Unification of the Army, the Navy and the Air Force Act

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Introduction

The military is a specialised society that has developed laws and traditions of its own. The object of military law is to provide for the maintenance of good order and discipline among members of the armed forces and in certain circumstances among others who live or work in a military environment. This is done by supplementing the ordinary criminal law with a special code of discipline and a special system for enforcing it. Such special provision is necessary to maintain, in time of peace as well as war, the operational efficiency of an armed force. Military law also regulates certain aspects of administration-aspects, which affect individual rights in spheres such as enlistment and discharge, terms of service, promotion and forfeiture of and deduction from pay. Most often in practice, however, the term "military justice system" is used with regard to disciplinary provisions rather than administrative ones.

The Supreme Court did the first major scrutiny of the military justice system in 1982, in the case of *Lieutenant Colonel P P Singh v Union of India.* Besides observing other deficiencies in the system, it held that the absence of even one appeal with power to review the decisions of courts-martial was a distressing and glaring lacuna in the military justice system. It urged the government to take steps to provide at least one judicial review in the case of service matters. However, due to political and bureaucratic apathy, nearly twenty-five years passed before the Minister of Defence introduced the Armed Forces Tribunal Bill, 2005 in the Parliament. This Bill was referred to the Parliamentary Standing Committee on Defence for making a report.

The Standing Committee has submitted its Tenth Report to the Parliament on 23 May 2006. The report contains various recommendations for making changes in the proposed Armed

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Forces Tribunal Bill. The Standing Committee is of the view that an 'expert committee' be constituted urgently to review thoroughly the Army Act, 1950, the Air Force Act, 1950, and the Navy Act, 1957, and bring them at par with the norms followed in other democratic countries. The Committee has also recommended the framing of a common disciplinary code for the three Services.

This paper examines the issues relating to a common code of justice and discipline for the Armed Forces. It will also discuss the changes made by other democracies in their military justice system, which could be considered while modernising our system.

MILITARY LAW IN INDIA

Indian military law has its origin in the military law of England. It was conceived to discipline a 'mercenary' force after the Mutiny of 1857. Under the British system, military justice was a command dominated system. The system was designed to secure obedience to the commander, and to serve the commander's will. The independence of India and the resultant constitutional changes necessitated the revision of the Indian Army Act, 1911 and the Regulations. The Army Act came into force on 22 July 1950. The Government framed Army Rules, 1950, which was replaced by the Army Rules, 1954. In 1993, certain amendments were incorporated in the Army Act and the Army Rules.

The Air Force Act came into force on 22 July 1950. The Air Force Rules, 1969, were made as per the provisions of Section 189 of the Air Force Act, 1950. The Naval Discipline Act in existence at that time differed from the laws relating to the Army and the Air Force in many respects. In the UK, a special committee had been set up to examine the question of revision of the British Naval Codes, and the Government of India awaited the committee's report. The Navy Act, 1957, came into effect from 1 January, 1958. In 2005, certain amendments were made in the Navy Act.

DIFFERENCES IN THE THREE SERVICE ACTS

The provisions contained in the three Service Acts are not similar. Under the Air Force Act, 1950, only three types of courts-martial, i.e., general court-martial, district court- martial and summary general court-martial have been provided. The Army Act, 1950 in addition to the above three types of courts-martial also has summary

court-martial which can try personnel below the rank of Junior Commissioned Officer and can award punishments of dismissal and imprisonment upto one year. However, the Navy has only one type of court-martial during peace time and a disciplinary tribunal during war. Unlike the Army and the Air Force, where the senior-most officer of the court-martial becomes the presiding officer, in the Navy the convening authority always nominates the president of the courts-martial. In the Navy, the findings and sentence of courts-martial do not require confirmation of the convening authority or any superior authority and become operative the moment they are pronounced, except in the case of a sentence of death which requires prior confirmation by the Central Government. The verdict of acquittal is final in the case of the Navy and not subject to confirmation or revision as in the Army and the Air Force.

In the Army and the Air Force the presence of a judge advocate in the district and summary general court-martial is not mandatory. In the Navy, every court-martial is required to be attended by a judge advocate. In the Army and the Air Force, the judge advocate remains present when the court deliberates on the findings, whereas in the Navy the judge advocate does not sit with the court when the court is considering the findings.

Unlike the Army and the Air Force the commanding officer of a ship may summarily try any person belonging to the ship, other than an officer, for an offence not being a capital offence and can award imprisonment or detention up to three months. This power of summary trial is limited in the Army and the Air Force where punishment up to 28 days of imprisonment can be awarded to persons below the rank of NCO.

