Refined & Respected

by Col Tony McCourt
Military Judge

By virtue of Ireland's shared heritage with the United Kingdom, Ireland has a common law legal system. However, unlike the UK, Ireland also has a written constitution. When Ireland achieved its independence in 1922, the Constitution provided that:

"extraordinary courts shall not be established save only such military courts as may be authorized by law for dealing with military offenders against military law. The jurisdiction of military tribunals shall not be extended to or exercised over the civil population save in time of war..."[1]

Minister for Defence, Willie O'Dea, TD, presenting Colonel Tony McCourt with his seal of office during the ceremony at McKee Barracks in September 2007.

The British system of military law, as it then was, was adopted and applied by the newly established Irish Defence Forces pursuant to the Defence Forces (Temporary Provisions) Act 1923. A further Defence Forces (Temporary Provisions) Act was enacted annually up to 1953. When the new Constitution was adopted in 1937 the relevant constitutional provision provided that;

"Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law .... A member of the Defence Forces, not on active service, shall not be tried by any court-martial or other military tribunal for an offence cognisable by the civil courts, unless such offence is within the jurisdiction of any court-martial or other military tribunal under any law for the enforcement of military discipline."[2]

The current "law for the enforcement of military discipline" referred to in the Constitution is the Defence Act 1954. This act is, in effect, a consolidation and updating of the various annual "temporary" acts enacted from 1923 to 1953. With that act began the divergence of Irish and British military law, since the 1954 Act was also influenced by Canadian military law. Ireland has been a party to the European Convention on Human Rights (ECHR) since 1953, but the general legal view of the time seems to have been that the human rights provisions of the Irish Constitution[3] were such that it was not necessary to provide specifically for the Convention rights. In 1983, a long time after such an appeal was established in the UK, the need to provide for an appeal court hearing from the finding or sentence of an Irish court-martial was enshrined in statute law4. The Irish act, unlike its UK equivalent, provided for an absolute right of appeal in all cases. By this act the Courts-Martial Appeal Court was established following the murder, by an Irish soldier, of three of his colleagues serving with the UN forces in Lebanon (UNIFIL) in 1982. The soldier, convicted by court-martial in 1983, is still serving his sentence of life imprisonment, having been transferred this year to a Northern Ireland prison.

Influences for Change

The European Court of Human Rights' decisions in Findlay v. The UK, [5] and follow on cases, indicated that it was time to re-examine Ireland's military legal structures and procedures even though the Irish military justice system was no longer exactly the same as that of the UK. Regard also had to be given to Irish constitutional decisions relating to the ordinary Irish criminal system and to current human rights norms in all common law jurisdictions. The incorporation of the Convention into Irish domestic law in 2003 added urgency.

In the latter half of 2001 the Deputy Chief of Staff (Support) established a Military Law Review Board to undertake a formal review of the military justice system. Most of the recommendations in the Board's unpublished report, produced in early 2002, have been enacted into law by the Defence (Amendment) Act 2007[6]. A comparative study indicated that major changes to military justice had been undertaken or were under consideration by most other common law jurisdictions. Importantly, each common law country decided to retain a separate military justice system. In shaping Ireland's new legislation careful consideration was given to ECHR case law, and in particular the effects of cases ranging as far back as Engel v Netherlands, [7] Incal v Turkey 1998[8], the various UK cases including Findlay 1997, Hood 1999[9], Morris 2002[10], Grieves 2003[11], Bell 2007[12] and the UK CMAC case of Skuse 2002[13]. The new system was also influenced by the experiences of the UK over the last ten years and by the excellent work done in the recent UK Armed Forces Acts of 1996, 2000, 2001 and 2006.

