS(A)/5/1/PS2(A)
DATED NOVEMBER 1991

FORM OF CERTIFICATE APPOINTING OR RENOUNCING RIGHT TO AN ADVISING OFFICER

1. If an accused appearing before a CO or ASA does not wish to be assisted by an "Advising Officer", he is to be invited to sign a certificate in the form shown below.

2. It should be noted that signature of this certificate does not affect the CO's duty to ensure that the accused is properly advised prior to disposal of the charges, in accordance with QR(Army) 4.081A.

CERTIFICATE

I, .....(No).....(Rank).....(Name) certify that I have been informed of my right to be assisted by an Advising Officer during the summary hearing before the CO/ASA on .....(date) of the charges against me.

*I agree to ..... being appointed my Advising Officer.

*I confirm that I do not wish to be assisted in this way.

Date..... Signature.....

(THIS CERTIFICATE TO BE RETAINED WITH THE AFB 120/121.)

*The accused is to delete and initial whichever alternative does not apply.

# TRI-SERVICE MANPOWER STATISTICS

# DEFENCE ANALYTICAL SERVICES ANNUAL RETURN

# TSM32

## 1991 DISCIPLINARY CONVICTIONS - UK REGULAR FORCES AND PROCEEDINGS AGAINST CIVILIANS

Contents:



Ministry of Defence
AS(M)1
Contact number: 071-430-5445
29 September 1992

DASA

# Notes on TSM32 Annual Return on Disciplinary Statistics.

Service data in the return covers all personnel, male and female

## 1. Sources of data.

| | |
|---|---|
| a. Royal Navy* & Royal Marines(NDA) | NP3(Discipline). |
| b. Royal Marines** | CGRM from data provided from DRORM, at Centurion. |
| c. Army*** | AS(M)3 from data provided from M2(A),PS2(A) and VJAG. |
| d. Royal Air Force | HQ P & SS(UK). |

*The RN data in table 6 are for Summary Trials that result in Warrant Punishments. No data are held by NP3(Discipline) on Summary Trials where no Warrant Punishment results.

** The RM are subject to the Army Act unless they are serving with HM Ships or at a Naval establishment at the time of the offence, when they would also be subject to the Navy Discipline Act. Their conviction would, however, be recorded in the appropriate Royal Marine's tribunal table.

***The source of Army data is the Record of Service, supported by manual returns provided by District HQ's and Manning and Records Offices where proven offences including drugs are concerned. The Army statistics cover all recorded proceedings, including lesser offences (in so far as they are recorded) where a soldier is convicted under the Services Act. A Commanding Officer can apply discretion in the reporting of civil convictions of Army personnel. Thus not all civil convictions may be recorded.

A small number of the convictions detailed in the return may ultimately be quashed, on appeal, after the publication of this return. The appeal procedures and any subsequent alteration to the initial sentences are long processes which would severely delay the publication of the rest of the data. With this in mind and in view of the relatively small number of records that are in question, the TSM is published before the results of all appeals are known. The inclusion of the results of all the appeals is unlikely to alter appreciably the figures published in this return.

## 2. Notes on the format and content of the Return.

a. The statistics cover convictions for which the records were processed in 1991. They may include convictions dated in earlier years for which there was a delay in processing the records. Any convictions made during 1991 but not processed during the year will appear in the figures for 1992 or a subsequent year.

b. The offences are set out in descending order of severity. "Disloyalty and Security Offences", which includes Treason is the most severe and "Violence", which includes murder, the next most severe. Within "Sexual Offences", "Other than Homosexual" is more severe than "Homosexual" since it includes rape.

c. An offender may be convicted of more than one offence at the same trial. Therefore the total of offences is likely to exceed the total number of offenders. Since, however, only one offence may be recorded as the most serious, the total number of most serious offences will equal the total number of offenders, as will that for the most serious offence in each table.

d. The punishments detailed only show the most severe punishment awarded at the trial of an individual.

2. Sub-categories of an offence are recorded in a smaller [illegible] example the numbers of "Importing", "Supplying", "Possession" and "Toxic Materials" are all printed in a smaller size than the numbers for "Total Drug Offences".

**3. Abbreviations used for offences.**

In all the tables;

a. Disloyalty and Security Offences is abbreviated to Disloyalty & Sec. Off.
b. Unauthorised Absence/Desertion is abbreviated to Unauthorised Abs/Des.
c. Road Traffic Act Offences is abbreviated to RTA Offences.

**4. Classes of drugs.**

a. Class A drugs include heroin, opium,morphine, cocaine, pethidine, other narcotic drugs, LSD and certain other injectable amphetamines and hallucinogens.
b. Class B include certain other narcotics, cannabis, cannabis resin and amphetamines.
c. Class C includes a number of amphetamine like drugs.
d. Toxic materials include glue lighter fuel and other inhaled hallucinogenic substances.

**5. Abbreviations used for punishments.**

| Full Title of Punishment | Title in tables |
|---|---|
| a. Absolute or Conditional Discharge | Abso./Condit.Disch |
| b. Suspended Sentence | Susp. Sent. or Susp. Senten |
| c. Reception/Custodial Order | Recep./Custo.Order |
| d. Young Offenders' Institutions | Y.O.I. |
| e. Community Supervision Order | Commu. Super. Order |
| f. Naval Discipline Act Awards | NDA Awards |
| g. Army Act | AA |

**6. Notes on punishments.**

a. For Courts Martial and Warrant Punishments/Summary Trials/Summary Proceedings "Detention" also includes cases of suspended detention.

b. For Courts Martial "Imprisonment" also includes cases of suspended sentences; and for Royal Navy Summary Trials with Warrant Punishments "Imprisonment" also includes cases of suspended sentences; "Minor Awards" also includes cases of Community Supervision Orders

c. For Civilian Court Convictions "Fines" also includes cases where the punishment awarded was a compensation order; and "Absolute/Conditional Discharge" includes minor awards.

d. For Civilians Convicted under the Services Act "Reception Custodial Order" also includes cases of detention and "Absolute/Conditional Discharge".

e. All sentences of imprisonment awarded under the Service Discipline Acts are automatically accompanied by dismissal from service with or without disgrace.

f. Civilians Convicted Under Services Act includes convictions from Standing Civilian Courts.
g. For service personnel "Custodial Orders" are included with "Minor Awards".
h. For service personnel in the RAF "Reduction in Rank" includes loss of seniority.

**7. Conventions and symbols.**

a. In all tables nil or not applicable are indicated by '–'

Table 1: Courts Martial

All Services

| | Offences | Offenders | Most Serious Offence | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **2,054** | **884** | **884** | **3** | **79** | **43** | **423** | **315** | **21** |
| Disloyalty & Sec. Offs. | 1 | 1 | 1 | – | 1 | – | – | – | – |
| Violence | 269 | 173 | 173 | – | 15 | 10 | 98 | 41 | 9 |
| Total Sexual Offences | 43 | 24 | 18 | – | 2 | 2 | 3 | 11 | – |
| Other than Homosexual | 24 | 13 | 8 | – | 2 | 1 | 1 | 4 | – |
| Homosexual | 19 | 11 | 10 | – | – | 1 | 2 | 7 | – |
| Total Drug Offences | 437 | 151 | 146 | 2 | 1 | – | 36 | 106 | 1 |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | 40 | 19 | 18 | – | – | – | 1 | 17 | – |
| Possession – Class A | 83 | 33 | 27 | – | 1 | – | 5 | 21 | – |
| Class B | 308 | 127 | 100 | 2 | – | – | 30 | 67 | 1 |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | 6 | 2 | 1 | – | – | – | – | 1 | – |
| Criminal Damage | 51 | 32 | 24 | – | 1 | 3 | 10 | 6 | 4 |
| Theft | 404 | 137 | 118 | – | 10 | 9 | 47 | 49 | 3 |
| Fraud | 123 | 41 | 19 | – | 1 | 2 | 8 | 7 | 1 |
| Unauthorised Abs/Des. | 422 | 326 | 289 | – | 1 | 2 | 200 | 84 | 2 |
| Drunkenness | 36 | 34 | 14 | 1 | 5 | 4 | 3 | 1 | – |
| Disciplinary Offences | 184 | 117 | 49 | – | 19 | 8 | 14 | 7 | 1 |
| RTA Offences | 60 | 39 | 27 | – | 23 | 2 | 2 | – | – |
| Others | 24 | 18 | 6 | – | – | 1 | 2 | 3 | – |

Table 2: Warrant Punishments/Summary Trials/Summary Proceedings

All Services

| | Offences | Offenders | Most Serious Offence | NDA Awards | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **16,664** | **12,402** | **12,402** | **26** | **3,803** | **3,961** | **560** | **3,973** | **79** | **–** |
| Disloyalty & Sec. Offs. | 164 | 162 | 162 | – | 104 | 49 | 1 | 8 | – | – |
| Violence | 1,347 | 1,172 | 1,171 | 3 | 118 | 409 | 109 | 532 | – | – |
| Total Sexual Offences | 6 | 4 | 3 | – | – | – | 2 | 1 | – | – |
| Other than Homosexual | 3 | 1 | 1 | – | – | – | 1 | – | – | – |
| Homosexual | 3 | 3 | 2 | – | – | – | 1 | 1 | – | – |
| Total Drug Offences | 468 | 260 | 259 | – | 2 | 23 | 5 | 175 | 54 | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | 17 | 9 | 9 | – | – | – | – | 3 | 6 | – |
| Possession – Class A | 46 | 27 | 25 | – | – | 1 | 1 | 9 | 14 | – |
| Class B | 367 | 225 | 206 | – | 1 | 22 | 4 | 150 | 29 | – |
| Class C | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Toxic Materials | 37 | 20 | 18 | – | 1 | – | – | 12 | 5 | – |
| Criminal Damage | 486 | 428 | 393 | 1 | 53 | 191 | 21 | 127 | – | – |
| Theft | 505 | 336 | 320 | 3 | 34 | 95 | 20 | 158 | 10 | – |
| Fraud | 253 | 194 | 176 | 1 | 66 | 71 | 5 | 32 | 1 | – |
| Unauthorised Abs/Des. | 2,233 | 2,074 | 1,999 | 7 | 157 | 170 | 65 | 1,590 | 10 | – |
| Drunkenness | 984 | 976 | 761 | – | 118 | 339 | 70 | 233 | 1 | – |
| Disciplinary Offences | 9,310 | 7,493 | 6,593 | 11 | 3,013 | 2,210 | 259 | 1,098 | 2 | – |
| RTA Offences | 746 | 568 | 460 | – | 133 | 316 | 2 | 9 | – | – |
| Others | 162 | 160 | 105 | – | 5 | 88 | 1 | 10 | 1 | – |

Source: AS(M)1

*Table 3:* Civilian Court Convictions

All Services

| | Offences | Offenders | Most Serious Offence | Abso./ Condit. Disch. | Commu. Punish. Order | Fines | Y.O.I. Deten. | Susp. Sent. | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **3,264** | **2,006** | **2,006** | **111** | **32** | **1,770** | **26** | **11** | **56** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 365 | 285 | 285 | 26 | 4 | 219 | 4 | 7 | 25 |
| Total Sexual Offences | 64 | 32 | 25 | 4 | 2 | 7 | 2 | 2 | 8 |
| Other than Homosexual | 47 | 27 | 20 | 2 | 2 | 4 | 2 | 2 | 8 |
| Homosexual | 17 | 6 | 5 | 2 | – | 3 | – | – | – |
| Total Drug Offences | 17 | 15 | 14 | – | – | 10 | – | – | 4 |
| Importing | 1 | 1 | 1 | – | – | – | – | – | 1 |
| Supplying | 2 | 2 | 2 | – | – | 2 | – | – | – |
| Possession – Class A | 2 | 2 | – | – | – | – | – | – | – |
| Class B | 12 | 12 | 11 | – | – | 8 | – | – | 3 |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 149 | 121 | 103 | 10 | 1 | 90 | 2 | – | – |
| | 297 | 205 | 176 | 14 | 4 | 132 | 12 | – | 14 |
| | 72 | 45 | 23 | – | – | 22 | – | – | 1 |
| rised Abs/Des. | – | – | – | – | – | – | – | – | – |
| unkenness | 12 | 12 | 10 | 1 | – | 9 | – | – | – |
| Disciplinary Offences | – | – | – | – | – | – | – | – | – |
| RTA Offences | 2,002 | 1,254 | 1,199 | 28 | 20 | 1,146 | 3 | 1 | 1 |
| Others | 286 | 254 | 171 | 28 | 1 | 135 | 3 | 1 | 3 |