The proceedings of a court-martial or disciplinary court are reviewed by the Judge Advocate General (JAG) of the Navy either on his own motion or on application made by an aggrieved person. The JAG is to transmit the report of the review together with his recommendations to the Chief of the Naval Staff (CNS) for his consideration. In the Army and the Air Force, the officers of the Department of the JAG, before confirmation, review the proceedings of courts-martial and may make recommendations. These reviews are advisory and not binding on the Chiefs of the respective Service.

Notwithstanding these differences, the will of the Chiefs of the three Services, rather than the rule of law reign supreme in the Indian military justice system.

NEED FOR UNIFICATION

The Indian Army Act, the Air Force Act, and the Navy Act, enacted during 1950-57, are more or less derived from the Indian Army Act, 1911. Though these Acts have been amended, they are unable to answer the needs of the modern soldier, and are at odds with the liberal interpretation of the Constitution. The three Service Acts also differ on various safeguards available to their personnel. The uncertainty and potential for delay in the present military justice system and the discontent associated with applying separate systems within such structures leads one to conclude that it is necessary to have a single system of law that would operate equally well in single, bi-Service or tri-Service environments.

Following the creation of Headquarters Integrated Defence Staff (IDS) and India's tri-Service Strategic Forces Command in 2001 and uniformity in the functioning of the three Services at various levels, there is a need for a uniform disciplinary code for the three services. A modern and fair system of Service law is as important to supporting operational effectiveness as having the best-trained and equipped forces as possible. A harmonized approach to Service law would enhance operational effectiveness.

A uniform code would be more appropriate in view of the fact that the three Services are increasingly deployed on joint operations in India and abroad, for which they train together. Within joint command and units the basic principle should be that Service personnel are subject to the same systems and the same rights and penalties, except where a special rule applicable only to the member of one Service is essential.

The law is not static and needs to be amended at regular intervals to keep pace with the changes in the international norms and domestic law of the country. The piecemeal amendments over the years have brought about few changes but they have not been helpful in keeping service law in line with developments in civilian law. Due to bureaucratic apathy and non-priority to issues of military justice, amendment to the Service laws has taken inordinately long. The existence of separate Acts makes the use, interpretation

and amendment of the Acts more complicated. It would be easier to modernise and amend a common code for the Services than to do so individually.

The Armed Forces Tribunal Bill, 2005 is likely to establish a common appellate tribunal for the Armed Forces. Creation of a common tribunal for the three Services necessitates that the protection of the rights available to a soldier, sailor and airman are similar under the three Services. This can only be ensured by subjecting them to a common code of conduct. An appeal from a common forum to the proposed appellate tribunal would provide equality to all the members of the Armed Forces.

The modernistion and unification of the Army, the Navy and the Air Force Act should be undertaken keeping in view our own experiences as well as developments in other democracies. We cannot insulate ourselves from the changes in systems followed in other countries, especially because our forces are internationally recognized and are part of peacekeeping missions the world over. Therefore, there is a need to create a common code of justice, which will promote discipline in the Armed Forces.

UNIFICATION IN OTHER COUNTRIES

There are large number of democracies in the world which are following common code of disciple and justice for their armed forces. The United Kingdom has recently gone for overhaul of its military justice system and its Armed Forces Bill, having a common code for the three Service is awaiting Royal Assent to become the Armed Forces Act, 2006. The process of unification of the military justice system of some of the countries is discussed in brief.

The United States

Before adoption of the Uniform Code of Military Justice (UCMJ) on 31 May 1951, the US Army operated under the Articles of War for about 175 years. The Navy, during this period, operated under the Articles for the Government of the Navy. Under the Articles of War, military justice was a command dominated system. The system was designed to secure obedience to the commander, and to serve the commander's will. Courts-martial were not viewed as independent, but as tools to serve the commander. They did a form of justice, but it was a different justice than that afforded in

civilian criminal trials. Military justice had few of the procedures and protections of civilian criminal justice, and protecting the rights of the individual was not a primary purpose of the system.

In the late nineteenth century, a few efforts to reform the military justice system arose. Some changes in procedure, such as allowing an accused to have counsel present in the court-martial (and, later, allowing counsel to speak) developed in the late nineteenth century. World War I generated greater interest in changing the system. In 1917, thirteen black soldiers were hanged for mutiny in a mass execution conducted one day after their trial ended. The case drew national attention, and in January 1918 the Army established the first system of appellate review in the military. Henceforth, capital and certain other sentences could not be executed until after review by the office of the Judge Advocate General.

