

# THE RIGHT TO A FAIR TRIAL AND MILITARY JUSTICE SYSTEM IN THE REPUBLIC OF THE MALDIVES

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## **ABSTRACT**

Members of the Maldivian military are entitled to fair trials as a fundamental constitutional right. Due to this, the Maldives constitution, human rights law, and the Maldives court system recognize the necessity for fair trials for everyone. Despite this, Maldives National Defense Force (MNDF) faces several serious Justice and fair trial gaps. This study aims to assess the way MNDF treats these rights to defend the military justice system. The purpose of this study is to investigate how the consequences of weakening or destroying the legitimacy of these human rights may affect the well-being of the Maldivian Army in maintaining good order. The term 'military justice' is used in this context; it refers to the conspicuous mechanism established to prosecute all military offenses. In order to maintain good order and Discipline, the military has sabotaged fundamental rights. Therefore, several cases that the armed forces have filed have been nullified by the civil justice system. Consequently, the existing military justice system in the Maldives has become ineffective. These differences necessitate the implementation of proactive strategies

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## INTRODUCTION

By Article 1 of the Montevideo Convention on the Rights and Duties of States, a state as a person of international law is expected to possess the qualities of a permanent population, a defined territory, government, and the ability to enter into relations with other states. (Montevideo Convention: 1933) As a state, nations have to form a security organization, such as the armed forces, in order to maintain their position. Therefore, the primary objective of establishing an army is to ensure national security and sovereignty. As a result, armed forces are vital to every nation's survival, and they form their backbone. In addition, it is necessary to maintain good order and Discipline to administer a well-organized and unified army effectively. Maintaining good order and Discipline in the army requires the Establishment of a justice system as well. Generally, these kinds of systems refer to as "military justice systems."

To achieve national sovereignty, the Republic of Maldives also organized regular armed forces on April 21, 1892. (Hassan Ahmed Manik., 2009) Nevertheless, several legal frameworks have evolved in the Maldives over the past few decades since the Maldives enacted a new constitution in 2008. These are the significant factors behind the evolution of legal frameworks. According to the new Constitution, all citizens are entitled to several fundamental rights and must establish independent organizations such as the human rights commission. However, it is still the case that some organizations within governmental structures have needed to reform their legal framework since 2008. In this regard, one of the most prominent organizations is the Maldivian army. A law governs the Maldivian army, called the Armed Forces Act 1/2008, which took effect before the new Constitution.

As a consequence of this, several provisions of the armed forces act are rendered null and void. In particular, the provisions relating to the military justice system are controversial and are subject to legal debate. The Maldives military justice system took many actions, and cases to maintain Discipline and good order were ruled invalid by superior courts. It has resulted in difficulties for the Maldives' armed forces in maintaining good order and Discipline. Among the reasons for rejecting the case is that the Maldives' military justice system does not adhere to due process and fair trial principles, which all citizens should respect as fundamental rights.

There are two primary sources of military law: domestic law and international law. Domestic law influences the majority of military law. Therefore, the Maldivian armed forces act is a rudimentary piece of law required to align with domestic and international norms in terms of Justice in the context of the Maldives.

### **AN OVERVIEW OF THE HISTORY OF MILITARY JUSTICE**

In the aftermath of the First World War, there was a turning point in establishing and reforming the military justice system. As part of its mandate, the United Kingdom Army Council examined the laws and rules of procedure governing military justice, both in peace and war, and made recommendations. (Council, 1919)

The British Articles of War of 1756, which served as the model for the American Article of War of 1775, reflect a more mature administrative structure and include provisions similar to those found in the current Uniform Code of Military Justice. (Charles A. Shanor, 2013) Thus, the U.S. Military Justice System is not unique or originated in the United States. As with so many other aspects of the American government and its legal system, the military justice system is rooted in Europe well before there was any thought of establishing the United States, much less a new world or colonization. (Morris, 2010)

It was not uncommon for early military justice attempts to be specific to a specific leader or conflict if the term is not too generous. In 1190, Richard the Lionheart issued an ordinance that punished his offending crusaders with fines, ignominious expulsions, and tar. Some credit Richard II with publishing the first comprehensive article of war in 1385, as they contained features that could be found in most any code – prohibitions against disobedience, pillage, and theft – and punishment more associated with the 14th than 21st centuries, including amputation of the left ear, drawing, and beheading. (Jaeger, 1997) Gustavus Adolphus, a Swedish king and military innovator of the 17th century, is credited with current military Justice. Some argue that his codification was minor than original, but in the way that it formed a philosophical and structural basis for many military codes that followed, it had a significant impact. Historically, legislative involvement was first suggested in 1689, when William and Mary, close contemporaries of Gustavus Adolf Phus, drafted the Bill of Rights, which required the consent of Parliament to raise and maintain armies.