Table 4: Civilians Convicted under the Services Act

All Services

| | Offences | Offenders | Most Serious Offence | Abso./ Condit Disch. | Commu. Super. Order | Recep./ Custo. Order | Compen -sation Order | Fines | Susp Senten | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **81** | **52** | **52** | **10** | **12** | **1** | **–** | **29** | **–** | **–** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – | – |
| Violence | 9 | 7 | 7 | – | 2 | – | – | 5 | – | – |
| Total Sexual Offences | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Other than Homosexual | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | 1 | 1 | 1 | – | 1 | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – | – |
| Class B | 1 | 1 | 1 | – | 1 | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 2 | 2 | 2 | – | – | – | – | 2 | – | – |
| Theft | 48 | 29 | 28 | 10 | 8 | 1 | – | 9 | – | – |
| Fraud | 1 | 1 | – | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – | – |
| Drunkenness | – | – | – | – | – | – | – | – | – | – |
| Disciplinary Offences | 3 | 2 | 1 | – | 1 | – | – | – | – | – |
| RTA Offences | 14 | 13 | 12 | – | – | – | – | 12 | – | – |
| Others | 2 | 2 | – | – | – | – | – | – | – | – |

Source: AS(M)1

Table 5: Courts Martial

Royal Navy

| | Offences | Offenders | Most Serious Offence | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **120** | **38** | **38** | **1** | **9** | **5** | **2** | **20** | **1** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 14 | 10 | 10 | – | 3 | 3 | 1 | 3 | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | 59 | 11 | 11 | – | – | – | – | 11 | – |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | 14 | 7 | 7 | – | – | – | – | 7 | – |
| Possession – Class A | 22 | 8 | 4 | – | – | – | – | 4 | – |
| Class B | 23 | 7 | – | – | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 8 | 4 | 4 | – | – | 1 | – | 3 | – |
| Theft | 24 | 5 | 5 | – | – | – | 1 | 3 | 1 |
| Fraud | – | – | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – |
| Drunkenness | 5 | 5 | 4 | 1 | 2 | 1 | – | – | – |
| Disciplinary Offences | 10 | 7 | 4 | – | 4 | – | – | – | – |
| RTA Offences | – | – | – | – | – | – | – | – | – |
| Others | – | – | – | – | – | – | – | – | – |

Table 6: Summary Trials with Warrant Punishments

Royal Navy

| | Offences | Offenders | Most Serious Offence | NDA Awards | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **1,114** | **515** | **515** | **26** | **12** | **81** | **60** | **257** | **79** | **–** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – | – |
| Violence | 140 | 93 | 93 | 3 | 1 | 16 | 15 | 58 | – | – |
| Total Sexual Offences | 5 | 3 | 3 | – | – | – | 2 | 1 | – | – |
| Other than Homosexual | 3 | 1 | 1 | – | – | – | 1 | – | – | – |
| Homosexual | 2 | 2 | 2 | – | – | – | 1 | 1 | – | – |
| Total Drug Offences | 279 | 108 | 107 | – | – | – | – | 53 | 54 | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | 17 | 9 | 9 | – | – | – | – | 3 | 6 | – |
| Possession – Class A | 28 | 16 | 14 | – | – | – | – | – | 14 | – |
| Class B | 202 | 90 | 71 | – | – | – | – | 42 | 29 | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | 32 | 15 | 13 | – | – | – | – | 8 | 5 | – |
| Criminal Damage | 15 | 11 | 7 | 1 | – | – | – | 6 | – | – |
| Theft | 164 | 56 | 53 | 3 | – | 1 | 14 | 25 | 10 | – |
| Fraud | 52 | 22 | 12 | 1 | 2 | 3 | 2 | 3 | 1 | – |
| Unauthorised Abs/Des. | 119 | 109 | 101 | 7 | 3 | 22 | 5 | 54 | 10 | – |
| Drunkenness | 83 | 81 | 43 | – | 3 | 15 | 16 | 8 | 1 | – |
| Disciplinary Offences | 247 | 182 | 93 | 11 | 3 | 22 | 6 | 49 | 2 | – |
| RTA Offences | 1 | 1 | – | – | – | – | – | – | – | – |
| Others | 9 | 9 | 3 | – | – | 2 | – | – | 1 | – |

Source: AS(M)1

Table 7: Civilian Court Convictions — Royal Navy

| | Offences | Offenders | Most Serious Offence | Abso./ Condit. Disch. | Commu. Punish. Order | Fines | Y.O.I. Deten. | Susp. Sent. | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **423** | **290** | **290** | **47** | **–** | **242** | **–** | **1** | **–** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 61 | 50 | 50 | 16 | – | 33 | – | 1 | – |
| Total Sexual Offences | 3 | 3 | 3 | 1 | – | 2 | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – |
| Homosexual | 3 | 3 | 3 | 1 | – | 2 | – | – | – |
| Total Drug Offences | 1 | 1 | 1 | – | – | 1 | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – |
| Class B | 1 | 1 | 1 | – | – | 1 | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 30 | 27 | 22 | 2 | – | 20 | – | – | – |
| | 33 | 21 | 19 | 9 | – | 10 | – | – | – |
| | 6 | 4 | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – |
| Drunkenness | 3 | 3 | 2 | – | – | 2 | – | – | – |
| Disciplinary Offences | – | – | – | – | – | – | – | – | – |
| RTA Offences | 238 | 166 | 161 | 16 | – | 145 | – | – | – |
| Others | 48 | 41 | 32 | 3 | – | 29 | – | – | – |

Table 8: Civilians Convicted under the Services Act — Royal Navy

| | Offences | Offenders | Most Serious Offence | Abso./ Condit Disch. | Commu. Super. Order | Recep./ Custo. Order | Compen -sation Order | Fines | Susp Senten | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| | – | – | – | – | – | – | – | – | – | – |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – | – |
| Violence | – | – | – | – | – | – | – | – | – | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | – | – | – | – | – | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – | – |
| Class B | – | – | – | – | – | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – | – |
| Criminal Damage | – | – | – | – | – | – | – | – | – | – |
| Theft | – | – | – | – | – | – | – | – | – | – |
| Fraud | – | – | – | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – | – |
| Drunkenness | – | – | – | – | – | – | – | – | – | – |
| Disciplinary Offences | – | – | – | – | – | – | – | – | – | – |
| RTA Offences | – | – | – | – | – | – | – | – | – | – |
| Others | – | – | – | – | – | – | – | – | – | – |

Source: AS(M)1



DASA

Table 9: Courts Martial — Royal Marines

| | Offences | Offenders | Most Serious Offence | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **22** | **13** | **13** | **–** | **–** | **1** | **10** | **1** | **1** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 8 | 6 | 6 | – | – | – | 5 | 1 | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | – | – | – | – | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – |
| Class B | – | – | – | – | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | – | – | – | – | – | – | – | – | – |
| Theft | – | – | – | – | – | – | – | – | – |
| Fraud | 4 | 1 | 1 | – | – | – | – | – | 1 |
| Unauthorised Abs/Des. | 7 | 5 | 5 | – | – | – | 5 | – | – |
| Drunkenness | 2 | 2 | 1 | – | – | 1 | – | – | – |
| Disciplinary Offences | 1 | 1 | – | – | – | – | – | – | – |
| RTA Offences | – | – | – | – | – | – | – | – | – |
| Others | – | – | – | – | – | – | – | – | – |

Table 10: Summary Trials with Warrant Punishments(NDA)/Summary Proceedings(AA) — Royal Marines

| | Offences | Offenders | Most Serious Offence | NDA Awards | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **504** | **460** | **460** | **–** | **53** | **376** | **2** | **29** | **–** | **–** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – | – |
| Violence | 30 | 25 | 25 | – | 2 | 14 | 2 | 7 | – | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | – | – | – | – | – | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – | – |
| Class B | – | – | – | – | – | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 11 | 11 | 11 | – | 1 | 9 | – | 1 | – | – |
| Theft | 2 | 2 | 2 | – | – | 2 | – | – | – | – |
| Fraud | 3 | 3 | 3 | – | 1 | 2 | – | – | – | – |
| Unauthorised Abs/Des. | 30 | 30 | 30 | – | 8 | 14 | – | 8 | – | – |
| Drunkenness | 25 | 25 | 18 | – | 5 | 11 | – | 2 | – | – |
| Disciplinary Offences | 341 | 317 | 312 | – | 36 | 265 | – | 11 | – | – |
| RTA Offences | 3 | 3 | 3 | – | – | 3 | – | – | – | – |
| Others | 59 | 59 | 56 | – | – | 56 | – | – | – | – |

Source: AS(M)1

Table 11: Civilian Court Convictions

Royal Marines

| | Offences | Offenders | Most Serious Offence | Abso./ Condit. Disch. | Commu. Punish. Order | Fines | Y.O.I. Deten. | Susp. Sent. | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **20** | **10** | **10** | – | – | **10** | – | – | – |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 2 | 1 | 1 | – | – | 1 | – | – | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | – | – | – | – | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – |
| Class B | – | – | – | – | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 1 | 1 | 1 | – | – | 1 | – | – | – |
| Theft | 2 | 1 | 1 | – | – | 1 | – | – | – |
| Fraud | 7 | 1 | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – |
| Drunkenness | – | – | – | – | – | – | – | – | – |
| Disciplinary Offences | – | – | – | – | – | – | – | – | – |
| RTA Offences | 7 | 7 | 6 | – | – | 6 | – | – | – |
| Others | 1 | 1 | 1 | – | – | 1 | – | – | – |

Table 12: Civilians Convicted under the Services Act

Royal Marines

| | Offences | Offenders | Most Serious Offence | Abso./ Condit Disch. | Commu. Super. Order | Recep./ Custo. Order | Compen -sation Order | Fines | Susp Senten | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | – | – | – | – | – | – | – | – | – | – |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – | – |
| Violence | – | – | – | – | – | – | – | – | – | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | – | – | – | – | – | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – | – |
| Class B | – | – | – | – | – | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – | – |
| Criminal Damage | – | – | – | – | – | – | – | – | – | – |
| Theft | – | – | – | – | – | – | – | – | – | – |
| Fraud | – | – | – | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – | – |
| Drunkenness | – | – | – | – | – | – | – | – | – | – |
| Disciplinary Offences | – | – | – | – | – | – | – | – | – | – |
| RTA Offences | – | – | – | – | – | – | – | – | – | – |
| Others | – | – | – | – | – | – | – | – | – | – |

Source: AS(M)1

Table 13: Courts Martial

Army

| | Offences | Offenders | Most Serious Offence | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **1,584** | **704** | **704** | **2** | **35** | **31** | **355** | **264** | **17** |
| Disloyalty & Sec. Offs. | 1 | 1 | 1 | – | 1 | – | – | – | – |
| Violence | 201 | 123 | 123 | – | 6 | 7 | 67 | 35 | 8 |
| Total Sexual Offences | 42 | 23 | 18 | – | 2 | 2 | 3 | 11 | – |
| Other than Homosexual | 23 | 12 | 8 | – | 2 | 1 | 1 | 4 | – |
| Homosexual | 19 | 11 | 10 | – | – | 1 | 2 | 7 | – |
| Total Drug Offences | 336 | 125 | 120 | 2 | 1 | – | 33 | 83 | 1 |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | 25 | 11 | 10 | – | – | – | 1 | 9 | – |
| Possession – Class A | 59 | 24 | 22 | – | 1 | – | 4 | 17 | – |
| Class B | 252 | 107 | 88 | 2 | – | – | 28 | 57 | 1 |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 29 | 20 | 14 | – | 1 | 1 | 6 | 2 | 4 |
| Theft | 274 | 93 | 76 | – | 2 | 7 | 30 | 36 | 1 |
| Fraud | 99 | 31 | 14 | – | 1 | 1 | 7 | 5 | – |
| Unauthorised Abs/Des. | 413 | 319 | 282 | – | 1 | 2 | 194 | 83 | 2 |
| Drunkenness | 16 | 14 | 4 | – | 1 | 1 | 1 | 1 | – |
| Disciplinary Offences | 140 | 84 | 36 | – | 10 | 8 | 12 | 5 | 1 |
| RTA Offences | 15 | 14 | 11 | – | 9 | 1 | 1 | – | – |
| Others | 18 | 12 | 5 | – | – | 1 | 1 | 3 | – |