In World War II, there were over two million courts-martial. Many people, from all walks of life, were exposed to the military justice system, and many did not like what they saw. The system appeared harsh and arbitrary, with too few protections for the individual and too much power for the commander. The criticisms against the military justice system became widespread. After the war, interest in reforming the system continued, and in 1948. Congress passed the Elston Act (named for its sponsor, Congressman Charles Elston of Ohio), amending the Articles of War. By 1948, the US defence infrastructure itself was reorganised with the creation of separate Air Force, and the establishment of the Department of Defence. This led to a perceived need for greater protection for men and women who would serve in the armed forces, and a desire for a common system for all the Services.

In 1948, the Secretary of Defence appointed a committee, to draft a uniform code of military justice. There were disagreements during the drafting process, and not all the Services, or all the judge advocates general, supported every provision in the final package. Secretary of Defence resolved disputes. The House of Representatives held about three weeks of hearings in the spring of 1949 and President Truman signed the UCMJ on 5 May 1950.

In passing the UCMJ. Congress gave power to the President of the United States to establish military criminal procedures. The

President did this by publishing the Manual for Court-Martial (MCM). The UCMJ marked a distinct, but not complete break from the past. Most significant was its acceptance of the idea that discipline cannot be maintained without justice, and that justice requires, in large measure, the adoption of civilian procedures. The Code was an effort to combine elements of two competing models the old command-dominated military justice system and the civilian criminal justice system with its heavy emphasis on due process. In the words of Edmund Morgan, "We were convinced that a Code of Military Justice cannot ignore the military circumstances in which it must operate but we were equally determined that it must be designated to administer justice."

The Code underwent two major changes in 1968 and 1983. The Military Justice Act of 1968 substantially increased the independence of courts-martial and the authority of the military judiciary. It provided for military judges to preside in special as well as general courts-martial. The Military Justice Act of 1983 streamlined pre-trial and post-trial processing, and abolished the practice of having the convening authority detail judges and counsels to courts-martial. Pre-trial agreements, rights of a suspect and accused, independence of military judges, functioning of the JAG branch and the appellate court review are hallmarks of the US military justice system. The UCMJ has made essential contribution to military justice, and to the effectiveness of the US Armed Forces.

The UK

In the UK, the legislation for the Services disciplinary and criminal justice system is provided for in the three Service Discipline Acts; the Naval Discipline Act 1957, the Army Act 1955, and the Air Force Act 1955, collectively known as the Service Discipline Acts (SDAs). Since 1950, the SDAs have been reviewed every five years and amended piecemeal to reflect changes in civil law and the requirements of the Services. In 1996 and 2000 there were some significant changes to ensure that the requirements of the European Convention on Human Rights were met.

The 1998 Strategic Defence Review (SDR) presented by the Secretary of State for Defence stated that there would be advantages from combining the three SDAs into a single Act. The SDR acknowledged the key principle that a system of service law

is essential to operational effectiveness. But it concluded that there would be advantages to be gained from combining the three systems into a single Act, while recognizing that this would be a substantial and complex undertaking.

Following initial work, a Tri-Service Act Team was set up in September 2001 to conduct a thorough review of the Armed Forces' discipline policies and procedures and non discipline-related legislation in the SDAs. The team comprised service and civilian legal and policy staffs. The initial focus of the work was on the Services' disciplinary systems. This involved a critical review of operational requirements justifying the retention of current legislative and policy differences between the Services. In reviewing these, for example the differing powers of Commanding Officers (COs) in the three Services, all relevant factors, including recent operational experience of the COs were taken into account. This was also an opportunity to modernise service legislation. Areas such as redressal of grievance procedures and the framework for holding Service Boards of Inquiry were given due importance.

The Defence Select Committee of the House of Commons has undertaken initial pre-legislative scrutiny of the Bill based on written and oral evidence. The Committee published its report in March 2005 and the Government published its response in July 2005. The new legislation in the form of the Armed Forces Bill was introduced in Parliament on 30 November 2005. The Bill was given Royal Assent in November 2006 and full implementation of the Armed Forces Act, 2006 will be by the end of 2008.

Key Areas likely to be Changed

(a) **Summary Discipline.** The power of the CO to enforce discipline through summary hearing has been retained. The main proposals include a range of harmonized powers to deal with some offences summarily. The accused will have the right to elect trial by the court-martial and appeal to the Summary Appeal Court.

