



**ARMED FORCES PERSONNEL AT  
THE ALTAR OF JUSTICE: IS JUSTICE  
SEEN TO BE DONE? (NEED FOR AN  
INDEPENDENT AND IMPARTIAL  
INDIAN MILITARY JUSTICE SYSTEM  
AND TIME TO DISCONTINUE  
SUMMARY COURT MARTIAL)**

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**INTRODUCTION**

Independence and impartiality is the essence of any Court of law and is the core essentiality of any legal system, be it any major international human rights instruments or our Indian Constitution, or our books of Statute. The readings of these instruments confirm that the Tribunal must, in all cases, be independent, impartial, and be established by the law of the land. This guarantee of independent and impartial Court under the rule of law dispensing fair trial while adhering to due process at all stages, makes a party to any dispute sure that their case shall be adjudicated by a neutral body, be it judicial or quasi-judicial.

In the context of Indian Military Justice System it may be argued that it is a self-contained system with appropriate checks and balances. The wide discretionary powers of the Commanding Officer (hereinafter CO) or the Convening Authority to determine which cases to prosecute, makes him the dispenser of favor or fortune, thereby marring the image of impartiality and independence and thus the perception of fairness to the

public and the soldier. The recently instituted Armed Forces Tribunal by the Armed Forces Tribunal Act (hereinafter AFT), 2007, has in all fairness, given the Forces' personnel the right for further Appeal, but it shall be more effective when the Military Justice System from the inception has both subjective and objective elements of an independent and impartial Tribunal established by law.

When the public in general talks about justice, they associate it as a matter of giving each their dues. In this research study, when justice is talked about in the military context, it is the aspect of procedural justice which can be attained by making and implementing decision adhering to due process of law by which citizen soldiers are treated fairly. It is not sufficient to say that due to the overriding importance of maintaining discipline, it is justified to apply lesser due process and consequently argue that if any illegality or capricious or arbitrary decisions are made by the judges conducting trial by Court-martial, the AFM or the High Courts or the Supreme Court are available to deal with such improper decisions. Military as an institution should be just as it will in turn instill a sense of stability, wellbeing and satisfaction in its members and avoid perceived sense of injustice which might lead to dissatisfaction and a rebellious feeling. According to Michelle (Maiese, 2004), the principle of justice and fairness is central to procedural justice. She maintains that when procedure adopted in adjudication of a case are according to tenets of fair trial, people repose their faith in the adjudicators even when results may be detrimental to them.<sup>1</sup>

<sup>1</sup> Michelle Maiese, Procedural Justice beyond Intractability, (Guy Burgess & Heidi Burgess eds.,

University of Colorado, Boulder, 2004), available at <<http://www.beyondintractability.org/bi->



It should be understood that discipline in the Armed Forces cannot be maintained solely upon the fact that the superiors wield the power to make or break the subordinate if there is lack of implicit obedience to his order, but when the personnel have a feeling that their system is Just and fair they would unquestionably lay their lives for the Country. Just because they have voluntarily submitted themselves to the existing system with all its defects, it would be wrong to conclude that no reform is called for. Justice and discipline has not been equally balanced so as to make the Armed Forces Personnel feel that they belong, not to a separate class of people, but are the citizens of India.

#### HYPOTHESIS

1. Court-Martial as an institution is not an independent and impartial Courts due to lack of independence of the members of the Court-Martial Assembly.
2. Summary proceedings are inherently unjust according to fair principles reflected in common and international law in the way they are administered with a reduction of due process.

#### EXISTING LAW

After 15<sup>th</sup> August, the need for a general revision of the Indian Army Act, 1911, the Indian Air Force Act, 1932 and the Indian Navy Discipline Act, 1934 was critically felt. The revision therefore was taken up and the code of discipline applicable to the Armed Forces were made which is self-sufficient and complete in all respects, to meet the special requirement of the Forces. While absolute uniformity was not desired in the

codes for all the three branches of the Forces, glaring inequalities were removed, wherever possible. The revision of the Indian Navy Discipline Act 1934 was delayed as recommendations of a special committee constituted in U.K for the revision of the British Navel Code were awaited. Finally on 27<sup>th</sup> December 1957, the Indian Navy Bill was passed by the Parliament with the assent of the Presidents.

