Military Justice System in India

Avinash Raj David,
Assistant Professor, Department of Management,
Center for Management Studies, JAIN (Deemed-to-be University), Bangalore, India
Email Id: avinash_d@cms.ac.in

ABSTRACT: ***Since India were under British Colonization, the Military Justice System established after the Independence were influenced by the British military law. Soon after the independence Army and Air Force Act was enacted in the year 1950. To control and govern the Armed Forces legal bodies were established exclusively for that purpose in different nations which have isolated and distinct legal bodies from the other countries. Although diverse & independent judicial bodies and arrangements are used by different countries to administer justice, some countries use civil judicial systems.Many times it was argued that the act should be amended to bring inpursuance with the principle of Constitutional Law, Rule of Law and principle of Natural Justice. As a result, with the enactment of the Construction of India Military law was amended to some certain extent. However, even today there many drawbacks in the existing legal framework. Here in this review paper we will discuss the existing legal framework, history and development of the legal justice system. Further, the validity of the Military law from the Constitutional perspective will also be examined in the review paper.***

KEYWORDS: Constitutional Law;Military Justice System;Military Law; Principle of Natural Justice; and Rule of Law.

INTRODUCTION

Military law is a mechanism envisioned for the representative of the armed forces in general and the army in particular, which governs their conduct in a certain way in order not only to preserve discipline among the rank and file, but also to attain the highest level of professional quality.In Ancient period there was no passable and satisfactorily literature are available related to the India's Military Rule, however, we still find some knowledge from the ancient epics of Ramayana and Mahabharata and from the words of foreign travelers such as Sukranti. During the ancient period, it is said that all able-bodied men of the tribe took part in the war. Sukranti said that for the disobedience of orders death was the only punishment[1].

Indians were well aware of the *Dandaniti (Art of Warfare)* and *Sastra Warfare*, according to TA Bhai. A great deal of thought, time and expenses was dedicated to this subject by ancient Indians of both the Vedic and post-Vedic ages, and their contribution to organizing and improving the art and conventions of war is considerable. It can, therefore, be seen that in ancient India, military organizations and laws, while now only of historical interest to us, bore a striking resemblance to the current rules of warfare and the preservation of Army discipline.

Rulers used to administer justice in compliance with Quranic laws during the medieval period. In imposing order in the Army ranks, they were very ruthless. Each official exerted significant general, administrative and judicial powers, particularly in criminal proceedings. The 'Qazis' that were to be resolved under the Quaranic laws were left with legal disputes.The declarations of witnesses as such were of little importance and the officers concerned should rely on their judgment on the basis of knowledge of human nature. On discretion, even capital sentences have been inflicted.

It was during the 16th century that the king raised a permanent standing army. This was the period when, owing to the political trends and other variables of modern times, the desire to retain a standing army increased increasingly. Statutory regulations for the preservation of order in the armies of the East India Company were first enforced in 1754 to punish officers and soldiers in the service for mutiny and desertion.

In 1845, the Indian Legislature for the first time issued a common code for the native armies of India under the powers bestowed upon it by the Act of 1833. The Governor General of the Council passed 'Articles of War' as Act XX of that year for those armies. Shortly thereafter, this Act was repealed and replaced by Act XIX of 1847. After the revolt of 1857, this Act was later revised. The Government of India felt the need to abolish the above act and to enact a new act after the revolt of 1857. Consequently, Act XXIX of 1861 came into being. The object of this Act was mainly to consolidate and amend the Articles of War in Her

Majesty's Indian Army for the Government of the Native Officers and Soldiers. The Act of 1869, i.e., Act V of 1869, further repealed this Act. It became apparent with this enactment that it was directed at the native officers, troops, and other individuals in the Indian Army of Her Majesty.

In 1895, the three indigenous armies were amalgamated, giving rise to major 'Articles of War' amendments. These reforms were introduced by Act II of 1894, which modified the Indian Articles of War, which established the legislative basis for the enactment of the 1911 Indian Army Act.

Military Law Since 1950

A need to amend the laws relating to the Armed Forces was felt after India gained independence in 1947. The Army Act 1950 was the first to come into being (Act XLVI of 1950). It was primarily because, after the enactment of the Indian Army Act 1950, it was desired to consolidate the scattered provisions of the law. Another significant reason for doing so was the freedom of the government, and, ultimately, it was to put the provisions of the Army Act in line with the constitutional amendments brought about in the Constitutional Law.

In addition, in order to update the British Naval Code, a special committee was created. Therefore, it was thought that it would be best to wait for the Committee's report, as the Committee's findings or acts might help them. Consequently, on 27 December 1957, the Indian Parliament finally passed the New Act.

The Military Justice Uniform Code also came into being in 1950. The laws for all three services were merged in this code, i.e. Air Force, Army and Navy into one. It was thought that it would be a better idea for this kind of Code to be implemented so that all the rights and duties of the Armed Forces personnel could be defined by reference to a single law.