(b) **Prosecutions.** There will be a joint Service Prosecuting Authority (SPA) which will replace the current single Service Prosecuting Authorities. The SPA will continue to remain independent of the chain of command and will be staffed by

lawyers from three Services. The SPA will determine whether to prosecute an offender under Service law and will be responsible for conducting the prosecution at trials by court-martial.

(c) **The Court-Martial.** The court-martial will remain the means of dealing with more serious offences. In future there will be a standing court-martial. There will not be any distinction between the district court-martial, general court-martial or field general court-martial. The court-martial will comprise a civilian judge advocate and a panel of 3 or 5 Service members depending on the seriousness of the offence charged.

(d) **Reviewing Authority.** The current ability of the Reviewing Authority to amend findings or sentence will cease. The convicted persons will have a right of appeal to the Court Martial Appeal Court (CMAC).

(e) **Redress of Complaint.** Service personnel will retain the statutory right to complain on any matter relating to their Service. The proposals on redress are aimed at speedy resolution of complaints through pro-active case management and delegation of powers from the Defence Council to an empowered panel independent of the chain of command.

South Africa

During the years 1912 to 1957 British military law was applied in the Union of South Africa. The military law contained in the first schedule of the Defence Act, 1957, was called the Military Discipline Code (MDC). Since the beginning of the 1990's, the South African laws were amended and a new constitution promulgated, affecting all spheres of society including the military. On 23 April 1999, the Military Discipline Supplementary Measures Act (MDSMA) 16 of 1999 was passed by the Republic of South Africa. The MDSMA as read with its Rules of Procedure and the Military Discipline Code (MDC), is aimed at maintenance of discipline essential for a fighting force that is necessary in peacetime as it is in wartime. The MDSMA has made certain important changes in the military justice system. It has established the Court of Military Appeals having full appeal and review competencies, the Court of Senior Military Judge, and the Court of Military Judge. In addition, the commanding officers

have been authorised disciplinary powers for minor offences. The system of *ad hoc* military tribunals (courts-martial) has been abolished.

The experiences of countries like the United States, the UK and South Africa brought up to the fore the desirability of making the rights and duties of members of the armed forces ascertained by reference to a single statute. These democracies have carried out large-scale revisions of their respective military codes to bring them in line with changes in international standards and the concept of the rule of law.

EFFORTS IN INDIA

The Government of India in 1965 had set up a Committee, consisting of officials from the Ministry of Defence and Ministry of Law, the Judge Advocates General and Directors of Personnel of three Services, for drafting of a uniform code for the three Services. The Committee was to analyse the difficulties being faced in operating the then military laws of the three Services, and study military codes of developed democracies. The Committee was tasked to draft a uniform code to rationalise the three Service Acts making special provisions for each Service separately with due regards to their peculiar requirements.

The Committee completed its task of drafting a uniform code in 1977. It was vetted by the Ministry of Law in 1978 and given the shape of a bill–The Armed Forces Code Bill, 1978. This Bill was re-examined by the three Services. It was felt that since the three forces were not unified and working problems of each were different, amendments as recommended by Harris Committee Report (1964), be carried out in the existing Acts. The Chiefs of Staff Committee (COSC) in 1979 rejected the adoption of a uniform code and instead recommended amendments to the existing Acts to make them more progressive individually.

However, the changes were made only when the provisions went strikingly opposite to the civilian justice system and the military could no longer justify that the continuation of contested provisions were needed for maintenance of discipline. Here also we made changes in a piecemeal manner at a snail's pace.

COMMON DISCIPLINARY CODE

Colonel Harry Summers, Jr., in his book, *On Strategy: A Critical Analysis of Vietnam War,* said that the people, the politician and the army–the "trinity"–must all have the will to win if war is to be successfully conducted. Modem military men and political leaders have to develop a mind-set to think strategically. Similarly national defence strategy must have the support of the people, the politicians, and the military in order to be successful. This idea applies equally to other national issues like development of weapons, size of our military, employment of women in combat roles in the Armed Forces and so on. We need to address these strategic considerations to answer the question, "What type of military justice system should we have to maintain the morale and discipline within the Armed Forces?" We can no longer leave it to the military to decide. It has to be viewed from the perspective of politician and people. Once the people, the politician and the military agree on the strategic aspects of military justice, the other related issues can be evolved. So far we have considered military justice system in a very narrow sense and left it to the armed forces.

