Military Justice System in India

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INTRODUCTION

The Union Cabinet chaired by the Prime Minister has given approval for the setting up of an Armed Forces tribunal. As reported, the tribunal would be formed on the lines of the Central Administrative Tribunal and its composition would be incorporated in the Armed Forces Tribunal Bill 2005, which is likely to be passed by the Parliament. It was introduced in the Lok Sabha on 20 December 2005. It has been referred to the Standing Committee on 27 December 2005. The proposed tribunal would deal with appeals from court martial verdicts and grievances related to conditions of service, including promotions, confirmations and appointments. It is likely to be independent of the Service Headquarters and headed by a retired judge of the Supreme Court. The judgments of the tribunal may be reviewed only by the Supreme Court. This is a long-awaited change in the justice system in India. However, the creation of an appellate forum may not solve all the problems that the military justice system is riddled with.

NEED FOR A SEPARATE SYSTEM

To appreciate the need for a change in the military justice system, it is necessary to understand why a separate system of justice is needed. Military functioning in modem war demands quick decisions that cannot be achieved by a debating society. In many military situations, a commander's decisions are enforced through his subordinates. This is the reason why the Armed Forces have a system of rank and command, clearly designed to place one person in charge when group action must be decided upon. Military justice provides a stimulus for cultivating a habit of unquestioning obedience by posing the threat that disobedience will be penalised.

The military has developed laws and traditions of its own. The primary function of the Armed Forces is to fight or be ready to fight should the occasion arise. The Armed Forces are not a deliberative body. They have an executive function. The officer's

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right to command and the soldier's duty to obey cannot be questioned. Besides, the military constitutes a specialised community governed by its own laws that recognise unique military offences, such as desertion, absence without leave, disobedience of orders and dereliction of duty. These offences exist to ensure discipline, which is essential for accomplishing military objectives. If a commander cannot rely on his subordinates to obey and if the members cannot rely on each other to follow orders, the effectiveness of a fighting force is undermined and the security of the nation may be endangered. No civilian parallel may be drawn to explain the need for enforcing discipline. Further, the military justice system is designed to adjudicate cases efficiently. This is important in a contingency, when a commander must deal with misconduct expeditiously to prevent degradation of the unit's effectiveness and cohesion.

THE INDIAN MILITARY JUSTICE SYSTEM

The British military justice system, conceived to 'discipline' a mercenary force after the 1857 mutiny, is the progenitor of the Indian Army Act 1950, the Navy Act 1957 and the Air Force Act 1950. (There are minor differences in these three Acts. However, for discussion, the general term "Army Act" (AA) will be used). Only a few minor changes were made before the British laws were adopted by independent India.

Deficiencies in the Justice System

The Army Act reflects the old system with all its inherent defects. Some of the defects are discussed in succeeding paragraphs.

Right to Bail. There is no provision of bail for a military person arrested on a charge. It is a matter of discretion of the commanding officer, or the superior military authority. While the Supreme Court has laid down categorically the principles on which bail ought to be granted, these provisions have not been made applicable to military personnel held in military custody. Such discretion in granting bail, is arbitrary, liable to misuse and makes the constitutional guarantee under Article 21 meaningless.

Trial in Summary Court Martial (SCM). Trial by SCM does not come up to the recognised standard of justice because there is no

prosecutor and the court itself performs some of the functions of the prosecutor. The accused is not entitled to defend himself with the help of a counsel, or defending officer. This is not in keeping with the safeguards provided in Article 22 of the Constitution. It also violates Article 21, as the procedure prescribed for SCM does not pass the test of just and fair reasonableness. The Supreme Court and high courts have criticised the decisions of a number of SCMs as being biased, awarding excessive punishment and being violative of Article 14 of the Constitution.

Legal aid to Accused. The most significant is the absence of the services of an experienced legal officer as counsel for the accused. Military rules permit an accused to engage a civilian lawyer at his own expense or to be defended by a military officer known as the defending officer. In reality, very few of the accused can engage a civilian lawyer at their own expense and service officers normally detailed for the duty are inexperienced and unwilling to undertake this commitment. The infrastructure required to meet this obligation of legal aid has not been developed in the Armed Forces. The organisation does not provide any incentive to the defending officers. The problem is further compounded by the fact that defending officers have little or no interest in the task. Consequently, cases before the court martial are not adequately defended, which is in violation of the provisions of Article 22 of the Constitution.

Members of Court Martial. A court martial constituted under military law determines both findings and sentence. The members are neither legally qualified nor trained in the administration of justice. In fact, experience shows that the most unwanted officers in a military station are detailed for court martial duties. They are exposed to varying degrees of "command influence" and cannot be completely independent in exercising their judgment in a trial. Invariably, the members are detailed from the command whose commander-in-chief orders the court martial. He appoints the principal functionaries of the court martial and controls their service career. Even if he does not wish to influence the functionaries directly, they function under the "command influence".