The present Canadian system was also a major influence, in particular the separate military judicial structure, the Canadian Charter of Rights of 1982[14], the Genereux[15] case of 1992, the Dickson Report (1997), the Lamer Report of 2003 and the amendments made to the National Defence Act of Canada up to 2003. The present structures in Australia and the recommendations contained in the Abadee Report of 2001 were considered. The New Zealand system and the proposals contained in the Military Justice Review Options Papers of July 2003 were considered. Regard was had to the US system and the proposals for change contained in the Cox Commission Report (May 2001). Irish matters considered included the Irish Constitution and its case law, decisions of the Courts-Martial Appeal Court, the recommendations of the Military Law Review Board, which were endorsed by the Office of the Attorney General, the ECHR Act of 2003 and importantly the observations of the Irish Human Rights Commission[16], a recently established body whose remit includes the provision of observations to Government on draft legislation. It would be true to say that the primary focus of this radical new military justice legislation is to ensure that Ireland's military justice system is fully compliant not only with the Constitution but also with the requirements of the European Convention on Human Rights, in particular Article 6 and with international human rights norms. In designing the new structures regard was also had to the fact that Ireland has quite small defence forces, comprising 10,500 regular personnel and about 13,000 reservists and limited resources available for the administration of military justice.

Scheduled Offences

A statutory distinction was introduced between offences of a disciplinary nature, scheduled in the 11th schedule to the Defence Act, which may be dealt with by a summary process and other offences, both disciplinary and criminal in nature, which may only be tried by court-martial[17].

New Statutory Appointments

The Government has appointed an independent Director of Military Prosecutions (the Director)[18]. The Judge Advocate General has appointed a Court-Martial Administrator (CMA)[19]. The appointment of Judge Advocate has been replaced with that of Military Judge.[20]

Summary Process v Trial by Court-Martial

One of the most important changes made is the clear distinction between a trial by court-martial, with legal representation and formal trial procedures[21] and the summary disposal of minor offences by a more informal summary process, which nonetheless provides due process[22].

Summary Process[23]

Significant changes have been made to the summary process in respect of all ranks up to and including Commandant. It is now limited to offences which are both minor and 'disciplinary in nature' (scheduled offences). The summary process is not a trial. Legal representation is not allowed. An assisting person may be present at, but may not participate in, the summary investigation[24]. New requirements for notice and service of documents are introduced[25]. At the first hearing the person charged must be offered the option to elect to have the case dealt with by court-martial [26] . The summary process will result in a 'determination' rather than a 'finding' and, if the charge is proven, a 'punishment' rather than a 'sentence'[27]. There will be an absolute right of appeal to a summary court-martial against the determination and/or the punishment[28]. The power of a commanding officer to make a custodial award of detention is abolished. In any case where a commanding or authorised officer considers that an offence warrants a punishment greater than that available to him he may remand the person for trial by court-martial and refer it to the Director. In such a case the Director may send the case to the summary court-martial for trial by a military judge sitting alone. The range of non-custodial financial and other punishments available at summary level has been refined[29]. In the event of an appeal to the Summary Court-Martial against a punishment awarded summarily the maximum punishment awardable is capped at that which could have been awarded by the commanding or authorized officer [30].

Trial by Court-Martial

A person may be tried by a court-martial because:

1. He has been charged with a minor disciplinary offence and has elected to be tried by court-martial[31].

2. His commanding or authorized officer decided, in his discretion, that the case should be tried by court-martial [32].

3. The commanding or authorized officer has remanded him for trial by court-martial because the charge is, of a more serious disciplinary nature, a criminal charge, one which cannot be dealt with summarily, or one which may be dismissed only with the prior consent of the Director who has refused such consent [33].

On remand for trial a prosecution file is prepared and sent to the Director, who, exercising powers similar to the Director of Public Prosecutions, will issue a direction [34]. This could be that no trial be held or that the person be tried by a general court-martial or limited court-martial or before the summary court-martial. Certain limits apply to the jurisdiction of each class of court-martial. If the offence is of a very serious nature it will be tried by a general court-martial regardless of the rank of the accused. If the charge is of a less serious nature and involves a person who is not an officer it may be tried by limited court-martial. If the charge is relatively minor and the Director so directs, it may be tried by the summary court-martial.