#### COURT- MARTIAL PROCEDURE- INDIAN

All laws relating to Armed Forces, like any other organized service under the State or private sector, provide for certain offences or misconduct, a procedure for their investigation and also a forum for their trial and punishment. Efficiency and discipline being the paramount factors for guiding the Armed Forces coupled with its primary role to defend the Nation in time of war as well as maintaining internal harmony in natural and other calamities, Military Law has evolved to attain the same by enforcing a particular degree of behavior among its members.

The three wings of the Armed Forces, namely, Army, Navy and Air Force are governed by separate special enactments. The object of Military Law<sup>2</sup> is to provide for the maintenance of good order and military discipline among the personnel and also sometimes on the people who live and work with them. It has also been enacted with an aim to regulate certain aspects of administration, mainly those which effect individual rights. In short, Military Law is a code enacted by the Parliament<sup>2</sup> to regulate

essay/procedural\_justice/>. (Last visited Mar. 5, 2020).

<sup>2</sup> Gazette of India, Part V, 602 (1949).



the conduct of the members of the Armed Forces.

#### THE LAWS REGULATING DISCIPLINE IN THE ARMY (The Army Act, 1950)

Trial by a Court-martial is one such facet of a soldier's life that none should wish to face it. When the Mutiny Bill 1749 was debated in the British Parliament, the Earl of Westmoreland, in a powerful speech, denounced the institution of trial of a soldier by a Court-martial in the following words;

“What makes the people of this country more happy and secure than they are in any other, is that valuable privilege of being tried by their peers and by judges who understand the laws of their country, who are bound to be of counsel with the prisoner at the bar and who are as independent as it is possible for men to be made, consistent with the nature of mankind and the support of the Government; but by this bill, and indeed every former bill of the same kind, the Officers and soldiers of our army are entirely deprived of this valuable privilege. If any of them be accused of a military crime, they are to be tried by a law which admits of no jury, nor of any challenge, and by judges who understand nothing of the laws of their country should choose to die by the order and bowstring of a bashaw rather than by the sentence of a Court-martial, from whom I should expect neither justice nor mercy.<sup>3</sup>”

These views were expressed more than two centuries ago, when there was nothing like Human Rights movement, when slavery was

still in existence and soldiers were nothing but slaves or fugitives released from jail on their volunteering to fight for the King. With Human Rights awareness growing by the day and for a country like India, which boasts of (in the Preamble of its Constitution itself) ensuring Justice & Equality to all, provisions for trial of a soldier by a Court-martial engrafted in all the statutes governing the Armed Forces of the Union are nothing short of means of making them suffer injustice and inequality at the hands of their superior. The basic tenets of fair trial are missing, which, to any person would seem that the whole trial is one with deep implication of arbitrariness. The various forums under which an accused may be tried are enumerated below;

#### GENERAL COURT-MARTIAL

The General Court-martial (hereinafter GCM), is one of the most prestigious Courts known to the Army Act (hereinafter AA) due to the power invested in it to try any person subject to the AA for any offence punishable under the said Act, and to award one or more punishments enumerated under Section 71 of the said Act.

#### Composition of General Court Martial

The GCM, shall have a quorum of not less than five officers, who have been commissioned for not less than three whole years and of whom not less than four are of rank not below that of a Captain.<sup>4</sup> The Convening Officers, depending upon considerations such as likely protracted trial, may increase the number of officers beyond

<sup>3</sup> Parliamentary History of England: From Norman Conquest in 1066 to the Year 1803 426, (Printed by T.C. Hansard, Peterborough Court, Fleet Street, 1813), available at

<http://books.google.co.in/books?id=2pc9AAAACAAJ&pg=PA6&lpg=PA6&dq=mutiny+bill+1749+debate& soulast visited Mar. 10, 2020>.

<sup>4</sup> AA 1950, §113



the minimum of five.<sup>5</sup> It is desirable for the convenience of obtaining majority view on the findings and sentence that the numbers of officers so appointed are uneven. The Officer, who has had the opportunity to serve in any of the three services, shall be eligible for counting his commissioned service for the purpose of reckoning three whole years. Ante date of seniority shall not be counted towards the commissioned service for making him eligible to sit as a member of Court Martial.