Functioning of Judge Advocate General (JAG) Department. The Judge Advocate (JA) performs no functions, either as an advocate or as a judge. Thus the JA cannot be compared to the

judge in a trial by jury except in the sense that he has to maintain an entirely impartial position and his address cannot be in the nature of a direction. The department of JAG is placed under the administrative and functional control of the same executive who orders a trial by court martial and reviews the proceedings. The quality of advice given by the JA plays a very crucial role in swaying the minds of the members of the court martial. The officers of the JAG department are, however, not independent and cannot be expected to give a fair and just opinion.

Double Jeopardy. The constitutional protection against double jeopardy enshrined in Article 20(2), whilst available before a court martial is not available to prevent a second trial on the same offence before a civil court. A person subject to the Air Force Act, who has once been tried and convicted or acquitted before a court martial can be tried again on the same charge by a civil court.

Denial of Right to Appeal. There is no provision of appeal against the finding and sentence of a court martial. Chapter XII of the AA, which contains sections 153 to 165, provides for the confirmation and revision of the order of the court martial. Section 153 states that "No finding or sentence of a general, district or summary general, court martial shall be valid except so far as it may be confirmed as provided by this Act." Section 160 provides for the revision of a finding or sentence of a court martial by an order of the confirming authority. Section 164 deals with confirmation and remedy available to those against whom a finding or sentence has been confirmed. In the case of a final finding or sentence awarded by a GCM, DCM and SGCM, the remedy available to the accused is given in section 164 (2), as "Any person...who considers himself aggrieved by a finding or sentence of a court martial...may present a petition to the central government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the central government, the Chief of the Army Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit." This remedy can be invoked only after the finding of the sentence has been confirmed. The privilege of seeking the remedy is, thus, not available to the accused before the confirmation of the sentence. Besides, this remedy is an exercise on paper and takes place in closed rooms where the accused has no right of personal

representation. Thus, in reality, there is no right to appeal against the order of the court martial. Article 136(2) of the Constitution stipulates that the Supreme Court (Article 227 (4) in the case of high courts) cannot give special leave to appeal against any judgement, determination or sentence of a military court or tribunal.

The Supreme Court, in the case of *Union of India v. Himmat Singh Chahar* (1999), has considered the extent to which a high court, under Article 226, of the Constitution can exercise the power of judicial review over the court martial. The Court held: "The judicial review would be for a limited purpose to

(a) find out whether there has been infraction of any mandatory provisions of the Act which has caused gross miscarriage of justice; or

(b) find out whether there has been violation of principles of natural justice which vitiate the proceedings; or

(c) find out whether the authority exercising the power was having jurisdiction under the Act." Thus, the remedy of judicial review provided to a military person under Articles 32 and 226 is limited.

The existing system of military justice is regulated by the power of military command rather than the rule of law. The military commander exercises almost unrestrained and unlimited discretion in determining:-

(a) Who shall be tried.

(b) The prima facie sufficiency of proof.

(c) The sufficiency of charges.

(d) The composition of the court.

(e) All questions of law arising during the progress of the trial.

(f) Correctness of the proceedings and their sufficiency in law and in fact. Moreover, there is no right to appeal against his decision.

MILITARY JUSTICE IN OTHER DEMOCRACIES

The world has moved forward in the last twenty five years, and there have been major changes in the military justice systems of other democracies. In fact, a number of democracies have abolished military tribunals during peacetime (Austria, Finland, Norway, and Switzerland). Reforms in the military justice system of some democracies are discussed in succeeding paragraphs.

The United Kingdom

The English court martial system can be traced back to the military court attached to the army in Scotland in 1296. Over the centuries, the English system developed from its feudal beginnings to a recognisable court. When the Royal Air Force was formed on 1 April 1918, the Army system was adapted for its use. This system survived until 1946, when the Lewis Committee report was published. The Air Force Act, 1955, the Army Act, 1955 and the Naval Discipline Act, 1957–collectively known as the Service Discipline Acts (SDA), introduced the present system. These legislations remain in force today albeit with certain amendments.

Prior to 1 April 1997, it was not possible to appeal against a sentence alone. The change brought about by the Armed Forces Act, 1996, brought the court martial system closer to the civilian system for appeal. Following an appeal to the Court Martial Appeal Court, a further appeal is possible to the House of Lords. In cases where a court martial decision has been reversed and there has been a miscarriage of justice, the Secretary of State is required to pay compensation to the person who has suffered.