Table 14: Summary Proceedings

Army

| | Offences | Offenders | Most Serious Offence | NDA Awards | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **8,874** | **6,414** | **6,414** | **–** | **779** | **1,663** | **498** | **3,474** | **–** | **–** |
| Disloyalty & Sec. Offs. | 16 | 16 | 16 | – | – | 8 | 1 | 7 | – | – |
| Violence | 897 | 808 | 808 | – | 63 | 228 | 92 | 425 | – | – |
| Total Sexual Offences | 1 | 1 | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – | – |
| Homosexual | 1 | 1 | – | – | – | – | – | – | – | – |
| Total Drug Offences | 171 | 138 | 138 | – | 1 | 23 | 5 | 109 | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – | – |
| Possession – Class A | 18 | 11 | 11 | – | – | 1 | 1 | 9 | – | – |
| Class B | 152 | 126 | 126 | – | 1 | 22 | 4 | 99 | – | – |
| Class C | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 335 | 288 | 261 | – | 25 | 97 | 21 | 118 | – | – |
| Theft | 250 | 201 | 192 | – | 8 | 56 | 6 | 122 | – | – |
| Fraud | 64 | 51 | 50 | – | 8 | 22 | 3 | 17 | – | – |
| Unauthorised Abs/Des. | 1,934 | 1,790 | 1,731 | – | 81 | 96 | 60 | 1,494 | – | – |
| Drunkenness | 571 | 566 | 435 | – | 56 | 120 | 54 | 205 | – | – |
| Disciplinary Offences | 4,500 | 3,341 | 2,714 | – | 533 | 968 | 253 | 960 | – | – |
| RTA Offences | 73 | 62 | 40 | – | 2 | 29 | 2 | 7 | – | – |
| Others | 62 | 62 | 29 | – | 2 | 16 | 1 | 10 | – | – |

Source: AS(M)1

Table 15: Civilian Court Convictions

Army

| | Offences | Offenders | Most Serious Offence | Abso./ Condit. Disch. | Commu. Punish. Order | Fines | Y.O.I. Deten. | Susp. Sent. | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **2,059** | **1,183** | **1,183** | **29** | **29** | **1,040** | **26** | **8** | **51** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 257 | 195 | 195 | 5 | 3 | 155 | 4 | 6 | 22 |
| Total Sexual Offences | 52 | 22 | 16 | 2 | 1 | 3 | 2 | – | 8 |
| Other than Homosexual | 38 | 20 | 14 | 1 | 1 | 2 | 2 | – | 8 |
| Homosexual | 14 | 3 | 2 | 1 | – | 1 | – | – | – |
| Total Drug Offences | 14 | 12 | 11 | – | – | 8 | – | – | 3 |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | 2 | 2 | 2 | – | – | 2 | – | – | – |
| Possession – Class A | 2 | 2 | – | – | – | – | – | – | – |
| Class B | 10 | 10 | 9 | – | – | 6 | – | – | 3 |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 99 | 76 | 63 | 6 | 1 | 54 | 2 | – | – |
| Theft | 211 | 145 | 121 | 2 | 3 | 91 | 12 | – | 13 |
| Fraud | 48 | 29 | 15 | – | – | 14 | – | – | 1 |
| [illegible]authorised Abs/Des. | – | – | – | – | – | – | – | – | – |
| [illegible]nkenness | – | – | – | – | – | – | – | – | – |
| [illegible]inary Offences | – | – | – | – | – | – | – | – | – |
| [illegible]ffences | 1,218 | 721 | 683 | 11 | 20 | 647 | 3 | 1 | 1 |
| [illegible]rs | 160 | 141 | 79 | 3 | 1 | 68 | 3 | 1 | 3 |

Table 16: Civilians Convicted under the Services Act

Army

| | Offences | Offenders | Most Serious Offence | Abso./ Condit Disch. | Commu. Super. Order | Recep./ Custo. Order | Compen -sation Order | Fines | Susp Senten | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **49** | **32** | **32** | **–** | **12** | **1** | **–** | **19** | **–** | **–** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – | – |
| Violence | 9 | 7 | 7 | – | 2 | – | – | 5 | – | – |
| [illegible]otal Sexual Offences | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Other than Homosexual | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | 1 | 1 | 1 | – | 1 | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| [illegible]nplying | – | – | – | – | – | – | – | – | – | – |
| [illegible]session – Class A | – | – | – | – | – | – | – | – | – | – |
| Class B | 1 | 1 | 1 | – | 1 | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Theft | 26 | 15 | 15 | – | 8 | 1 | – | 6 | – | – |
| Fraud | – | – | – | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – | – |
| Drunkenness | – | – | – | – | – | – | – | – | – | – |
| Disciplinary Offences | 3 | 2 | 1 | – | 1 | – | – | – | – | – |
| RTA Offences | 6 | 6 | 6 | – | – | – | – | 6 | – | – |
| Others | 2 | 2 | – | – | – | – | – | – | – | – |

Source: AS(M)1

Table 17: Courts Martial

Royal Air Force

| | Offences | Offenders | Most Serious Offence | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **328** | **129** | **129** | **–** | **35** | **6** | **56** | **30** | **2** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 46 | 34 | 34 | – | 6 | – | 25 | 2 | 1 |
| Total Sexual Offences | 1 | 1 | – | – | – | – | – | – | – |
| Other than Homosexual | 1 | 1 | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | 42 | 15 | 15 | – | – | – | 3 | 12 | – |
| Importing | – | – | – | – | – | – | – | – | – |
| Supplying | 1 | 1 | 1 | – | – | – | – | 1 | – |
| Possession – Class A | 2 | 1 | 1 | – | – | – | 1 | – | – |
| Class B | 33 | 13 | 12 | – | – | – | 2 | 10 | – |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | 6 | 2 | 1 | – | – | – | – | 1 | – |
| Criminal Damage | 14 | 8 | 6 | – | – | 1 | 4 | 1 | – |
| Theft | 106 | 39 | 37 | – | 8 | 2 | 16 | 10 | 1 |
| Fraud | 20 | 9 | 4 | – | – | 1 | 1 | 2 | – |
| Unauthorised Abs/Des. | 2 | 2 | 2 | – | – | – | 1 | 1 | – |
| Drunkenness | 13 | 13 | 5 | – | 2 | 1 | 2 | – | – |
| Disciplinary Offences | 33 | 25 | 9 | – | 5 | – | 2 | 2 | – |
| RTA Offences | 45 | 25 | 16 | – | 14 | 1 | 1 | – | – |
| Others | 6 | 6 | 1 | – | – | – | 1 | – | – |

Table 18: Summary Proceedings

Royal Air Force

| | Offences | Offenders | Most Serious Offence | NDA Awards | Reprimand & Minor Awards | Fines | Reduction in Rank | Service Detention | Dismissal from Service | Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **6,172** | **5,013** | **5,013** | **–** | **2,959** | **1,841** | **–** | **213** | **–** | **–** |
| Disloyalty & Sec. Offs. | 148 | 146 | 146 | – | 104 | 41 | – | 1 | – | – |
| Violence | 280 | 246 | 245 | – | 52 | 151 | – | 42 | – | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | 18 | 14 | 14 | – | 1 | – | – | 13 | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – | – |
| Class B | 13 | 9 | 9 | – | – | – | – | 9 | – | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | 5 | 5 | 5 | – | 1 | – | – | 4 | – | – |
| Criminal Damage | 125 | 118 | 114 | – | 27 | 85 | – | 2 | – | – |
| Theft | 89 | 77 | 73 | – | 26 | 36 | – | 11 | – | – |
| Fraud | 134 | 118 | 111 | – | 55 | 44 | – | 12 | – | – |
| Unauthorised Abs/Des. | 150 | 145 | 137 | – | 65 | 38 | – | 34 | – | – |
| Drunkenness | 305 | 304 | 265 | – | 54 | 193 | – | 18 | – | – |
| Disciplinary Offences | 4,222 | 3,653 | 3,474 | – | 2,441 | 955 | – | 78 | – | – |
| RTA Offences | 669 | 502 | 417 | – | 131 | 284 | – | 2 | – | – |
| Others | 32 | 30 | 17 | – | 3 | 14 | – | – | – | – |

Source: AS(M)1

Table 19: Civilian Court Convictions — Royal Air Force

| | Offences | Offenders | Most Serious Offence | Abso./ Condit. Disch. | Commu. Punish. Order | Fines | Y.O.I. Deten. | Susp. Sent. | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **762** | **523** | **523** | **35** | **3** | **478** | **–** | **2** | **5** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – |
| Violence | 45 | 39 | 39 | 5 | 1 | 30 | – | – | 3 |
| Total Sexual Offences | 9 | 7 | 6 | 1 | 1 | 2 | – | 2 | – |
| Other than Homosexual | 9 | 7 | 6 | 1 | 1 | 2 | – | 2 | – |
| Homosexual | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | 2 | 2 | 2 | – | – | 1 | – | – | 1 |
| Importing | 1 | 1 | 1 | – | – | – | – | – | 1 |
| Supplying | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – |
| Class B | 1 | 1 | 1 | – | – | 1 | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 19 | 17 | 17 | 2 | – | 15 | – | – | – |
| Theft | 51 | 38 | 35 | 3 | 1 | 30 | – | – | 1 |
| Fraud | 11 | 11 | 8 | – | – | 8 | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – |
| Drunkenness | 9 | 9 | 8 | 1 | – | 7 | – | – | – |
| Disciplinary Offences | – | – | – | – | – | – | – | – | – |
| RTA Offences | 539 | 360 | 349 | 1 | – | 348 | – | – | – |
| Others | 77 | 71 | 59 | 22 | – | 37 | – | – | – |

Table 20: Civilians Convicted under the Services Act — Royal Air Force

| | Offences | Offenders | Most Serious Offence | Abso./ Condit Disch. | Commu. Super. Order | Recep./ Custo. Order | Compen -sation Order | Fines | Susp Senten | Civil Imprison -ment |
|---|---|---|---|---|---|---|---|---|---|---|
| **Totals** | **32** | **20** | **20** | **10** | **–** | **–** | **–** | **10** | **–** | **–** |
| Disloyalty & Sec. Offs. | – | – | – | – | – | – | – | – | – | – |
| Violence | – | – | – | – | – | – | – | – | – | – |
| Total Sexual Offences | – | – | – | – | – | – | – | – | – | – |
| Other than Homosexual | – | – | – | – | – | – | – | – | – | – |
| Homosexual | – | – | – | – | – | – | – | – | – | – |
| Total Drug Offences | – | – | – | – | – | – | – | – | – | – |
| Importing | – | – | – | – | – | – | – | – | – | – |
| Supplying | – | – | – | – | – | – | – | – | – | – |
| Possession – Class A | – | – | – | – | – | – | – | – | – | – |
| Class B | – | – | – | – | – | – | – | – | – | – |
| Class C | – | – | – | – | – | – | – | – | – | – |
| Toxic Materials | – | – | – | – | – | – | – | – | – | – |
| Criminal Damage | 1 | 1 | 1 | – | – | – | – | 1 | – | – |
| Theft | 22 | 14 | 13 | 10 | – | – | – | 3 | – | – |
| Fraud | 1 | 1 | – | – | – | – | – | – | – | – |
| Unauthorised Abs/Des. | – | – | – | – | – | – | – | – | – | – |
| Drunkenness | – | – | – | – | – | – | – | – | – | – |
| Disciplinary Offences | – | – | – | – | – | – | – | – | – | – |
| RTA Offences | 8 | 7 | 6 | – | – | – | – | 6 | – | – |
| Others | – | – | – | – | – | – | – | – | – | – |

Source: AS(M)1

ARMY CODE N
(Revised 19

# THE RIGHTS OF A SOLDIER CHARGED WITH AN OFFENCE UNDER THE ARMY ACT 1955

This pamphlet is a guide; it is not intended to deal with every kind of question which might arise, nor does it cover all rights, duties or liabilities a sol might have. While most of its contents apply to any person charged wit offence under the Army Act 1955, the pamphlet deals primarily with pri soldiers and non-commissioned officers. If a soldier is in any doubt he sh ask for an officer to advise him.