The Maldivian armed forces have regulated the military justice system since 1892 to maintain good order and Discipline. There are no specific laws or legal frameworks governing military justice in the Maldives, as in other countries like U.S. and U.K. Since 1892, the military has had some specific regulations and procedures to govern its justice system. These regulations are not part of the Maldivian Constitution or any other law in the Maldivian legal framework. The Maldivian army act came into effect in 2008. As a result, this act does not fall under the new Constitution passed in 2008. The new Constitution (2008) guarantees several fundamental rights, such as the right to a fair trial. The existing justice system has dismissed several members of the Maldivian army over the past decade. Therefore, to ensure their right to appeal, these soldiers appealed through the Maldivian civil justice system. Finally, the Maldivian civil justice system reinstated these soldiers to the service.

### **DEFINITION OF MILITARY JUSTICE SYSTEM**

The military justice system applies to members of the armed forces and, in some cases, to civilians. The primary purpose of military Justice is to maintain discipline and good order in the armed forces. The structure, rules, and procedures of military Justice can differ significantly from their civilian counterparts. Military Justice usually operates in a separate court system with stricter rules and procedures to ensure internal Discipline and operational effectiveness. There may be implications for the principle of civil supremacy or questions of compliance with international standards, such as human rights and fair trials. (Vashakmadze, 2010) Discipline and Justice are essential elements in the system, whose rules apply to thousands of military personnel every year – and in theory, the system firmly establishes the basis for Discipline and Justice without exception for every member of the military community.

A separate military tribunal system is intended to allow the Armed Forces to deal with matters that directly pertain to the military's Discipline, efficiency, and morale. The safety and well-being of Canadians depend on the readiness and willingness of a force of men and women to act against threats to the nation's security. To maintain the Armed Forces' readiness, the military must enforce internal Discipline effectively and efficiently. Violations of military Discipline need to be dealt with swiftly and frequently punished more severely than they would be if they occurred within civilian society. Therefore, there is a need for separate tribunals to enforce disciplinary standards in the military. ('R. v. Généreux, [1992])

### **THE RIGHT TO A FAIR TRIAL**

Protection of human rights depends on adequate legislative and regulatory frameworks and the possibility of effective judicial enforcement. A sufficient allocation of resources is necessary to achieve effective judicial enforcement. (Sehutter, 2005) The principle of fairness is regarded as an essential part of the enforcement of criminal law. It follows that fairness applies in a full criminal trial, when the case is diverted, and when a shortcut to proof is used. Fairness in criminal proceedings is rooted in the concept of participation. The applicability of the notion of fairness to diversion mechanisms is not self-evident. Fairness is regarded as a fundamental principle underlying criminal proceedings, which also permeates the rules of evidence of the different legal systems. Fairness is defined based on the case-law of the European Court of Human Rights. The interpretation of the concept of fairness by the European Court of Human Rights has been chosen as the normative framework because the Court has, over the past decades, created an authoritative account of the concept of fairness in criminal proceedings. In qualitative and quantitative terms, the Court has established the most complex and sophisticated concept of fairness compared to other human rights bodies. (Vriend, 2016)

The Maldives ratified the International Covenant on Civil and Political Rights 1966 (ICCPR) on September 19, 2006. (Nations, 2021) In 2008, the Maldivian Constitution introduced the right to a fair trial as a new

fundamental right. As a result, according to these two instruments, the Maldivian legal framework recognizes the right to a fair trial as a fundamental right.

According to article 42 of the Maldivian Constitution, (a) In determining one's civil rights and obligations or any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent court or tribunal established by law. (b) All judicial proceedings in the Maldives shall be conducted with Justice, transparency, and impartiality. (c) Trials of any matter shall be held publicly, but the presiding judge may exclude the public from all or part of a trial following democratic norms: 1. in the interests of public morals, public order, or national security; 2. where the interest of juveniles or the victims of a crime so requires; or 3. in other exceptional circumstances where publicity would prejudice the interests of Justice. (d) All judgments or orders of a Court shall be pronounced publicly unless the Court orders explicitly otherwise for the reasons stipulated in article (c). All publicly pronounced judgments or orders shall be available to the public.

