Is Military Law Appealing?

Preface

On the legal framework of UK military justice system

Contributors

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It has been said "Military law is to law what military music is to music" – if this saying is supposed to mean that military law is boring and lacks imagination – then perhaps it is time to think again. The high-profile Court Martial of Marine A, now known to be Sgt Al Blackman has brought attention to the military justice system, with strong sentiments being expressed as how the law should treat the Royal Marine, captured unsuspectingly in vivid footage from a headcam, in the blatant killing of a wounded Afghan insurgent. Convicted of murder, with the use of a firearm by a Court-Martial and sentenced to 10 years' imprisonment, as well as discharge with disgrace from Her Majesty's Armed Forces, Sgt Blackman's case has now received treatment from the Criminal Court of Appeal .

The judgment is undoubtedly an interesting one, due to the unique and extreme circumstances in which the offence took place and may be useful for practitioners appearing before Courts Martial generally. However, the attitude of the Court of Appeal to matters that are referred from the Court Martial is normally that, in line with appeals from other statutory Tribunals, it will be slow to interfere with what it sees as a decision made by a specialist criminal court, because the Court Martial is particularly well placed to deal with "service issues which arise in circumstances which cannot arise for any civilian". Nevertheless, the case has also come at hand in a time when profound questions are being asked about the nature and desirability of the law that applies when British Armed Forces are deployed on overseas military operations and in ensuing litigation from the use of force.

In fact, the recent case from the English Supreme Court on liability for negligence and the scope of combat immunity

as well as decisions from the European Court of Human Rights on the extra-territorial application of the ECHR have made high-ranking military commanders fear that legitimate combat decisions may now be subject to the later forensic scrutiny by lawyers and Judges in courts in civil actions for damages . The problem is compounded by the fact that, whilst British military personnel on active duty are bound by strict rules of engagement and the law on the use of force, the enemies that they face often do not hold any compunction in violating the laws of war. The predicament is such that these various and related issues have now been addressed by the Defence Committee of the House of Commons, by a report into the legal framework for the future of UK military operations.

The select committee's inquiry has been brought about by an increasing view that the applicable Law of Armed Conflict (otherwise known as International Humanitarian Law) and legal cases are having damaging consequences for military effectiveness. The genesis of this issue was brought to fore in October 2013, when the policy exchange published a paper entitled: *The Fog of Law: the legal erosion of British fighting power*. The report caused a stir by suggesting that there has been "sustained legal assault" on British forces, which could have "catastrophic consequences" for the safety of the nation. In essence, there is a growing body of opinion, which has now been given serious consideration by the Defence Select Committee, in that the application of civilian norms to the military is creating a new norm of military negligence claims and depleting the fighting spirit of troops. Among the explanations given for this recent trend and indeed a focus of legal criticism, is the failure to apply the doctrine of Crown immunity, juxtaposed against the extraterritorial application of the Human Rights Act. However, other scholars have already retorted to that effect that there is no such sharp dichotomy between safeguarding the rule of law through the current legal model and the effectiveness of military operations.

Thus, in the midst of Sgt Blackman's case, the contours were already being set for the debate as to which system of law (military, civilian, International Humanitarian law, English Criminal law, or European Human Rights law) ought to apply on the battlefield? This is already a complicated question because the answer is that all systems can apply at varying degrees, depending upon the status of the parties (Soldiers, civilians, insurgents, regular enemy forces, or prisoners) the intensity of the conflict at the time they interact and whether it is an International Armed Conflict, or an internal insurrection. When the British Parliament passed the Human Rights Act in 1998, it was never envisioned that it would apply extraterritorially, or that it could have any effect upon military operations overseas. At the same time, the effect of s.42 of the Armed Forces Act 2006 is that the Court Martial may try UK service personnel, for any criminal offence of England & Wales, committed anywhere in the world. Advocates for Human Rights law have pointed out that civilian oversight over the actions of the Armed Forces is not objectionable and in fact, provides a useful check against the worst excesses of prisoner abuse by Soldiers, as has been witnessed in the death in custody of the Iraqi Baha Mousa. Moreover, although the military and civilian systems of law can be treated as discrete entities, the interaction between the two has increased, as the changing nature of the conflicts in which British troops have been deployed, has also evolved.

However, the criticisms of a Human Rights based approach to military operations are also weighty. Military conflicts demand an assessment of calculated risks, which are needed to win victory and often made under extreme pressure. The fundamental rights and freedoms as guaranteed by the ECHR were clearly not designed to be exported to anywhere the British military happens to step foot. Moreover, the perception that legal constraints prevent the Soldier from fighting an enemy in the manner that he is being attacked, do damage confidence and morale. Following the murder by Sgt Blackman, the MOD could face a civil claim for the breach of the right to life, under art.2 of the ECHR, by the family of the murdered Afghan insurgent; but ironically, it is not the encroachment of European Human Rights law that has been most crucial in the Sgt Blackman case. Under English law, murder carries a mandatory life sentence and discretion was exercised by the Court Martial to set his minimum tariff at a 10 years imprisonment, from a starting point of 15 years. Whilst this was reduced by the Court of Appeal, so that Sgt Blackman will serve eight years, he was treated more leniently because on the whole of the evidence, combat stress, arising from the nature of the insurgency in Afghanistan, and the particular matters affecting him, ought to have been given greater weight as a mitigating factor. This dilemma, and graphic illustration of the differing circumstances in which murder can be committed, calls into question the suitability of mandatory life sentencing for murder under English law.

Situation ethics can be complicated further when friend, or foe, is mortally injured and mercy killing is contemplated. But as the law currently stands, there are no special exemptions for offences committed by Soldiers acting in the heat of battle and the military justice system imposes the same principles of law upon our Soldiers, as would a Crown Court in any other part of the land. As well, the Law of Armed Conflict and International Human Rights Law continue to bind the British Armed Forces, as does now the ECHR. This provides a strong basis upon which British military can claim their actions are moral and can deserve our support. At the same time, the British public has a right to expect its Soldiers to behave in a certain way. The wide spectrum and types of military operations that have been carried out in recent years makes the work of the Court Martial and military lawyers increasingly specialised . So, when the role of the lawyer is to bring some form of order to the chaos that ensues in war, it is often the Soldier that has donned a military uniform, with the noble ambition to try to bring the rule of law to those not fortunate enough to enjoy it – both need each other more than they may think.

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