This copy is issued to No. _____

Rank _____

Name _____

Unit _____

and is not to be taken away from him

By Command of the Defence Co

**Abbreviations**

| | |
|---|---|
| AA | Army Act 1955 |
| ASJR | Army Summary Jurisdiction Regulations 1972 |
| CJA 1967 | Criminal Justice Act 1967 |
| CM(A)A 1968 | Courts-Martial (Appeals) Act 1968 |
| DCM | District Court-Martial |
| GCM | General Court-Martial |
| I and D(A)R 1979 | Imprisonment and Detention (Army) Rules 1979 |
| MMLI | Manual of Military Law Part I |
| QR | Queen's Regulations for the Army |
| RP | Rules of Procedure (Army) 1972 |
| Sch | Schedule |
| CO | Commanding Officer |
| OC | Officer Commanding (Subordinate Commander) |
| s(s). | Section(s) |


Army Law Training & Publications Branch
Army Legal Group UK
Old Sarum
Salisbury Wilts
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offence is to ensure that a copy of this pamphlet, and advice from either an officer or a warrant officer are made available to the soldier. He will be allowed to consult copies of MMLI and QR on request. If it becomes likely that he is to be brought to trial by court-martial, he may choose some suitable and available person in the army to advise him. If necessary, the CO will appoint an officer for this purpose. QR 6.051A and 6.085

2. **Arrest**

a. *Information*—A soldier placed in close arrest is at his request to be told the name, rank and unit of the person who alleges that he has committed an offence and also given a copy of the charge report (AFB 252). QR 6.045(c)

b. *Communication*—At the soldier's request if he is in close arrest he may be supplied with writing materials. Provided that neither the interests of the investigation, the prevention of crime and the apprehension of offenders nor the operations, safety and security of the armed forces are likely to be adversely affected, he may be permitted to:—

(i) speak on the telephone to relations or friends at his expense or receive incoming telephone calls at reasonable times;

(ii) send letters, telemessages or telegrams at his own expense; QR 6.006A

(iii) have the fact of his arrest and the place where he is being held notified to one person reasonably named by him. QR 6.006B

c. *Duties*. A private soldier in close arrest, having handed over his normal duties, does not attend parades or do more than is necessary to keep himself and his accommodation clean. If in open arrest, he attends all parades and may be ordered to perform all duties. QR 6.020 and 6.021

A NCO in any form of arrest also hands over his duties and then merely keeps himself and his belongings clean. (On active service private soldiers and NCOs may be ordered to bear arms and to perform duties). QR 6.020

3. When a **soldier under the age of 18 years** is awaiting trial by court-martial his CO will inform his parents or legal guardian as soon as possible. QR 6.093

4. **Interviews by the Service Police.** See Code of Practice for the Treatment and Questioning of Persons by the Service Police. MMLI, Ch.V, para.90

5. **Identification Parades.** See Code of Practice for the Identification of Persons Suspected of Offences under the Service Discipline Acts. MMLI, Ch.V, para.90; QR 6.059–6.062

6. **Search of Persons, Vehicles and Property.** A CO has an inherent power, without a warrant, to make a full search of any camp, barracks and married quarters under his command and while doing so may search military personnel and their property including vehicles. MMLI, Ch.VI, para.14(b)

7. **Time limits for military proceedings.** Generally none but there are some time limits for:—

a. some civil offences and

b. those soldiers who cease to be subject to military law: they must be dealt with quickly thereafter either by summary dealing within three months or trial by court-martial within six months. AA s.132

8. **Delays and Reporting.** Where a soldier is held in arrest the formal investigation of his case should usually begin within 48 hours of the CO becoming aware of it. Once a soldier has been arrested or charged, reports have to be submitted every 8 days to the officer who would be responsible for convening the court-martial until the case is eventually disposed of. RP 4 and 5; QR 6.047

An accused person may only be held in arrest beyond 72 consecutive days without a court-martial being convened for his trial if the court-martial convening officer gives a written direction with reasons why the accused should not be released from arrest. RP 6; QR 6.047

## PRELIMINARY INVESTIGATIONS

9. As soon as possible after being charged a soldier will be brought before either his CO or OC so that the charge may be investigated. RP 4(1); QR 6.047(a)

10. If the soldier does not understand the charge he may ask the CO or OC to explain it. RP 7(1)

## SUMMARY DEALING

11. **General.** The CO or OC may decide either to hear the evidence himself or (CO only) to have the evidence reduced to writing in the form of a summary of evidence or an abstract of evidence. These investigations are explained in para. 21 below. RP 7

12. **Charges.** The charges which may be dealt with summarily are set out in ASJR. ASJR 11 a Sch.1

13. **Hearing.** If the CO or OC decides to hear the evidence himself, the soldier will be present and entitled to:—

a. require that the evidence of witnesses be given orally instead of in writing;

b. require that the evidence be given on oath, remembering that this will then apply to all witnesses;

c. cross-examine witnesses giving evidence against him;

d. give evidence on oath himself (even if the prosecution witnesses have not given evidence on oath), alternatively he may make an unsworn statement or choose to remain silent;

e. call witnesses to speak on his behalf. RP 8

a. by CO

AA s.78(3)–(5); QR 6.072; ASJR 14 and 15

| | SSgt/ Sgt | Cpl/ Bdr | LCpl/ LBdr | Private Soldier |
|---|---|---|---|---|
| Detention up to 28 days (for extended detention, 29–60 days, see para.15 below) | No | No | No | Yes |
| Fine up to 28 days pay | Yes | Yes | Yes | Yes |
| Severe Reprimand | Yes | Yes | Yes | No |
| Reprimand | Yes | Yes | Yes | No |
| Reversion from acting to permanent or intermediate rank | Yes | Yes | Yes | No |
| Reversion to the ranks | No | No | Yes | No |
| Stoppages of pay | Yes | Yes | Yes | Yes |
| Minor punishments —admonition | Yes | Yes | Yes | Yes |
| —restriction of privileges up to 14 days | No | No | No | Yes |
| —extra guards or picquets up to 3 | No | No | No | Yes |



b. by OC

ASJR 16
QR 6.07

| | Cpl/ Bdr | LCpl/ LBdr | Private Soldier |
|---|---|---|---|
| Fine up to 7 days pay | Yes | Yes | Yes |
| Reprimand | Yes | Yes | No |
| Stoppages up to 7 days pay | Yes | Yes | Yes |
| Minor punishments —admonition | Yes | Yes | Yes |
| —restriction of privileges up to 7 days | No | No | Yes |
| —extra guards or picquets up to 3 | No | No | Yes |

15. **Extended Detention**. This applies only to private soldiers and means a punishment of more than 28 days but not exceeding 60 days detention. It may be awarded by a CO if all of the following conditions are satisfied:

a. A summary of evidence or an abstract or evidence (see para.21 below) has been prepared supporting a charge or charges capable of being dealt with summarily. Where an abstract is used it must be served on the soldier.

b. The CO has been granted permission by higher authority to award extended detention.

c. Not less than 24 hours before being dealt with, the soldier received:

(i) a copy of the charge-sheet;

(ii) a copy of the summary or abstract of evidence incorporating any statements made by the soldier or defence witnesses;

(iii) an indication that the CO was thinking of awarding extended detention of up to 60 days.

d. The soldier is not disputing the material facts as contained in the summary or abstract of evidence.

e. The soldier is not disputing that the facts mentioned at d. above constitute the offence with which he has been charged as indicated in the charge-sheet.

f. The CO asks the soldier whether he will accept his award or if, instead, he wishes to be tried by court-martial. That is called 'electing trial'. (See paras. 17–20 below).

**16. Complaints.** If, after a soldier has been dealt with summarily, he considers that he has been treated unjustly by his CO or OC, he may submit a written complaint specifying his reasons and the matter will be reviewed by higher authority. AA ss.181 and 115; QR 5.204–5.206

## ELECTING TRIAL BY COURT-MARTIAL

**17. When can a soldier elect trial?**

a. A soldier only has the right to demand a trial by court-martial if his CO or OC when investigating the charge gives him the choice of either accepting his award or being tried by court-martial.

b. A CO or OC will give that choice if the punishment is other than a severe reprimand, reprimand or minor punishment or where a finding of guilty (whatever the punishment awarded) will involve a forfeiture of pay. AA ss.78(5) and 145(1)(a) and (c)

**18. Do you have time to make up your mind?**

Yes, if you wish, you may have up to 24 hours in which to decide whether or not to elect trial by court-martial. If you decide to elect trial you will be given the opportunity of withdrawing your election the following day. QR 6.051A(c) and 6.088

**19. Can election for trial be withdrawn?**

Yes, election may be withdrawn at any time before the trial actually begins provided that:—

a. The CO agrees, if the soldier wishes to withdraw before remand for trial;

b. the court-martial convening officer agrees, if the soldier wishes to withdraw after remand for trial. AA s.78(5); QR 6.088



**20. What are the consequence of election?**

a. The charge may not be increased in gravity unless evidence of a more serious offence subsequently becomes available. QR 6.089

b. Punishment in the event of conviction is not to be increased merely because trial was elected. In ordinary circumstances, the court will not award a heavier punishment than that which could have been awarded summarily by the CO. QR 6.121

## SUMMARIES OF EVIDENCE AND ABSTRACTS OF EVIDENCE

**21. What are they?**

Both are written investigations which may be ordered by a CO even if he intends to deal summarily with the soldier using his ordinary powers. A summary or abstract of evidence must be ordered if the CO is going to seek permission to award extended detention or to remand the soldier for trial by court-martial. The differences between the two forms of investigation are that:—

a. *A summary of evidence* is taken by an officer on behalf of the CO in the presence of the soldier who is in close arrest but may have an advising officer or lawyer present. Witnesses give their evidence on oath and are subject to cross-examination by the defence. If the soldier wishes, he may give evidence himself and call witnesses but neither he nor they may be questioned by the officer taking the summary except to clarify what has been said.* The soldier may also choose to say nothing. RP

b. *An abstract of evidence* is a collection of existing written statements assembled on the direction of the CO after which a copy is served on the soldier. After receiving his copy of the abstract, the soldier has an opportunity to consider it before being seen again by the officer who served the abstract. If necessary, the soldier may seek advice on:—

(i) whether the contents support the charge; and

(ii) whether to make or produce a statement by himself and/or witnesses on his behalf* or to say nothing. RP 10

**These represent opportunities for the accused soldier to bring to the notice of the military authorities any matters which may explain or excuse the allegations against him.*

**22. When must a summary of evidence be ordered?** RP 7(2)

If a. the maximum punishment for the offence with which the soldier is charged is death;

b. the CO considers it necessary in the interests of justice;

c. the soldier requires in writing that a summary of evidence be taken, provided that he does so before his CO has remanded him for trial by court-martial and submitted the papers to higher authority. RP 13

**23. May a CO still deal summarily even if a summary of evidence has been taken or an abstract of evidence has been made?**

Yes, if a CO takes this course, the soldier will be brought before him; and

a. any prosecution witnesses who have not yet given their evidence orally in the soldier's presence will be called to do so if he so requires; and

b. the soldier will get a further opportunity to give evidence himself on oath or to make an unsworn statement and also to call witnesses who can speak on his behalf. RP 11(1)

(NB. This does not apply to Extended Detention cases (see para.15 above) in which the soldier has decided not to dispute the evidence against him and is, in effect, pleading guilty to the charge.) RP 11(2)

**24. What are the purposes of a summary or abstract of evidence?**

a. to assist the CO in deciding whether or not the soldier should be remanded for trial by court-martial;

b. to enable a higher authority to consider a CO's application for Extended Detention (see para.15 above);



c. to enable the court martial convening officer to consider whether or not to order trial by court-martial and, if so, the type of court;

d. to provide a brief for the prosecutor at the trial;

e. to inform the defence of the evidence which will be given at the trial;

f. to indicate to the president of the court-martial if there is no judge advocate, or to the judge advocate where one has been appointed, the nature of the case; and

g. in the event of a plea of guilty at a court-martial, to enable the court and the confirming officer to know the facts of the case and to decide on punishment.