Appeal to Courts-Martial Appeal Court

In the case of a conviction by any class of court-martial, there is a right of appeal to the Courts-Martial Appeal Court, (1 Supreme Court and 2 High Court judges) all of whom are civilians [35].

Summary Court-Martial [36]

The summary court-martial is a newly created standing court which, unlike a general or limited court-martial, will not require an order of a convening authority to bring it into being. Any military judge will constitute a summary court-martial. A summary court-martial has jurisdiction to;

a. hear an appeal against a 'determination' made and/or a 'punishment' awarded by a commanding officer or authorized officer at a summary process,

b. try a charge referred to it by the Director where the person charged has elected to be tried by court-martial or where the Director considers that a charge on which a person has been remanded for trial by court-martial is one which is appropriate for trial by that court,

c. decide legal aid applications.

The jurisdiction of that court may be expanded in the future. Where a summary court-martial, exercising its appeal jurisdiction, makes its decision on the appeal, such decision is final, subject to the possibility of a 'case stated', on a point of law only, to the Courts-Martial Appeal Court [37].

General or Limited Court-Martial

Both general and limited courts-martial will come into being on an order of the Court-Martial Administrator (CMA), when so directed by the Director [38]. The CMA will select the members of the court-martial board. Such a board may include one senior NCO, when the accused is not an officer. The court will comprise a military judge and a court-martial board of not less than 5 or 3 members, as the case may be. The court-martial board will decide issues of fact only [39]. Findings of fact will require a two-thirds majority, increased from a simple majority [40]. The military judge, alone, will deal with applications for legal aid, decide all issues of law and hand down sentence [41].

Court-Martial Administrator

The Court-Martial Administrator (CMA) has been appointed by warrant of the Judge Advocate General, a senior civilian lawyer appointed by the President. The CMA is not a lawyer. He replaces the former Convening Authority. Apart from his role in selecting members of court-martial boards, he will be responsible for the administration of the business of courts-martial. He will refer cases to the summary court-martial, both appeals from summary cases and charges for trial, as directed by the Director [42]. Where such a direction so requires he will convene a general or limited court-martial [43]. He is, in fact, double-hatted since he also serves as the Director of Administration. As CMA he is independent in the performance of his functions [44].

Director of Military Prosecutions (Director) [45]

This new appointment is based on the similar appointment established in recent years in Canada and the UK. The appointee may, as in the UK, be double-hatted. He must be an officer and a lawyer of not less than ten years standing. At the request of the Minister for Defence, a committee comprised of the Chief of Staff, the Director of Public Prosecutions (DPP) and a judge of the High Court, select an applicant for nomination by the Minister and appointment by the Government. He is independent of the chain of command. There will be no assessment reports on his performance. His powers are similar to those of the DPP. It is an offence to attempt to influence him as to a prosecution [46]. He may only be removed for cause shown. There is a removal procedure provided for in the Act. A High Court judge may be appointed by the Government to examine and report on how he performs his duties.

Military Judge [47]

The newly created position of military judge has replaced the judge advocate. He must be an officer and a lawyer of not less than

Colonel Tony McCourt alongside his daughter Alison & wife Mary at McKee Barracks.

ten years standing. At the request of the Minister for Defence, a committee comprised of the Chief of Staff, the Judge Advocate General and a judge of the High Court, may select an applicant for appointment by the President on the recommendation of the Government. He is independent of the chain of command. There will be no assessment reports on his performance. His term of office is until retirement. While he holds military rank of not less than that of colonel he only performs judicial functions. He may not be removed except for cause shown. Unlike in Canada, he cannot serve in any other appointment than that of military judge, although the Canadian provision in this regard is now under review. If he ceases to be a judge he must retire from the Defence Forces. His powers as a judge are similar to those of a judge of the ordinary civilian criminal courts. It was decided to have a military officer in that role since he alone decides sentence of any court-martial [48].