In search of this realization, a committee was set up by the Government of India. The terms of reference of this committee were intended to investigate in detail the historical history of the three codes of the Army, the Navy and the Air Force, in particular the difficulties faced in applying them to the representatives of the Armed Forces vis-à-vis the other developed democratic countries of the world, in particular those of the developed democratic countries of the world. However, because no concrete results have been achieved in achieving the goals for which it was formed, the purpose behind the creation of the said committee could not be fulfilled.

Constitutional Provisions and Military law

In the case of the Armed Forces, Parliament has no unbridled power to create a special judicial structure. It must take into account the constitutional protections given to its citizens, who often include members of the Armed Forces.However, in order to allow them to carry out their duties effectively and to preserve discipline among them, those fundamental rights can be limited by notifications in their regard.

Like most of the Constitution of the world, the Indian Constitution provides the basis for the development of the Union's Armed Forces. The key role of the Armed Forces, we understand, is to cope with any foreign aggression. However, often the help of such powers becomes equally important in way to help the civil power in a form to preserve law and order. Restrictions on different human rights have been imposed on representative of the Armed Forces in compliance with Art. 33 of the Indian Constitution.

Military Law in other Jurisdictions

(i) ***United Kingdom*:**

In United Kingdom, we can observe that to control military justice system there were scuffle betweenthe Crown and Parliament. Before the 17th century there was no specific act regulating Military Law. The issue was king’s subject matter and parliament has no control over it. However, in the year 1689 the parliament passes the firstMilitary law. Before that every physically able-bodied person was considered asa soldier. As far as Military Justice system was concern, in United Kingdom the Court of Chivalry was primarily responsible for administering justice. Since the court was comprised of Earl Marshal – a royal officeholder

and Lord High Constable- commander of the royal armies, it was called as court of the Constable and Marshal. This was the reason that thegradually it was called as Court-Martial.

The British Court-Martial has developed a system of military due process over a period of roughly seven hundred years. The system evolved from the Court of Chivalry with its Combat trial to one that granted an accused more sophisticated rights, the right to receive notice, to present his defence, and to argue his case.Lastly, as opposed to the general population, the control of the Court-Martial was gradually restricted to exercising its powers over soldiers only. Legislative restrictive action was taken when expansion of those powers was attempted, at least in later years.

(ii) United States of America:

The American Military Justice system, which began operating officially was in 1775. The British system acted as a strong founding stone for the military justice system in the USA. It is possible to track the history of military law in America through the three different periods. They can be divided as follows:

- Period from 1775 to 1800;
- Period from 1800 to 1900; and
- Periodfrom1900 to the present.

The nineteenth century was an era of relatively significant improvements in the American military legal system, but the developments marked by the twentieth century are groundbreaking in contrast.In 1916, Congress conducted a significant revision of the Articles of War, and for the first time we see the three martial courts that exist today:

- The General Martial Court,
- The Special Martial Court (replacesMartial Regimental or Garrison Court) and;
- The Summary Court (replaces the 1874's Court of the Field Officer)

Judicial Pronouncements

The Hon'ble SC also observed that the provisions of the Armed Forces Acts do not infringe or repeal fundamental rights. In the light of the said precedent laid by the Hon'ble Supreme Court, the following important cases were discussed here as follows[2]:

(i) **Ram Sarup vs. The Union of India and another:**

In the case the plaintiff register a case before the Supreme Court to issue writ of habeas corpus and certiorari concerning the repeal of the constitutional right of the petitioner at the time of his trial under the Army Act. The Hon'ble SC decided that each and all clause of the Army Act is a law passed by Parliament. Thus even though any clause appears to infringe on the FRs provided in Part III of the Const. it remains legal.

It should be considered, in performing his power pursuant to Art. 33 of the Indian Constitution, the Parliament has thus made the required amendments to impact the respective FRs. Nevertheless, the Hon'ble SC opined that the provisions of Section 125 of the Act were not discriminatory and did not violate the provisions of Article 14 of the Constitution. The Hon'ble Court further observed that it is not contested that a distinct class is created by the persons to whom the provisions of sec. 125 refer[3].

(ii) **Ous Kutilingal Achudan Nair and Others Vs. Union of India and Others:**

Here in this case the Hon'ble SC noted that Art. 33 of the Indian Constitution determine for an exemption to the provisions of Part III of the proceedings, together with right to form associations or union as given under Article 19 (1) (c) of the Constitution[4].