AR 40 lays down certain restrictions on the composition of the GCM. Accordingly, as far as it seems practicable to the Convening Officer, Officers of different Corps or department should compose the Court and in no case Officers exclusively of the same Corps<sup>6</sup> or department to which the accused belongs. Further, for the trial of an Officer, all the Members shall be of a rank not lower than that of the accused officer unless Convening Authority is of the opinion that officers of such rank are not available due to exigencies of public service. Such opinion should find place in the convening order itself. Thirdly, a Field Officer cannot be tried by a member below the rank of a Captain. In addition to statutory restrictions, certain administrative restrictions have also been placed on the composition of the GCM, which may be summarized as under:-

- (a) Where an officer of the rank of Colonel and above is available to sit as presiding officer of a GCM, an officer inferior to him in rank will not be appointed. In an eventuality when officer of the rank of Colonel is not available, the convening authority must obtain prior sanction of his next superior authority and

state so in the convening order.

- (b) When a CO of a unit is to be tried by a GCM, as many members as possible will be Officers who have held or holding command equivalent to that held by the accused.
- (c) When the trial is likely to be prolonged, the Court will normally be composed of larger number of Members than the legal minimum of five. Correspondingly, more waiting Members must be detailed to meet challenges to the Members.<sup>7</sup>

#### HEARING OF CHARGE BY COMMANDING OFFICERS

Whenever a person subject to Armed Forces Law is charged with an offence, he is liable to be dealt with by his CO in terms of the laws relating to Armed Forces. Disciplinary proceedings provided therein are similar to proceedings under Cr. PC, 1898, which was applicable to all Criminal Courts in the year 1911. When Indian Army Act, 1911 was enacted and Rules were made by the then British Governor General In Council. The only variance that was incorporated was that powers and duties of the complainant, The Police Officer (Investigation), The Magistrate (for taking Cognizance & Committal to trial), The Judge (in the matters of trial and sentencing the person accused of a military offence) and the Jailor (in the matter of carrying out of the punishment), all rolled into one and were vested in the CO.

<sup>5</sup> Id. at Note 2 of §113

<sup>6</sup> Army Rule (hereinafter, AR) 1954, r 40, (definition of Corps- AR1954, r 187(3)).

<sup>7</sup> RA 1987, ¶ 459.



## JUSTICE AND ESSENCE OF INDEPENDENT AND IMPARTIAL INDIAN MILITARY JUSTICE SYSTEM

For any Court to render Just decisions, the Judges have to be independent of any kind of pressure, especially from the executive and enjoy complete decision making liberty. There should not be any reasonable apprehension in the minds of informed and prudent observer that the position and integrity of the Judges has been or can be compromised leading to any bias. For the Military Justice System to be Just, independence of judges is not enough. The individual adjudicator (Presiding Officer and Members of the Court-martial) must be seen to be objective and impartial. In *Findlay v The United Kingdom*,<sup>8</sup> the European Court of Human Rights observed that manner of appointment and term of office were indicative of guarantee against outside influence, establishing the fact that the Courts were independent. Further according to the Court, impartiality entails that the tribunal be subjectively free of personal prejudice or bias and must be also impartial from an objective viewpoint so as to diminish any legitimate doubt of impartiality.

### PURPOSE OF INDIAN MILITARY JUSTICE SYSTEM: JUSTICE OR DISCIPLINE

It may be a matter of argument whether Indian Military Law - whose entire goal has been to foster discipline within the Forces, calculably for being in a state of readiness and willingness to obey any order for

protecting our nation- be significantly concerned with justice. In furtherance of the argument, there is a need to analyses both justice and discipline based systems as brought out by Gaya (Gaya, 1678) (cited in Lederer& Hundley 1994), according to whom those who champion the cause of discipline envision a system designed only to ensure prompt and total obedience to orders through fear of punishments and those who want a justice based system want individual offenders to be punished with all fairness and not for a dereliction they did not commit. Both the systems have their own pros and cons.<sup>9</sup>

Gaya (Gaya, 1678) (cited in Lederer& Hundley 1994), further says that first preference of any Commander first would be discipline based system as it operates swiftly, efficiently and economically. The drawback being that, if discipline is perceived as unfair, the personnel will likely distrust the superior authority have diminished institutional loyalty and will prefer mutiny to continued performance of duty. Justice based system focuses on individual accountability where one is punished only for the wrongs committed and proven with accuracy along with proportional punishment. Thus this perceived notion of fairness encourages individual responsibility and institutional loyalty. The shortcomings of such a system is that, accuracy requires a significant procedural process which is usually slow and expensive and depending upon the burden of proof used, it may yield acquittals of guilty persons, thus potentially calling the system into disrepute and encouraging violation.