Fair trial and the rights of the accused: Article 14 of the 1966 International Covenant on Civil and Political Rights;

1. All persons shall be equal before the courts and tribunals. In determining any criminal charge against him or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre publique*), or national security in a democratic society, or when the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the Court in exceptional circumstances where publicity would prejudice the interests of Justice; but any judgment rendered in a criminal case or a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; To be tried without undue delay; To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of Justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as

witnesses against him; To have the free assistance of an interpreter if he cannot understand or speak the language used in Court; Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as taking into account their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offense, and when subsequently his conviction has been reversed, or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law, unless it is proven that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted under each country's law and penal procedure.

As a significant change of the Maldives legal framework in 2008, every Maldivian was guaranteed several constitutional rights. On the authority of the Maldives constitution, chapter II articles 16 to 69 deal with fundamental constitutional rights. Furthermore, chapter II article 69 says: "No provision of the Constitution shall be interpreted or translated in a manner that would grant to the State or any group or person the right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set out in this Constitution."

Within military Discipline and proceeding military Justice, the Maldives army had restricted several constitutional rights. For instance: (No slavery or forced labor, Freedom of expression, Freedom of the Media Rights to strike, Freedom of assembly, Right to marry, and Establishment of the family. According to the Maldives armed forces Act (1/2008), the only fundamental right which was limited was the Freedom to form political parties, associations, and societies. Subsequently, all these fundamental rights were destroyed by Maldives' armed forces in the name of maintaining good Discipline and order.

### **ANALYSIS**

An international comparison showed a significant convergence in the judiciary over the last few decades. Assuring the concept's success was the United Nations' International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and national and international judicial practice related to that. 'Fair trial' is a universal principle that is in one form or another binding on practically all legal systems and that - despite differences in interpretation - enables a given country's judicial system or judicial procedure to be judged by the rest of the world. (Bado', 2014)

Human rights are institutionalized through their transformation into positive law. Human rights will become fundamental rights if this occurs at

a level in the legal system hierarchy that is constitutional. (Eriksen, 2006) Articles 16 to 69 of chapter II of the Maldives constitution address fundamental constitutional rights. Moreover, chapter II, article 69 states: "No provision of this Constitution shall be interpreted or translated in a manner that would grant to the State or any group or individual the right to engage in any activity or act that would undermine the rights and freedoms contained in this Constitution.

Lieutenant Abdulla Shareef was accused of supporting a political opponent and insubordination. Abdulla Shareef was dismissed from the Maldives National Defense Force for his actions. He then appeals to the Civil Court, consisting of the Maldives court system's superior courts and lower courts. The Court has reinstated his service; as a rule-out, Maldives National Defense Force has violated the fair trial rights, which the Constitution guarantees as a fundamental right. (Abdulla Shareef v Ministry of Defense (State), 2019)

In this case, *Staff Sergeant Ibrahim Simadh v Ministry of Defense*, the SSGT Simadh was also held responsible for insubordination to his commander and support of opposition political leaders at the time. In light of his allegations, the Maldivian Armed Forces terminated his service. Simadh's action was taken under the existing military justice system. In order to protect his constitutional rights, he appealed the case against the Ministry of Defense. According to the Court's ruling, the Maldivian army has breach constitutional and international rights, such as due process and fair trials. (Staff Sergeant Ibrahim Simadh v Ministry of Defense (State), 2019)

In one of the landmark cases, *Captain Abdul Muiz Musthafa v Ministry of Defense (State)*, Captain Muiz was accused of insubordination and mutiny. The Maldivian armed forces have taken action to dismiss him from service. There has been a ruling by the Maldives Supreme Court that the accusation is unconstitutional. While acting on behalf of the Maldives armed forces, several fundamental rights were guaranteed to them. As a result, the Supreme Court of Maldives reinstated Captain Muiz's service. (Captain Abdul Muiz Musthafa v Ministry of Defense (State), 2021)