## PREPARATION FOR TRIAL BY COURT-MARTIAL

**25. Documents**

As soon as possible after being remanded by his CO for trial by court-martial, and not later than 24 hours before trial, the soldier will receive:—

(1) a copy of the charge-sheet; RP 25(1)(d)(

(2) a copy of the summary or abstract of evidence showing what parts, if any, the prosecution does not intend to use at the trial; RP 25(

(3) as soon as is possible notice of any additional evidence not contained in the summary or abstract of evidence but which the prosecution intends to call at the trial; RP 25( and 49

(4) at the soldier's request, a list of the ranks, names and units of the president and members (including waiting members) of the court which is to try him. RP 25(

(5) unless the prosecutor intends to tender him for cross-examination at the trial, notice of any witness whose evidence is contained in the summary or abstract of evidence but whom the prosecutor does not intend to call at the trial; RP 50

(NB. When he receives the charge-sheet and summary or abstract of evidence the soldier is entitled to have the charge or charges explained to him.) RP 25

26. **Legal representation**

a. the soldier will have either a defending officer (see para. 1 above) or a lawyer to defend him unless he expressly indicates in writing that he does not want either; — RP 25(1)(b) and 79

b. the soldier may communicate with his defending officer or lawyer and witnesses so that his defence can be prepared; — RP 25(1)(a)

c. the soldier is to be notified in sufficient time if he is to be prosecuted by a legally qualified officer in order that he may make arrangements for a lawyer to defend him if he so wishes. — RP 25(1)(c)

27. **Legal Aid**

The soldier may apply for legal aid, with a view to being defended by a civilian lawyer, once his CO has remanded him for trial by court-martial. The application is made on AF A2471 (Rev 9/84). If it is granted, the soldier may have to make a financial contribution which will be assessed in the light of his available resources. Alternatively, he may ask to be represented by a legally qualified officer of the Army Legal Corps or the Royal Air Force Legal Services, free of charge, if such an officer is available. Even if an application for legal aid is unsuccessful, a soldier may instruct a lawyer to defend him at his own expense and must inform his CO of that step as soon as possible. In any event, and not less than 24 hours before the trial, the court-martial convening authority must be similarly notified. — QR 6.094 and Annex 6D; RP 79

28. **Psychiatric Examination** — QR 6.092 and Annex 6C

29. **Witnesses**

a. although the soldier has the right to communicate with witnesses who can assist his defence, neither he nor anyone on his behalf may without the consent of the convening officer (or, after the trial has begun, the consent of the president of the court-martial), communicate with any prosecution witness.

b. if the soldier wishes to call at his trial any witnesses in his defence, and he makes a written request to his CO at least 24 hours before the trial, reasonable steps will be taken to secure their attendance. — RP 25(1)(e)(ii)



30. **Some points which an accused soldier may wish to discuss with his advisers**

a. does the prosecution evidence in the summary or abstract of evidence and under RP 49 support the charge(s)?

b. has the court-martial jurisdiction to try him? — RP 36 and 3

c. is the charge properly framed? — RP 37

d. if applicable, is there potential injustice in his being tried with other accused persons or on several charges? — RP 25(1)(g) (h), 39 and 4

e. does he have an alibi? — RP 12; CJA 1967 s.1

f. is there any evidence which could be admitted? — CJA 1967 ss.9 and 10

**TRIAL BY COURT-MARTIAL**

31. **Medical examination** — QR 6.113

32. **Presence**. The soldier will be present throughout the proceedings in open court. — AA s.94(1)

33. The soldier will be in close arrest unless the convening officer directs that he be in open arrest while the court is not actually sitting. — QR 6.115

34. The president of the court or the judge advocate (if appointed) will keep the soldier informed as to his rights. The accused may in certain circumstances consult the judge advocate about the relevant law or procedures. — RP 77(6) and (7)

35. The soldier may consult his defending officer or lawyer at any time. Although he has the right to cross-examine witnesses and address the court, it is usual for those tasks to be done on his behalf by the defending officer or lawyer. — RP 79(2)

36. If the soldier is found guilty of some or all of the charges, he may invite the court before it decides on sentence to take into consideration any other similar offences which he has committed. The advantage of this is that, if the court agrees to do so, the soldier will not be tried in the future for those other offences. An appropriate punishment will be awarded to cover both the convictions and the offences taken into consideration. — AA s.1

a. **Policy** — QR 6.120–3; MML1, Ch. III, para. 88

b. **Powers** — AA ss.71, 71A, 71AA and 85

| | NCO | Private Soldier |
|---|---|---|
| Death (not DCM) | Yes | Yes |
| Imprisonment or custodial order (DCM max 2 years) | Yes | Yes |
| Dismissal (with or without disgrace) from HM service | Yes | Yes |
| Detention (max 2 years) | Yes | Yes |
| Reduction in rank | Yes | No |
| Fine up to 28 days pay | Yes | Yes |
| Severe reprimand or reprimand | Yes | No |
| Stoppages of pay | Yes | Yes |
| Minor punishments — admonition | Yes | Yes |
| — restriction of privileges up to 14 days | No | Yes |

**POST TRIAL**

38. **On conviction**

a. A copy of the pamphlet "Appeals and Petitions" (Army Code No. 11921) will be available to the soldier. — QR 6.125



b. A sentence of detention of 28 days or more will usually be served in the Military Corrective Training Centre (MCTC) at Colchester. Corrective training will be directed towards rehabilitation either as a soldier or, if sentence is to be followed by discharge, as a civilian.

c. A sentence of imprisonment, which automatically entails discharge, will be served in a civilian prison in the UK. — AA s.71(3)

d. A "Custodial Order", which automatically entails discharge, will be served in a civil establishment in the UK where civilians under 21 serve similar sentences. — AA s.71AA

e. A soldier may appeal against finding and may petition the confirming and/or reviewing authorities against both finding and sentence. — CM(A)A 196[illegible] s.8; RP 100

f. A soldier sentenced to imprisonment or to a custodial order may be entitled to remission of sentence in accordance with the Rules made under the Prison Act 1952; this remission may be lost for bad behaviour.

g. A soldier sentenced to a period of detention of 28 days or more shall be entitled to up to one third remission of sentence, subject to his serving a minimum of 24 days in detention, but may lose this for bad behaviour. — I and D[illegible] 1979, s.[illegible]

h. A soldier sentenced to imprisonment becomes eligible for consideration for parole after serving 6 months or one third of his sentence, whichever is the longer.

39. **Release from arrest and return to duty after conviction.** — QR 6.1[illegible]

40. **On acquittal**, the soldier may apply to the Ministry of Defence (PS2(Army)) for a refund of defence costs. — QR J6.[illegible]

Printed in the United Kingdom for Her Majesty's Stationery Office
(2688 881 D(81)1083 9 88 8,000 G436 10170

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# ROLE OF SUMMARY PROCEEDINGS: THE MAINTENANCE OF DISCIPLINE

Lieutenant-Colonel K.W. Watkin[1]

> After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy....
>
> Maurice de Saxe: Mes Reveries, xviii, 1732[2]

## 1. INTRODUCTION

In order to appreciate the effect which the Charter may have on summary proceedings in the Canadian Forces it is necessary to understand the role of those proceedings in maintaining discipline. A historical review of summary justice demonstrates that the expeditious and uncomplicated adjudication of breaches of discipline has been an essential element of military justice since at least Roman times. In addition, the power to dispense summary justice has primarily been concentrated in the hands of the commanding officer. In this paper the reasons for the continued reliance on summary proceedings in the Canadian Forces will be explored in detail. Special emphasis will be placed on outlining the requirement for discipline, the unique role which the summary trial plays in maintaining discipline and the particular

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[1] B.A.(Hons), LL.B., LL.M.

[2] R.D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 91.

flexibility which that service tribunal offers in supporting the operational commitments of the Canadian Forces.

## 2. THE NEED FOR DISCIPLINE

The role of the military justice system is to assist in the maintenance of discipline in the Canadian Forces. In assessing that role it is essential that the need for discipline in the armed forces be understood.

The role of the armed forces is to apply force, or the threat of force, in the furtherance of the interests of the state. Such force, or the threatened use of such force, can be directed towards external threats, or in maintaining internal security. Many armed forces, such as the Canadian Forces, also perform a number of ancillary duties such as disaster relief, and search and rescue operations. However, the use of the military forces in these non-combat roles is largely a result of the unique abilities and equipment these forces possess because of their preparation for combat. Canadian Forces naval ships can be used for fisheries patrols, but the vessels which civil agencies might use for such duties cannot be used for combat.

It is significant that the role of military forces is related to the application of violence, because it is the potential destructive power of these forces which requires that they be more closely controlled than other segments of society. In Canada, the use of this sanctioned violence is ultimately controlled by the

Government of Canada, as empowered by Parliament. However, the actual training and on site deployment of the armed forces is in the hands of military officers. They control military forces by a variety of means including the application of military law as prescribed by the National Defence Act.

In order to fulfil the function of the armed forces, military commanders must be able to train and motivate personnel under their command to fight. This readiness to fight, whether willingly or otherwise, requires that the members of the armed forces often suppress their own interests including, ultimately, the preservation of their own lives. In his book, Combat Motivation: The Behaviour of Soldiers in Battle[3], Anthony Kellett determined that the factors affecting the motivation of soldiers to fight were primary group allegiances (group cohesion and buddy loyalties), unit esprit, manpower allocation, socialization, training, discipline, leadership, ideology, rewards, pre-conceptions of combat, combat stress and combat behaviour (including self preservation).[4] However, Kellett concluded it was identification with being a member of a military force which ultimately caused soldiers to fight.

> Most of the soldiers in the armies examined in this study (armies that, in this century, usually combined regular troops with a larger proportion of short-service soldiers) fought when called upon to do so--usually without notable enthusiasm, but equally without widespread or persistent defection. They fought because

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[3] A. Kellett, Combat Motivation: The Behaviour of Soldiers in Battle (The Hague: Kluwer Nijhoff Publishing, 1982).

[4] Ibid. at 319-332.

they were in the firing line, where realistic alternatives were few and where the penalties of not fighting (personal and social as well as disciplinary) outweighed the uncertain risks of fighting. The very fact of belonging, for whatever reasons, to an organization that is based on combat and that (by its size, its functional interrelationships, its normative demands, and its regulatory constraints) places unusual restraints on the individual makes rejection of the combat role difficult. The Stouffer study drew the following conclusion:

> We are forced to the conclusion that personal motives and relationships are not uniquely determinate for organization in combat...officers and men must be motivated to make the organization work, but not **all** of them have to be so motivated, nor must they all agree on details of social philosophy or be bound by ties of personal friendship in order for a functioning organization to exist. To put it another way, the best single predictor of combat behaviour is the simple fact of institutionalized role: knowing that a man is a soldier rather than a civilian. The soldier role is a vehicle for getting a man into the position in which he has to fight or take the institutionally sanctioned consequences.[5]

This readiness and ability to withstand the stresses of combat is not limited to what might traditionally be called "front line" forces. As modern warfare has become more technological it has become popular to conceptually divide members of armed forces into two groups: those who fight and those who maintain the weapons systems. It is then somehow considered that the "maintainers" do not need the same disciplinary training as those personnel directly involved in a combat role. While the technological advances have increased the support to front line personnel (tail to teeth) ratio in modern armed forces and resulted, in part, in the myth of the

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[5] Ibid. at 334.

push button war, they have also ensured that the combat support forces remain subject to considerable combat stress. The increased range of weapon systems, greater mobility of military forces (including the use of airborne forces) and the need to effect repairs at or near the site of combat all serve to extend combat or near combat conditions to support personnel. Therefore, all members of the armed forces must have the requisite institutional values to prepare them to fight.

The requirement that all members of the armed forces be trained and disciplined to fight has been termed as the "universality of service" principle. A service member who occupies an administrative position within the military cannot forget that they are a "soldier first, tradesman second". An individual, "woman or man, is not recruited into the army primarily as an office clerk but as a soldier, and that individual is always called upon to bear arms when necessary."[6] A graphic example of the liability for all members of the Canadian Forces to be prepared to fight was demonstrated during the Persian Gulf Conflict (September, 1990-March, 1991) when all participants, regardless of trade, were subject to attack by Iraqi Scud missiles.

The institutional factors which make the military

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[6] Rivard v. Canada (Dept. of National Defence (1990), 12 C.H.R.R. D/35, Ede v. Canada (Canadian Armed Forces) (1990), 11 C.H.R.R. D/439, Galbraith v. Canada (Canadian Armed Forces) (1989), 10 C.H.R.R. D/6501, Gaetz v. Canada (Canadian Armed Forces) (1989), 10 C.H.R.R. D/5902, Husband v. Canadian Armed Forces (2 August, 1991) No. T.D. 12/19 (Can. Trib.), Bouchard v. Canadian Armed Forces (5 September 1991) No. T.d. 14/91 (Can. Rev. Trib.), Dunmall v. Canadian Armed Forces (25 October, 1991) T.D. 15/91 (Can. Trib.).

different from the rest of society were set out by Charles C. Moskos in an article entitled "Institutional and Occupational Trends in Armed Forces":

> An **institution** is legitimated in terms of values and norms, that is, a purpose transcending individual self-interest in favour of a presumed higher good. We use **institution** here in the sense it usually possesses in everyday speech. Members of an institution are often seen as following a calling captured in words like **duty, honor, and country**. They are commonly viewed and regard themselves as being different or apart from the broader society. To the degree institutional membership is congruent with notions of self-sacrifice and primary identification with one's institutional role, institution members ordinarily enjoy esteem from the larger society.
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> Military service traditionally has acquired many institutional features, for example, fixed terms of enlistment, liability for 24-hour service, frequent moves of self and family, subjection to military discipline and law, and inability to resign, strike, or negotiate working conditions. When grievances are felt, members of an institution do not as a rule organize themselves into interest groups. Rather, if redress is sought, it takes the form of personal recourse to superiors, with its implication that the organization will take care of its own. Above and beyond these conditions, of course, there are the physical dangers inherent in combat training and actual combat operations.[7]

These institutional factors are contrasted with the occupational factors which apply to most of civilian society. An occupation is defined in terms of the marketplace. Supply and demand governs the employee's interests. Employees are paid an equivalent amount based on similar skill levels and usually have a voice in determining salary levels and working conditions. Moskos concludes that the "occupational model implies the priority of

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[7] C. Moskos & F. Wood, eds, The Military: More Than Just a Job (London: Pergamon-Brassey's International Defense Publishers Inc., 1988). at 16-17.

self-interest rather than that of the employing organization"[8]. One of the factors which distinguishes the military "institution" for the civilian "occupation" is the subjection of the member of the armed forces to military discipline and law. It is the determination of what constitutes military discipline and how it is employed to enhance institutional values of the military which sets the stage for understanding the role of the summary trial.