(iii) **Secretary Ministry Of Defence vs Babita Puniya**:

Here in this case, although considering the abrogation of women's fundamental rights under Sec. 12 of the Army Act 1950, the Hon'ble Supreme Court noted that women were not given permanent commissions

from Short Service Commissioned Officers under the said provision. In not granting permanent commission to the women the court said that the Article 33 of the Constitution authorizes Parliament, by statute, to decide the degree to which the rights granted by Part III of the Constitution are restricted/abrogated in their implementation, inter alia, by the representative of the Armed Forces, in order to ensure that their duties are properly discharged and that discipline is preserved among them[5], [6].

Military Justice System

The organization of policies and rules that governs the armed forces is termed as military justice system (or military law). Many nation-states have distinct and remote bodies of legislation regulating the actions of their armed forces members. To enact certain rules, several governments enforce special legal frameworks and additional measures, while others use systems of civil law.

Judicial concerns that are particular to military justice include:

- maintenance of order and discipline,
- the fairness of orders, and
- the adequate behavior of military personnel.

Few governments authorize their military justice systems to interact their armed forces in case of civil offences committed by them. These authorizations come with certain rules and condition which must be followed while dealing with such cases.

It is to be noted that martial law and military justice is two different terminologies. Military justice is the imposition of military force as a replacement for civil authority over a civilian population that is sometimes proclaimed in times of emergency, war or civil strife. Various states restrict the manner and time to declare and enforce martial law.

Military Justice is a organization of policies and rules that governs the armed forces. The conduct and behavior of army personnel is also regulated by Military Justice. To make the provisions more specific few countries has developed distinct legislative bodies that explicitly established to control the military forces of their respective countries.

On the one hand although dissimilar and independent court or judicial authorities are used by some countries to administer justice, on the other hand, some countries use civil justice systems to tackle offences committed by army personnel.

Redressal System

In India, the redress mechanism in the armed forces does not seem to be reacting to the need for time. It is considered that the military remedy scheme is out of date and need to be modify. More and more people from the armed forces knock at the doors of the Civil Courts. There have been more than 6300 cases of defence personnel approaching civil courts for justice in the last three years alone. The Delhi High Court alone lists approximately 2000 cases at different stages of the hearing.

The Army's redress mechanism is provided by complaints that are admissible under Sections 26 and 27 of the 1950 Army Act or through non-statutory complaints. It is to obtain relief from any valid grievance caused by the supposed error in the chain of command committed by the superior officer.These complaints usually apply to confidential files, promotions, postings, summary awards, etc.

Defects in the Indian Military System

In order to hold fair trial the court, must possess 3 characteristics:

- Experience: Qualified, trained and experienced judges are required;
- Independence: There should be fair appointments and promotion of judges, there should not be any involvement of executive like in determining the term of the office, etc.
- Neutrality: There should be no biasness that means judges should be free of personal and institutional prejudice [7].

The Indian military justice system is inadequate on all these counts. It decreases adequate legal guidance and expertise, it lacks freedom from exercising own power and was influenced by the command superior officer of the military, and it also fails to stop the involvement of other organs.

Currently it is based primarily on the British Indian Army Act of 1911. Across these rules, the court-martial process is broadly similar, with some main variations in the Navy Act. Centered on the Army Act, paramilitary forces have their own particular rules.

The Army Act represents the previous justice system existing in British times, along with the other actions of the various armed forces, and is thus riddled with defects. It is of utmost importance to eradicate these flaws before they plague or execute the military justice system. Few weaknesses are.

- *No right of bail is provided*- The military personnel allegedly accused of any offences has statutory clause for calming bail as their right. Depending on their discretion, the superior authority can come to a decision to grant bail or not to grant bail. The SC court has laid down certain guidelines which should be followed while granting a bail to an individual. But it is argued that it is arbitrary and unfair to grant bail at someone's discretion and it also violates Art. 21 of the Indian Const.

- It does not authorize a culprit person to take a civil lawyer to protect him or a military officer identified as the defending officer to defend him.This incident can be termed as a serious violation of Article 21 since there is the absence of legal aid facilities.

- *Trial in a Summary Court-Martial [SCM]* - Here the, trials of convicted military personnel are held. The trail at SCM does not adhere to guidelines drawn by the SC and the HC. It is mainly due to the fact that prosecutor is not present or sometimes the prosecutor's duties are performed by the SCM itself.

- A severe violation of Article 22 arises when the defendant is unable to protect himself with the help of a legal consultant. The Supreme Court and High Courts have strongly criticized SCMs for not following the just and equitable test of reasonableness.

- *Double Jeopardy*-Constitutional defense against double threat is enshrined in Article 20(2). In the military justice phase, it is available. However it is not accessible in civil court.

- *There is No right of appeal*- In a higher court, there is no clause to make appeal. The Army Act under section 164(2) provides appeal provision only after the finding or sentence given by the authority. Like it provides that army personnel if not satisfied with the decision may file petition before the superior authority or central government. Therefore, it can be said that before the finding or sentence is confirmed, this remedy is not available to the accused. On the other hand, it was exercised in close room where no legal representative can be present and thus such a provision is meaningless. Hence it can be said that there is no right of appeal is available to the army personnel.