For drafting a common code, it is imperative that the government constitutes an 'Expert Committee" headed by a Member of Parliament. Each Service should detail a representative who would be responsible for providing the day-to-day link to his own Service on policy matters. In addition, incorporating a member from the Ministry of Law and Justice would ensure that time is not lost in future scrutiny. The drafting of a common code has to be a time-bound task where minor differences within the Services are thrashed out on day-to-day basis.

The Expert Committee would be required to gather information about discipline systems in the Armed Forces of other countries. It would also have to get the view of a cross- section of personnel of all ranks in the military units (including field areas) and Headquarters staff, and training institutions like Defence Services Staff College, College of Defence Management and the National Defence College on the improvements considered necessary. Other relevant factors, including the most recent operational experiences and developments in civilian law would also have to be taken into account. This could be achieved in about six months, followed by the actual drafting of the Bill, which may take another twelve months.

No doubt it will be a challenging task, but if pursued earnestly, the Bill could be submitted to the Parliament within a time frame of about eighteen months. A new orientation and a greater level of activity from the government, academic institutions like the USI and the legal fraternity would be required to achieve this goal.

While modernising our system, the following issues need consideration:

(a) The Judge Advocate General branch must not be in the military chain of command.

(b) Provisions relating to summary general and summary court-martial must be abolished.

(c) Increase in the power of minor punishment, its applicability to higher ranks with a provision for review by judicial authority.

(d) Procedural rights to a suspect or accused must be ensured.

(e) Right to bail and legal aid to the accused must be at par with the civilian system.

(f) Role of convening authority in the disciplinary process is required to be reduced.

(g) Provision for plea bargaining needs to be introduced.

(h) Process of redressal of complaints needs to be streamlined.

Encroachment of fundamental rights of members of the Armed Forces is not permissible in matters which do not relate to the discharge of their duties or to the maintenance of discipline. The models followed in the US, the UK, Australia and South Africa, could be examined to see how these countries have resolved the issues related to the applicability of individual rights and constitutional guarantees to military personnel.

ROADBLOCKS

The biggest roadblock could be the attitude of the military hierarchy. The military has the reputation of being encumbered by

its traditions and fixed ideas. The views of Sir Basil Liddell Hart, a military thinker and a soldier, would be relevant in this context:

> "There was only one thing more difficult than getting a new idea into the military mind and that was getting an old idea out."

The military carries the grave responsibility of protecting the nation and its ideals. It has to prove itself in the extreme confusion of war, when a single error may jeopardize the existence of a country. Perhaps this is the reason why the military mind relies so heavily on time-tested methods and practiced routines, whether it is dealing with immediate problems of the battlefield, details of the logistics or the manifold difficulties of long- term planning.

Usually, a debate is held before the enactment of an Act or amendment to it. Political parties, academics and interested parties take part in such a debate. The background information and the proceedings of discussion are available for public scrutiny. In the US, the UK and South Africa, where changes in the military justice system have been made in the recent past, the civil society has made important contributions to the development of military law. Unfortunately, in the case of India, the information relating to military law remains 'secret' and not available for public scrutiny.

Since we do not have an enlightened civil society or a lawyers' forum that could be entrusted with the task of giving inputs for the modernisation of military law, military- related research institutions would have to play a greater role in bringing changes in the system. Once agreed to by the Service HQ, these research institutions could undertake certain tasks, like creating awareness on the advantages of a unified system of military justice, collecting the views of retired military officials, and gathering data related to the new system.

CONCLUSION

Since its inheritance in the 1950s, no serious attempt has been made towards the modernisation of the military justice system in India. Some piecemeal amendments were made as and when the civil laws underwent change. However, the law still denies service personnel certain basic rights on the pretext that Article 33 of the Constitution abrogates their fundamental rights.

What we have failed to understand is that the military justice system is about maintaining discipline as well as delivering justice. This is not an either-or proposition. A fair military justice system is vital for upholding the morale and discipline of the Armed Forces and for retaining public confidence in the Armed Forces. A system that fails to protect adequately the rights of those accused of misconduct will undermine discipline just as much as a system that fails to enforce the rules and protect the law abiding. In either case, the system's failure will have an adverse effect on morale, mutual trust and respect for authority. A system that does not take care to assess guilt or innocence carefully and to punish fairly and appropriately is a system that is not tied to accountability. The system must be based on two basic principles :

(a) Every soldier, sailor or airman, regardless of rank, must be responsible and accountable for his actions.

(b) Every soldier, sailor or airman, regardless of circumstances, must be entitled to being treated fairly and with dignity and respect.

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