Discipline has traditionally been considered to be the soul of the armed forces.[9] It is derived from the word "disciple" and is defined in the Concise Oxford Dictionary as:

> discipline 1. branch of instruction or learning; mental or moral training, adversity as effecting this; system of rules for conduct; behaviour according to established rules. 2. order maintained among school children, soldiers, prisoners, etc.; control exercised over members of a church or other organization....[10]

To discipline someone is to "bring under control, train to obedience and order, drill, punish, chastise".[11] It does not simply consist of the imposition of punitive sanctions as is reflected in the following introduction to the chapter on discipline in the Canadian Forces manual on leadership for

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[8] Ibid. at 17.

[9] The American general, General W.T. Sherman said "There is a soul to an army as well as to an individual man and no general can accomplish the full work of his army unless he commands the souls of his men as well as their bodies and their legs." R. Mummey, "A Brief History of Summary Punishment in the Armies of the World" (1954) The Federal Bar Journal 286. at 289.

[10] The Concise Oxford Dictionary 7th ed. (Oxford: Clarendon Press, 1982) at 273.

[11] Ibid. at 273.

officers:

> The military way of life demands full time dedication to the service and its requirements. It is necessary that a member of the services train himself to have the attitude or state of mind which will prepare him for the demands of combat. In this way, he directly associates and supports the aim of the Services which is to maintain a state of combat readiness at all times. This code of conduct demands that an officer or man must be prepared to so condition himself that he will immediately obey an order even if it may result in his injury or death; the ultimate test that officers and men in the Services must be prepared to face. This code of conduct is firmly based on the code of service discipline which has to some minds become synonymous with enforced control and corrective punishment. This is only one side of the coin; discipline also includes justice, training and morale.[12]

This trained habit of obedience is not required to guarantee a blind compliance with orders, but rather to ensure that in times of stress orders will be clearly understood and carried out without delay.

> The habit of obedience and self-discipline which results from sound training is not only essential in the execution of orders but it also often spells the difference between courage and cowardice. When faced with danger man is afraid, and often tends towards panic and clouded reasoning. "Habit is second nature" and in danger men must act in accordance with a pre-established drill.[13]

In addition to this primary purpose of ensuring that the member of the armed forces does not panic in the face of danger, but rather carries out the assigned orders, discipline has two other purposes which are set out by Kellett as follows:

> The second purpose is to maintain order within the army

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[12] Leadership for the Professional Officer, Canadian Forces Publication 131(2) at 7-1.

[13] Ibid.

> so that it may be easily moved and controlled and so it does not abuse its power. If an army is to fulfil its mission on the battlefield, it must be trained in aggression, however, its aggressive tendencies have to be damped down in peacetime, and the medium for this process is discipline. The third purpose of discipline...is the assimilation of the recruit and the differentiation of his new environment from his former one.[14]

While Kellett's work involved the land forces his observations concerning discipline are equally applicable to naval and air forces. Discipline is an essential element of the process which turns civilians into members of a military which is capable of fulfilling its combat function.

The two forms of discipline which are used to prepare an armed force to fulfil its function are formal or collective discipline and self-discipline. Collective discipline is embodied in the traditional discipline of recruit camp. It relies heavily on drills and training to socialize the recruit to military life and to persuade that recruit by systematic effort to conform to the standards of military society. Included in that training is the requirement to conform to the code of service discipline and the customs and traditions of the service. Collective discipline was historically the prevailing form of discipline applied to the British and Canadian armed forces prior to World War II. However, in this century there has been less reliance on the coercive and rigid principles of collective discipline and greater reliance on

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[14] **Supra**, note 2 at 89.

the service member's willingness to perform the required duty.[15] The Canadian Forces manual of leadership for officers explains the operation of this "self-discipline", in part, as follows:

> The subordinates have the power to disobey but the broad penalties of the orders generally prove sufficient, along with the natural conscience of the man, to achieve obedience. It is well known that the restraints of conscience vary with the person but even the most restive, once he has accepted the legality of the situation, must feel the gnawing of his own conscience at the moment of decision. Because of the varying and possibly limiting definitions of "self" a more accurate description of this quality is "individual discipline".[16]

The shift from collective to individual or self-discipline came about for two reasons. First, the large influx of volunteers during World War 1 and World War 11 made it impossible to train them to the levels of discipline present in the pre-war volunteer armies. The backlash against those pre-war standards at the end of World War II resulted in some significant changes to military law. Secondly, the increased range and hitting power of weapons necessitated a dispersal of military forces.[17] Kellett comments that as "units became increasingly dependent on their own resources to press the fight, the enforcement of rigid discipline declined as

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[15] Ibid. at 133-134. Professor M. Janowitz, in Socalization and the Military Establishment (New York: Russel Sage Foundation, 1965) at 43-45, refers to this change as a switch from "domination" by military authorites to one of "manipulation". Manipulation involves emphasis on group goals rather than punitive action.

[16] Leadership Manual, **supra**, note 9. at 7-2.

[17] **Supra**, note 2 at 133-134.

a feature of combat experience".[18]

The maintenance of discipline in Canada's modern armed forces relies on a blend of both collective and self-discipline. Collective discipline is primarily used during recruit training. Once the service member leaves the recruit training environment the transition begins to a reliance on self-discipline. This transition is described in the leadership manual for officers as follows:

> 1. ...The leader must assist the man in his transition from an environment of imposed discipline to an environment of self discipline; that is, leaving basic training and joining his first active military unit. In his assistance the leader must ensure that he interprets the regulations consistently and fairly. When a man resists the progression from imposed to self-discipline the leader must find the reason for this resistance.
>
> 2. Initially, the leader must discipline and counsel; however, when resistance continues he must resort to the penalties prescribed by the orders. He must be aware that repeated offenses by a man indicate to some degree a failure in the leadership of his unit and therefore should concentrate on the preventive rather than the remedial....[19]

The use of punitive measures, such as the laying of charges and proceeding with a trial before a service tribunal, can therefore be seen to be just one of the disciplining tools available to the military commander. It is an important and essential means of maintaining discipline, but it is intended to be used only as a last resort.

An essential feature of the disciplinary process is that it is

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[18] Ibid. at 134.

[19] **Supra**, note 10 at 7-3 to 7-4.

meant to be intrusive. As a means of socializing members of the armed forces, and particularly recruits, military control of the service member's life must be much more pervasive than the control exercised by civilian society on its members. That does not mean that members of the military are not subject to the rules which govern the conduct of their civilian counterparts. Military members must perform all of the obligations required of members of Canadian society. However, they also have additional responsibilities as members of the armed forces. In most cases compliance with the obligations of both Canadian civilian and military society requires a higher standard of conduct from service members than from their civilian counterparts. The intrusiveness of the disciplinary process is reflected in the scope of military law. Military law includes not only offences which are also found in civilian criminal law, but also offences which would not be the subject of punitive action in civilian life. The reasoning behind the broad scope of military law was set out by Mr. Justice Ritchie in MacKay v. R[20]. He quoted with approval an earlier decision of Mr. Justice Cattanach of the Federal Court Trial Division:

> The same learned Judge later made the following comment (at p. 525 C.C.C., p. 657 D.L.R., p. 236 F.C.):
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> > Many offences which are punishable under civil law take on a much more severe punishment. Examples of such are manifold such a theft from a comrade. In the service that is more reprehensible since it detracts from the essential **esprit de corps**, mutual respect and trust in comrades and the exigencies of the

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[20] (1980), 54 C.C.C. (2d) 129 (S.C.C.) [hereinafter MacKay].

barrack room life-style. Again for a citizen to strike a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly, a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.

> It may be thought also that the offence of trafficking in narcotics takes on a special character when it is committed, as it was here, at an armed forces base where service personnel are equipped with firearms.[21]

The essential nature of trained obedience in the execution of orders is reflected in military offences such as absence without leave, desertion and insubordination. It is also present in the requirement to wear a uniform and to maintain that uniform in an appropriate manner. Since the habit of obedience requires a compliance with all but unlawful orders no breach of orders can be overlooked. Failure to comply with even minor orders and regulations involves a lack of respect for authority. If that respect cannot be ensured by wilful compliance then it must be enforced by corrective action. Minor breaches are dealt with primarily by the summary trial and usually result in the awarding of a minor punishment. It is by "correcting" the minor breaches that compliance with all lawful orders is ensured and discipline is maintained. Therefore the invoking of the disciplinary process is

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[21] Ibid. at 153.

not simply a punitive action, although punishments do have a punitive component. The early and repeated (if necessary) attention to minor breaches of discipline is intended to solve the disciplinary problem and direct the service member towards institutional goals before a major breach of discipline occurs. It is corrective in nature intending to encourage the service member to adopt a habit of obedience to orders. In becoming a disciplined member of the armed forces the individual conforms to the institutional requirements of the military thereby making it more likely that they will fight when required to do so.

There is also a need for breaches of discipline to be dealt with in an expeditious manner. In terms of discipline the old adage "justice delayed is justice denied" can be rephrased as "discipline delayed is discipline destroyed". An alleged breach of discipline creates uncertainty for both the person committing the act and the person attempting to enforce the prescribed conduct. This is an uncertainty which remains until such time as the matter is dealt with by a service tribunal. For the individual committing the act there is the uncertainty of not knowing if the alleged breach will in fact be determined to be unlawful. A delay in resolving this issue leaves open the question as to whether the individual has successfully shown disrespect for authority. While waiting for a resolution it will be open for the individual or another member of the armed forces to repeat the conduct which is the subject of the disciplinary action. At the same time, the delay creates an uncertainty for the person enforcing the code of

service conduct as to whether that person is right in reporting other similar breaches pending the outcome of the first incident. While civilian criminal trials have similar uncertainties created by delays in proceeding with cases the stakes are much higher within the military.

In a system which exists to provide violent action or the threat of violent action the need to control the violence can never be forgotten or down played. Failure to effect control over the potential for violence can result in a danger to both individuals (including death) and to society at large. For that reason control must be the paramount consideration in maintaining discipline. As control is exercised by the habitual obedience to orders any delay in enforcing the habit of obedience is harmful to discipline. Control must therefore be evidenced by means of an expeditious resolution of alleged breaches of discipline. While a finding of innocence or guilt resolves the question of whether the alleged action was proper the speed with which that resolution is carried out can be equally important in terms of maintaining control of the armed force.

3. <u>THE SUMMARY TRIAL: UNIQUELY DESIGNED TO MAINTAIN DISCIPLINE</u>

a. <u>General Considerations</u>

The hierarchial nature of military society is reflected in military law in terms of the offences for which a person may be

tried[22], the form of service tribunal which may try a case and the type of punishment which may be imposed. While different treatment under military law is often based on rank that does not mean that a lower ranking accused is necessarily worse off than a person holding a higher rank. For example, an officer above the rank of captain is more likely (in most cases must be) tried by court martial, and therefore is potentially subject to more serious punishment. In addition there is a stigma attached to a court martial as it is considered to be a far more serious proceeding. On the other hand, lower ranking officers and non-commissioned members (particularly those below the rank of warrant officer), while also subject to court martial, are liable to trial by summary trial. The summary trial is presided over by an officer within the chain of command, has fewer procedural safeguards and generally can impose a broader range of punishments (albeit more minor in nature). The reason for this different treatment, particularly where it relates to the susceptibility of an accused to be tried by summary trial is directly related to two factors. First, the summary trial is used to assist in the socialization of lower ranking personnel away from occupational goals towards ones which are institutional in nature. Secondly, the conduct of summary trials by officers serves to reinforce the habit of obedience which

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[22] For example the National Defence Act contains offences relating to commanders (eg. s. 73- Misconduct of Commanders in Presence of Enemy), officers (eg. s. 92- Disgraceful Conduct), superior officers (eg. s. 95- Abuse of Subordinates), and subordinates (eg. s. 84 Striking or Offering Violence to a Superior Officer).

is the essential element of discipline.

b. A Vehicle for Socialization

In light of our British roots it is possible to theorize that the extensive summary jurisdiction found in Canadian military law, particularly in respect of non-commissioned members, is a direct result of class distinctions which were prevalent in British society in the 19th century. Officers by virtue of their social status should only be subject to court martial with all its procedural safeguards while the lower class enlisted personnel could be better dealt with by summary proceedings.