Geared by this hindsight, it is pertinent that

<sup>8</sup> Council of Europe: European Court of Human Rights, 25 February 1997, available at

<http://www.unhcr.org/refworld/docid/3ae6b66d1c.html> (last visited 10 Mar 2020),

<sup>9</sup> Gaya, supra, note 1.



justice and discipline be balanced as far as possible according to the given circumstances of a case. It is also important that personnel of the Armed Forces believe that justice shall be done by fair and impartial trials, by independent and impartial adjudicators and adequate due process shall be provided to the military personnel accused of criminal conduct. The 1960 Powell Report (cited in Gibson, 2012), to the Honorable Wilber M. Brucker, Secretary of the Army, on the Uniform Code of Military Justice, Good Order and Discipline in the Army - a study of the Military Justice System, especially on the status of the Unified Code of Military Justice (hereinafter UCMJ), speaks about the fact that justice and discipline go hand in hand though the distinction between them is very thin. The report referred to discipline being a state of mind to obey any kind of order and undertake any dangerous task and such a state of mind is necessary being a goal of the Commanding Officer. Such preparedness is not a characteristic of a civilian. And to make the soldiers disciplined it follows that their actions should be corrected. Conversely this corrective action would require being fair and just. Therefore one can safely say that both justice and discipline are inseparable.

### CONSTITUTIONAL VALIDITY OF SUMMARY COURT MARTIAL PROCEEDINGS

Article 21 of the Indian Constitution and its interpretation has brought about a richer meaning to the rule of law and has over the years gone beyond the concept of due

process clause (originally an American doctrine) incorporating substantive and procedural due process under Article 14 and 21 of the Constitution.<sup>10</sup> In the foreword of the book penned by Abhinav Chandrachud, Ex Justice R.V. Raveendran, of the Supreme Court, says that the Supreme Court in their judgments have brought about a semblance of parity between procedure established by law and due process of law, thus impliedly importing and incorporating fairness in trial, right to be heard before being condemned, judgment only after trial and deprivation of life and liberty only after due process, as part of Article 21. Its ambit has further been enlarged with the right to counsel, the right to legal aid, and the right to privacy, among others, as parts of substantive due process.

Article 14 of Indian Constitution enunciates equality before law and equal protection of law which is fundamental to the Rule of Law. Legitimacy of a legal system is determined when each and every person is subject to the same laws. This requirement is also central to Article 14(1) of the ICCPR which states that, „All persons shall be equal before the courts and tribunals. SCM seen in the light of Articles 14 and 21 of our Constitution may seem to go against the true spirit and object of the Article. India is a signatory to the ICCPR Convention and hence obligated to follow its provisions.

In light of the international requirements of equality it could be argued that members of the Armed Forces are subject to Article 33 of our Constitution by way of which

<sup>10</sup> Abhinav Chandrachud, Due Process of Law, (Eastern Book Company, New Delhi, 2011).



Parliament is empowered to abrogate certain rights of the service personnel, but nowhere is it mentioned that under Article 33 Parliament has the right to discriminate among members of the Armed Forces. This is exactly what has happened as The Supreme Court of India has held<sup>11</sup> that though due to national security and for maintaining discipline some rights have been abrogated for the Armed Forces personnel but they are also the citizens of India. Personal liberty is a cherished right and it should be deprived only under fair, just and reasonable procedure by an independent, impartial and unbiased Judge of high integrity.

### UNLAWFUL COMMAND INFLUENCE AND INSTITUTIONAL CORRUPTION

Unlawful command influence (hereinafter UCI) manifests when an authority wields power and influence (in the context of this study, the Convening Authority), upon the Court Members, the Judge Advocate, the witnesses or any other personnel connected to the Court-martial proceedings. This use of undue influence undermines the judicial process as well as affects the morale and confidence of the personnel in this system. It is interesting to note that in the Indian Military Justice System the term UCI does not find any definition or description in the Statutes governing the Military, nor is there any kind of prohibition on such use of undue

influence or coercion, making it next to impossible for the accused to object to its application even though they are subject to it.