Under the recent reforms in the British military justice system, the duties of the commander have been distributed among three separate bodies. An independent prosecuting authority decides whether to take a case to court martial, an administration officer selects the court martial panel members, and a reviewing officer justifies the decision. The UK's Armed Forces Discipline Act 2000 has also established a summary appeal court for the purpose of hearing appeals against the findings and punishments awarded by commanding officers while dealing summarily with charges. The order of trial in a Summary Appeal Court follows very closely that of the Crown Court.

The government has introduced a Tri-Service Armed Forces Bill in the Parliament on 30 November 2005. The Bill reflects the government's commitment to modernising the military justice system. The main proposals in the Bill include:

(a) A common Service Discipline Act for the three services.

(b) Harmonization of offences and disciplinary powers of commanding officers.

(c) A joint court administrative authority.

(d) A single prosecuting authority.

(e) A standing unified tri-service court martial.

(f) Abolition of the rights of reviewing authority to review court martial.

(g) Right of accused to elect his trial by court martial.

Canada

The Canadian system of court martial was based on the British system. In 1950, a comprehensive National Defence Act was created, which included all legislations relating to the Canadian Army, Navy and Air Force, established a uniform process for administering justice and provided the right to appeal from the findings and sentence of courts martial to the Court Martial Appeal Board. The next step pertaining to appeal process came in 1959, when Parliament replaced the Board with the Court Martial Appeal Court. The adoption of the Canadian Charter of Rights and Freedoms in 1982, has resulted in more constitutional issues being raised before the court.

Canadian military courts are required to have a greater degree of institutional independence from the command structure of the armed forces. The commander has no authority to appoint judges or panel members. In cases where the accused is a non-commissioned officer, Warrant Officers are authorised to sit as members of the court martial panel. The Director of Military Prosecutions prefers charges and conducts prosecution at court martial. The court members are chosen under a modified random

selection process based on rank, and there is right to appeal to the Supreme Court of Canada on questions of law.

The United States of America

In the United States, the modem military justice system is based on the Constitution, which gives the Congress the authority to "provide for the common defence", "to raise and support armies", and "to make rules for the government and regulation of the land and naval forces", and designates the President as Commander-in-Chief of the armed forces. It was established with a foundation resting on four authorities: the Uniform Code of Military Justice (UCMJ); the Manual for Court Martial (MCM); a Presidential Executive Order that includes the rules for trial by court martial; and the body of case laws developed from the courts that review military justice cases. Military members do not forfeit their constitutional rights. Like all American citizens, service members enjoy the fundamental protections of the Constitution.

The UCMJ represents a masterpiece of legislation that balances the need for good order and discipline with the constitutional rights afforded to all citizens. It provides for a single criminal code applicable to all the services and a criminal justice system containing safeguards for the soldier that go beyond the rights enjoyed by civilians. The military justice system provides checks and balances to ensure that an accused's procedural and substantive rights are protected. The military judges base their rulings on constitutional provisions, common law, Rules for the Court Martial (RCM), and Military Rules of Evidence (MRE). These rules and procedures ensure that an accused's rights are maintained throughout the trial. The military justice system also offers the accused extraordinary access to the appeals process through a series of appellate forums: the Court of Criminal Appeals (one for each service), the Court of Appeals for the Armed Forces, and the United States Supreme Court. In addition, the President of the US can, in time of emergency or war, order 'military commissions' to be set up to try certain offences. Their 'jurisdiction' can extend to civilians.

The military justice system gives service members virtually all the rights and privileges afforded to citizens who face prosecution in civilian courts. In many areas, such as, the right to counsel,

pre-trial investigations, discovery, sentence, post-trial process, and appeals, the military justice system offers benefits that are more favourable to the accused than those available in the civilian system. In addition, Article 37 of the Uniform Code of Military Justice prohibits unlawful command influence.

INTERNATIONAL LAW

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of their basic rights and freedoms, the most prominent of which are the right to life and liberty. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non-derogable rights in the ICCPR. Other legal provisions on fair trial are to be found in Article 7 of the African Charter on Human and Peoples' Rights, Article 8 of the American Convention on Human Rights and Article 6 of the European Convention on Human Rights. Additional rules relating to the right to fair trial are contained in the United Nations documents---Guidelines on the Role of Prosecutors, 1990, Basic Principles of the Role of Lawyers, 1990 and Basic Principles on the Independence of Judiciary, adopted by the UN General Assembly in 1985.

Article 14 of the ICCPR, which provides for equality before the courts and for the right to a fair and public hearing, contains a catalogue of "minimum [procedural] guarantees" for an individual undergoing a trial for criminal charges. These rights are:

1. The right to a fair and public hearing.
2. Equal access to, and equality before the courts.
3. The right to a competent, independent and impartial tribunal established by law.
4. The right to a presumption of innocence until proved guilty according to law.