Such a theory ignores the historical underpinnings of the summary trial. The summary trial was instituted in the British forces in the late 19th century during a time of low recruitment, when desertion, in particular, was rampant among the lower ranks. The offences of desertion and absence without leave are classic examples of a failure of the person committing the offence to adjust to military life. The summary trial was seen as offering a more humane way of dealing with "socialization" problems than could be provided by the traditional court martial. This problem of identifying with the military was not a problem traditionally found in the officer corps.[23]

However the enlisted personnel joined the armed forces (including the navy) because they could not find work elsewhere. Therefore, their motives were occupational in nature. The summary

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[23] Kellet, Combat Motivation **supra**, note 2 at 48.

trial was developed to replace the court martial as a more humane method of dealing with offences related to the problems of socializing the personnel of the lower ranks.

This split between an officer corps which is primarily institutionally motivated and non-commissioned members who are more occupationally oriented still exists in the armed forces of Canada. In a study completed by Charles Cotton in 1979, senior combat and support officers and junior combat officers were found to have largely institutional values (or "vocational" as Cotton terms it). Junior support officers and senior combat and support non-commissioned members were largely ambivalent holding a position between the two extremes of institutional and occupational goals.[24] Finally, junior combat and support troops were strongly supportive of occupational goals. As Cotton stated:

> Again, we see the concentration of those supporting the vocational soldier model in the higher ranks and in the combat arms. On the other hand, the junior troops are much more likely to fall into the employee category, with only 5% supporting the vocational norms associated with the soldier role type. Mapping out the attitudinal composition of the volunteer force in this way makes it easier to see the lines of cleavage within the military system. These data suggest, at least in Canada's case, that the most significant line of cleavage appears between those who lead and those who follow. This may well indicate a lack of cohesiveness in the land force, in that shared value assumptions can be seen as one indicator of morale and cohesion in military units.[25]

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[24] C.A. Cotton, "Institutional and Occupational Values in Canada's Army" (1981) 8 Armed Forces and Society 99 at 106. Table 2.

[25] Ibid. at 106. This study has not gone without some criticism. Mr. S.B. Fleming in a staff note entitled The Hearts and Minds of Soldiers in Canada: The Military Ethos Scale (MES) in Retrospect (Ottawa: Operational Research Establishment, 1989)

While this study was carried out in respect of army personnel the fact that the Canadian Forces has a unified recruiting and recruit training programme tends to indicate that similar results would occur in the air force and navy.

The identification with the military (the institution) is an essential factor in ensuring that members of the armed forces will fight. The summary trial system is uniquely targeted towards those personnel who identify the least with the institutional values of the military. The trying officers at the trial by commanding officer and the trial by delegated officer have jurisdiction over the most junior members of the armed forces and are provided a broad range of more minor punishments in order to discipline those who are the least institutional in outlook. The superior commander has jurisdiction over junior officers and senior non-commissioned members who occupy the medium range of the institutional/occupational scale. The range of punishments available to the superior commander is less broad than those available to the commanding officer and the delegated officer and ultimately can be linked to a lessened requirement to nudge wayward junior officers or senior non-commissioned members towards

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criticized the methodology used in the Cotton study. Mr. Fleming was particularly concerned over Professor Cotton's conclusions that Canadian army personnel were "reluctant soldiers". Mr. Fleming reviewed the data using a different approach and reached a the conclusion that "Cotton's data more appropriately should be seen to demonstrate that the army in Canada believes in the importance of a traditional ethos of sacrifice; of unlimited liability to duty regardless of the consequences". However, Mr. Fleming's review did not address differences between rank levels in terms of their having embraced institutional values.

institutional values.

c. Trial by Officers

Under Canadian military law the presiding officers at courts martial and summary trials are officers. In the case of summary trials the trying officer usually has no formal legal training and is not assisted by a legally trained judge advocate. This exclusive adjudicative role is directly related to the status of the officers as professionals and the responsibility that status carries with it. In War, Morality and the Military Profession [26], Samuel Huntington distinguishes between enlisted personnel as tradesmen and officers as professionals.[27] It is the professional responsibility of officers which distinguishes them from enlisted personnel. Huntington refers to this professional responsibility as follows:

> The expertise of the officer imposes upon him a special social responsibility. The employment of his expertise promiscuously for his own advantage would wreck the fabric of society. As with the practice of medicine, society insists that the management of violence be utilized only for socially approved purposes. Society has a direct, continuing, and general interest in the employment of this skill for the enhancement of its own military security. While all professions are to some extent regulated by the state, the military profession is monopolized by the state. The skill of the physician is diagnosis and treatment; his responsibility is to the health of his clients. The skill of the officer is the management of violence; his responsibility is the military security of his client, society. The discharge of the responsibility requires mastery of the skill; mastery of the skill entails acceptance of the responsibility. Both responsibility and skill

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[26] M. Wakim, ed., War, Morality, and the Military Profession (Boulder, Colorado: Westview Press, 1979).

[27] Ibid. at 19.

> distinguish the officer from other social types. All members of society have an interest in its security; the state has a direct concern for the achievement of this along with other social values; but the officer corps alone is responsible for military security to the exclusion of all other ends.[28]

It is the understanding by officers of the institutional requirements of the military and their responsibility which is derived from that professionalism which makes them the appropriate person to judge an offence under military law in order to determine if a breach of discipline has occurred. As the persons responsible for the readiness and capability of the armed forces it is officers who must ensure that the habit of obedience and therefore the discipline of subordinates is maintained at the proper level. At the same time subordinates look to the persons who they must obey in order to have disciplinary issues resolved. The habit of obedience is thereby reinforced.

d. Trial by the Military Commander

A significant difference between the summary trial and the court martial is the position which the trying officer holds in relation to the accused. In the case of the summary trial the trying officer gains that status by virtue of the positions they hold within the chain of command. At a General Court Martial and Disciplinary Court Martial the members of the court are selected by the convening authority and every effort is made to select officers not connected to the accused. Commanding officers are specifically

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[28] Ibid. at 17.

prohibited from serving as members of either type of court martial.[29] In the case of a Standing Court Martial the trying officer is a military legal officer who is from outside the accused's chain of command. The different status of the officers who preside at each type of service tribunal reflects the different roles of these tribunals.

The goal of both service tribunals is the maintenance of discipline. However, the summary trial is designed as a "personal" forum for the trial of minor service offences. This personal nature of the summary trial reflects the responsibility which the trying officer has for the discipline and the operational capabilities of the personnel under the command of that officer. In contrast, a court martial is structured to try the more serious military offences and to act as a "safety valve" for those personnel who, because of the nature of the offence or the potential punishment, prefer to be tried by court martial. Therefore, the court martial offers an elevated level of independence while sacrificing a significant amount of the personal responsibility for the outcome of the trial. The summary trial is subordinate to the court martial in terms of judicial independence, but it must be stressed that the court martial does not have a supervisory capacity over the summary trial. It is not an appellate court and its decisions are not binding of trying officers at summary trials.

The court martial, due to its broader jurisdiction and greater

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[29] QR&O, art. 111.20 and 111.39.

powers of punishment is seen as the senior form of service tribunal. However, the summary trial remains the dominate and most important disciplinary tribunal for ensuring the maintenance of discipline in the Canadian Forces. It is the personal nature of the summary trial which gives it this status.

e. Personal Aspect of Leadership

The respect and obedience which an officer commands is not based solely on rank. Rank is simply a visible example of the professional status which an officer has gained within the military. The ability to command respect and to effectively control subordinates is based on the leadership ability of the officer. The importance of leadership to combat effectiveness was discussed by Kellett as follows:

> Decision and persuasion are central to leadership, and the formal military leader's control over the channels of information facilitates his ability to determine a course of action and to convince his followers of its validity. The ability of a man to extract from others certain forms of behaviour often inimical to their immediate self-interest cannot be comprehended without reference to the follower. Men, particularly in dangerous and high-stress situations, desire leadership so that their immediate needs (administrative, tactical, and so on) may be met and their anxieties allayed. Well-trained and experienced officers and senior non-commissioned officers confer a sense of protection on their subordinates by virtue of their military skills; wasteful leadership and high casualties erode the subordinate's sense of well being. Thus effective combat leadership has to temper accomplishment of the unit's mission with concern for the integrity and well-being of the group.[30]

The essence of leadership is persuasion. Often that

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[30] **Supra**, note 2 at 326-327. See also Janowitz, Sociology and The Military Establishment, **supra**, note 13 at 43-45.

persuasion is expressed in the form of personal example. The personal nature of leadership is also reflected in the mutual trust which develops between superior and subordinate. The leader's responsibility for the maintenance of discipline has always contained those personal characteristics.

Foremost among the characteristics which the officer must display in disciplining subordinates is fairness. In military justice systems such as those found in Canada, the United Kingdom and the United States, which provide for the right to elect court martial, the person subject to summary proceedings can indicate their doubts in the fairness of the trying officer by choosing to elect court martial. As indicated by Peter Rowe in "Military Justice Within the British Army":

> The need for the maintenance of discipline in any army is axiomatic but it is not advanced by injustice. A soldier must have confidence in the fairness of his commanding officer and that any errors will be corrected. Discipline will inevitably suffer if this confidence is lacking and one might expect a larger number of soldiers to elect trial by court-martial and thus frustrate the beneficial effects (from the army's point of view) of summary disposal. For there are distinct advantages to the army in transferring powers from a court-martial to a commanding officer. This is so, however, only until the point is reached that the punishments "become so severe that the rights of individuals outweigh the needs of the services with respect to the maintenance of discipline." Individual cases are dealt with more expeditiously, and this avoids the disturbance to military routine that a court martial causes. Such evidence as there is suggests that this form of disposal is preferred by both soldiers and commanding officers.[31]

Of course, the use of punitive sanctions is only one small

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[31] P. J. Rowe, "Military Justice Within the British Army" (1981) 94 Military Law Review 99. at 117-118.

part of the disciplinary process. The military commander is responsible for all aspects of ensuring trained obedience to orders including drill, exercises and the supervision of operations. The removal of the power of trial and punishment from the very person who must ensure that discipline is maintained will severely weaken the commander's ability to persuade subordinates to comply with orders. The threat of punitive sanctions remains part, albeit the least desirable part, of the persuasion process. The removal of summary powers from the officer personally responsible for the conduct of military operations would also create the situation where the military commander could order the subordinate to perform an act which might cause the subordinate's death, but could not punish the subordinate for a breach of discipline. The responsibility of military commanders is an all encompassing one which includes powers over life and death. By necessity that responsibility must also include the power to fully instill discipline in the personnel who must carry out the orders.

f. Position of the Trying Officer

The decision as to which level the disciplinary power should be concentrated reflects a compromise between the level of responsibility and professional status of the military officer on one hand and the degree of personal identification and control over subordinates on the other hand. Among the factors identified by Kellet as factors affecting the ability of personnel to fight were primary group allegiances, unit esprit and leadership. Like

leadership, primary group allegiances and unit esprit have a strong personal component. The primary group allegiances

> ...are founded on the basis of mutual attraction, tactical requirements and interdependence, and shared values and goals. To be cohesive, a group must have a mission or an objective. In combat the group sets standards of behaviour largely in terms of two primary goals: individual and group survival (frequently the dominant objective) and task accomplishment.[32]

The effectiveness of these primary group allegiances is further enhanced "where the loyalty to the group is supplemented by commitment to a wider entity...."[33] In the Canadian Forces this wider entity is embodied in the unit, examples of which are the ship, squadron and regiment. The enhancement of fighting effectiveness through primary group allegiance, unit esprit and leadership is most effective at the lower levels of the military structure where personal contact and allegiances are their strongest.

While the fighting effectiveness of military forces is often concentrated on facts existing at the lower levels of the military structure the level of responsibility and the professional status of military officers increases based on the rank and position held by that officer. As Huntington states:

> The larger and more complex the organizations of violence which an officer is capable of directing, and the greater the number of situations and conditions under which he can be employed, the higher is his professional competence. A man who is capable of directing only the activities of an infantry squad has such a low level of professional ability as to be almost on the border line.

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[32] Kellet, Combat Motivation, **supra**, note 2 at 320.