Corruption can take any form including institutional corruption like „police corruption, judicial corruption, political corruption, academic corruption<sup>12</sup> but this paper shall attempt to investigate into the corruption in the self-contained Military Justice System. When a person wields power and authority and abuses this position to maltreat, influence and coerce his or her subordinates he is perpetrating corrupt practice which is not motivated by economic or financial benefits but just a sadistic pleasure of using power for power's sake.<sup>13</sup> This kind of corruption concerning the institution, i.e. the Indian Armed Forces shall be the focal point of this chapter. In a way, corruption mushrooms under UCI.

### WHAT CONSTITUTES UNLAWFUL COMMAND INFLUENCE

Unlawful command influence by the commander in the justice delivery system is permitted<sup>9</sup> while unlawful command influence is forbidden. UCI can exist in a variety of forms like actual, apparent or perceived.<sup>10</sup> Actual UCI occurs when, under the totality of circumstances, the evidence could lead a reasonable person to conclude that command influence affected the disposition of the case and prejudiced the officers conducting the court martial, against the accused. The Hon'ble Supreme Court of India has observed that Courts-martial are ad

<sup>11</sup> Lt. Col. PPS Bedi v Union of India, AIR 1982, SC 1413.

<sup>12</sup> Corruption: Challenge to Good Governance and Development in available at

<http://www.anticorruptionleague.org/articles/corruption-challenge-> (Accessed 10 Mar 2020)

<sup>13</sup> Miller, Seumas, "Corruption", The Stanford Encyclopedia of Philosophy (Spring 2011 Edition), Edward N. Zalta (ed.),



hoc in nature and are simply executive Tribunals wherein the adjudicators are from within the chain of command of the senior officer appointing them. These officers in turn are dependent for their promotions, postings and annual reports on this senior officer the members of a Court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges."<sup>14</sup>

One can thus assume that Military Justice is prefabricated and pre-judged according to the wishes of the Convening Authority who is empowered to select the judge, defense and prosecution. It implies that it is his wishes to prosecute or not to prosecute, which ultimately are detrimental to the accused and this in itself a corrupt practice. The irony is that the Convening Authority does not suffer any kind of prosecution for committing such corrupt practices which tantamount to obstruction of justice and are an offence in the Military Law itself.

Take a hypothetical equivalent system designed for the rest of the Indian citizens, where the Home Secretary orders the Court to assemble as and when needed, with his bureaucrats as judges. Home Secretary appoints the prosecution and the defense counsels in addition. All judges and prosecution and defense counsels are untrained in law. He appoints only one legally qualified person as JA to the Court but he has only advisory role and his advice is not binding on the judges. He has no say in the award of punishment. The decisions of the Court are not mandatory till it is approved

by the Home Secretary. How great will be the independence of such a Court and how fair will it be to the accused? Analysis of the High Court of Australia Judgment<sup>13</sup> makes it clear, that Court-martial are created by Act of Parliament but violate of the Constitution. (Union Judiciary in our case). Judges have no tenure or freedom from the executive. Judgments are effective only if confirmed by the executive. Courts-martial are part of the executive and not the judiciary. Exactly same arguments are entirely true in the Indian context too with more conviction because unlike Australia, we have not even created Courts like Australian Military Courts (hereinafter, AMC).

In the United States of America Article 37 of the United Code of Military Justice (hereinafter UCMJ)<sup>15</sup> clearly spells out as to what constitutes UCI and any act especially trying to influence the Court-martial Members, under it as unlawful. It is time for the Indian Military Justice System to come out of the implied mode and to explicitly make UCI punishable under its Statutes.

Thus actual UCI affects the fairness of a trial, while the appearance of UCI merely affects the level of public confidence in the Military Justice System. UCI was illustrated in an appeal in the Delhi High Court<sup>16</sup>, in which officers underwent Court-martial for alleged offences and the Honorable Court held:

“Law reigns supreme and that is the constitutional mandate in this country. The Military Intelligence Directorate cannot, under the parameters fixed under the Constitution and under the provisions of the

<sup>14</sup> Lt. Col. PPS Bedi v Union of India, AIR 1982 SC 1413; Reid v Covert, 354 U.S. 1(1956) at 1174.

<sup>15</sup> Unified Code of Military Justice (hereinafter UCMJ), art. 37

<sup>16</sup> U.C Jha, the Military Justice System in India: An Analysis, 194 (LexisNexis, Butterworths Wadwa, Nagpur, 2009).