5. The right to prompt notice of the nature and cause of criminal charges.
6. The right to adequate time and facilities for the preparation of a defence to the defendant and to his counsel.
7. The right to a trial without undue delay.
8. The right to defend oneself in person or through legal counsel of one's own choice and to free legal assistance.
9. The right to an interpreter and the right to examine witnesses.
10. Prohibition of self-incrimination.
11. Prohibition of double jeopardy.
12. The right to appeal against conviction and sentence to a higher tribunal established according to law.
13. The right to compensation for miscarriage of justice.

The Basic Principles on the Independence of the Judiciary emphasise that the independence of the judiciary should be guaranteed by the state and enshrined in the constitution or the law of the country. It suggests that "everyone be entitled to a fair and public hearing by a competent, independent and impartial tribunal, in accordance with the principles proclaimed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other United Nations Documents". It says further that "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducement, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." The Basic Principles on the Role of Lawyers states that the role of lawyers should be seen in the context of rights of due process and access to the legal representation included in the international "Bill of Rights" and other sets of standards adopted by the United Nations. The United Nations' Guidelines on the Role of Prosecutors dictates that states shall ensure that prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statuary protections for the rights of the suspect and victims, and of human rights and fundamental freedoms recognised by national and international law.

RULE OF LAW

The rule of law is the basis for any liberal political system that recognises individual rights protected by an independent judiciary. It presupposes the existence of a set of rules drawn up in advance to determine the powers of institutions and the government and must apply to all organs of society and every citizen. Fuller (1969) has prescribed eight conditions for the rule of law :-

(a) Law must be general.

(b) Laws have to be promulgated (publicity of law).

(c) Retroactivity must be avoided, except when necessary for the correction of the legal system.

(d) Laws have to be clear and understandable.

(e) The legal system must be free of contradictions.

(f) Laws cannot demand the impossible.

(g) The law must be constant through time.

(h) Congruence must be maintained between official action and declared rules.

The rule of law implies that the functions of the government should be exercised in such a manner as to create conditions in which the dignity of man as an individual is upheld. It means that no man can be punished or be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of law. The rule of law is a part of the 'basic structure', which cannot be abrogated in the exercise of the amending power of Parliament under Article 368 of the Indian Constitution.

The Indian military justice system falls short of the international legal standards in that it is not free from command pressure and there are chances of its being applied with discretion. An individual cannot be governed by regulations that depart from known rules or be tried by a judiciary under the influence of a higher command or have no forum to appeal against the decision of quasi-judicial authorities. The functioning of the justice delivery system for the armed forces and the need for reforms must be viewed in this context. If reforms have to be made, the new system must establish a uniform code for all members, which is updated at regular intervals

based on the prevailing international standards. It must ensure that :-

(a) The tribunal exercising military jurisdiction is a part of the overall legal structure of the country's legal system.

(b) There is no control or interference by the military executive.

(c) The acts of executives, including the award of non-judicial punishment is subject to judicial review.

(d) Appeals lie from trial courts to higher appeal courts.

(e) Compensation is paid for miscarriage of justice.

(f) Accused military members are rehabilitated in civil life.

CONCLUSION

In conclusion, we may say that the human rights principles recognise the inherent dignity and fundamental freedoms of all members of the human family. They form the foundation of all basic freedoms, justice and peace in the world. Under Article 14 of the ICCPR, the right to a fair trial and equality before the court has been regarded as fundamental rules of law. The recognition of these principles has brought about changes in the military justice systems of the USA, Canada, Australia and the UK. Even countries like China, Indonesia, New Zealand, Russia, and Thailand have procedural safeguards and appellate courts which entertain appeals against the decisions of the court martial. But in India there are glaring deficiencies in the safeguards provided to the accused and in the attitude of those administering the military justice system. The system is considered a part of the executive department and is an instrument in the hands of the executive to enforce discipline. This, despite the fact that the Constitution of India makes a declaration that justice shall be secured for every citizen.

The Indian military justice system, is a hangover from a time when the battlefield was far away and the Armed Force needed to be self-contained. No legal system can or should operate in a vacuum, disregarding the changing norms of society. The military justice system has become outdated and the mere creation of an appellate tribunal will not make it dynamic. It requires the incorporation of fundamental protections based on international legal norms in the light of the experiences of other democracies in

the world. Therefore, instead of making reforms by creating a "tribunal" it would perhaps be more advisable to review the military justice system in totality, in order to evolve a healthy justice delivery system. The system should be common to all the three Services and function as a guide to the people in the process of nation building. If the government succeeds in making military law more humane and dynamic, it will serve to reassure military personnel that they are overseen by a fair, just and impartial justice delivery system under the Indian Constitution.

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