Conclusion

The aforementioned are only some of the many changes now being implemented to modernise and update the system of military justice. Other significant changes include new powers to the military judge to take into account the effect of an offence on the victim, to suspend a custodial sentence, to make orders in respect of the payment of fines or compensation awards by installments, refinements to the scales of punishment, and new powers to deal with accused persons suffering from mental disorders. The new system of military justice will be introduced in the summer of 2008. Work on the drafting of another Defence Amendment Bill to deal with outstanding issues, recommended by the Military Law Review Board in its report, will commence shortly. The present and proposed changes take full account of legal requirements, recent case law and prevailing human rights norms, both nationally and internationally.

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Footnotes:

1. Art. 70, Constitution of Irish Free State, 1922.
2. Art. 38, Constitution of Ireland, 1937.
3. Arts. 40 to 44, Fundamental Rights, Constitution of Ireland, 1937.
4. Courts-Martial Appeals Act, 1983.
5. (1997) 24 EHRR 221, Reports of Judgments and Decisions 1997-I.
6. Defence (Amendment) Act 2007 available at www.oireachtas.ie.
7. Engel and Others v Netherlands, (1976) 1 EHRR 647.
8. (2000) 29 EHRR 449.
9. Judgment of 18 February 1999, (Application no. 27267/95)
10. (2002) 34 EHRR 52.
11. (2004) 39 EHRR 7.
12. Judgment of 16 January 2007, (Application no. 41534/98).
13. R v Skuse, Judgment of UK CMAC 3 May 2002.
14. Part 1 of the Constitution Act 1982.
15. R v Genereux (1992) 1 SCR 259.
16. www.ihrc.ie/_fileupload/misc/Observations_on_Defence_(Amendment)_(No.2)_Bill_2006 doc
17. Defence (Amendment) Act 2007, Chapter 3, sections 20, 21, 22, 24 and 27.
18. Defence (Amendment) Act 2007, section 33. Col Bill Nott is the first Director of Military Prosecutions (Director).
19. Defence (Amendment) Act 2007, section 32. Col Paul Packenham is the first Court-Martial Administrator.
20. Defence (Amendment) Act 2007, section 34. Col Tony McCourt is the first Military Judge.
21. Defence (Amendment) Act 2007, Chapter 4.
22. Defence (Amendment) Act 2007, Chapter 3.
23. Defence (Amendment) Act 2007, Chapter 3.
24. Defence (Amendment) Act 2007, Chapter 3, sections 23, 24 and 28.
25. Defence (Amendment) Act 2007, Chapter 3, sections 23, 24 and 28.
26. Defence (Amendment) Act 2007, Chapter 3, sections 23 and 24.
27. Defence (Amendment) Act 2007, Chapter 3, sections 23, 24 and 28.
28. Defence (Amendment) Act 2007, Chapter 3, section 26.
29. Defence (Amendment) Act 2007, Chapter 3, sections 23, 24 and 28.
30. Defence (Amendment) Act 2007, Chapter 3, section 26.
31. Defence (Amendment) Act 2007, Chapter 3, sections 23 and 24.
32. Defence (Amendment) Act 2007, Chapter 3, sections 23 and 24.
33. Defence (Amendment) Act 2007, Chapter 3, sections 23 and 24.
34. Defence (Amendment) Act 2007, Chapter IVB, section 33.
35. Courts-Martial Appeals Act 1983.
36. Defence (Amendment) Act 2007, section 38.
37. Defence (Amendment) Act 2007, section 26.
38. Defence (Amendment) Act 2007, sections 32 and 37.
39. Defence (Amendment) Act 2007, section 48.
40. Defence (Amendment) Act 2007, section 48.
41. Defence (Amendment) Act 2007, sections 38, 47 and 48.
42. Defence (Amendment) Act 2007, section 32.
43. Defence (Amendment) Act 2007, section 32.
44. Defence (Amendment) Act 2007, section 32.
45. Defence (Amendment) Act 2007, section 33.
46. Defence (Amendment) Act 2007, section 18.
47. Defence (Amendment) Act 2007, section 34.
48. Defence (Amendment) Act 2007, section 48.