Army Act and Army Rules, assume the role of a prosecutor and a judge of its own cause. To give an air of verisimilitude the respondents (military authorities) had held the Court-martial proceedings which are wholly void".<sup>17</sup>

#### INSTITUTIONAL CORRUPTION AND THE EFFECT ON THE RIGHTS OF CITIZEN SERVICEMEN

The Theory of Institutional Corruption as espoused in the Stanford Encyclopedia of Philosophy<sup>18</sup> provides that to be corrupt, an action should involve the corruptor or the corrupted and holds that the corruptor does not only perform the action of corruption but is morally responsible for such actions. An action is corrupt when it has a corrupting effect on the moral character of a person or undermines the institutional process. We can call an action corrupt only when the corruptor intends or foresees the harm the said action would have caused. There is an asymmetry between the corruptors and corrupted. The corrupted are also to be blamed for letting them in such a position and as such are no better than the corruptors though their beliefs and intentions may differ. Also the corruptors may not necessarily be responsible for their corrupt actions. The person who does a corrupt act under institutional corruption has to belong to an institution and so does the corrupted. Institutional corruption involves institutional actors who corrupt or are corrupted. In this research study, Armed Forces are an institution and the Convening Authority, with his vast powers, is the corruptor and the Members of the Court-martial who are under

his chain of command, are the corrupted.

One can come to a reasonable conclusion that it is not necessary that private gain be the motive for corruption by people holding public offices. In the Military context from the perspective of Institutional Corruption, corruption may be caused by the defective and archaic Statutes, structures, processes and/or the actions or omissions of the actors (in this case the Convening Authority) in the system who are required to act as per the expectations. Pressuring decision-makers and witnesses has to be precluded to avoid overt corruption of the Military Justice system which will in turn maintain and to foster confidence among the service personnel and the public. Failure to recognize the possible vulnerabilities, threats or risks of corruption in the criminal justice system of the Armed Forces, shall be detrimental in the long run to the security of the country itself.

The mere fact that the Convening Authority stresses to the adjudicators of a particular case before the trial that their sentence should send a message and should act as a detriment to others, the resultant effect can only be guessed. „With this mantle of command authority the adjudicators of the accused toe the line of action, as implicitly given by the Convening Authority and the accused is left without any hope of a feasibly fair trial.<sup>18</sup> The general concern regarding UCI is that the Commander has the ability to influence judicial proceedings and participants in such a manner so as to deprive the accused of his right to a fair trial".<sup>20</sup> There is no provision

<sup>17</sup> Ex Major NR Ajwani v Union of India, 95 (2002) DLT 770.

<sup>18</sup> United States v Stombaugh 40 MJ 2008 (C.M.A 1994). (The language actually predates Stombaugh,

but it effectively became part of the test for command influence in Stombaugh).



in the statutes governing Military Law which can hold the Convening Authority responsible and accountable for the use of such implicit or explicit opinion and perception which potentially effects the rights of the service personnel. „The rights of the servicemen cannot be abridged completely either by the constitution nor by the statutes beyond what is the minimum need for the proper functioning of the land, sea and air forces in a war like situation.“<sup>19</sup> The Supreme Court of India has observed: Our Constitution envisages a society governed by Rule of Law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the antithesis of rule of law. Equality before law and the absolute discretion to grant or deny benefit of law are diametrically opposed to each other and cannot co-exist.“<sup>20</sup> The military Commanders role is wide and powerful and with this comes the problem of him using it in an arbitrary manner. „Because of this, the words of commanders warrant the greatest scrutiny.“<sup>21</sup> According to Lindsey Nicole Aleman (Aleman, 2006, 179). „By establishing such a dominant role for the Convening Authority, the Military Justice System presents the potential problem of a commander using his power and influence in such a way as to thwart the fairness, impartiality and integrity of disciplinary proceedings.“<sup>22</sup>

## THE UNIFORM CODE OF MILITARY

<sup>19</sup> Eugene. R. Fidel, A World Wide Perspective On Change In Military Justice, in *Evolving Military Justice* 209

<sup>20</sup> Sudhir Chandra v. Tata Iron and Steel Co. Ltd, A.I.R 1984, S.C 064

<sup>21</sup> Lieutenant Colonel Lawrence J. Morris, *This Better Be Good: The Courts Continue to Tighten*

## JUSTICE

UCMJ, which was effective from 31<sup>st</sup> May 1951, was the result of the intensive study undertaken by the Forrestal Committee. Standard of procedural fairness in military trials was strengthened. Control of the Commanders over Court-martial outcomes was minimized. Civilian Courts for Court-martial appeals were instituted and the rights of the servicemen accused of an offence was duly accorded.<sup>23</sup> The elimination of Command Influence was a major thrust area of this committee. The Supreme Court was also prompted to supervise Courts-martial but till 1983 only cases pertaining to *Habeas Corpus* or Court of Claims were taken up.