As part of the military criminal justice process, the Maldivian armed forces violated the following rights. Namely, Fair and transparent hearings, Fair administrative action, Personal liability, No unlawful arrest or detention, Power of arrest and detention, Search and prosecution, Rights of the accused, Confessions and illegal evidence, The assistance of legal counsel, No degrading treatment or torture, No imprisonment for non-fulfillment of contractual obligation, Human treatment of arrest or detained person, Retrospective legislation, Prohibition of double jeopardy, Publication of acts and regulations, Retention of other rights, Voidance of laws inconsistent with fundamental rights. Therefore, the Maldives National Defense Force has unfairly interfered with these fundamental rights to govern military Justice within their institutional and legal frameworks since 2008, which is unconstitutional, and thus unacceptable.

All United Nations (U.N.) members were obliged to implement treaties and conventions that they ratified voluntarily. Maldives approved the ICCPR (International Covenant on Civil and Political Rights) on September 19, 2006, and has been obligated to implement all of its articles. However, it has been observed that Maldives armed forces have violated the Universal Declaration of Human Rights 1948 Article 5, 9, 10, 12 in the name of governing military justice. Moreover, they have sabotaged ICCPR article 14, which guarantees a fair and public hearing by a competent, independent, and impartial tribunal.

In the ten-year disaggregated statistics on cases related to torture during the past decade, Maldives armed forces reported two cases of torture related to article 19 of the Convention against torture. ((HRCM), 2018) These two cases were determined in the name of governing military Justice. Thus, it has led to severe problems in regulating military Justice in the Maldives. There is no specific regulatory framework for Military Justice at present. The following is a selection of legislation relating to Military justice, but none of them fully addresses current needs:

- a. Maldives Armed Forces Act: 1/2008
- b. MNDF-SR 101 General Rules and Regulations; (2008)
- c. MNDF-SR 102 Code of Ethics; (2008).
- d. MNDF-SR 117 Code of Conduct; (2008).
- e. MNDF-SR 109 Regulations on Administrative Punishments for Offences Committed by Servicemembers: (2008).

### **CONCLUSION**

Due to the ratification of the new Constitution in 2008, the Maldives has formulated a new legal framework. According to the new Constitution, several fundamental rights are guaranteed and are obligated to govern all institutions within the framework of the Constitution. Maldives National Defense Force (MNDF) has a history of regulating national security in the Maldives. However, all laws which are in effect in the Maldivian army are older than the Constitution. Consequently, several laws and regulations were contradicted by the 2008 Constitution. Accordingly, this study recommends the following changes;

It should contain provisions regarding the competence (rights and duties) of the prosecutor, the collection of evidence, the presence of a defense lawyer, and the conclusion of the investigation. The law should also define time limitations on criminal proceedings and the period of custody and detention. A fair and independent investigation process is essential. It may undermine the integrity of the military justice system if the investigation process lacks objectivity or impartiality.

Standard law systems involve commanders at various stages of a case, including during the investigation, the referral of charges, and the post-trial period. In civil law systems, the role of the commander usually ends with the initial investigation. The commander must give the case to the prosecutor for further investigation and decide whether to charge the defendant.



In most cases, the military prosecution is responsible for initiating criminal proceedings. In addition, the military prosecution is also responsible for investigating and presenting criminal charges in Court. The military prosecution should not belong to the military hierarchy. The functions of military prosecutors have been transferred to civilian prosecutors in some countries to avoid any doubt as to their independence from the chain of command.

The accused and the prosecutor should appeal decisions made by, first instance, military courts to the Court of Military Appeals and the (civilian) Supreme Court.

The trial must be conducted fairly and impartially. As a result, the accused is entitled to certain rights about fair trials. After reviewing certain fair trial rights, it was concluded that an accused before a military court receives sufficient information about his charges, is given ample time for preparation of a defense, is granted a public hearing, and has the right to choose and to be represented by an attorney of his choice.

In order to determine the scope and content of the right to an independent tribunal, it has been established that it requires both the independence of the military justice system and the independence of the individuals who compose the military tribunals. Military tribunals must maintain their institutional independence tribunals must be independent of the executive and the military hierarchy. They must be self-governing regarding their operations and administrative issues and be independent in their decision-making. Military tribunals must be respected, and their decisions must not be interfered with by the executive and military hierarchy. Institutional independence of military tribunals also requires that the decisions of military courts should never be the subject of review by the Establishment that is not judicial.

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