- *Members of Court Martial*-Either constitutionally qualified or not, mmbers are not trained to administer justice. They are under numerous commanding powers and cannot exercise their judgment in a courtroom entirely individually.

Reforms in the Military Justice System

If we would look at the large number of cases appeared before the higher civil court it can be said that justice system of armed force is running at slow pace and has been completely failed to administer the justice. The number reveals that more than a lakh of legal cases challenged by the Ministry of Defense and the HQ of the armed forces.

1. Old-Fashioned:

The military justice system was considered old-fashioned and disproportionate with the social and political views of the Constitution. The distinction should be drawn between the pressures of a self-governing society and the requirements of military discipline. Few of the Indian Military Justice is system in compliance with the British Law can be summarized as follows:

- No bail is given on charges against an accused military individual.
- Insufficient legal aid during courts-martial for the convicted.
- The JAG department shall be put under the same executive's managerial and practical oversight.
- No appeal is lodged against a court-judgment martial's and conviction.
- Air Force personnel do not have the double-hazard statutory defense provided for in Article 20(2) to preclude a second hearing before a civil court.
- A SCM trial does not follow the accepted standard since there is absence of prosecutor.

2. Glaring Deficiencies

Judicial advocacy has usually made comprehensible conditions of service of aggrieved military personnel as well as the fairness of courts-martial in the area of human rights. The protections given to the accused and the conduct of those operating the military justice delivery system are glaring shortcomings.

It would not to be right to claim so as to there is no require to alter the law, because the figure of persons exaggerated by military law is limited, or the representatives of the armed forces have willingly submitted all their shortcomings to the current framework.A process that is not only transparent and impartial but as well as focus at a liberal understanding of the concepts of natural justice should be followed by the justice system of the armed forces. Although enforcing order within the organization must always be the primary objective of the military justice system.

The Armed Forces Tribunal in India

The Armed Forces Tribunal and its benches have been in service since August 2009. It has original control related to court-martial jurisdiction of operation and appeals. There have been 5,500 cases resolved in the last 5 years. The Tribunal, by civil contempt, is unable to enforce its orders.An appeal can be brought against the Tribunal's order before the SC.

The AFT does not have the strength of civil contempt. For grievances concerning leave, posts, promotions, summary disposals and proceedings, the Armed Forces Tribunal (AFT) has no jurisdiction. A substantial figure of cases has arisen in which the government has not taken action against the decisions of the Tribunal.

The world has gone forward over the past two decades and significant improvements have taken place in the military justice systems of other democracies.It is time that we improved our framework and bring back confidence of public in the standard of military justice.

CONCLUSION

The provisions of military justice regulate the position of the Indian Army during war or peace. These are developed in the form of different Statutes, Rules or Regulations. It is a written code which, apart from service conventions, has seen periodic changes and reviews. Army Personnel has their legal system which differs from general justice system.

So as to preserve obedience and avoid lengthy period of absence the legal and justice system of the armed forces was designed to be relatively fast in implementation. Therefore, as it is in the civil system, provision of appeal has not been allowed.

More than 1.5 million Indians, as veterans of the armed forces, are issue to the armed justice structure. This party still refers to a legal system structured and enforced in the name of discipline after the Mutiny of

1857 to look after the welfare of Indian colonial masters.The military justice system is rarely questioned in our country-the perception that it is about protecting the system, calling it 'time-tested' is typically overlooked. Moreover, on military topics, a curtain of secrecy is drawn. There is a clear trend of change in the world's military justice system in terms of the accused's rights and human rights standards.

Judges' independence, the development of permanent courts, the access to legal advice, and the enhanced ability of the suspect to use a trial rather than summary proceedings are among the key features of this reform. The limitations of the Indian military justice process, as well as the shortcomings of human rights, must be addressed by legislation and must be in compliance with international standards.

REFERENCES

[1] N. Hussain, *The jurisprudence of emergency: Colonialism and the rule of law*. 2003.

[2] Advocate Kapil Kishor Kaushik, "Do Members Of Armed Forces In India Enjoy Their Fundamental Rights," *legalserviceindia*. .

[3] AIR, *Ram Sarup vs. The Union of India and another*. 1965, p. 247.

[4] AIR, *Ous Kutilingal Achudan Nair and Others Vs. Union of India and Others*, vol. SC. 1976, p. 1179.

[5] Civil Appeal Nos. 9367- 9369, *Secretary Ministry Of Defence vs Babita Puniya*. 2011.

[6] *The Army Act, 1950*. .

[7] Shailesh Rai, "India's court-martial system fails on all counts: competence, independence, impartiality," *ScrollIN*, 2015.

[8] Article 20 and 21, *The Constitution of India*. .