The Court of Military Appeals which finally decides questions of law was the Court of last resort for each of the Armed Forces. It also acts with the JAG in an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying the defects in the system and its administration.<sup>24</sup>

The salient provisions in UCMJ designed to oust command influence and bring about fair trial are as under<sup>25</sup>:

- a. The accused was given the Right to a Counsel at the pre-trial stage.
- b. A charge was prohibited if there was lack of sufficient evidence or which did not state an offence.
- c. Legally trained counsel for both the

the Burden in Unlawful Command Influence Cases, DA-PAM- 27-50-306

<sup>22</sup> Aleman, *supra* note 20 at 171.

<sup>23</sup> Beth Hillman , *Review (Reform), Chains of Command, Legal Affairs*, (May- June 2002),

<sup>24</sup> Judge Advocate Generals School, *supra* note 34.

<sup>25</sup> *Id*



prosecution and defense was made mandatory.

- d. Compelling self- incrimination was prohibited

### **PERCEPTION OF INDEPENDENT AND IMPARTIAL MILITARY JUSTICE SYSTEM**

It is an interesting fact to note that though under the UCMJ many feel that Military Judges are not sufficiently independent owing to the fact that their annual assessment, posting and promotion are still in the hands of the JAG as well as they do not have a fixed tenure, but the Supreme Court has held otherwise in Weiss case of 1994 stating that "Congress has achieved an acceptable balance between independence and accountability."<sup>26</sup> It was a year before in 1993 that the Navy Court of Marine had another story to tell. They spoke about the perceived sense of an observer as to the independence of the Judges due to the system of rating of the Judges.<sup>27</sup>

Even after constant changes in the Military Justice System, there still remains a perception in the minds of people about the independence and impartiality of this Justice System. Cox Commission, an independent group convened in 2001 by the National Institute of Military Justice to study the military criminal justice group, in its report recommended that the role of the Commanding Officers considerably reduced, and that the commander who presses charges against a service member no longer be responsible for the selection of Jurors.<sup>28</sup> The Commission also recommended that the authority and independence of military

judges be increased by granting them guaranteed terms of duty, so that they cannot be removed summarily if they reach decisions that are unpopular with their military superiors. The Commission's report was treated with disdain.<sup>29</sup> Yet another Act , i.e. The Military Justice Improvement Act of 2013 (S 967) wherein Commanders role in prosecution, selecting Court Members and post-trial role has been limited, is still pending to be taken up as legislation.

### **ROOM FOR REFORM IN THE INDIAN MILITARY JUSTICE SYSTEM**

Till 2007 when the Armed Forces Tribunal (hereinafter AFT) was established by the Act of the Parliament, the Indian Military Justice System had successfully resisted any kind of change. It was not merely a case of oversight by the Government and the top military brass, but also their stoic belief that the system was perfect with all the checks and balances. The citizen servicemen in such a system were devoid of any right to appeal against the decision of the Court-martial.

This need for providing an effective and important right of appeal was raised during the passing of the Army Act, 1950 and the Air Force Act, 1950, which was duly rejected by the Government. Though the Navy Bill, 1957 was modelled after the Lewis Committee Report, 1946 of the United Kingdom, the provision for an appeal against Court-martial orders was missing as it was maintained that an effective review was being carried out by the JAG. The main idea behind such resistance was mainly due to the fact that the Armed Forces in their quest for maintaining discipline needed a speedy administration of

<sup>26</sup> Weiss v. United States, supra note 277

<sup>27</sup> United States v. Mitchell 37 MJ 903 (N.M.C.M.R 1993),

<sup>28</sup> Hillman, supra note 37

<sup>29</sup> Id



justice and in such a case a right to appeal would mean a lengthy process whereby the service personnel would be away from their duty to tend to their own case.