[33] Ibid. at 321.

> A man who can manage the operations of an airborne division or a carrier task force is a highly competent professional. The officer who can direct the complex activities of a combined operation involving large-scale sea, air, and land forces is at the top of his vocation.[34]

However, the further up the chain of command the responsibility for maintaining discipline is placed the greater the loss of the "personal" contact associated with fighting effectiveness. In order to maintain fighting effectiveness a compromise is reached between the level of professional expertise held by an officer and the need for personal contact by that officer with subordinates. In the Canadian Forces disciplinary powers are concentrated at the unit level. The commanding officer can directly exercise the summary jurisdiction or can delegate those powers to a delegated officer. The commanding officer (usually a lieutenant-colonel or a major) and the delegated officer (usually a major or a captain) provide an suitable level of professional expertise while maintaining personal contact with the personnel they command. The disciplinary powers of the superior commander (usually a general) reflects the increased professional expertise needed to deal with higher ranking non-commissioned members and lower ranking officers.

## 4. ROLE OF THE CANADIAN FORCES

The conditions under which the Canadian Forces operates have considerable impact on the structure of service tribunals and trial procedures. This impact is a result of the requirement that the

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[34] **Supra**, note 24 at 17.

service tribunals be capable of being held wherever and whenever Canada's military forces are operating. The following is an outline of the operational commitments of the Canadian Forces. It will provide considerable insight into the varying conditions under which discipline must be maintained.

Canadian security policy is determined by three major elements: defence, sovereignty and civil responsibilities in Canada; collective defence arrangements through NATO, including our continental defence partnership with the United States; and international perace and security through stability and peacekeeping operations, arms control verification and humanitarian assistance. In support of this policy Canada's military forces are committed to operations involving deterrence, protection of national sovereignty and peacekeeping.[35] In addition, the Canadian Forces provides unarmed assistance to other government departments, civil authorities and civilian organizations.[36]

Since the early 1950s the military operations of the Canadian Forces have had a particularly international flavour as is demonstrated by Canada's involvement in the North Atlantic Treaty Organization (NATO), North American Aerospace Defence (NORAD), the Persian Gulf Conflict and numerous United Nations operations. In support of NATO Canada has taditionally maintained forces in Europe and has earmarked Canadian based units in an augmentation role. While recent events in the Eastern Block European nations have

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[35] Canadian Defence Policy, National Defence, April, 1992.

[36] Ibid. at 19-20

resulted in a lessening of tensions, and Canada is in the process of withdrawing most of its military units from Europe, a military role for the Canadian Forces has not disappeared. Canada has not withdrawn from NATO itself. Continued involvement in NATO includes the commitment of Canadian military forces to the European theatre of operations. With the increasing conflict in the former Yugoslavia there is a very real possibility that NATO, and with it Canada, could be drawn into an armed intervention as part or, or in addition to, United Nations operations.

Canada's NORAD commitments involve considerable liaison and integration with the United States armed forces. The defence of North America includes both the detection and interception of unauthorized aircraft all around the borders of Canada. Such operations entail the carrying out of operations from and over Canada's northern territories.

The maintenance of alliances with other countries is not limited to formal agreements and treaties. In late 1990 and early 1991 the Canadian Forces deployed air, naval and army units to the Kuwait theatre of operations as part of a coalition of forces tasked with removing invading Iraqi military forces from Kuwait. The successful conclusion of that operation was directly a result of the speed with which the international community, including Canada, committed military forces to counter Iraqi aggression.

The involvement of Canada's armed forces in peacekeeping/peace making operations has been extensive and is on the increase. In 1992 Canadian Forces personnel served as part of numerous United

Nations operations around the globe including service in areas such as Croatia, Bosnia-Hercegovina, Kuwait, Central America, Cambodia, Cyprus, Syria, Somalia and the Sahara. These deployments have been to areas of actual or potential conflict. As the United Nations becomes increasingly interventionist the chance that Canadian Forces personnel will become directly involved in armed conflict is also increased.

In addition to these international commitments the Canadian Forces is required to ensure that the sovereignty of the nation is maintained. Such operations have included surveillance of Canada's borders, and the deployment of land forces personnel on exercise by air to remote areas of Canada's north. Finally, the Canadian Forces remains the force of last resort for internal security operations. Such operations can include traditional "aid of the civil power" operations as contemplated in Part XI of the National Defence Act (eg. riots, public demonstrations, Oka, etc.) assistance to penitentiaries operations, operations in time of emergencies (eg. the "October Crisis", 1970) and armed assistance to other federal government agencies (eg. provision of security forces at the Montreal Olympics, 1976). The commitment of military forces to end the native demonstration at Oka, Quebec in late 1990 is a graphic example of quickly the resources available to civilian authorities to maintain law and order can be overwhelmed, thereby necessitating the deployment of disciplined and well armed military

forces to restore government control.[37]

This review of the operational commitments of the Canadian Forces prompts two observations. First, if a military commander is to be able to promptly deal with breaches of discipline, service tribunals must be sufficiently transportable in make up and flexible in procedure to be able to be held anywhere that the Canadian Forces is deployed. This includes the most remote parts of Canada and literally anywhere in the world. Secondly, the type of operations confronting Canadian miltary commanders demand the maintenance of a high level of discipline for all members of the Canadian Forces. There cannot be one level of discipline and with it one form of service tribunal in times of "peace" and another level of discipline and type of trial during times of "war".

With regard to the employability of service tribunals the requirement to maintain discipline continues regardless of where the units are deployed. This need to conduct trials outside of Canada (or in the Canadian wilderness) distinguishes the military justice system from its civilian counterpart. However, even within the military justice system there is a difference between courts martial and summary trials regarding their employability. While courts martial are considerably more portable than civilian courts they do not provide the same flexibility as is provided by the summary trial. In order to hold a court martial the members of the

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[37] For an overview of the legal aspects of deploying troops on internal security operations see K.W. Watkin, "Legal Aspects of Internal Security: A Soldier's Protection and Obligations" (1985) 1 C.F. JAG J. 51, (1987) 2 C.F. JAG J. 5.

court, the judge advocate (or in the case of the Standing Court Martial the military judge alone), the court reporter, the prosecutor and the defending officer must all be sent to the scene of the court. The resulting delays inherent with the administration of a court martial could be harmful to discipline in the unit where the alleged offence has occurred. It is also possible that the local operational situation, including the attitude of the host country or organization, could preclude a formal trial.

A decision to routinely hold the trial in Canada or another safe location could adversely affect the operational effectiveness of the deployed unit. Apart from the delay in dealing with the case the trial would require the removal of the accused, witnesses and administrative personnel from the scene of operations thereby affecting the ability of the unit to complete its mission. Added to these problems is the complication that non-military witnesses may refuse to travel to another country or location to testify at a court martial. It simply would not be practical to pre-position a court martial in an area of operations waiting for a breach of discipline to occur. Deployments of Canadian Forces personnel, particularly on peacekeeping operations, often are very small in number with the result that actual breaches of discipline requiring resolution by trial may be sporadic. The pre-positioning of court martial personnel would be wasteful in terms of personnel and other resources.

The use of courts martial to maintain discipline would be

particularly difficult in the case of naval units which are at sea for long periods of time. An advantage which the summary trial offers over the court martial is that it is conducted by personnel already present at the place where the alleged breach occurred. Charges can be dealt with promptly thereby limiting the uncertainty and resulting harm to discipline which can result from delay.

In a foreign jurisdiction prompt resolution of an incident may also be essential in reducing any tensions which may have arisen with the local population. Of course, the conduct of the trial by the military commander present at the scene of the incident further enhances the personal aspects and habit of obedience which is essential to the maintenance of discipline. This does not mean that courts martial are never held in isolated or foreign locations. However, the disruption to discipline and operational effectiveness through the administrative burden of a court martial, the inherent delay in setting up the court and the loss of personal involvement on the part of the immediate commander is kept to a minimum by limiting courts martial to the trial of serious offences, or where the accused has elected court martial.

In terms of the level of discipline which must be maintained in order to ensure operational effectiveness there can be no distinction between times of peace and war. The role of the Canadian Forces, when not actually deployed on operations, is to train for those operations. As discipline is the trained obedience to orders it is not something which can be suddenly acquired when a unit is sent into an operational setting. Good discipline is the

result of habit. The attainment of the appropriate level of discipline is a gradual process. Once the proper discipline is attained it must be constantly reinforced. In some respects "discipline" can be equated to an insurance policy. The premiums are paid through training and constant reinforcement. When the time arises to cash in on the policy the return is directly related to the price paid prior to the occasion of its required use.[38]

A system of discipline based on whether Canada is at peace or war is all the more problematic since the concept of peace and war is itself outdated. There has been no recognized war declared since the Arab/Israeli conflict in 1949. There have, however, been numerous "wars" such as the Korean Conflict, the Vietnam War, the Yom Kippur War, the Persian Gulf Conflict, insurgency in Central America, the break up of the former Yugoslavia and the ongoing disputes in Cambodia. Increasingly the term "war" is being replaced by that of "armed conflict" as the international community has come to recognize that the notion of war being conducted between two nation states is often being pushed into the background. Countries find themselves increasingly becoming involved in international armed conflict resulting from an internal breakup. While Canada has technically been at peace since the end of the Second World War Canadian military forces have been at "war" in Korea and in the Persian Gulf; have found themselves keeping the

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[38] This insurance analogy was borrowed from Sir J. Hackett, The Profession of Arms (London: Sidgwick & Jackson, 1983) at 169 wherein he states: "...armed forces, like insurance policies, are chiefly of value as provision against the unknown."

peace in numerous world hot spots (Cyprus, Sahara, Central America, the Middle East, etc.); and has recently become involved in a more interventionist role taken on by the United Nations in the former Yugoslavia and in Somalia.

While members of the Canadian Forces may be deployed outside of Canada a great deal of their support is provided by personnel based in Canada. The failure to receive adequate support from Canada because of a lapse in the discipline of the supporting personnel could have a disastrous effect of the operational effectiveness of members of the Canadian Forces deployed on peacekeeping operations overseas.

Even in our "peaceful" country the Canadian Forces has been called out on a number of occasions in the past 20 years as a force of last resort on internal security operations. Military personnel as a force of last resort when civilian agencies cannot control the situation. The standard of discipline of troops deployed on internal security operations must be extremely high, particularly because of the political fallout which can result if those personnel act contrary to orders. In order to maintain this high level of discipline the military justice system must be able to function even when the civilian justice system has broken down. As has been evidenced in the past 20 years the need for internal security operations can arise with little warning. Canadian Forces personnel must be trained at all times, including training to the appropriate level of discipline, in order to handle all the varied and often difficult roles which it has been assigned.

Despite the changing world situation the "peace/war" myth still exists in Canada. For example, in R v. Genereux[39] Chief Justice Lamer, in writing for the majority of the Supreme Court, stated that a service tribunal would not have to meet the independance and impartiality requirements of s. 11(d) of the Charter only under the "most extraordinary circumstances".[40] Chief Justice Lamer went on to state "[a] period of war or insurrection might constitute such circumstances". These comments by the Supreme Court of Canada appear to contemplate one type of service tribunal for "peace" and another for "war". Such a notion does not reflect the reality of the situation in which Canadian Forces personnel are deployed. Discipline is not something that can be turned on or turned off when war is declared, or troops are deployed on internal security operations. It is because the members of the Canadian Forces are disciplined that they can react to threats regardless of whether those threats are internal or external.

The roles which the Canadian Forces perform in Canadian society are unique. As a result the Canadian Forces as a military organization requires service tribunals which are uniquely suited to maintaining the level of discipline necessary to successfully complete the tasks assigned to it by the Government of Canada regardless of the place or conditions of employment. The summary trial provides the requisite flexibility to enable the military

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[39] (1992), 70 C.C.C. (3d) 1 (S.C.C.).

[40] Ibid. at 40

commander to maintain discipline wherever and whenever the Canadian Forces is deployed.

5. SUMMARY

The unique structure and considerable flexibility of summary proceedings is particularly well suited to the disciplinary and operational needs of the Canadian Forces. The summary trial emphasizes personal control by military commanders of their subordinates. It reinforces the trained habit of obedience which is essential to the maintenance of discipline. Summary proceedings, by virtue of their integration within the unit structure, offer an extremely "portable" trial process which can be readily employed any where that Canadian Forces personnel are serving.

At the same time, however, the development of a disciplined armed force requires individual members of that force to suppress their individual desires in order to obtain the group goal. It is the degree to which the suppression of those individual desires also involves breeches of individual Charter rights which lies at the heart of the assessment of the constitutionality of the summary trial process.