Just like the Findlay's case which brought about remarkable changes in the United Kingdom's Military Justice System, the decision of the Supreme Court of India in Lieutenant Colonel P.P.S. Bedi's case,<sup>30</sup> which was in sync with the development in other countries like the Military Justice System of United Kingdom and The United States of America, can be said to have shaken the Indian Government from their stupor and made them start formulating a new course of action to give the much needed right of appeal to the Indian Soldiers. While stressing on principle of Natural Justice to be accorded to service personnel, the Supreme Court in 1990<sup>57</sup> held that though recording of reasons for an order passed in the Court-martial cannot be insisted under the Army Act, but the same would be desirable.

## CONCLUSION AND RECOMMENDATION

The difference between the procedure established in the Armed Forces and other sectors of organized services is that while in other sectors only Service misconducts and misdemeanors is investigated and tried by in-house tribunals, in the Armed Forces of the Union, even civil offences can be tried by a Court-martial. While in-house service tribunals in other organized service sector can impose penalties having a service consequence only, like, suspension, stoppage of increment, recovery of damages, loss of seniority for promotion,

dismissal from service etc., a Court-martial can always try an offence under the Indian Penal Code and award up to death sentence to the accused before it. And this is when the adjudicators trying the accused are not trained judges who understand the finer points and intricacies of law but are only lay Armed Forces Officers who have been chosen by the Convening Authority and made to sit as jury on the Court-martial. It is this vital difference that makes the Court-martial, the most dreaded word among the members of the Armed Forces of the Union.

The right to a fair trial is an important component of the Rule of Law wherein each individual must be able to avail his procedural rights. Practical difficulties cannot be taken up as an excuse to deny Defense personnel equal access to justice as their civilian counterparts. The Indian Constitution under Article 14 guarantees equality before the law and equal protection of law. This may be seen to an extent in the General Court-martial proceedings but are normally amiss during SCM. The Code of Criminal Procedure also provides that for a trial to be fair, the Trial must (hereinafter, SCM) be in an open Court.<sup>3</sup> Right to a lawyer is guaranteed to an accused under Article 22 of the Constitution of India. Decisions of the court made without the accused having been provided a lawyer are not valid.

Access to justice does not limit itself to mere facility provided to all to get access to the Courts or have access to legal expertise; it encompasses the Principle of Legality which presupposes that matters will be

<sup>30</sup> Lt. Col. PPS Bedi v Union of India, AIR 1982 S.C. 1413 at 442



adjudicated in a fair manner by adhering to legal rules and not in an arbitrary manner departing from the rules established by law. Institutional autonomy is one of the major requirements that any Court must possess to be rid of any kind of interference. It should follow laws which are just, procedurally fair, in accordance with International Human Rights standards, not suffer from institutional corruption leading to unlawful command influence and have adequate legal accountability

mandatory subject of the curriculum in the Law Colleges under the graduate studies thus bringing in general awareness among future lawyers and judges about functioning of the Military Justice System and helps them in arguing / adjudicating cases brought before them in its right legal perspective.

RECOMMENDATIONS

1. During the selection process, all ranks in the Indian Armed Forces must be made aware of their rights and duties especially affected by the provisions of Article 33 of our Constitution so as to free them of ignorance and motivate them to give their whole hearted consent and assent to being part of this prestigious institution.
2. Basic study of military law as part of curriculum in the mandatory promotion examination for officers in their formative years does not imbibe in them any finer nuances of law and thus lack the expertise to deal with cases based on principles of law and its interpretation while adjudicating cases in later years. An annual „Refresher Course in Military Law“ is recommended to be conducted under the aegis of Judge Advocate Generals (hereinafter JAG) Branch for all officers in the service bracket of ten to twenty five years and for which they be reported and rated fit to serve as Members of the Court / Presiding Officer of the Court-martial.
3. Study of Military Law is incorporated as a

4. Disciplinary cases arising out of administrative matters are adjudicated by the Convening Authority / Commanding Officer so as not to undermine his authority in maintaining good order and discipline among the troops which is his foremost task. Cases of criminal nature are dealt by legally qualified JAG Officers.

5. The JAG Branch be taken out of the executive chain of command of the Armed Forces and placed directly under the Ministry of Defense with attendant monitoring systems and duly chalked out checks and balances.

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